

Neutral Citation Number: [2025] EAT 153

Case No: EA-2024-000736-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 October 2025

Before:

MARCUS PILGERSTORFER KC

DEPUTY JUDGE OF THE HIGH COURT

Between:

ZEN INTERNET LIMITED

Appellant

- and -

MR PAUL STOBART

Respondent

David Reade KC and Georgina Churchhouse (instructed by Square One Law LLP) for the
Appellant

Stuart Brittenden KC and Alex Shellum (instructed by Chris Booth, Employment Law Advisor) for
the **Respondent**

Hearing date: 9 July 2025

JUDGMENT

SUMMARY

Unfair Dismissal – test of fairness in a capability case; Polkey deductions; adequacy of reasons

Mr Stobart was employed by Zen Internet Limited as Chief Executive from 1 October 2018 to 31 March 2023 when he was dismissed. The Tribunal found the reason for the dismissal was capability – his capacity to achieve profitability in the business. The Tribunal found the dismissal procedurally unfair because Zen failed to follow its own procedures, which mirrored the ACAS Code, and which would have involved it taking steps formally to establish the facts, inform Mr Stobart of the problem, arrange meetings for him to put his case, decide on the outcome, and offer an appeal. Applying the Polkey principle, the Tribunal considered that had Zen acted fairly, Mr Stobart would have been fairly dismissed “*a little over two months following the 17 March 2023 Board meeting and certainly by no later than 31 May 2023*”[3]. Zen appealed the findings of unfairness and the Polkey assessment.

Held, allowing the appeal in part:

- (i) The appeal against the finding of unfairness was dismissed. Zen was correct that there is no absolute requirement that in every case particular procedural steps must be taken before an employee can be dismissed fairly for capability reasons, James v Waltham Holy Cross UDC [1973 ICR 398, Polkey v A. E. Dayton Services Ltd [1988] AC 344 and Burns v Turboflex Ltd (Unreported, EAT/377/96) discussed and applied. However, on a fair reading of the reasons the Tribunal (i) had imposed no such requirement, (ii) had directed itself correctly, (iii) had not ignored Mr Stobart’s senior position or the issue of warnings, and (iv) had not substituted its decision for that of the employer.
- (ii) The appeal against the Polkey finding was allowed. The Tribunal wrongly confined its consideration to the period from 17 March 2023 onwards, and had ignored the period from 24 February 2023 when the concerns about capability had crystallised. Further the Tribunal failed to give adequate reasons for its conclusion that a fair dismissal would have taken place by no later than 31 May 2023. This issue was remitted.

MARCUS PILGERSTORFER KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. When dismissing an employee for capability reasons, is it necessary in every case for certain procedural steps (such as giving a warning, and an opportunity to improve) to be taken before the dismissal will be found fair? Further, having found a dismissal unfair, for the purpose of assessing the compensatory award under section 123(1) Employment Rights Act 1996 (“ERA”), may the Tribunal confine itself only to the period after the dismissal took place when deciding what would have happened had the employer behaved differently and fairly?
2. These issues, along with others, are raised in this appeal concerning the dismissal, for capability, of a Chief Executive Officer after his employing company formed the view that he lacked the capacity to return it to profitability.

Factual Background

The Parties

3. Zen Internet Limited (“Zen”) was established in the 1990s by Mr Richard Tang. It is an internet technology company and, in the period prior to the hearing before the Employment Tribunal, had a history of continued success with annual increases in income and the business increasing in size. Initially, Mr Tang was Zen’s Chief Executive Officer. He was also the majority shareholder of the company.
4. Mr Paul Stobart has enjoyed a long career in business and has a history of occupying senior management roles. He has a good reputation in terms of improving the performance of the companies he has managed, of increasing brand awareness, and of promoting expansion. He was initially recruited by Zen as Chairman of the Board and also as a mentor to Mr Tang.

Mr Stobart employed as Chief Executive

5. In September 2018, it was agreed that Mr Stobart would become employed as Chief Executive and Mr

Tang would become Chairman. Mr Stobart had suggested to Mr Tang that Zen had potential and that he could achieve results for the company by improving profitability. On 27 September 2018, Mr Stobart drew up a 5 year strategy plan in which he projected revenue growing year on year by 15-16% from 2019 to 2023; he predicted profit increasing by between 3-9% in each of those years. He also made reference to Earnings Before Interest, Taxes, Depreciation and Amortisation (“EBITDA”) and projected this would increase during the same period from £5,567 to £19,868.

6. Mr Stobart was offered what the Tribunal described as “*a generous salary*” which reflected the confidence the Board had in him at that time to improve performance as he had predicted. Mr Stobart entered into a contract of service as Chief Executive with Zen on 10 September 2018. That appointment was to take effect from 1 October 2018. Mr Stobart remained in that role until he was dismissed with effect from 31 March 2023.
7. The contract of service provided that staff policies and procedures applied to Mr Stobart and that he would be entitled to (and would need to give) 12 months’ notice of termination. Salary, expenses, bonuses and healthcare benefits were outlined, as well as a car allowance. Mr Stobart was subject to Zen’s disciplinary and grievance procedures.

Concerns about Profitability

8. On 13 February 2022, concerns about Zen’s profitability were first raised by Mr Tang towards the end of a ‘Working Together’ document. The Tribunal found there were certain disagreements between Mr Stobart and Mr Tang about business decisions; however, whilst these were acknowledged in Mr Stobart’s performance reviews, they were said to have been resolved. The Tribunal noted that it had been difficult for Mr Tang to pass responsibility for the Chief Executive role to Mr Stobart. Mr Tang felt Zen was very much his business which he had created, however there was “*a mutual determination to make the new relationship work*”. Nonetheless there remained insufficient clarity regarding underlying concerns and disappointments that Mr Tang had with Mr Stobart and the Tribunal found that “*any loss of confidence by Mr Tang in relation to Mr Stobart was not clearly expressed until the final*

months of his employment as CEO”.

9. Zen generated a profit of £669,000 before tax in the 2019 financial year. From 2020 to 2023, however, Zen made a loss. The extent of that loss reduced each year. Nonetheless, this was problematic for a business which had historically made a profit, and it occurred during a period when Mr Stobart was the CEO.
10. The Tribunal found that from August 2020 onwards, Mr Tang raised his concerns concerning profitability with Mr Stobart. Mr Tang had been anxious that the company might *“bumble along at break-even for years”*, a concern which Mr Stobart accepted was a fair one. These concerns were raised within performance reviews that Mr Tang undertook with Mr Stobart. The reviews covered a wide range of topics and remained very positive about his overall performance as CEO. Nonetheless the importance of profitability was confirmed to Mr Stobart in review documents for the year to October 2020 and the year to September 2021. In the performance review for the half-year to March 2022, Mr Stobart opened by recognising the importance of returning Zen to profitability.
11. In October 2022, a Board Finance Report revealed a full year loss before tax and adjustments of £900,000. At a board meeting on 25 January 2023, the minutes recorded an underlying profit of £2,000 despite it being budgeted as £60,000. The Board Finance Report produced in February 2023 included within the commentary that at that stage in the 2022/23 financial year, Zen was making a loss of £270,000, £95,000 behind budget. Further, EBITDA was £625,000, viz £151,000 behind budget.
12. Mr Stobart’s final performance review took place with Mr Tang on 30 October 2022. The Tribunal found that the lack of profitability was a concern for Mr Tang during this performance review, and he recorded as follows by way of conclusion:

“Today, we are not financially sustainable. We are at ‘amber’ – break-even. We have the 135 plan, and you are confident that we will deliver the plan, but I would ... advise you not to count your chickens before they have hatched. From my perspective, you have expressed equal confidence in previous plans that have ended up not delivering.”

13. However, Mr Tang also described himself as being content, saying:

“Overall, I’m very happy with where the business is and where [it] is going, and the job that you are doing to get it there... Technology is in the best shape that it [has] been in for as long as I can remember, which is great!... Achieving break even is very welcome. A very welcome relief.”

14. The Tribunal noted that Mr Stobart’s overall performance category was assessed as “very good” and that there was some dissonance between profitability concerns and overall performance. It found as follows (§31):

“It is my finding that during these performance reviews, Mr Tang was describing some concerns with regards to profitability, but within a review which was largely very positive. It is difficult to see how Mr Stobart was being informed of actual concerns regarding his performance which might threaten his ongoing position of CEO. However, I must acknowledge that Mr Stobart was cautioned at each review by Mr Tang that profitability was the primary concern for Zen. Mr Stobart would have been aware from his considerable business experience that this was [a] fundamental element when running any business and it was something that would need to improve.”

2023 Offer of a Role Swap

15. In early 2023, and in light of his ongoing concerns about profitability, Mr Tang had a discussion with Mr Stobart. Mr Tang explained his belief that it would be prudent for him to assume the role of CEO, and for Mr Stobart to revert to being Chairman.

16. Mr Stobart emailed Mr Tang on 24 February 2023 questioning whether this was the best way forward, and suggesting an alternative proposal to ensure Mr Tang became more involved in business decisions. On the same day Mr Tang replied, insisting that a swap of roles was in “Zen’s best interests” and expressing his view that this should happen at the end of the then current financial year (30 September 2023). Mr Tang’s email went on:

“I’ve lost confidence in your ability to lead the business back to sustainable profitability. I have lost count of the number of times you’ve represented profitability goals to me (and the board) that you have then not delivered. I’m not prepared to give you any more chances. Sorry.”

17. The Tribunal found that by 24 February 2023, Mr Tang had “clearly informed” Mr Stobart that he could no longer remain in the CEO role due to Mr Tang’s lack of confidence that Mr Stobart had the ability to run the business and return it to profitability. The Tribunal also found that Mr Stobart, in light of his

considerable experience, recognised that it was important for business leaders to ensure long term profitability and to retain the confidence of those responsible for their appointment. Mr Stobart accordingly emailed Mr Tang on 3 March 2023 to confirm he was willing to swap roles; he proposed what he described as “*an elegant transition plan*” which was designed to avoid prolonged discussion, upset or conflict. He did not actively challenge Mr Tang’s proposal but did give a list of his achievements and how he had added value to Zen.

18. At this point, the Tribunal found that Mr Tang was unhappy with the way that Mr Stobart was managing Zen as CEO and considered that his actions were endangering the financial viability of the business. Whilst he still valued Mr Stobart to some extent, and did not want to lose him, he concluded that he could no longer remain as CEO.
19. Accordingly, on 4 March 2023, Mr Tang emailed Mr Stobart expressing his pleasure that the latter had agreed to swap roles, but indicating that he found the proposed terms unacceptable. He said: “... *you have taken very little if any personal responsibility for the company’s dismal financial performance during your tenure as CEO*”. In his email, Mr Tang made a formal offer to swap roles with Mr Stobart with effect from 30 September 2023. Mr Stobart would be paid his CEO salary and benefits to that date. Then, from 1 October 2023, Mr Stobart would be “*employed*” as Chairman using standard non-executive terms and remuneration (at the time £26,522 per year plus £5,000 for occupying the role of Chairman). This was a substantial reduction in Mr Stobart’s level of remuneration at Zen. Mr Tang acknowledged that the CEO services agreement under which Mr Stobart was employed required 12 months’ notice to be given of termination. However, he said that abridged notice was given because the usual notice period had been “*weighted against my unrecoverable loss of confidence in your ability to perform a critically important element of your role*”. Mr Tang said he was willing to recognise achievements and successes but reminded Mr Stobart that “*[a]ny self-funded business like Zen must make a sustainable level of profit, otherwise it will get into financial difficulty and ultimately go bust*”. Mr Tang indicated the offer remained open for acceptance until 13 March 2023, and, if not accepted by then, would be withdrawn. He concluded (and cautioned Mr Stobart) saying:

“This offer is made as an attempt to resolve amicably an irreparable failure in your performance. It is made without prejudice to any disciplinary action that the company may take should you choose not to accept his offer.”

20. A discussion took place between Mr Tang and Mr Stobart on 14 March 2023 but no resolution was reached.

17 March 2023: Board Meeting and Notice of Termination

21. On 17 March 2023 at 09:48, Mr Tang sent an email to the Board of Directors giving notice of an exceptional board meeting at 15:30 by Microsoft Teams. Mr Tang then discussed the question of Mr Stobart’s service agreement with two of the other non-executive directors, Phil Male and Shaun Parker. The discussion (which Mr Tang summarised to Messrs Male and Parker in an email that day) included whether Mr Stobart’s role was comparable to that of a football manager or airline pilot (which the Tribunal considered meant that the role involved a high level of responsibility for success and failure). Mr Tang referred to four matters he would have done differently, included that he would not have *“crashed the business into £5m of trading losses”*. Mr Tang then identified the question for consideration as being *“whether we should exercise our right under [Mr Stobart’s] service agreement to dismiss him before the end of March and put him on PILON”*. A list of pros and cons were identified. As the Tribunal said:

“These pros and cons included a perceived saving in Mr Stobart’s early dismissal and the opportunity for Mr Tang to assume the role of CEO as soon as possible against the surprise to others within the company and losing the ‘good things that [Mr Stobart] would bring to [the] business over the remainder of the [financial year]’.”

22. Mr Tang concluded by confirming that he remained willing to offer Mr Stobart the role of Chairman as a swap and emphasised that the proposed dismissal was *“...not personal – it would be just about acting in the company’s best interests”*. He concluded by saying *“Let’s have a discussion”*.
23. At 15:30 on 17 March 2023, the board meeting took place. It was quorate with Mr Tang, Mr Kay, Mr Parker and Mr Male in attendance. Apologies were received from Mr Stobart. The minutes record that Mr Tang had lost confidence in Mr Stobart’s ability as CEO to *“run the company at a sustainable level*

of profitability, and that sustained profitability was critical to the financial viability of the Company". Mr Tang proposed *"that the Company issue 12 months' notice to terminate the CEO's Appointment, in accordance with his service agreement"*. Although Mr Parker and Mr Kay were recorded as not themselves sharing Mr Tang's loss of confidence, the minute recorded their belief that Mr Tang's *"loss of confidence was a very significant factor, and so [they] supported the proposal"*. The proposal was approved and Mr Tang instructed to serve notice of termination on Mr Stobart.

24. After the meeting on 17 March 2023, Mr Tang prepared and signed a communication notifying Mr Stobart of his termination. He confirmed that following board approval:

"I hereby issue 12 months' notice to terminate your Appointment in accordance with clause 2(i) of your Director's Service Agreement dated 10 September 2018. The last day of your appointment will therefore be 17 March 2024."

25. Mr Stobart was informed that it was anticipated that he would work *"a proportion of [his] notice period, and that the remaining portion will be paid in lieu of notice in accordance with clause 18 of [the] Director's Service Agreement – details and dates to be confirmed"*. Mr Stobart was told that in the meantime he would continue to perform his duties as CEO.

Effective Date of Termination Brought Forward

26. On 20 March 2023, a further board meeting took place at 17:15. The board was informed the letter terminating Mr Stobart's employment had been sent. Mr Tang proposed that Zen terminate Mr Stobart's employment earlier, on 31 March 2023, and that the remainder of the notice period would be paid in lieu. Mr Tang proposed that he would then assume the role of CEO from 1 April 2023, and would also remain as Chairman until a successor was found (given that he considered it was clear that Mr Stobart was not interested in the previous offer of a job swap). Following approval of this proposal, Mr Tang sent an email to Mr Stobart on 20 March 2023 at 18:07 to inform him of the development, and a further termination of appointment letter was sent on 23 March 2023. This letter referred to clause 19(ii) of the Director's Service Agreement which permitted early termination with sums due being sent in equal monthly instalments.

27. The Tribunal was confronted by an argument on behalf of Mr Stobart that the bringing forward of the effective date of his termination (to 31 March 2023) was a device to avoid Zen's liability to pay him a bonus, which would have become due on 1 April 2023. Ultimately, the Tribunal was not persuaded on the evidence that this was the real reason behind the dismissal or Mr Tang's proposal to bring forward the effective date of termination, and its approval by the Board. It held that the decision to dismiss "was one relating to concerns about improving profitability and keeping it sustainable" (§51). It was "the failure to secure sustainable profitability which [Mr Tang] believed was integral to the CEO role" (§52). The Tribunal was not satisfied that there was an ulterior motive behind the dismissal or decision to bring it forward: §53.

28. The Tribunal then made findings about procedural aspects of the dismissal as follows (see §§54-56):

"54. Mr Tang did accept that he was aware of the Zen disciplinary and grievance procedures and that they applied to capability issues, requiring that an investigation be undertaken if capability became an issue, holding a hearing where the employee could put their case and in the [event] that they were unhappy with the outcome of the process, they could seek an appeal. The Zen procedure was not included within the hearing bundle but there was no suggestion that it would not reflect the broad principles of the relevant ACAS Code of Practice.

55. While Mr Tang disputed that Zen had not followed its procedures when deciding to dismiss Mr Stobart, I do not accept this was the case. There had been discussions taking place by email between them in February and March 2023, but they did not take the form of a formal process and they did not involve a separate and more independent investigating manager. Mr Stobart was [not]¹ informed that he was the subject of a process investigating his capability. The decision of the Board did not involve Mr Stobart being able to make representations either in writing or verbally and he was not provided with a right of appeal.

56. I do have some sympathy with Mr Tang and the Board at Zen in that they were dealing with a CEO, who was in a senior leadership role, who normally attended Board meetings and where they would look at issues through the 'lens' of company leaders remaining effective and furthering the interests of Zen as a company. But while this might be the case, Mr Stobart remained an employee and whose contract of employment confirmed that he was subject to the company's policies and procedures including the application of the disciplinary and grievance procedures. This placed not only Mr Stobart under an obligation to Zen, but also placed Zen under an obligation to Mr Stobart as his employer."

¹ The parties were agreed before me that there is a typographical error in this paragraph of the Tribunal's judgment. The word "not" was omitted.

The Decision of the Employment Tribunal

29. The Tribunal heard Mr Stobart's unfair dismissal claim on 14-15 March 2024. Judgment was reserved and sent to the parties on 3 May 2024. The Tribunal recorded that there was no dispute that Mr Stobart had been dismissed by Zen following a decision reached on 17 March 2023. 12 months' notice had initially been given consistent with Mr Stobart's contractual entitlement. A subsequent decision was then taken to terminate the contract earlier, with an effective date of termination of 31 March 2023, and with the balance of the notice period being paid in lieu.

30. The Tribunal then addressed the reason for the dismissal. The Tribunal considered that "*the real concern*" was with Mr Stobart's "*performance and his capacity to achieve profitability in a business which in the past, with Mr Tang [as] CEO, had achieved consistent and continuous growth*". At §70, the Tribunal said this:

"70. It is fair to say that Mr Tang did reach a 'final straw' in February 2023 where he believed Mr Stobart's performance as CEO was no longer acceptable. But the evidence of the performance reviews, the emails and minutes in February and March 2023 reveal an overall contentment with his work, with questions relating solely to his capability for the role of CEO. This was the real operative reason behind the decision to terminate. This was an available potentially fair reason, it was appropriate and indeed it had been relied upon by Zen as respondent in their defence to this claim. As this is available, I do not accept that some other substantial reason was the real reason for the dismissal and the reason which was in the mind of Mr Tang as the person recommending dismissal to the Board."

31. Accordingly, the Tribunal found that the reason, or principal reason, for dismissal was capability within the meaning of section 98(2)(a) ERA. The next stage in the analysis was for the Tribunal to consider whether the dismissal for that reason was fair or unfair in the sense described by section 98(4) ERA. The Tribunal considered the dismissal unfair because Zen failed to follow a fair procedure (see §82). The reasoning leading to that conclusion appears at §§71-79 of the judgment and I set it out in full:

"71. I considered whether Zen acted reasonably in all the circumstances in treating capability as a sufficient reason to dismiss Mr Stobart from his CEO role and given that it related to performance (as opposed to a health related absence), I was concerned about whether the respondent adequately warned Mr Stobart and gave him a chance to improve and that dismissal was within the range of reasonable responses."

72. As has already been discussed within the findings of fact and submitted by Mr Brittenden, there was a dissonance in the performance review documents. This was that while concerns were being

raised regarding profitability following Mr Stobart's appointment as CEO, by Mr Tang, the documents produced at these meetings also provided many positive comments about performance and did not suggest he was going to face any intervention from the Board or Mr Tang.

73. It was only in February 2023 that Mr Tang's dissatisfaction and overall lack of trust were clearly expressed and where the job swap and potential disciplinary action was raised.

74. The role of a CEO as an employee is a curious one and especially the case where they work for a large organisation with a Board of directors or trustees and there are dominant shareholders who had been involved in the creation of the business. The CEO is at the pinnacle of the organisation and the analogy of a football manager made during discussions between Mr Tang and non executive directors on 17 March 2023 is a reasonable one to make. The CEO leads the organisation, is aware that there is a heavy weight of expectation and that their remaining in the role can be precarious based upon the performance of [the] organisation they lead.

75. It is for these reasons and taking into account Mr Stobart's considerable experience, he should have been aware that an ongoing failure to achieve profitability over a period of more than 4 years, could well affect his position as CEO. The nature of the relationship between Mr Tang as majority shareholder, creator of the company and former CEO and Mr Stobart as his mentor, experienced business leader and former Chairman, was a complicated one. It is perhaps understandable that Mr Tang tried to balance his ongoing frustrations with profitability against the other positive achievements and also his struggles with 'letting go' from the CEO role which he had occupied for many years. Such are the tensions that exist where an individual has created and nurtured a business from scratch and who may have an emotional attachment far beyond someone who is simply paid to be a CEO or director.

76. This explained why he operated in the way that he did engaging in discussions and emails with Mr Stobart and then eventually involving the Board. He saw his concerns as being a leader, shareholder and director matter as opposed to a traditional employer and employee matter. Mr Stobart had of course begun his relationship with Zen as a mentor, non executive director and Chairman of the Board.

77. But Mr Stobart as CEO was an employee and there was no dispute that he enjoyed access to the same Zen policies and procedures as other more junior employees within the company. Once Mr Tang became aware of his loss of trust in Mr Stobart's performance, he should have raised the matter with the Board and HR and arranged for a meeting with Mr Stobart to explain the concerns, rather than simply making vague reference to disciplinary procedures as he did in one of his emails during February/March 2023.

78. I agreed with Mr Brittenden's submission that the ACAS Code of Practice on Disciplinary and Grievance Procedures applies to all employees regardless of seniority and the Tribunal should consider its application when determining whether a dismissal was fair. Paragraph 1 of the Code makes clear that disciplinary situations can include poor performance although an employer may rely on a separate capability procedure if one exists. Whilst I am aware of a disciplinary and grievance procedure being used within Zen as respondent, there was no evidence that a capability procedure document had been produced separately. Mr Tang's emails with Mr Stobart included reference to disciplinary procedures and it is these documents which should have been considered when he felt it was necessary to take such action.

79. *The ongoing performance documentation, financial information produced for Board meetings and other correspondence involving Mr Tang and Mr Stobart provided much to demonstrate a failure to achieve profitability during the latter's tenure as CEO. But nonetheless, Zen should have taken steps to formally establish the facts, inform the employee of the problem, arrange meetings where he could be accompanied and put his case, decide upon outcome and to allow him an appeal. None of these steps were taken and while there may have been good reasons to end Mr Stobart's employment as CEO, the failure to apply a fair investigation which considered whether capability existed, whether steps should have been taken short of dismissal and allowed Mr Stobart to improve were not deployed. Accordingly, I must conclude that the decision to dismiss him was procedurally unfair.*"

32. Having determined the dismissal unfair, the Tribunal then addressed, for the purposes of assessing the remedy, what would have occurred had a fair procedure been followed. It decided that Mr Stobart would have been fairly dismissed by reason of capability by no later than 31 May 2023 (§83). The reasoning appears at §80:

"The parties however, will not be surprised to read following the above discussion that while the dismissal was procedurally/Polkey unfair, there was nonetheless a likelihood that Mr Stobart would have been fairly dismissed had a fair procedure been followed. In this case, I believe that it would have been almost certain that the utilisation of a fair procedure would have resulted in a fair dismissal taking into account the available evidence and time elapsed where profitability had not been achieved. Under these circumstances, had Mr Stobart been the subject of a formal investigation under Zen's procedures, a fair dismissal would have taken place a little over two months following the 17 March 2023 Board meeting and certainly by no later than 31 May 202[3]². Dismissal on grounds of capability would have been within the range of reasonable responses available to the decision making manager in this case taking into account the period where profitability had been an issue and the role of CEO occupied by Mr Stobart."

33. Finally, the Tribunal considered, but refused, to make any reduction to the award (which was to be assessed at a subsequent remedy hearing) on the basis of contributory fault, applying sections 122(2) and 123(6) ERA: see §81.

Grounds of Appeal

34. By a Notice of Appeal dated 13 June 2024, Zen advanced three grounds of appeal against the judgment of the Tribunal:

² At §80, the year is typed as 2024, however this was a typographical error: see §83. The parties were again agreed that this must be the case.

- i. **Ground 1:** the Tribunal erred in law in deciding that Mr Stobart was dismissed for the reason or principal reason of capability.
- ii. **Ground 2:** the Tribunal erred in law in deciding that Mr Stobart's dismissal was procedurally unfair under section 98(4) ERA.
- iii. **Ground 3:** the Tribunal erred in law in deciding that a fair dismissal would have taken place no later than 31 May 2023 and not prior to 1 April 2023.

35. Following the appeal being considered on the sift, by Order of Judge Stout dated 15 July 2024, grounds 2 and 3 were permitted to proceed to a full hearing. Ground 1 was considered an unarguable perversity challenge. No further action was taken on that ground in accordance with Rule 3(7) of the Employment Appeal Tribunal Rules 1993 (as amended). No application under Rule 3(10) was made in respect of that ground. Accordingly, the two grounds that were live before me were Grounds 2 and 3.

Ground 2: Section 98(4) ERA and the finding of Unfairness

36. By Ground 2, Zen challenges the finding of the Tribunal that Mr Stobart's dismissal was procedurally unfair. Mr Reade KC, leading Ms Churchhouse, developed this ground under three limbs which I shall take in turn:

- i. **First**, it was argued that the Tribunal erred in law by imposing an absolute requirement that to act fairly in a capability case, an employer must always give a warning of performance concerns and an opportunity for improvement.
- ii. **Secondly**, Zen contended that at §72 of the judgment under appeal, the Tribunal failed to consider whether, in light of Mr Stobart's senior position as CEO, the comments in Mr Stobart's performance reviews surrounding profitability amounted to an implied warning.

- iii. **Finally**, it was argued that the Tribunal erred in law by adopting a ‘substitution mindset’ and thereby wrongly concluded that it would be reasonable for Zen to follow its disciplinary policy/ACAS Code of Practice, and undertake steps set out at §§77, 79 of the judgment, in the circumstances of this case.

Warning and Opportunity for Improvement

37. Mr Reade’s first argument was that the Tribunal erred in law by imposing an absolute requirement to give warning of performance concerns, and an opportunity for improvement, before a dismissal on capability grounds could be found to be fair. He submitted that, as a matter of law, there was no such absolute requirement.

Is a warning and an opportunity to improve always required in a capability dismissal?

38. The appropriate starting point is the case of **James v Waltham Holy Cross Urban District Council [1973] ICR 398**, a decision of the National Industrial Relations Court (“NIRC”) presided over by Sir John Donaldson. There, an employee had submitted a grievance to the Council and had persisted in it, refusing to give particulars when asked. He was subsequently dismissed. The reason for dismissal was found not to be the grievance itself, but the attitude he showed towards individuals during the investigation of the grievance and a concern that his continued employment was not conducive to harmonious staff relationships. At no time was the employee warned that he was at risk of dismissal by continuing with his conduct. The NIRC was faced with an argument that as a matter of law an employee is entitled in all circumstances to state his case against being dismissed before dismissal takes place: see p403G. Sir John Donaldson, giving the judgment of the Court, rejected that submission, holding as follows (p403H - p404G, with my emphasis added):

*“In our judgment, [the employee’s] submission does not accurately state the law. **An employer’s duty is to be fair both to the employee and the business in all circumstances.** ...*

This duty of fairness both to the employee and to the business is the only general rule. All else is but a particular application of that general rule. Thus in the field of conduct there are at least two types of case in which it may be reasonable exceptionally to dismiss without giving the employee an opportunity of offering an explanation. The first is that in which the employee, as part of the conduct complained of, states in terms why he is adopting that attitude. If it is clear that this is the employee’s considered view and not merely the result of a passing emotion, there can be no point in giving him

an opportunity of restating a view the expression of which led to the decision to dismiss him. But even so, an employer should be slow to conclude that an opportunity to reflect and a subsequent opportunity to explain could in no circumstances produce a changed situation in which dismissal would be unnecessary. The second is that in which an employee's conduct is of such a nature that, whatever the explanation, his continued employment is not in the interests of the business. In such a case it is not unfair to dismiss without giving the employee an opportunity for explanation, although even in such a case many employers would rightly afford such an opportunity in order that the employee may have no possible excuse for feeling aggrieved.

In the field of capability similar problems frequently arise. If an employee is not measuring up to the job, it may be because he is not exercising himself sufficiently or it may be because he really lacks the capacity to do so. An employer should be very slow to dismiss on the ground that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance. But those employed in senior management may by the nature of their jobs be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less apparent. Again, cases can arise in which the inadequacy of performance is so extreme that there must be an irredeemable incapability. In such circumstances, exceptional though they no doubt are, a warning and opportunity for improvement are of no benefit to the employee and may constitute an unfair burden on the business.

39. 15 years later, the House of Lords promulgated its seminal decision in **Polkey v A. E. Dayton Services Ltd [1988] AC 344**. The House decided that where an Employment Tribunal finds a potentially fair reason for dismissal, and a failure on the part of the employer to follow appropriate procedural steps, it is not relevant to the question of whether the dismissal is fair or unfair (within the meaning of what is now section 98(4) ERA) for the Tribunal to go on to consider whether the employee would still have been dismissed had fair procedural steps been followed. As Lord Bridge put it: *“If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by [section 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken”* (p364E-F). Instead, the likely effect of taking the appropriate procedural steps are only considered at the remedy stage. Again, as Lord Bridge explained: *“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, or, in the case of redundancy, no compensation in excess of*

his redundancy payment” (p364H – p365A).

40. During the course of his leading speech, Lord Mackay of Clashfern LC touched on whether consultation, warning or following the provisions of a Code of Practice will always be required in order for an employer to act fairly (p354H – p355C, emphasis added):

“Where there is no issue raised by sections 58 to 62 the subject matter for the tribunal's consideration is the employer's action in treating the reason as a sufficient reason for dismissing the employee. It is that action and that action only that the tribunal is required to characterise as reasonable or unreasonable. That leaves no scope for the tribunal considering whether, if the employer had acted differently, he might have dismissed the employee. It is what the employer did that is to be judged, not what he might have done. On the other hand, in judging whether what the employer did was reasonable it is right to consider what a reasonable employer would have had in mind at the time he decided to dismiss as the consequence of not consulting or not warning.

If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee.”

41. In 1997, this Tribunal (Judge Pugsley presiding) decided the case of **Burns v Turboflex Ltd** (Unreported, EAT/377/96). The case concerned an employed managing director. After Turboflex had been sold there was concern by the new owners that the managing director was failing to make sufficient attempt to implement their objectives. It was decided to remove him from his position and he was notified accordingly. In the course of its decision, the EAT set out paragraph 10 of the Tribunal’s judgment as follows (emphasis added):

*“10 A fair dismissal requires that the employer shall have a honest belief that the employee is incompetent or unsuitable for the job and that he should have reasonable grounds for that belief; Alidair Ltd -v- Taylor [1978] ICR 445. Further, **an employer who dismisses an employee on the grounds of capability will normally risk a finding of unfair dismissal unless he can show that he has given the employee adequate warnings.** Such warnings must be effective to identify the shortcomings of the employee, explain, where necessary, what steps are to be taken to remedy them, provide all necessary support, guidance, etc which may reasonably be required in order to achieve them, provide a reasonable time for improvement and give clear warning as to the possible consequences of failure to achieve the required standard. **It is implicit in this process that the employee is given an opportunity to explain his shortcomings, the proper consideration be given to any such explanation and he be provided with all necessary support in the form of additional facilities, staff training, etc which the employee may reasonably need. It is important, however, that***

an employee should be aware of the dissatisfaction; Laycock -v- Jones Buckie Shipyard Ltd EAT 395/81. This principle is subject to the qualification that senior employees may not need such clear warnings that they are failing to achieve their performance as might be required of more junior staff; Jones -v- Waltham Holy Cross UDC [1973] 398. Although a contrary view was apparently expressed by the EAT in McPhail -v- Gibson [1977] ICR 42, the important issue was whether the employee was aware that his job was in jeopardy. In Laycock -v- Jones Buckie Shipyard Ltd it was indicated that “as a matter of common sense, the higher someone is in the managerial scale the more likely it is that he will be conscious of the satisfaction or lack of satisfaction that his performance is giving”. It is a matter for the Tribunal to consider according to the fact of each case individually.”

42. Having cited that paragraph, the EAT held that this was a “*clear and comprehensive summary of those criteria which the tribunal should consider when assessing the fairness of a decision based on capability*”. The EAT went on to record that it had been argued before it that there was a conflict between **McPhail v Gibson [1977] ICR 42** and the decision in **Jones**. In relation to this Judge Pugsley, on behalf of the EAT, explained (with my emphasis):

“We decline the invitation to pick our way through the tortuous path of conflicting decisions or, more accurately, conflicting dicta in very different cases. Much of that which is dignified by the words as being a proposition of law, is, on its true analysis, no more than a comment of industrial good sense in the context of a particular case. The one matter that to us is paramount is the sentence of Sir John Donaldson’s judgment which reads “This duty of fairness both to the employee and to the business is the only general rule all else is but a particular application of that general rule.”

The circumstances in which employees come to be dismissed is so infinitely variable that to attempt to rely on authority as providing the answer to the problem which section 57(3) (now section 98(4)) poses for industrial tribunals is to make a fundamental error as to the construction of that section. It is for the tribunal to consider the words of that section. Guideline authority can of course be helpful, but so often guidelines are wrenched from their particular factual context, and can become tripwires if applied to other situations. Determining the fairness of a decision to dismiss requires the exercise of judgment by an Industrial Tribunal, not merely the arid application of dicta of appellate courts.

...

We do not consider that it is possible to lay down as a proposition of law any general rule that is dependent upon the status or the nature of the job. A van driver employed at a modest salary does not need to be warned that he should not drink before he drives; the personnel director of a large company does not need to be told that he should not make racist or sexist comments about or to members of his staff; a pilot does not need to be warned that he should not crash the plane. There can in our view be no absolute rule as to when warnings are or are not inappropriate. All must depend upon the facts of the case. We note that the appellant was the managing director but of a subsidiary company.

*There has been in our view in this decision a confusion between the need for a warning and the need to satisfy the requirement of natural justice. **Before the decision to dismiss is made an employee is entitled to know the nature of the allegations made against him, and to have the opportunity to give***

his version of events. Of course, as the decision in Polkey recognised, there are occasions where any pre-dismissal interview would be merely an empty charade. If a company is faced with a sudden financial catastrophe, such as the going into liquidation of one of its principal creditors and customers, it may need to make the desperate decision forthwith to close one of its units of production at a particular plant in order to safeguard the viability of the rest of the company. That is a totally different position than if a company is taking a much longer term view as to its needs to shed labour.”

43. The EAT concluded that the Tribunal’s decision was fundamentally flawed in that it did not distinguish between the need to provide warnings and the need to give an opportunity to meet criticisms made on grounds of his capability.

44. I was also referred to the ACAS Code of Practice on Disciplinary and Grievance Procedures (“the ACAS Code”). The ACAS Code was issued by ACAS pursuant to section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”). The status of the ACAS Code is well understood. By section 207(1) TULRCA, “[a] failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to proceedings”. However, section 207(2) TULRCA explains that “[i]n any proceedings before an employment tribunal”, the ACAS Code “shall be admissible in evidence and any provision of the Code which appears to the tribunal... to be relevant to any question arising in the proceedings shall be taken into account in determining that question”.

45. Mr Brittenden KC, who appeared for Mr Stobart, leading Mr Shellum, submitted that these provisions reflected Parliament’s intention that employers should adhere to the principles set out in the ACAS Code. Additionally, he submitted that to relax the ACAS Code’s requirements would undermine Parliament’s intention reflected in section 207A TULRCA (inserted by section 3 Employment Act 2008) which provides for the adjustment of awards for failure to comply. Mr Brittenden referred to the Explanatory Notes to the 2008 Act which, he said, explain the rationale:

“21. In order to provide an incentive to follow recommended practice, section 3 contains provisions giving employment tribunals the discretion to vary awards for unreasonable failure to comply with any relevant Code of Practice relating to workplace dispute resolution, by introducing a new section 207A and Schedule A2 to TULRCA 1992. The relevant Code of practice is one which relates exclusively or primarily to procedure for the resolution of disputes. Of the existing six codes issued under TULRCA, such a definition only applies to the Acas Code of Practice on disciplinary and

grievance procedures, which Acas is substantially revising for reissue at the time the Act comes into force.”

46. In my judgment, Parliament’s intention in relation to the ACAS Code is evident from the provision that the code “shall be admissible” in proceedings, and the relevant provisions “shall be taken into account” by the Tribunal: see section 207 TULRCA. Parliament thereby required that relevant provisions of the ACAS Code must be taken into account, however it did not take the step of making compliance determinative of liability under, for example, section 98(4) ERA. Further, whilst section 207A TULRCA was intended to incentivise the following of the ACAS Code, it is notable that in claims to which it applies (including unfair dismissal), the power to increase or decrease an award can only be exercised where the Tribunal is making an award. The section has no application where liability is not established and no award is made.

47. I turn then to the material provisions of the ACAS Code. At §1 it is explained that *“Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit they may need to be adapted”*. Further, §19 of the ACAS Code provides (with my emphasis): *“Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is **usual** to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period **would normally** result in a final written warning”*.

48. Mr Brittenden submitted that those provisions of the ACAS Code were of universal application and excluded no employee because of their particular job or status in the employing organisation. I agree that the ACAS Code does not make such a distinction (it only deals as a ‘special case’ with employees who are trade union representatives at §30).

49. Pulling the threads together, the question of whether a dismissal is fair or unfair falls to be considered by the Tribunal through the lens of section 98(4) ERA. That subsection is in the following terms:

“Where the employer has fulfilled the requirements of subsection (1) [viz shown a potentially fair reason for dismissal], the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

50. Section 98(4) is clear that the answer to the statutory question will depend on the particular circumstances of the case and a Tribunal must be sensitive to, and consider, those that are disclosed in the case that is before it.
51. When performing that exercise, I agree with Mr Reade that the authorities to which I have referred establish that there is no absolute requirement that in every capability case the employee must be given warning of performance concerns and an opportunity for improvement before a dismissal can be found to be fair. However it is clear, and should be emphasised, that such procedural steps are the normal expectation: to dismiss for capability without adopting such a procedure will usually result in a finding that the employer’s actions fell outside the range of reasonable responses in all the circumstances of the case. This is the consistent message from the authorities since **James** was decided in 1973 and is reflected in the language of the ACAS Code which I have discussed above.
52. Nonetheless, the test set out in section 98(4) ERA permits a Tribunal to find, in the circumstances of an appropriate case, that a dismissal for capability was fair even in the absence of prior warnings or an opportunity to improve. The authorities describe such cases as being “*exceptional*”. Whilst exceptionality cannot operate as some form of test, it is an indication that such cases are likely to be rare. In **James** the NIRC identified that such a conclusion may be drawn where a warning and opportunity for improvement are of no benefit to the employee, and may constitute an unfair burden on

the business. That, in my view, corresponds with the touchstone referred to in **Polkey**, that a fair dismissal may result where the employer could reasonably conclude in the circumstances known to him that the procedural step in question would be “*utterly useless*”. In **Turboflex** the EAT referred similarly to the procedural step being “*merely an empty charade*”. There can be little doubt that these are high hurdles which reflect the fact that in most cases warnings and an opportunity to react and improve serve a useful function and are important elements of fairness.

53. In **James** those employed in “senior management” were identified as a group where the need for warning and opportunity for improvement might be much less apparent because generally such employees are more aware of what is required of them and capable of judging whether they are meeting those requirements. A similar point was made in **Laycock v Jones Buckie Shipyard Limited (Unreported, EAT 395/81)**, cited in **Turboflex**. Those observations were, in my judgment, merely guidance as to the type of circumstances in which the rare exceptional cases referred to above might arise. I respectfully agree with the judgment of Judge Pugsley and members in **Turboflex** that it is inappropriate to lay down a general rule of law dependent upon the status or nature of an employee’s job. As the EAT held in **Turboflex**, whether warnings and opportunities to improve are or are not appropriate must depend upon all the facts and circumstances of the case. The focus should be on whether, in light of the circumstances known to the employer at the time, s/he could reasonably conclude that a particular procedural step was devoid of any useful purpose so as to be “utterly useless” or futile.

Did the Tribunal err by imposing an absolute requirement for a warning/opportunity to improve?

54. I turn then to the question of whether the Tribunal erred in law in the present case. Mr Reade submitted that the Tribunal erred because, contrary to the authorities referred to above, it wrongly imposed an absolute requirement that an employee must always be given a warning and/or opportunity to improve in a capability dismissal. He submitted that it was evident that the Tribunal had imposed such a requirement from §77 of the reasons, where the Tribunal had held “*Once Mr Tang became aware of his loss of trust in Mr Stobart’s performance, he should have raised the matter with the Board and HR and arranged for a meeting with Mr Stobart to explain the concerns*”. He submitted that the Tribunal failed

to ask itself whether, on the factual findings it made, such procedural steps would have been “*utterly useless*” (as in **Polkey**), unnecessary in light of Mr Stobart’s seniority and thus consciousness of the performance issues (as in **Laycock**, and **James**), or whether the inadequacy of performance was so extreme that was an irredeemable incapability and the requirement would place an unfair burden on the business (as in **James**). Mr Reade went on to argue that an affirmative answer to these questions was entirely consistent with the Tribunal’s earlier factual findings.

55. Mr Brittenden submitted that Zen’s argument was based on a fundamental misreading of the relevant paragraphs of the reasons (including §77) and should be rejected. He argued the Tribunal’s reasons should be considered fairly, and as a whole. He submitted that the Tribunal did not in fact impose the absolute requirement identified by Mr Reade. Nor, he said, did it criticise Zen for failing to warn Mr Stobart, or grant him an opportunity to improve. Instead, the finding of unfairness was that Zen had failed to follow its procedures which reflected the ACAS Code, including denying Mr Stobart the opportunity to state his case at a meeting (see §§77, 79). Mr Brittenden submitted that the Tribunal correctly directed itself as to the law it had to apply, correctly applied that law to the facts it found, the conclusion it reached was a finding of (or akin to) fact, and that this Tribunal should therefore not interfere with it.

56. In support of those submissions, Mr Brittenden referred me to the decision of the Court of Appeal in **Union of Construction, Allied Trades and Technicians v Brain [1981] ICR 542** in which Donaldson LJ explained that usually the words of what is now section 98(4) ERA “*is the only relevant law for it is a simple and comprehensive provision*” (p549E). His Lordship continued (p550A-C), with my emphasis added³:

“Whether someone acted reasonably is always a pure question of fact, so long as the tribunal deciding the issue correctly directs itself on the matters which should and should not be taken into account. But where Parliament has directed a tribunal to have regard to equity – and that, of course, means common fairness and not a particular branch of the law – and to the substantial merits of the case, the tribunal’s duty is really very plain. It has to look at the question in the round and without regard to a lawyer’s technicalities. It has to look at it in an employment and industrial relations context

³ These observations were cited with approval in **Taylor v OCS Group Limited [2006] ICR 1602** at §48.

and not in the context of the Temple and Chancery Lane. It should, therefore, be very rare for any decision of an industrial tribunal under this section to give rise to any question of law. And this is quite plainly what Parliament intended.

Of course, a tribunal can approach this simple question in a way which is other than that which Parliament intended. However, where Parliament has given to the tribunal so wide a discretion, in my judgment, appellate courts should be very slow indeed to find that the tribunal has erred in law. ...”⁴

57. Mr Brittenden also relied on **Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457**. There, given that the Tribunal had properly directed itself in the unfair dismissal case that was before it, Elias LJ considered (§51):

“... save at least where there is a proper basis for saying that the tribunal simply failed to follow their own self direction, the appeal tribunal should not interfere with that decision unless there is no proper evidential basis for it, or unless the conclusion is perverse. That is a very high hurdle.”

58. The need for respect for the decision of the Employment Tribunal emerges from a number of other authorities cited by Mr Brittenden. In **Brent London Borough Council v Fuller [2011] ICR 806**, at §12, Mummery LJ held that *“As appellate tribunals and courts are confined to questions of law they must not, in the absence of an error of law (including perversity), take over the tribunal's role as an “industrial jury” with a fund of relevant and diverse specialist expertise”*. Similarly, in **Bowater v Northwest London Hospitals NHS Trust [2011] IRLR 331**, Longmore LJ said, at §19:

“It is the ET to whom Parliament has entrusted the responsibility of making what are, no doubt sometimes, difficult and borderline decisions in relation to the fairness of dismissal. An appeal to the EAT only lies on a point of law and it goes without saying that the EAT must not, under the guise of a charge of perversity, substitute its own judgment for that of the ET.”

59. Finally, Mr Brittenden referred to **Tayeh v Barchester Healthcare Limited [2013] IRLR 387**, in which Rimer LJ addressed the role of the appellate court in an unfair dismissal case as follows (§§53-4):

“53. ... The ET is the tribunal to which fell the responsibility of finding the facts in the case and of applying the applicable law to the facts so found. Amongst the findings it had to make was whether or not the dismissal of Ms Tayeh for her misconduct under each of heads 4 and 5 fell within the ‘band of reasonable responses’. That was either a finding of fact pure and simple, or else was a finding in the nature of a value judgment akin to such a finding. Whichever it was, once the ET had made its finding, that would normally mark the end of the matter. That is because there is no appeal to the EAT against an ET's findings of fact. Appeals to the EAT against an ET's judgment lie only on questions of law:

⁴ Mr Brittenden also referred to the judgment of Oliver LJ, which agreed with that of Donaldson LJ, and specifically concurred that the decision *“was essentially one of fact”* (p553E).

*section 21(1) of the Employment Tribunals Act 1996 . This principle is applied by the EAT strictly. It will, for example, not be enough for a would-be appellant to the EAT to assert that the ET's finding on a particular factual issue was against the weight of the evidence. If there was evidence justifying the ET's finding, that will usually be fatal to the bringing of an appellate challenge and the EAT will refuse to permit an appeal to proceed. Generally speaking, the only bases on which appellate challenges to an ET's findings of fact will be permitted by the EAT will be if they are said to have been supported by no evidence at all, or if they were findings that no reasonable tribunal could have reached. In either case, if such challenges are made good, they would demonstrate an error of law. At least the latter way of putting the case is dependent on an assertion of perversity, although that requires nothing less than 'an overwhelming case': see *Yeboah v. Crofton* [2002] IRLR 634 , at paragraph 93, per Mummery LJ.*

54. So the decision of the ET in a case such as the present is, and will be, normally the end of the road for both parties – just as it should be — unless, however, it can be shown to be arguably vitiated by an error of law. ...”

60. In assessing Zen’s challenge, I agree with Mr Brittenden that the correct approach is to consider the Tribunal’s reasons fairly and as a whole. Lord Hope put it succinctly in **Hewage v Grampian Health Board** [2012] ICR 1054 as follows (at §26):

“It is well established, and has been said many times, that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis.”

61. In my judgment, the Tribunal correctly directed itself as to the law it had to apply. There is a section of the reasons headed “Law” from §§57ff. In that section, the Tribunal referred to section 98 ERA and to a number of cases that had been cited to it. Amongst those cases, the Tribunal referred to **James** (see §60e), and said this:

“James v Waltham Holy Cross UDC [1973] ICR 393 – where the employer is considering capability, it should be slow to dismiss without first raising the question of performance with the employee and giving them an opportunity to improve.”

62. That is a succinct encapsulation of the case, but in my judgment recognises the key point that an employer should *usually* raise the issue and give an opportunity to improve. It does not suggest that this is absolutely required in all cases.

63. The Tribunal also cited **Foley v Post Office; Midland Bank Plc v Madden** [2000] IRLR 82 for the proposition that a Tribunal should not substitute its own view for that of the employer when applying

the test of reasonableness (see §61f).

64. In his oral submissions, Mr Reade accepted that the Tribunal had accurately directed itself as to the law it had to apply⁵. I agree. In these circumstances, as the authorities above indicate, the EAT should be cautious before concluding that the Tribunal failed to follow its self-direction and should be slow to interfere with a finding on fairness which is a finding of fact, or a value judgment akin to a finding of fact.
65. Looking next to the substance of the Tribunal's findings, the analysis of the fairness question commences at §71. The Tribunal started by saying that it had considered whether Zen acted reasonably in all the circumstances in treating capability as a sufficient reason to dismiss Mr Stobart. The Tribunal identified that it was concerned about whether Zen had adequately warned Mr Stobart and given him a chance to respond. Mr Brittenden submitted, and I accept, that the paragraphs immediately following §71 went to these aspects. The Tribunal referred to the dissonance in the performance review documents between concerns about profitability being juxtaposed alongside many positive comments about performance: §72. The Tribunal then concluded that Mr Tang's dissatisfaction and overall lack of trust were "*clearly expressed*" to Mr Stobart in February 2023 (§73). After considering the particular position of CEO (§74), the Tribunal found Mr Stobart should have been aware that the failure to achieve profitability over a period of more than 4 years could well affect his position (§75). Mr Brittenden submitted that in §§73-5 the Tribunal was rejecting a submission that he had advanced on behalf of Mr Stobart, namely that he was not adequately warned about the possibility of dismissal and had not been given a chance to improve. I agree that this analysis is correct on a fair reading of the Tribunal's judgment. It was, by contrast, from §77 of the reasons that the Tribunal identified what it considered rendered Mr Stobart's dismissal unfair: that was the failure to follow Zen's policies and procedures (which reflected the ACAS Code), and in particular take the steps set out at §77 and §79: to have taken

⁵ The only part of the self-direction which Mr Reade balked at was that in relation to the ACAS Code. The Tribunal had, at §60g, recorded a submission of Mr Brittenden that cases which predated 1987 should be considered "carefully" as they predated the application of the ACAS Code. He submitted that the ACAS Code did not change the approach of the authorities which pre-dated it. I did not consider that this amounted to an erroneous self-direction, as it merely indicated that the older cases should be considered "carefully" rather than in a particular way.

“steps to formally establish the facts, inform the employee of the problem, arrange meetings where he could be accompanied and put his case, decide upon outcome and to allow him an appeal”.

66. It follows that I agree with Mr Brittenden that the Tribunal was not focused, when finding unfairness, on a lack of warning or an opportunity to improve.
67. I therefore do not accept Mr Reade’s submission that the Tribunal erred by imposing an absolute requirement to give warning of performance concerns and an opportunity for improvement. However, for completeness, I have gone on to consider this submission in wider form: viz whether the Tribunal imposed an absolute requirement that particular procedural steps must be taken in every capability dismissal. I am satisfied on a fair reading of the reasons that it did not. In my judgment the Tribunal demonstrated that it correctly understood the underlying principles, citing **James**. At §71 it said it was focused on *“all the circumstances”* of Mr Stobart’s case, and it expressed its conclusions in §77 and §79 by reference to the facts of this case (rather than in terms of general propositions). I do not consider, on a fair reading, that it imposed an absolute procedural requirement; its findings were in relation to the particular circumstances of Mr Stobart’s case.
68. As for Mr Reade’s argument that the Tribunal failed to ask whether any further procedural steps would have been utterly useless, unnecessary or would place an unfair burden on the employer, it is right to say that the Tribunal did not expressly pose and answer such a question. Nonetheless, I consider on a fair reading it is implicit in the Tribunal’s assessment at §79 (read with §55) that the procedural errors it identified were considered to be of at least some practical utility, and that this was not one of those exceptional cases identified in the authorities where all further procedural steps could fairly be dispensed with. The findings at §79 recognised that there *“may have been good reasons to end Mr Stobart’s employment”* but nonetheless, the additional procedural steps were considered to be required in order for Zen’s response to fit within the band of reasonable responses. Those included the opportunity for there to be an independent investigating manager and for Mr Stobart to make representations (see §55). In my judgment it is not necessary as a matter of law for the Tribunal in every case expressly to pose

and answer the question of whether further procedural steps would have been futile in the sense I have explained. What is important is that the Tribunal explains why it is that the employer's conduct falls outside the band of reasonable responses. This the Tribunal did. The submission that the earlier findings of the Tribunal⁶ were consistent with the view being taken that further procedural steps were futile is in my judgment a quibble with the assessment of the Tribunal. In the absence of an error of principle, no error of law is thereby disclosed.

69. For the reasons I have given, I conclude that the first limb of Mr Reade's argument is not well founded.

Implied Warning

70. The second limb is that the Tribunal failed to consider whether, in light of Mr Stobart's senior position as CEO, and the comments made in the performance reviews surrounding profitability outlined earlier in the reasons, there had been an implied warning to him.

71. A preliminary point was taken in relation to this argument in the Respondent's Answer. It was said that the argument amounted to a new point of law raised for the first time on appeal. Ultimately, however, Mr Brittenden did not press this objection at the hearing. He preferred, instead, to maintain that it was an irrelevant and academic criticism because the Tribunal did not find that the dismissal was unfair for lack of any warning.

72. I do not consider that there is substance to this second limb of the challenge. I am entirely satisfied that when reaching its conclusions on the section 98(4) ERA question, the Tribunal did consider both Mr Stobart's senior position at Zen and Mr Tang's comments made during the performance reviews on the topic of profitability. The Tribunal specifically reflected on Mr Stobart's seniority at §§56 and 74-5. In respect of Mr Tang's comments on profitability, the Tribunal set out its findings of fact at §§24ff. It then reflected upon (i) the dissonance it found between profitability concerns and overall performance (§§31, 72), (ii) when it considered dissatisfaction and overall lack of trust had been "clearly expressed" to Mr

⁶ Which Mr Reade and Ms Churchhouse set out at §60.7 of their skeleton argument.

Stobart (§73), and (iii) how that impacted upon Mr Stobart's awareness (§75). As I have said above, I agree with Mr Brittenden's analysis that the Tribunal rejected a submission that Mr Stobart was not adequately warned and had not been given an opportunity to improve. The Tribunal took these matters into account when assessing the fairness question, and found unfairness as set out in §§77, 79. No error in principle of the type advanced in this limb of Mr Reade's argument having been disclosed, the evaluation in light of those factors was for the Tribunal to decide.

Substitution Argument

73. Finally in respect of the fairness assessment, Mr Reade argued that the Tribunal substituted its view for that of the employer when it decided that, to act reasonably, Zen "should have" followed its policies and procedures/the ACAS Code and the steps identified at §77 and §79 of the reasons.
74. The cardinal sin of a Tribunal substituting its judgment for that of the employer, rather than assessing whether the employer's actions fell within the band of reasonable responses, was confirmed by the Court of Appeal in **Foley v Post Office; HSBC Bank Plc v Madden** [2000] ICR 1283. At p1291G, Mummery LJ explained as follows:

"The employment tribunal then followed, as it was bound by authority to do, the approach in Iceland Frozen Foods Ltd. v. Jones [1983] I.C.R. 17 and held that, although it was of the view that the decision to dismiss was "harsh," it was not entitled to substitute itself for the employer and impose its "decision upon that of a reasoned on the spot management decision" (paragraph 23). Instead it asked, as required by authority, whether the dismissal was "within the range of reasonable responses for this employer to have dismissed this employee." It found that it was. That finding is not erroneous in law, unless it can be characterised by an appellate body as one which no reasonable tribunal could have reached."

His Lordship then rejected a submission that a different approach should be adopted (p1291H-p1292C):

"That is not, however, the basis on which Mr. Reade, on behalf of Mr. Foley, attacked the decision of the tribunal. His submission, based on Haddon v. Van den Bergh Foods Ltd. [1999] I.C.R. 1150, was that the tribunal ought to have started from the position of considering what it would do in the circumstances and then consider on the objective test in section 98(4) whether the decision to dismiss was reasonable or unreasonable. It should not simply have applied what was described in Haddon as the "mantra" (i.e., the band of reasonable responses and the warning against substituting its own judgment for that of the employer) which drove employment tribunals to subvert the provisions of section 98 and in effect apply a more extreme perversity test. If the tribunal had taken the approach in Haddon it would have given effect to its express view that the decision to dismiss was "harsh" and

it would have concluded that the dismissal of Mr. Foley, who had a clean record, for an offence which was not gross misconduct, was manifestly unreasonable.

I would reject these submissions on the perversity point and on the substitution point as contrary to authority binding on this court.”

75. At p1292H-p1293C, Mummery LJ continued:

“It was also made clear in Iceland Frozen Foods Ltd ., at pp. 24 g -25 b, that the members of the tribunal must not simply consider whether they personally think that the dismissal is fair and they must not substitute their decision as to what was the right course to adopt for that of the employer. Their proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses “which a reasonable employer might have adopted.”

In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to “reasonably or unreasonably” and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not.”

76. In J Sainsbury Plc v Hitt [2003] ICR 111⁷, the Court of Appeal emphasised that these principles apply not only to the reasonableness of a decision to dismiss, but also to the reasonableness of the procedure adopted by the employer. At §30 and §34, Mummery LJ explained:

“30. ... The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.

...

34... the range of reasonable responses approach applies to the conduct of investigations, in order to determine whether they are reasonable in all the circumstances, as much as it applies to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.”

77. There was no dispute that the principles emerging from Foley and Hitt fell to be applied by the Tribunal in this case. But did this Tribunal commit the sin of substitution?

⁷ It was noted that a petition to the appeal committee of the House of Lords for leave to appeal had been refused in Foley: see Hitt at §22.

78. Mr Reade’s criticism was focused in particular on the language of §§77-79 of the reasons. At §77 the Tribunal stated that once Mr Tang became aware of his loss of trust in Mr Stobart’s performance he “*should have*” raised the matter with the Board and HR and arranged for a meeting. At §78 the Tribunal said Mr Tang “*should have*” considered Zen’s procedures. Finally, at §79, the Tribunal concluded Zen “*should have*” taken steps formally to establish the facts, inform Mr Stobart of the problem, arrange meetings so he could put his case, decide upon an outcome and allow him an appeal. Mr Reade submitted that by expressing itself in terms of what the employer “*should have*” done, the Tribunal betrayed that it was substituting its own view, rather than asking whether no reasonable employer would have done what Zen did. Mr Reade supported this argument by reference to other findings of the Tribunal⁸ which he said pointed against the reasonableness of complying with the ACAS Code in the circumstances.
79. Mr Brittenden submitted that Zen’s argument involved an over-technical reading of the Tribunal’s reasons. He reiterated that the Tribunal directed itself properly in relation to the band of reasonable responses test. He referred me to §7d, where the Tribunal identified the fairness question as: “*applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?*” He then relied on the Tribunal’s self-direction in relation to two authorities at §61e and f:
- “e) Iceland Frozen Foods Limited v Jones [1982] IRLR 439 – where the test to apply when considering whether the decision to dismiss was reasonable is whether the decision fell within the range of reasonable responses available to a reasonable employer in those circumstances which led to the dismissal.*
- f) Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82 – which reminds the Tribunal that it must not substitute its own view for that of the employer when applying the test of reasonableness.”*
80. Finally, he relied on the Tribunal correctly restating the question it had to address at the start of its fairness analysis (see §71, and the reference to the range of reasonable responses test), and when answering the **Polkey** question at the end of §80. He submitted that it is inconceivable that the Tribunal lost sight of the correct approach, and that its findings at §§77-79 should be read in the context of these correct self-directions.

⁸ Which he and Ms Churchhouse set out at §62 of their skeleton argument.

81. As for the language of ‘should’ employed by the Tribunal at §§77-9, Mr Brittenden submitted that it was natural that when a Tribunal finds that the conduct of the employer falls outside the range of reasonable responses, the Tribunal will specify what the employer should instead have done to get itself within the band. He submitted that given the correct articulation of the test elsewhere in the reasons, that is how the language should be approached in this case.
82. Whilst I take the view that the Tribunal’s language in §§77-9 was sub-optimal, approaching the reasons as a whole, and in the fair way described by Lord Hope in Hewage, I have concluded that the Tribunal did not substitute its view for that of the employer. I have reached that conclusion essentially for the reasons outlined by Mr Brittenden, but in particular:
- i. I am satisfied that the Tribunal correctly directed itself that it had to apply the band of reasonable responses test. That is clearest from §61e and f, and also from the way it posed the fairness question at the start of its analysis at §71.
 - ii. Given this, as Elias LJ identified in Roldan, my task is to assess whether there is a proper basis for saying the Tribunal simply failed to follow its own self-direction when it came to reach its conclusions.
 - iii. In my judgment the findings in §§77-9 as to what Zen “*should have*” done were, read fairly, in context, and with my nit comb put away, findings about what Zen failed to do in order to bring its response within the band of reasonable responses. Read in light of the correct self-directions, I am unable to accept that the use of this language involved the Tribunal losing sight of its proper task.
 - iv. Given that I am satisfied that the Tribunal correctly applied the band of reasonable responses test, it is not for me interfere with its assessment. That is, in my view, what Mr Reade’s

submission that other findings pointed against the reasonableness of complying with the ACAS Code invite me to do. I decline the invitation.

83. For all these reasons, I dismiss the challenge advanced under Ground 2.

Ground 3: Polkey

84. By Ground 3, Zen challenges the finding of the Tribunal (relevant to remedy) that a fair dismissal would have taken place by 31 May 2023 (rather than before 1 April 2023). Zen advanced two sub-arguments in support of this ground.

- i. First, it is argued that the Tribunal failed properly to apply the **Polkey** question to the facts by considering what would have happened but for the unfairness. It is said that the Tribunal failed to consider the counterfactual scenario from 24 February 2023, when it found that Mr Tang became aware of his loss of trust in Mr Stobart; rather the Tribunal only considered what would have occurred after 17 March 2023 when notice of termination was given. In this way, it is argued that the Tribunal wrongly adopted an exclusively ‘forward looking’ approach.
- ii. Secondly, it is argued that the Tribunal failed to provide any or any adequate reasons to explain why the period of loss extended to 31 May 2023, and why a fair process could not have been completed by 31 March 2023.

The Polkey Question

85. Before examining those arguments, it is helpful to place them within in the context of the correct approach to the **Polkey** question. Having found Mr Stobart’s dismissal to be unfair, the Tribunal was required to determine what remedy to award. The remedies available are set out in section 112 ERA. In this case, Mr Stobart did not seek to be reinstated or re-engaged; he sought compensation only. An award of compensation is made up of a basic award and a compensatory award (see section 118 ERA). The compensatory award is quantified in accordance with section 123. Materially, that provides:

“(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.”

86. The Tribunal was therefore required to assess what would be just and equitable to award in all the circumstances, having regard to the loss caused by the unfair dismissal. The need to have regard to what losses were caused by the unfair dismissal ensures that the amount awarded is compensatory in nature. The broader context of this assessment was subject to analysis in **Contract Bottling Ltd v Cave [2015] ICR 146**: see §§13ff. In his judgment, Langstaff P identified that a claim for future loss of earnings is moderated by assumptions, including (but not limited to) the employee remaining in receipt of the same income from the same job. Whether that assumption holds depends on a range of different circumstances which can be raised for consideration. One issue, conventionally called the **Polkey** question, is whether a fair dismissal might in any event have taken place, whether for the same reasons as originally operated, or for entirely separate reasons.

87. In **Polkey** itself the House of Lords confirmed the relevance to assessing compensation of how the outcome would have differed were the unfairness of a dismissal to have been cured. In his speech at p365D, Lord Bridge approved the dicta of Browne-Wilkinson J in **Sillifant v Powell Duffryn Timber Ltd [1983] IRLR 91** as follows:

“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.”

88. Over the years, the exercise has been subject to further explanation in a number of authorities⁹.

89. In **King v Eaton Ltd (No 2) [1998] IRLR 686**, the Inner House of the Court of Session dealt with the

⁹ Some of the authorities dealt with the effect of section 98A(2) ERA which was introduced for a period to reverse the effect of **Polkey** and reintroduce the position under **British Labour Pump Co Ltd v Byrne [1979] ICR 347**: see **Kelly-Madden v Manor Surgery [2007] ICR 203**. It is necessary when considering these authorities to disentangle those parts of the reasoning which implement section 98A(2) now that this provision has been repealed. See dicta to this effect in **George v London Borough of Brent (Unreported, UKEAT/0233/15/DM)** at §15.

question of whether it will always be possible to perform the exercise. At §19, Lord Prosser said as follows:

“... It seems to us that the matter will be one of impression and judgment, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure made no difference, or whether the failure was such that one simply cannot sensibly reconstruct the world as it might have been. ...”

90. In **Lambe v 186K Ltd** [2005] ICR 307, the Court of Appeal approved this approach, albeit with a refinement: it was not considered helpful to characterise defects as either procedural or substantive. Wall LJ endorsed observations to that effect made by Peter Gibson LJ in **O'Dea v ISC Chemicals Ltd** [1996] ICR 222 and held that **King** should be read in light of them: see §§53-5. Otherwise endorsing the approach in **King**, at §59, Wall LJ said this:

“The highlighted passage from King v Eaton Ltd (No 2) [1998] IRLR 686, 691, para 19 seems to us both practical and to coincide with the approach of this court in O'Dea's case. It provides tribunals with a straightforward and sensible yardstick with which to approach such cases, and avoids unnecessary and unproductive debate about whether a particular piece of conduct fits into the "substantive" as opposed to the "procedural" category.”

91. In **Gover v Propertycare Ltd** [2006] ICR 1073, the Court of Appeal explained that the principle recognised in **Polkey** was not narrowly limited but an example of the general application of section 123(1) ERA: §19. There was also “no limitation as to the nature of the reason for dismissal” when conducting the **Polkey** exercise: it was open to a Tribunal to consider that the employee would in due course have been dismissed for a different reason from that which resulted in the unfair dismissal: see §18. At §23, Buxton LJ approved the dicta of HHJ McMullen QC sitting in the EAT in **Gover** that the task of the Tribunal was:

“...to draw upon its own industrial experience of circumstances such as this and to construct, from evidence not from speculation, a framework which is a working hypothesis about what would have occurred had the [employer] behaved differently and fairly.”

92. The Court of Appeal returned to the issue in **Thornett v Scope** [2007] ICR 236. Pill LJ reminded Tribunals that inherent in the assessment of future loss was a “speculative element”. At §36 he said:

“The tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation.”

At §37 he continued:

“When Lord Prosser, in King v Eaton Ltd (No 2) [1988] IRLR 686, para 19, spoke of making decisions “with more or less confidence” he was not saying that a prediction could only be made when confidence was complete; on the contrary, he contemplated prediction when there was “less” confidence. As already stated, however, there may come a point, at which evidence of countervailing factors is so slight that an indefinite continuation of the employment may be held to be an appropriate prediction.”

93. Pill LJ emphasised that the parties must take care to place before the Tribunal the material on which they seek to rely on the **Polkey** question (see §38). He concluded by saying (§39):

“It is important, however, that, when a conclusion is reached as to what is likely to have happened had the employment been allowed to continue, the reasons for that conclusion and the factors relied on are sufficiently stated.”

94. In **Software 2000 Ltd v Andrews & Others [2007] ICR 825**, this Tribunal considered the foregoing cases. In relation to **Scope**, Elias P, giving the judgment of the Tribunal, said this (§§52-3):

“52. The case emphasises that the task is for the tribunal to identify and consider any evidence which it can with some confidence deploy to predict what would have happened had there been no unfair dismissal. To fail to do this could lead to over compensating the employee, which would not be a just outcome. In this context we would caution against taking the phrase “constructing the world as it might have been” too literally.

53. The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.”

95. The EAT went on to summarise the principles that emerged from the case law (see §54). I set these out below, adapted to remove the effect of section 98A(2) ERA which has since been repealed:

“The following principles emerge from these cases.

(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) ...even if a tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

*(7) Having considered the evidence, the tribunal may determine: (a) that ...the dismissal would [certainly, or almost certainly] have occurred when it did in any event: [whilst the dismissal remains unfair, the employee has not suffered any loss of earnings in respect of which compensation falls due]; (b) that there was a chance of dismissal..., in which case compensation should be reduced accordingly [by the appropriate percentage]; (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 *O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615; (d) that 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."*

96. In **Stonehouse Coaches Limited v Smith** (Unreported, UKEATS/0040/13/BH), the EAT was dealing with the case of a bus driver who had been dismissed for foul language towards a passenger. The Tribunal had awarded four weeks loss of wages as compensation for future loss given that it considered

it 100% likely that there would have been a fair dismissal by that point. At §13, Langstaff P said this (with emphasis added):

*“13. “Polkey” awards have perhaps developed a mystique of their own, which they do not entirely justify. It should be remembered that the principle is part of the general principle of assessment of future loss. Where a person has suffered a loss, in consequence of dismissal, a Tribunal has to determine the extent of that loss. **That involves comparing what would have occurred had there been no dismissal when the dismissal took place with what did in fact occur.** The first question, what would have occurred, depends on a very great number of factors. They may include factors such as the Tribunal being aware of the illness of the Claimant which would have put him off work. They include the possibility that he would have chosen to leave that employment for any one of a variety of reasons. They include the possibility that the job might no longer have existed, again for a number of reasons. They also, and obviously, include the possibility, where the employer has taken steps to, and has, dismissed the employee for reasons which in substance are good but procedurally are bad, whether if the procedure had been fair there would have been a dismissal. This involves looking at the chance that would have occurred. Thus the chance of a fair dismissal, which is the subject matter of Polkey, is one of a number of factors which are likely to limit the extent of any compensatory award. Here, the Tribunal took the view that the chance was to be placed at 100% on the sliding scale, as it has been called, which runs from 0–100% (see the words of Judge Peter Clark in *Countrywide Freight Group v Hobbs* UKEAT 0582/11, a decision of 9 May 2012, paragraphs 10 and 11). Where a Tribunal is satisfied that there would have been a dismissal if a fair procedure had been adopted, the compensatory award cannot extend further than the date upon which the Tribunal predicts that would have happened. Here, Judge McManus decided that a “reasonable timescale” would have been four weeks. Although the issue was not one of reasonableness but of prediction, that is what I think she meant to say and is entirely appropriate. **There is always likely to be a time gap between an actual decision to dismiss, reached unfairly by unfair procedure, and a decision which would or might have been reached following a fair procedure. That gap is a period of time during which the employee would remain in employment and for which the employee is entitled to be compensated.**”*

97. Finally, in **Contract Bottling Ltd v Cave & Another** [2015] ICR 146, Langstaff P helpfully explained (§§19-21):

*“19. As to ... the chances of a job not continuing, whether by the employee's choice or the employer's choice or decision, it has become conventional to express this in terms of a percentage. This is not the only way of doing it. It too may be represented, taking it together with the chances of obtaining fresh employment, by assessing a period of weeks as being the appropriate amount of compensation. As the words “just and equitable” in section 123 of the Employment Rights Act 1996 suggest, the award may necessarily have an element of broad-brush about it. *O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615 demonstrates that a period of time may be as appropriate in some cases as it is to express a result in terms of a percentage deduction from what would otherwise be the full period of loss assessed by the tribunal. A percentage does, however, have the advantage of transparency in identifying a particular factor in respect of which arguments may then be addressed. In assessing this percentage, it must be remembered that a tribunal is not looking to decide the probability of a past event having happened. It is seeking to determine the likelihood in percentage terms of a future event occurring.*

20. Whether the word “chance” is used or “risk” is used is, in my view, largely immaterial. They

express the same concept, though from different perspectives. The aim of the assessment is to produce a figure that as accurately as possible represents the point of balance between the chance of employment continuing and the risks it will not, expressed in terms of weeks, months or years or as an overall percentage. If a percentage, it will inevitably take account not only of the risk that, at some time during a period of weeks, months or years which would otherwise pass before a fresh job was obtained, the claimant would have lost her employment by fair dismissal, but also take account of when that would have occurred. For instance, a 50% risk that an employee would lose her job at some stage during a 12-month period following dismissal does not justify a 50% reduction from the whole year's salary if it is thought that it is a risk expressed in respect of an event which might happen, if at all, only after six months. There would first be six months' full salary. In the case of this example, the risk mathematically would be expressed as 25%.

21. I draw attention to these factors to place the assessment of a Polkey contribution in context, but also to demonstrate that it is inevitably an exercise about which there can be no absolute and scientific certainty. It is a predictive exercise. Evidence is needed to inform the prediction. It is important that a tribunal should spell out, as best it can, what factors it takes into account in determining why it adopts a particular percentage. However, there can be no legitimate ground for criticising a particular percentage unless it is manifestly less than or more than the percentage which might have seemed proper or unless it is simply unreasoned. This is because, of its very nature, justifying 20% rather than 25% (as the case may be, or some slightly higher or some slightly lower percentage) is not susceptible of detailed reasoning. It is, and has to be, a process of assessment. Part of my reasoning in setting out all the various factors which can intersect is to show how much a matter of art, as Mr Robinson-Young put it, this is rather than a matter of science.”

The Relevant Period

98. The first of Zen’s arguments concerned whether the Tribunal had wrongly concentrated on the period after 17 March 2023 when assessing what would have occurred had the employer behaved fairly. In the Respondent’s Answer it was suggested that the argument that section 123(1) ERA is ‘backwards looking’ and not ‘forwards looking’ was a new point of law raised for the first time on appeal. Zen disagreed with that submission. Mr Reade argued that it had been Mr Stobart’s case below that section 123(1) ERA was forward looking and it was through that submission that the Tribunal was led into error. He took me to §50 of Mr Stobart’s skeleton argument before the Tribunal which reads as follows (emphasis in the original):

*“In any event, the **Polkey** analysis is, of necessity, forward-looking. The test is **not** whether R could have got its house in order and dismissed C fairly by 31 March 2023 – that question is in the words of Lord Bridge “simply irrelevant”. Rather, the ET is required to proceed on the facts and to inquire what would have happened **after** 31 March 2024”*

99. Ultimately, Mr Brittenden did not press the point that I should refuse to consider this argument on the

basis that it was not run below. In my view he was right to adopt this position. I consider the argument is open to Zen to take on appeal given the way the arguments on **Polkey** were advanced below by Mr Stobart. In any event, had it been necessary I would have given permission for the point to be raised having considered the factors identified in **The Mayor & Burgesses of the London Borough of Brent v Johnson & Others [2022] EWCA Civ 28** at §§37-41. I do not consider that Mr Stobart can be said to be prejudiced by this point being raised on appeal given his submissions below; nor do I consider that further evidence would be required, or that the trial would have been conducted differently below in respect of the evidence.

100. Zen’s substantive argument focuses on the Tribunal’s conclusion, in §80 of the reasons, that “... *had Mr Stobart been the subject of a formal investigation under Zen’s procedures, a fair dismissal would have taken place a little over two months following the 17 March 2023 board meeting and certainly by no later than 31 May 2023*”. Zen relies on the fact that earlier, the Tribunal had found that Mr Tang informed Mr Stobart on 24 February 2023 that he had lost confidence in him (see §34) and from that date had “clearly informed” Mr Stobart that he could no longer remain in the CEO role (see §35). Mr Reade submitted that the Tribunal ought to have considered what would have happened had Zen acted fairly and taken the procedural steps identified at §§77-9 from 24 February 2023. It ought not to have limited itself to looking forward from the date when notice of termination was first given (17 March 2023). Mr Reade relied on the Tribunal having been seduced into this error as a result of Mr Stobart’s closing submissions.

101. In his submissions, Mr Brittenden submitted that the terminology of ‘forward’ or ‘backward’ looking approaches was somewhat of a distraction. In general, he accepted that the Tribunal was not guillotined in terms of what it can consider when undertaking the predictive **Polkey** exercise. He therefore accepted that in an appropriate case, it might be acceptable for the Tribunal to look at what might have occurred differently *before* the actual dismissal. Nonetheless he submitted that it was open to the Tribunal here to have adopted a prospective analysis and said this was consistent with **Software 2000**, **Stonehouse**, and **Contract Bottling**. Mr Brittenden submitted that the Tribunal did not indicate at §80 that it had

accepted Mr Stobart's closing submission that the exercise was only forward looking. He submitted the effective date of termination was 31 March 2023 and the Tribunal had in fact looked at events pre-dating that, from 17 March 2023, when notice was given. He submitted the Tribunal's conclusion that it would have taken a little over 2 months for the necessary steps to have been completed was permissible in the circumstances.

102. I start with the issue of principle. In a case involving **Polkey** arguments, when predicting what is likely to have occurred if the employer had acted differently and fairly, is a Tribunal limited to looking forward from a particular date (e.g. the date of dismissal or notice of dismissal)? In my judgment the clear answer is that there is no such legal fetter. It must be remembered that the **Polkey** exercise is one part of the function of the Tribunal in assessing compensatory loss pursuant to section 123 ERA. The governing principle underlying that section is to award compensation that is just and equitable having regard to the loss caused. No restriction in terms of time periods is discernible from the statute, and in my view it would be wrong to develop one. Similar attempts to develop rigid rules of application of the **Polkey** principle were rejected by the Court of Appeal in **Gover**.
103. Confusion has, perhaps, arisen from the fact that in a typical case where the **Polkey** question arises, the unfairness often lies in the employer failing to take some action which would, or might, have prolonged the employment. Thus an employer might have acted unfairly by moving too quickly to dismiss and failing to consult in a redundancy dismissal; or it might have failed to investigate or hold a disciplinary meeting in response to misconduct. In such cases, as Langstaff P recognised in **Stonehouse**, there is likely to be a time gap between an actual decision to dismiss reached unfairly by unfair procedure, and a decision which would or might have been reached following a fair procedure.
104. However this will not always be the case and the Tribunal must focus in on the particular unfairness that it has found in the facts of the case before it. One example raised during the course of argument demonstrates why this is so. Take a case where a dismissal for misconduct is rendered unfair only because of an unreasonably long investigative and disciplinary process, beset by delay. In such a case,

had the employer behaved differently and fairly, the process would have concluded with the same outcome but at a date sooner than in actuality. The employee would not have lost out financially because in the hypothetical fair scenario, the employment would have ended earlier. In my judgment there is no good or principled reason why the Tribunal should have to shut its eyes to what it assesses would have occurred had the employer behaved differently and fairly, even if some or all of those actions would have occurred before the actual decision to dismiss.

105. In a case concerning how the employer might have responded differently and fairly to the situation that led to the dismissal that took place (as opposed to e.g. where it is said that the employee would have been fairly dismissed for an entirely separate reason), the Tribunal should look at what it was about the dismissal that rendered it unfair. It should then assess the evidence the parties put before it and consider what is likely to have happened had the particular employer acted differently and fairly in the respects identified. The Tribunal is not limited to considering how the actions may differ from a particular point in time; however practically speaking the focus is often likely to be on the period after the original concern came to light. As the authorities show, the exercise necessarily involves a degree of speculation. Depending on the evidence different findings are possible: see e.g. those identified at principle (7) in **Software 2000** at §54.

106. In this context, there was some debate at the hearing before me about how, on the counter-factual scenario, it should be assumed that the employer acted fairly. As I have explained above, fairness in unfair dismissal is assessed by reference to the band of reasonable responses. That concept recognises that different responses to a particular situation can all be reasonable – hence the “band” or “range” of responses. Unfairness arises where an employer makes a decision or adopts a procedure that falls outside the range of how a reasonable employer would decide/adopt. Given that acting fairly can mean acting in one of a number of permissible ways, when constructing the hypothetical fair scenario, which of those ways is it to be assumed that the employer would have acted? Is the minimum fair response¹⁰ to be

¹⁰ See, by analogy, the defendant’s least obligation principle that applies in contract law.

assumed, or should the Tribunal discern as best it can which of the fair options the particular employer would have followed? Neither Mr Reade nor Mr Brittenden was aware of any authority which directly engages with this issue. Whilst one can imagine cases where this might make a difference, I am ultimately satisfied that this is not one of them. The Tribunal here identified the procedural steps that were required for Zen's response to fall within the band, and the debate concerned how long it would have taken for Zen to have carried out those steps. It is therefore not necessary for me to consider further this issue on this appeal.

107. I return to the question of whether this Tribunal erred in law. It is certainly the case that the Tribunal's conclusion in §80 is expressed in terms of a fair dismissal taking place, after a formal investigation under Zen's procedures, "*a little over two months following the 17 March 2023 Board meeting and certainly by no later than 31 May 2023*". But does this mean that the Tribunal was considering how long a fair investigation and dismissal would take if it were to start on 17 March 2023 (viz confining consideration to the period after 17 March)? Or is the date of the 17 March 2023 Board meeting simply a placeholder – a date in the chronology around which to orient its finding of how long until a fair investigation/dismissal would have completed, even if that process started before that date?

108. I remind myself of the need to read the Tribunal's assessment fairly and in context (see Hewage above). At §80, the Judge commenced the analysis by stating there was a "likelihood" that Mr Stobart would have been fairly dismissed had a fair procedure been followed. This is then clarified to be a finding that it would have been "almost certain" that a fair procedure would have resulted in a fair dismissal. In support of that finding, the Judge refers to the evidence of lack of profitability and the time that had elapsed over which profitability had not been achieved. At the end of the paragraph, the Judge explains why the substantive decision to dismiss on grounds of capability would have fallen within the range of reasonable responses and been fair: the duration of the lack of profitability and the nature of Mr Stobart's role as CEO. The only part of the paragraph which addresses the impact of Zen adopting a fair procedure is the statement that after a formal investigation the fair dismissal would have taken place a little over two months following the 17 March 2023.

109. In my view on a fair reading of §80 the Tribunal was confining its consideration to what would have occurred after 17 March 2023. I bear in mind that the finding was made in the context of the submissions made to the Tribunal on the point. This includes Mr Stobart's submission which I have set out above. Although I agree with Mr Brittenden that the Tribunal did not state in terms in §80 of its reasons that it accepted Mr Stobart's submission, there is equally no statement that the submission was not accepted. I note in addition that at §50 of Mr Stobart's written submission, the point was made in stark terms: that the Tribunal was "*required*" to inquire into what would have happened "*after*" the date of dismissal¹¹. Although the language used by the Tribunal is focused on when a fair dismissal would have taken place (rather than when it considered the formal investigation resulting in the fair dismissal would have commenced), I cannot be confident, given the context of the submissions, that the Tribunal adopted the correct approach in law which I have set out above. In these circumstances, I conclude that the Tribunal's approach to the **Polkey** question was erroneous in law and its decision should be set aside.

Reasons

110. Zen's second argument is related to the first. Zen argues that the Tribunal failed to provide any or sufficient reasons as to why the period of loss extended to 31 May 2023, and why the investigation (including the steps identified at §§77 and 79 of the judgment) could not have been completed by 31 March 2023. Mr Reade relied on the context of the Tribunal's other findings, including §75 (that the failure to achieve profitability had not been achieved in over four years) and §79 (that the ongoing performance documentation, financial information produced for board meetings, and other correspondence involving Mr Tang and Mr Stobart provided much to demonstrate a failure to achieve profitability during Mr Stobart's tenure as CEO). He submitted that in light of those findings it was not clear on the reasons given why the fair procedure identified could not have taken place between 24 February 2023 (when the issue crystalised) and 31 March 2023.

¹¹ There is some indication that the Tribunal had §50 of the submission in mind in that the typographical error as to the year in the submission (31 March 2024) is reflected in the Tribunal's typographical error when referring to 31 May 2024 at §80 of the judgment.

111. In this connection, Mr Reade referred me to the helpful summary of the duty to give reasons provided by Cavanagh J in **Frame v The Governing Body of the Llangiwg Primary School & Another** (Unreported, UKEAT/0320/19/AT): see §§40-48 esp at §47:

“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.”

112. Mr Reade placed particular emphasis on principle (4) in that list. He submitted §80 of the judgment merely states a conclusion and does not provide any rationale for the conclusion that a fair dismissal would have taken place by 31 May 2023.

113. Mr Brittenden argued that the reasons given by the Tribunal were adequate. §80, he said, falls to be read in light of the earlier findings about what was required of a fair procedure (see e.g. §55 and §79). He referred to Donaldson LJ’s judgment in **UCATT v Brain** (above) at p551E-F. There it was said that:

“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 reasons are given.”

114. He also placed reliance on the judgment of Underhill LJ in **Beatt v Croydon Health Services NHS Trust** [2017] ICR 1240. When considering a reasons challenge to a **Polkey** finding, his Lordship referred to the nature of the exercise as being (§101):

“...to make an assessment, of what will often have to be a fairly broad-brush nature, about what might have happened in a hypothetical situation which never in fact transpired.”

115. I acknowledge that the **Polkey** exercise is one of prediction, which involves speculation, and that it can be quite broad-brush in nature. That will impact on the extent of the reasons which can be provided in a given case. A detailed explanation of why the Tribunal has settled upon a particular time period or percentage chance is in many cases unrealistic and not required. Nonetheless, the authorities speak in clear terms about the need for the Tribunal to engage with the evidence, even if the picture that emerges is an incomplete one: see **Software 2000** §§52-3. It must construct from that evidence (and not from speculation) the working hypothesis about what would have occurred had the employer behaved fairly: **Gover** §23. Having done that, the reasons for the Tribunal’s conclusion as to what is likely to have happened and the factors relied on must be sufficiently stated: **Scope** §39. It follows, in my view, that whilst the Tribunal’s reasons need not be lengthy or elaborate, they must in some form identify the features of the evidence that were critical to the decision that was made. Otherwise the Tribunal is simply engaged in the task of stating a conclusion.

116. In the present case, I consider the Tribunal’s conclusion at §80 is inadequately reasoned. It simply states the conclusion that a fair dismissal would have taken place by 31 May 2023. No evidential factors or considerations are referred to (even in short form) to justify or explain why that period was settled upon.

117. It follows that I allow the appeal on Ground 3 and set aside the Tribunal’s conclusion on the **Polkey** issue.

Conclusion and Disposal

118. For the reasons I have given:

- i. The challenge to the Tribunal's finding that Mr Stobart's dismissal was unfair fails and is dismissed.
- ii. The challenge to the Tribunal's finding on the **Polkey** issue is well founded and the Tribunal's conclusion on this issue is set aside.

119. Mr Reade sought to persuade me to substitute a decision for that of the Tribunal on the **Polkey** issue. However, in light of the guidance in **Jafri v Lincoln College** [2014] ICR 920 and **Burrell v Micheldever Tyre Services Ltd** [2014] ICR 935, I am of the firm view that this is an issue where more than one outcome is possible and I should refrain from substituting my own decision. The question of when a fair dismissal would have taken place must therefore be remitted for reconsideration.

120. I invited the parties' submissions concerning whether the remission should be to the same or different Tribunal. The relevant guidance is set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 at §§46-7 (referred to with approval at §31 of **Barke v SEETEC Business Technology Centre Ltd** [2005] ICR 1373). Mr Reade argued that the remission should be to a different Tribunal on the basis that (i) the decision on **Polkey** was totally flawed such that one cannot be confident the Tribunal would get it right the second time around; (ii) there was a real risk that the Tribunal has made up its mind and might reverse engineer the same result; and (iii) there was likely to be a lengthy delay if remitted to the same Judge as opposed to a newly constituted Tribunal. Mr Brittenden submitted the question should go back to the same Judge who heard the evidence; that Judge can retake the decision in light of the guidance in this judgment. He submitted the remedy hearing has not yet taken place and that would provide a suitable opportunity for the decision to be retaken.

121. Having balanced the relevant factors, I am of the view the remission should be to the same Tribunal.

Whilst I have concluded that the Tribunal erred in law, I do not consider the decision “totally flawed” in the sense described by Burton J at §46.4 of **Sinclair Roche**. Nor do I consider that there is a real risk that the Tribunal would take the opportunity to bite the cherry for a second time, instead of genuinely looking at matters afresh and in line with the guidance in this judgment. I consider the position is as described in §46.6 of **Sinclair Roche**: the Tribunal has been corrected on an honest misapplication of the legally required approach; it has not committed itself in its reasons in such a way to suggest a rethink is impracticable. Accordingly, the presumption that the Tribunal will professionally go about its task on the remitted question applies. Further, the Tribunal has already heard the relevant evidence. It is more proportionate for it to be asked to retake the decision in the light of further submissions and this judgment than for a fresh Tribunal to come to the case. There has been some passage of time since the judgment was sent to the parties in May 2024, but this is not such that the Tribunal will not be able to refresh its memory. It also seems to me that the same Tribunal will be able to deal with the remitted question within a reasonable period, especially as it is still seized of the issue of remedy.

122. I benefitted greatly from the submissions that were advanced on behalf of the parties in this case and conclude by thanking counsel for their assistance.