

Neutral Citation Number: [2026] EAT 162

Case No: EA-2023-000230-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 October 2026

Before:

HER HONOUR JUDGE JOFFE

Between:

FARGRO LIMITED

- and -

MR DAVID HIDE

Appellant

Respondent

Mr Rad Kohanzad (instructed by Croner Group Limited) for the **Appellant**
Mr Jonathan Davies (instructed by OH Parsons LLP) for the **Respondent**

Hearing date: 27 August 2026

JUDGMENT

SUMMARY

Unfair dismissal

This was an appeal by the respondent about a failure to make a finding of contributory fault on the part of the claimant and a cross-appeal by the claimant about the amount of a **Polkey** reduction.

The Employment Judge found that the claimant's dismissal for misconduct was unfair in circumstances where the respondent had engaged consultants to carry out the investigation and the disciplinary and appeal hearings. The consultants then reported to a manager who made the decisions to dismiss the claimant and then to reject the claimant's appeal. The EJ concluded that having the same decision-maker for the dismissal and the appeal was unfair but that there was no unfairness in the process being conducted by consultants. The EJ made a 66.66% **Polkey** reduction.

There was no finding of contributory fault. In the judgment the EJ said that there was no 'direct evidence' on the basis of which a finding of contributory fault could be made. On the respondent's reconsideration application, the EJ recognised that direct evidence was not required to make a finding of contributory fault but said that this was not a case in which it was possible to make findings from which he could assess a level of culpability by the claimant.

The respondent maintained its appeal, which had been pursued on the basis that the EJ had erred in law in requiring direct evidence to make findings of contributory fault, on an amended ground that the EJ had erred in failing to make the necessary findings of fact which would have enabled him to make a finding of contributory fault.

The claimant cross-appealed on the basis that the EJ had failed to make findings about other aspects of unfairness. This was a failure to give reasons or was perverse. The **Polkey** reduction was therefore perverse.

Held:

Dismissing the appeal: The EJ had not erred in not making a finding of contributory fault in circumstances where he was not able to identify evidence on the basis of which he could make findings of fact which would establish the appropriate level of culpability on the part of the claimant.

Allowing the cross-appeal in part: The EJ had failed to make findings on some material submissions as to further reasons why the claimant said the dismissal was unfair and failed to give consideration to whether the claimant had had a proper opportunity to explain himself to the decision-maker in circumstances where the decision-maker did not meet with him prior to dismissal. None of his conclusions on the issues he did consider were perverse but the **Polkey** reduction would need to be revisited if there were further bases for finding the dismissal was unfair.

HER HONOUR JUDGE JOFFE:

Introduction

1. This is an appeal and a cross-appeal from a judgment with reasons of Employment Judge ('EJ') Cadney sent to the parties on 9 December 2022, following a two day hearing of an ordinary unfair dismissal claim.
2. For clarity, I refer to the parties as claimant and respondent as they were before the Employment Tribunal.
3. In a nutshell, the respondent says the EJ's reasons on contributory fault are inadequate but the decisions on liability and **Polkey** are not and the claimant says the reverse.

Background

4. The facts found by the EJ are sparse and this reflects the fact that the evidence in front of him was itself limited.
5. The claimant was employed by the respondent as an integrated pest management specialist from 28 January 2013 to 27 January 2020.
6. On 15 November 2019, Dr Burnstone, the claimant's manager, asked him to remove a screensaver which Dr Burnstone considered could cause discomfort to colleagues. The screensaver showed the claimant and some colleagues at a social event, a football match. If it was explained to the EJ why the screensaver was considered controversial, that does not appear in the judgment.
7. On 19 November 2019, the screensaver was still on the claimant's computer. The EJ found that Dr Burnstone asked the claimant to remove it and the claimant refused. The claimant disputed this account of events but there is no appeal in relation to these findings of fact.
8. Dr Burnstone contacted Ms Wheeler, the respondent's HR manager, complaining that the

claimant had failed to follow a reasonable management instruction and undermined him in front of other staff. On 22 November 2019, Dr Burnstone and the claimant had a meeting and Dr Burnstone set out his expectation that there would be no further incident and that the claimant would bring up his worries in a calm and considered fashion and adhere to company policy. There was no formal disciplinary action but it was said that disciplinary action could be taken if further issues arose.

9. Also that day a colleague, JH, made an allegation of bullying by the claimant.

10. There was some form of investigation meeting on 26 November 2019 and the claimant was suspended.

11. The disciplinary process which followed was conducted by employment consultants retained by the respondent. Mr Tudor from Croner conducted the investigation meeting with the claimant on 3 December 2019 and wrote a report on 17 December 2019. None of the employment consultants who conducted the disciplinary procedure gave evidence to the Tribunal.

12. The report recommended disciplinary action on charges of

- 'i) Allegations of bullying JH;
- ii) Failing to follow reasonable management instructions to stop talking about politics in the workplace;
- iii) Encouraging political conversation to a level deemed pestering which had the potential to make colleagues feel uncomfortable and intimidated (namely JH);
- iv) Inappropriate use of the work email phone and laptop;
- v) Inappropriate use of work time;
- vi) Not acting in accordance with Fargro's standards of behaviour;
- vii) Unacceptable attitude toward management leading to a fundamental breakdown of trust and confidence.'

13. No details of those charges are provided in the judgment. I was not provided with the report or other documents before the EJ, but I did have the respondent's witness statements, which themselves provide no further detail of the claimant's alleged conduct.

14. Mr Yeomans, another Croner consultant, held the disciplinary hearing on 13 January 2020. Mr Yeomans did not uphold the bullying allegation but did uphold the second through seventh

allegations and recommended that the claimant be dismissed. Mr Hopkins, managing director of the respondent, accepted that recommendation and the claimant was summarily dismissed by a letter dated 27 January 2020.

15. The claimant appealed and his appeal hearing was held by a further Croner consultant, Mr Thomas. Mr Thomas identified eleven points as having been raised on appeal. The claimant said at the tribunal hearing that Mr Thomas only dealt with five of these. Mr Hopkins considered the report of Mr Thomas and dismissed the appeal.

The Judgment

16. The reasons run to some eight pages and 47 paragraphs; as I have said, the evidence itself had been brief. On the issue of unfairness, the approach the EJ took was to look at criticisms of the dismissal made by the claimant and consider them in two categories: procedural and substantive defects. A more conventional approach to fairness in a misconduct dismissal would have been to follow the structured approach in **BHS v Burchell** [1980] ICR 303 and consider whether the respondent had a genuine belief in the claimant's misconduct, had reasonable grounds for that belief and had carried out as much investigation as was reasonable in the circumstances and then to consider other aspects of procedural fairness. I observe that that approach might have led the EJ to consider some of the issues the claimant says were not considered.

17. The EJ considered the claimant's contention that it was unfair for the respondent to have engaged consultants to carry out the disciplinary process because, it was said, there was no contractual right to do so and the claimant had not consented to this process. The respondent's submission was that, whilst the contract was silent on the point, it was a relatively common practice and added 'an extra level of fairness', as the contractors were independent. The EJ recorded a further submission made by the claimant:

'The claimant alternatively submits that the decision was procedurally unfair as the respondents' decision maker, Mr Hopkins, carried out no independent analysis or investigation but simply accepted,

both at the disciplinary and appeal stage, the recommendations.’

18. The EJ found:

‘In my judgement the respondent is correct as to this point. Firstly there is nothing in the material provided to me which demonstrates that the contract has any bearing on this issue; and it is open to the respondent to appoint external consultants as the respondent did. In the end the however, the decision must be that of the respondent, not the external consultant. I accept Mr Hopkin’s evidence that he was the ultimate decision maker. In the circumstances I accept the process being carried out in this way did not prejudice the claimant or cause any unfairness.’

19. The EJ was however persuaded that the fact that Mr Hopkins was the decision maker at both dismissal and appeal stage was a factor which had to be considered when assessing fairness.

20. The EJ rejected two further points said by the claimant to create procedural unfairness:

- a. That a trawl of his devices to search for evidence was a breach of his Article 8 rights;
- b. That the screensaver incident had been decided already by Dr Burnstone without any disciplinary action being taken so it was not open to the respondent to consider it as part of the matters leading to dismissal.

21. On the substantive issues, the EJ considered what appear to have been two points:

- That a number of findings were not supported by evidence. The EJ found on this:

‘The claimant’s second submission is that a number of the findings were not supported by the evidence, for example the conclusion that he was guilty of the inappropriate use of work time (allegation (v)). This assumed that the inappropriate use of the devices had occurred during working time but there was no evidence, or at least insufficient evidence to support this. This in my judgement is a valid point, and it follows that at least in part the conclusions that led to his dismissal fell outside the range reasonably open the respondent.’

- That the sanction was too severe for the charges upheld, which did not include the most serious allegation, that of bullying and harassment of JH. The matters left were minor.

22. The EJ recorded the respondent’s arguments on the issue of seriousness:

‘37. The respondent contends that this is to underplay the seriousness of the allegations that were upheld. The essence of the respondent’s submissions is that the claimant’s approach is too atomistic; and that the tribunal should step back and look at the overall picture. The claimant’s behaviour towards colleagues and his line manager was unacceptable [a]s encapsulated in allegations vi) and vii) . He failed to follow company instructions as to the use of electronic devices and refused to accept reasonable instructions from his line manager. The conclusion that the evidence overall demonstrated a pattern of unacceptable behaviour amounting to serious misconduct, was, on any analysis, one that was reasonably open to the respondent, and the sanction necessarily fell within

the range reasonably open to it. They contend that Mr Tudor, Mr Yeomans and Mr Thomas, and ultimately Mr Hopkins all clearly took the view that the behaviour categorised by the claimant as minor disputes were in fact examples of serious misconduct and that conclusion was on the evidence, one that was reasonably and rationally open to them.'

23. The EJ then concluded overall that the respondent was 'broadly substantively correct for the reasons it had put forward. On the information before the respondent it was open to it to conclude that the claimant had committed serious misconduct; and that the decision to dismiss substantively fell within the range reasonably open to it.'

24. The EJ concluded that the dismissal was nonetheless procedurally unfair because Mr Hopkins had been the decision-maker at both the dismissal and appeal stages and also because the appeal report did not address all of the grounds of appeal.

25. I had in front of me the claimant's skeleton argument from the Tribunal proceedings, prepared by Mr Davies, who also appeared on this appeal. This contained a number of submissions about features which were said to have rendered the dismissal unfair which were not expressly mentioned by the EJ. That state of affairs forms part of one of the grounds in the cross-appeal and I return to it further below.

26. The EJ's decision on **Polkey** was as follows:

'43. Polkey - The respondent submits that even if I identify any procedural flaws, that the decision to dismiss was based on a body of substantive evidence which had been independently examined by three external consultants. Whilst hey [sic] did not agree as to every point each took the view that the claimant was guilty of gross misconduct; a view shared by Mr Hopkins. Even if there are procedural errors rendering the dismissal unfair there should be a 100% Polkey deduction on the basis that it is essentially inevitable that anyone other than Mr Hopkins hearing the appeal would have reached the same conclusion.

44. The claimant submits, as set out above that the evidence does not support the conclusion that the claimant had committed any misconduct and certainly not misconduct sufficient to justify dismissal and there is a significant likelihood that a properly conducted appeal would not have resulted the claimant's dismissal.

45. In my view the fact that although I have taken the view that the decision was broadly substantively fair, that there are elements of the decision that were not factually supported, and the appeal did not address all the grounds of the appeal there is a possibility that a different conclusion would be reached it does not appear to me to rise above that level and in my judgement the likelihood of the same substantive conclusion being reached by a different appeal officer is substantial. In the circumstances a 66.66% Polkey reduction is appropriate.'

27. On contributory fault, the EJ said:

‘Contributory Fault - There has been no direct evidence called before me to allow me to make any specific findings of fact in relation to contributory fault; and in the circumstances I make no finding as to contributory fault and there is no further reduction beyond the 66.66% Polkey reduction set out above.’

The reconsideration decision

28. HHJ Katherine Tucker considered the appeal on the sift and stayed it to allow the respondent the opportunity to apply for reconsideration of the decision on contribution.

29. The respondent applied for reconsideration on 11 August 2023 in these terms:

‘The Respondent believes that the Tribunal erred in determining that direct evidence was required to make a finding of contributory fault (Para 46 of the judgment). The Respondent presented its case of reasonable belief in the guilt of the Claimant. An employer is not required to call “direct evidence” as to what did and did not happen.

The role of a tribunal in an unfair dismissal case is to seek to make a finding on the balance of probabilities as to what did and did not occur (in relation to contributory fault) and resort to the burden of proof it has difficulty in doing so. The Tribunal was able to make a finding that the Respondent was able to conclude that the Claimant had committed serious misconduct (para 39).

In accordance with r.70 of the ET Rules it would therefore be in the interests of justice to vary the judgment to consider a further reduction of 33.3% to account for the contributory fault of the Claimant as evidenced in cross examination and the documentation provided in the bundle; alternatively, to revoke the judgment.’

30. The substance of the EJ’s decision on reconsideration was as follows:

‘3. In principle that application raises two questions. The first is whether direct evidence was necessary, and the second, in the event that I was wrong about the first, is what indirect evidence does the respondent contend was sufficiently cogent or reliable to allow me to make findings of fact as to contributory fault.

4. In respect of the first I fully accept that as a matter of law direct evidence is not automatically or inevitably required in that in appropriate cases there may well be sufficient evidence to allow conclusions to be drawn without direct evidence of the wrong doing being brought before the tribunal.

5. The issue is therefore the second question. If the respondent considers that I was wrong in my assessment that in this case direct evidence was required to allow me to draw conclusions as to contributory fault, what in the background evidence does it contend was sufficiently cogent and reliable to compel me to draw an such conclusion and in respect of which allegations. .

6. The fundamental basis for my decision was although I had been provided with all the relevant material with which to consider whether the dismissal was procedurally and/or substantively unfair, and to consider whether to make a Polkey deduction, there was no direct evidence in respect of the allegations faced by the claimant. **As is set out in the judgment the claimant did not accept that he was guilty of the conduct alleged against him, and did not accept that it amounted, if true, to misconduct, let alone gross misconduct. Whilst this did not affect the tests I had to apply in respect of the unfair dismissal claim or the Polkey deduction, in my view in order to make a finding of contributory fault I would be required to make primary findings of fact from which I could assess any appropriate level of culpability. As set out above, whilst there may be cases in which it is possible to make such findings, for example where some or all of the underlying factual allegations are not in dispute in my original view this was not such a case. In those circumstances I took the view that it was not possible for me to make any direct findings of fact as to what the claimant had or had not done, and the level of any culpability and I did not, therefore make any additional deduction for contributory fault**

7. The difficulty I have with the current reconsideration application is specifically why the respondent contends that I was or should have able to make any specific findings of fact as to contributory fault,

and on the basis of what information. In the reconsideration application itself the respondent simply asks me to reconsider on the basis of the cross examination of the claimant, and the documentation provided in the bundle. The respondent has not set out which of the factual allegations it contends there is sufficient evidence to make primary findings of fact or what that evidence is. In effect the respondent invites me to reconsider that evidence in the hope that I might find something which on reconsideration would persuade me to change my view, without providing any specific assertion or submissions as to what that something might be. With due respect to the respondent this appears to me by definition simply to be a second bite at the cherry on the basis of information, indeed all the information, already before the tribunal. In the absence of any specific identification by the respondent of any evidence in the bundle, or any specific evidence given by the claimant in cross-examination which it contends should cause me to reconsider there is no material before me which would allow or cause me to do so. 8. In the circumstances I remain of the view that this was not an appropriate case in which to make a finding in respect of contributory fault. However in order to assist the EAT in respect of the appeal if the respondent does wish to make a further reconsideration application with reference to specific aspects of the evidence I will, of course, consider it.'

[Emphasis added]

31. The respondent did not take up the invitation by the Employment Judge to make a more focussed application in which it referred to the evidence it sought to rely on with respect to the issue of contribution.

32. The further procedural history of the proceedings at EAT level was as follows:

- On 10 April 2025, HHJ Auerbach allowed the single amended ground of appeal through to a full hearing;
- On 12 June 2025, Judge Burns KC allowed Grounds 3 and 5 of the cross-appeal through to a full hearing on the sift. He said, of Ground 3:

'Ground 3 – it is arguably an error of law for the ET to conclude that it is reasonable for an employer to delegate investigation and decision-making powers to an external consultant to the extent that the employer did not need to meet the employee before deciding to dismiss and without considering or direct itself to a statutory relevant factor - the size and administrative resources of the Respondent. It is not apparent from the Judgment whether the Respondent was a small, medium sized or large employer. The ET accepted that Mr Hopkins was the decision maker (para 27) but did not address why it was not unfair for the claimant to be dismissed without a meeting or a chance to state a case to the decision maker.';

- On 24 June 2026, Judge Jones KC at a rule 3(10) hearing also permitted Ground 2 to proceed. He said:

'Accepting that it is not required of a Tribunal that it should identify every submission made to it, nor is it required where a submission is rejected to set out in detail why, I nevertheless consider it reasonably arguable that the Tribunal erred by not addressing the submissions referred to in Ground 2 a number of which identify alleged procedural unfairnesses that would, if found, have justified a finding of unfairness.

In this case the dismissal has already been found to be unfair. The matters

identified in ground 2 remain significant, however, for the purposes of the Polkey analysis. That analysis requires the Tribunal to ask itself, simplifying, what would have happened had the employer not acted unfairly. That counterfactual requires the Tribunal to be able to identify in what respects the dismissal was unfair. If it was unfair in more than one respect, the counterfactual must encompass all of the relevant instances of unfairness. It follows that even though a finding of unfairness has been made, if the Tribunal has failed to identify each respect in which the dismissal was unfair, the Polkey question may be premised on a counterfactual which excludes relevant considerations.’

The legal framework

33. Section 123 of the Employment Rights Act 1996 sets out the manner in which a tribunal must calculate a compensatory award:

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

...

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

34. The duty on the Tribunal is expressed in mandatory terms: it *shall* reduce the award where it makes a finding of fact that the dismissal was caused or contributed to by action of the complainant.

The question of what exactly triggers consideration of a reduction for contribution was considered in

Carmelli Bakeries Ltd v Benali UKEAT/0616/12/RN, a case in which the respondent had not raised

the issue of contribution either in its ET3 or at the hearing but contended on appeal that the tribunal

was obliged to consider the issue of its own motion. The respondent relied on the unreported case of

Swallow Security Services Ltd v Millicent UKEAT/0297/08 in which HHJ Burke QC held:

‘27. ...there is, in s 123(6), an express obligation upon the tribunal, if it finds that the dismissal was to any extent caused or contributed to by any action of the Claimant (which conduct must be blameworthy: see below), to make a reduction in compensation to the extent that it considered it just and equitable to do so. In our judgment it follows that, if in the course of their deliberations, a tribunal concluded that there had been such causative and blameworthy conduct, the tribunal would be bound to apply s 123(6), whether the issue of contributory fault has been raised by the employer or not. The tribunal are statutorily required so to do. Further, in our judgment, in any case before the tribunal in which the facts are such that a finding of contributory fault may appropriately be made, the tribunal are bound to consider the issue, raise it with the parties, and decide whether there has or has not been contributory fault and whether a deduction from contribution should be made. We do not accept Mr Massarella’s argument that the trigger for the tribunal’s duty to consider the issue has to be a finding that there has been contributory fault; for if the tribunal do not raise the issue, such a finding, however appropriate it might have been, may never be made. The trigger must arise at an earlier point, such as that which we have described.’

35. Slade J held:

‘45. On the basis of the mandatory language of ERA section 123(6), in relation to a compensatory award for unfair dismissal and having regard to Roldan and Swallow Security Services, if the ET found that the Claimant had carried out culpable conduct which to any extent caused or contributed to the dismissal they were bound to consider whether it would be just and equitable to reduce the awards having regard to their findings.’

36. The reference to **Salford NHS Foundation Trust v Roldan** [2010] EWCA Civ 522 was to this passage from the judgment of Elias LJ, in respect of **Polkey** reductions:

‘There is authority in the EAT that when assessing compensation, Polkey should be addressed by the Tribunal of its own motion even if the point is not expressly raised, at least where there is evidence putting the point in issue: see *Red Bank Manufacturing Ltd. v Meadows* [1992] ICR 204. It seems to have been assumed below that this applies likewise to the application of section 98(a)(2). No challenge has been mounted to that principle in this case. So we shall assume it to be correct even in a case such as this where the employer is legally represented and makes no submissions on the point. **However, it is plain from the remedies' decision that the Tribunal concluded that there was no evidence adduced to put the point in issue. On that basis there was no obligation on the Tribunal to engage with the issue at all.**’
[Emphasis added]

37. The question of what kind of evidence the Tribunal was bound to consider was also relevant to this appeal. The respondent relied on the decision of HHJ Auerbach in **Hovis Ltd v Louton** EA-2020-000973-LA, in which he analysed the limited circumstances in which a trial judge may revert to the burden of proof in deciding an issue.

38. In the course of the judgment, HHJ Auerbach discussed the types of evidence a judge is obliged to consider in seeking to arrive at findings of fact:

‘[23] A distinct legal proposition, however, is that it is an error of law for the trial judge to fail to consider at all, evidence of a particular type, such as documentary or hearsay evidence, simply because it is of that type, unless it falls properly to be excluded from consideration because of the application of some rule of evidence or other established exclusionary legal principle.

[24] As to that, rule 41 Employment Tribunals Rules of Procedure 2013 provides that employment tribunals are not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. So, hearsay or documentary evidence, or other types of evidence, of whatever nature, are not, as such, inadmissible, and if such evidence is sufficiently relevant to what the tribunal has to decide, then it should be considered. But the assessment of the evidence, and what weight to attach to it, is, of course, a matter for the tribunal.

[25] There is, specifically, no rule that hearsay evidence cannot be considered or given weight by a tribunal. The judge is, of course, entitled to give consideration to how the fact that the evidence is hearsay may have a bearing on the assessment of its reliability and what weight to attach to it. In particular, witnesses who give oral evidence to the tribunal in person are required by rule 43 to do so on oath or affirmation. Their evidence can also be tested by cross-examination in front of the tribunal in a way that hearsay evidence cannot.

[26] Although in his skeleton Mr Webb cited a dictum of Baroness Hale in *Polanski v Conde Nast Publications Limited* [2005] 1 WLR 637, about the possible implications of a party refusing to submit to cross-examination, he confirmed in oral submissions that he did not suggest that a hearsay account which has not been tested in that way must be given no weight at all. He was right not to do so. The

fact that a hearsay statement has not been given under oath, or tested in that way at trial, are considerations that may of course inform the judge's assessment of its reliability or credibility, or otherwise of what weight to attach to it, but that is a different matter. They are also not necessarily the only considerations that may affect the evaluation of hearsay evidence. The tribunal needs to consider all the relevant circumstances in the given case, such as the particular circumstances in which the statement was made, the nature of the record of that statement, and so forth.

[27] Nor, Mr Webb also accepted, is there any rule that oral evidence given, and tested, at trial, must or will always, as it were "trump" opposing documentary or hearsay evidence. The credibility and reliability of the oral evidence must itself still be subject to some evaluation; and it may also, in a given case, be outweighed by a determinative document, or a hearsay account, which, in all the circumstances, the judge finds more reliable or compelling.'

39. The claimant relied on authorities which discussed the obligations on parties, in what is an adversarial forum, to pursue the cases they wish the tribunal to decide. In **Kumchyk v Derby City Council** [1978] ICR 1116, the claimant sought to introduce a new point on appeal which had not been pursued at the industrial tribunal.

40. Arnold J said of this omission:

'It is well established in these tribunals, and we hope in this appeal tribunal, that where the representation is a non-professional representation, or possibly even where it is an inexperienced professional representation (if such a thing can be conceived), in listening to an argument put forward by an advocate or evaluating a point of law put forward by an advocate, the tribunal will be as helpful as possible, perhaps by itself refining and improving the argument, perhaps by suggesting to the advocate that the argument might be put in a different or more favourable fashion, something of that sort. But we think that it is very far from the duty or indeed the practice of the chairman of industrial tribunals that they should be expected to introduce into the case issues which do not figure in the presentation on the one side or the other, at any rate in normal circumstances.'

41. Also on this subject, I considered the judgment of the Court of Appeal in **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] ICR 1231, [2025] EWCA Civ 185 and in particular the analysis of the law by Warby LJ at paragraphs 36 - 39:

'36. Thirdly, where a party seeks the ET's ruling on an issue that emerges from an objective analysis of the statements of case (and falls within its jurisdiction) the ET has a duty to address that issue. This is the core function of the tribunal. That does not mean that the ET has to resolve every issue that is raised in a case. Sometimes a party will not press all the claims that have been pleaded; the ET is not obliged to address those which are raised but later abandoned: see *Mensah v East Hertfordshire NHS Trust* [1998] IRLR 531. And the ET needs only decide enough to reach a conclusion on the claims that have been pressed. Subject to these points, however, I would accept the broad submission of Ms Monaghan KC, that the ET does not have a discretion not to consider and determine a claim that has been brought before it.

37. Fourthly, however, the ET's role is arbitral not inquisitorial or investigative. It must perform its functions impartially, fairly and justly, in accordance with the overriding objective, the law, and the evidence in the case. It may consider it appropriate to explore the scope of a party's case by way of clarification. That may, in particular, be considered appropriate in the case of an unrepresented party. Whether to do so is however a matter of judgment and discretion which will rarely qualify as an error of law such that the EAT can interfere. The ET has no general duty to take pro-active steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage. These propositions emerge clearly from a series of decisions of this court and the EAT.

38. We have been referred to the decisions of this court in *Mensah* (above) at [28] and [36] and *Muschett v HM Prison Service* [2010] EWCA Civ 25, [2010] IRLR 451 [31]. I do not consider it necessary to review those two cases in further detail. That was done in *Drysdale v Department of Transport* [2014] EWCA Civ 1083, [2014] IRLR 892 where the court subjected the relevant authorities to a detailed analysis from which Barling J (with whom Arden and Christopher Clarke LJ agreed) derived the following general principles:

- (1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.
 - (2) What level of assistance or intervention is "appropriate" depends upon the circumstances of each particular case.
 - (3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.
 - (4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.
 - (5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.
 - (6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant.
39. The following analysis seems to me correct in principle and consistent with the case law. The starting point is to consider what claims emerge from an objective analysis of the statements of case. A failure by the tribunal to identify and address those claims is liable to amount to a breach of its core duty and hence an error of law. A failure to identify and determine a claim that does not emerge from such an analysis can amount to an error of law but only in rare or exceptional circumstances of the kind outlined in *Drysdale*. It is in this overall context that the role of an agreed list of issues falls for consideration.'

42. A case which I asked the parties to consider on the issue of dismissals where the decision-maker has not met with the employee being dismissed was **Charalambous v National Bank of Greece** [2023] EAT 75. In that case Judge Gullick KC dismissed the claimant's appeal against a finding that her dismissal was fair despite the fact that the dismissing manager did not conduct the disciplinary proceedings himself. It had been argued for the claimant that **Budgen & Co v Thomas** [1976] ICR 344 establishes that a dismissal will, at the very least as a starting point, be unfair if the manager making the decision to dismiss does not hear directly from the employee.

43. Judge Gullick in his discussion of the authorities said:

'The facts of *Budgen* were that the employee was suspected of stealing from the till in a shop where she worked. On her return to work from holiday, she was interviewed by the employer's security officer. The employee signed a document which admitted that she had disobeyed the rules about the proper operation of the till and, in that document, apparently admitted that she had put the money

concerned into her overall. The employee was dismissed on the same day. The security officer had contacted management at head office and explained what had happened over the telephone. The employer's personnel manager decided that the employee should be dismissed. That decision was passed back to the manager of the store who communicated the dismissal to the employee. The Industrial Tribunal held that the dismissal was unfair, concluding that it could not be right that head office had decided to dismiss the employee before hearing her and that "a statement to a security officer is not a substitute for an interview with the management who will eventually dismiss". The Industrial Tribunal held that there should have been "an interview ... with some senior management whose responsibility it was to decide on punishment". Such an interview did not take place and the dismissal was, in the view of the Industrial Tribunal, accordingly unfair.

39. The Employment Appeal Tribunal dismissed the appeal, in a judgment given by Phillips J. At page 348 of the report, this Appeal Tribunal rejected the employer's argument that a hearing had been unnecessary. It stated: "... Whatever the circumstances, whatever the employee is alleged to have done, and however serious it may be, it is, in our judgment, always necessary that he should be afforded some opportunity of explaining himself to those persons in the management who will in the first instance take the decision whether or not he is to be dismissed. The fault of the employers is that pointed out by the industrial tribunal: they confused, and by their argument to this tribunal clearly still confuse, two quite different things. One is the process of investigating the complaint; the other is the process of deciding whether or not dismissal is the right penalty. Very often, those separate functions will be undertaken by the same person or body, and, when that happens, there is no problem. But if, as here, the investigation of what happened is undertaken as a separate exercise, then whatever the outcome of that investigation, and however serious the offence disclosed, it is still necessary, when a decision is being taken whether dismissal is to follow, for the employee to have an opportunity to say whatever he or she wishes to say to the person who will take the decision. It is not possible or desirable to elaborate that at greater length. The tribunal put it admirably in a single sentence which is short, pithy and correct: "A statement to a security officer is not a substitute for an interview with the management who will eventually dismiss." That really is what this case is all about."

40. I reject Mr Johns' submission that Budgen is authority for the proposition that for a dismissal to be fair, at least insofar as the initial decision to dismiss is concerned, a decision-maker must themselves have direct personal communication at a meeting with an employee. At page 348H of the report in Budgen, this Appeal Tribunal held that it was necessary that an employee should be afforded "some opportunity of explaining himself" to those who will take the decision to dismiss and, at page 349B, that an employee should "have an opportunity to say whatever he or she wishes to say to the person who will take the decision". I do not regard Budgen as establishing that, in order for a dismissal to be fair, there must necessarily be a meeting between the employee and the dismissing officer. All the references by this Appeal Tribunal in its judgment to the employee having the opportunity to "say whatever he or she wishes to say" do not mean that such communication cannot, in principle, either be in writing or by way of a report to the dismissing officer.

41. I agree that it is desirable that such a meeting between the employee and the dismissing officer should take place. It is good practice and something which many employers' disciplinary procedures will expressly require. No doubt many dismissals will be found to be unfair if no such direct meeting takes place. Budgen, where the entire process was conducted by the security officer relaying events to the personnel manager over the telephone, was one of those cases. But I do not regard Budgen as establishing that a dismissal must be unfair if such a meeting does not take place. As the editors of Harvey on Industrial Relations and Employment Law point out in the passage to which I have already made reference, it may be reasonable for an employer to dismiss where a full report, including potentially mitigating features, is provided to the dismissing officer. As Mr Kohanzad correctly points out, the Employment Tribunal in an unfair dismissal case is applying the broad statutory language in section 98(4) of the 1996 Act and conducting an assessment of what "equity and the substantial merits" require in the particular case before it. This is not a process that should become "encrusted with case law": see the observations of Underhill J in this Appeal Tribunal in Newcastle upon Tyne City Council v Marsden [2010] ICR 743 at [16].

...

43. The key point being made by this Appeal Tribunal in Budgen was that the employee should have an opportunity to explain her position sufficiently prior to a decision being reached.'

The ground of appeal and arguments

44. There was one ground of appeal as amended; it was that the EJ failed to make necessary

findings of fact which would have enabled him to make a finding of contributory fault. As I have said, this ground had previously been formulated as: ‘The ET erred in considering that it needed ‘direct evidence’ in order to make a finding of contributory fault’.

45. Mr Kohanzad said that, as per **Hovis**, the EJ was obliged to look at all of the evidence he had and evaluate it to consider whether it was necessary to make a reduction for contribution. The respondent had pleaded the issue of contribution and it appeared in the list of issues. The EJ’s response to the reconsideration request had been, in effect, to concede that it was not necessary for there to be direct evidence on the issue of contribution but to say that there was nonetheless insufficient material on the basis of which to make any finding and to place the onus on the respondent to identify the evidence on the basis of which findings could be made.

46. The EJ was required to conduct the exercise set out in **Steen v ASP Packaging Ltd** [2014] ICR 56 (essentially a four stage test for assessing reduction of compensation for contribution) whenever there were facts pointing to culpable conduct of the employee which contributed to the dismissal, regardless of whether the employer raised the issue. The EJ was required to evaluate all of the evidence with which he had been provided, including hearsay and documentary evidence: **Hovis Ltd v Louton**. Here the EJ had the claimant’s own evidence, the investigation report, disciplinary findings and contemporaneous correspondence. This was not an exceptional case where the EJ had embarked on the exercise of evaluating the evidence on each allegation, reached the conclusion that he could not decide and was forced to resort to the burden of proof. He had not conducted the relevant exercise at all.

Claimant’s response

47. The respondent had failed to plead any facts which it said supported a finding of contributory fault. It had called no witnesses to speak to such facts. The internal investigation had only interviewed two witnesses, only one of whom, Dr Burnstone, was a witness to any matter in respect of which a

finding of misconduct was made (the screensaver incident). His statement did not appear in the bundle. The respondent did not call the consultants who had conducted the investigation, the disciplinary hearing or the appeal hearing. The only hearsay evidence in the bundle about the underlying incidents was Dr Burnstone's letter of 19 November 2019. The 'electronic printouts' said to have been put to the claimant as part of the investigation and the 'letters of serious concern' about the claimant discussing politics in the workplace were not in the bundle.

48. The only matter on which the underlying facts were put to the claimant was the allegation about the screensaver. The issue of contribution was not pursued by the respondent in submissions. The EJ did not make any primary findings of fact about the matters said to have been misconduct because of the way the case was put by the respondent. The EJ was not obliged to construct and decide a case of contributory fault which the respondent had not properly advanced.

49. Mr Davies suggested that the proposition which seemed to be derived from **Swallow Security Services Ltd v Millicent** and **Carmelli Bakeries Ltd v Benali** that an employment tribunal is bound to consider contribution even if a legally represented party does not raise it might not be correct. The wording of section 123(6) ERA 1996 did not compel this reading. There was no good policy reason for it and it gave rise to unattractive consequences in a case like the present where a party, having failed to put relevant evidence before the Tribunal or make submissions about the issue, could subsequently complain to the EAT. Mr Davies pointed to various authorities where it was stressed that tribunals do not have a duty to consider issues which have not been introduced by the parties, including **Kumchyk**.

50. The EJ on reconsideration had been unable to identify what evidence there was to support primary findings of fact on the basis of which he could make findings of contribution. This was because there was nothing to find. The burden was on the respondent to establish contributory fault. In an adversarial system, a party has to make its case and cannot expect a tribunal to go searching for

it unaided.

The cross-appeal

Ground 2 and claimant's arguments

51. This ground asserted that there had been a failure to give adequate reasons, in particular at paragraph 39. It was said that the EJ failed to explain how Mr Hopkins came to his conclusions or examine his thought processes.

52. It was necessary to a proper assessment of **Polkey** for the EJ to assess all aspects of unfairness. The EJ found that it was a 'valid point' to say that a number of findings were not supported by evidence but failed to go on to specify which findings of fact were not supported.

53. A number of the submissions made by the claimant as to why his dismissal was unfair were simply not addressed at all by the EJ. The claimant pointed to nine aspects of the dismissal which he says were not addressed:

- Mr Hopkins' failure to carry out his own independent assessment of the facts and reach his own decision;
- The fact that the screensaver incident had previously been found to not merit disciplinary action but was then included in the charges and ultimately the findings of misconduct;
- The fact that on 29 November 2019 the claimant was invited to a further investigation meeting but given no details of the allegations;
- The fact that the claimant was not shown documents on which he was asked questions at the investigation meeting;
- The fact that the claimant was not given the opportunity to question witnesses and Mr Yeomans did not himself test the evidence;
- The claimant was not asked about mitigation and there was no express consideration of mitigation;

- The fact that the respondent looked through the claimant's personal correspondence, eg his Facebook account;
- The use of breach of trust and confidence as a disciplinary charge;
- The respondent's failure to consider defences put forward by the claimant.

Respondent's response

54. Mr Kohanzad relied on the familiar and uncontroversial proposition that reasons are addressed to parties and should enable them to understand why they have won or lost. They are to be read fairly and as a whole.

55. Tribunals are not obliged to deal with every submission and every piece of evidence in front of them. Whilst there were no doubt profoundly important pieces of evidence or argument which it would be an error for a tribunal not to deal with, the arguments pointed to by the claimant were not so significant that it was an error not to deal with them. Here the EJ had explained in the round why he found the dismissal otherwise fair, at paragraph 38. It is clear from this paragraph that it was only the alleged inappropriate use of work time which the EJ considered was not supported by evidence.

56. So far as the complaint that Mr Hopkins' thought processes were not examined was concerned, the EJ had accepted his evidence that he was the ultimate decision-maker. The evaluation of the evidence was a matter for the EJ.

57. The issues of sanction and mitigation were dealt with through the range of reasonable response analysis.

Ground 3 and claimant's arguments

58. This ground was that it was perverse for the EJ to make only the limited findings as to why the dismissal was unfair that he made. It was said that there was no evidence that Mr Hopkins considered the matter himself. He did not hold a meeting with the claimant and there is no

contemporaneous documentation setting out his thought processes.

59. Mr Davies relied on all of the matters which he said the EJ failed to provide reasons about as matters in respect of which it was perverse for the EJ not to have found further unfairness. He also pointed to the matters which had been noted by the judges of the EAT who had considered the cross-appeal at interlocutory stages:

- the fact that the claimant did not have an opportunity to state a case to the decision maker, Mr Hopkins, prior to his dismissal;
- the fact that the EJ did not expressly consider the size and administrative resources of the respondent when considering the lack of opportunity to state a case.

Respondent's response

60. There was evidence to support the finding that Mr Hopkins considered the matter for himself; a finding that the evidence was thin did not support a perversity appeal.

61. Mr Kohanzad said that the matters identified by Judge Burns KC were not part of the pleaded grounds. So far as the size and administrative resources point was concerned, the EJ had dealt with that in considering the contracting out issue, which he had found was not a source of unfairness. Whilst **Charalambous** showed that it was not ideal for a decision-maker not to speak directly with the employee being disciplined, there was no rule of law rendering it automatically unfair. The EJ had considered the point and rejected it as a source of unfairness. That decision could not be said to be perverse.

Ground 5

62. This was that the **Polkey** reduction of 66.66% was perverse. Both parties agreed that this ground was parasitic on the other grounds. If the EJ had erred in not making further findings of unfairness, the **Polkey** assessment was plainly affected.

Discussion and conclusions

Appeal

63. There are some issues which, because of the mandatory language in which the tribunal's role is described by the statute, the tribunal is obliged to consider. Contribution is one of those issues in the circumstances set out in section 123(6) ERA 1996. **Swallow Security Services Ltd v Millicent** provides a steer as to the ambit of the tribunal's duty to address the issue with the parties where the parties have not raised it themselves.

64. That authority does not however cast much light on the facts of this case. Here the EJ did consider the issue in his reasons. Although the EJ may have misdirected himself in the way he described his reasons for not making a finding of contributory fault in the judgment (that there was no 'direct evidence'), the respondent no longer challenges that self-direction, but says that in any event the EJ failed by not assessing the evidence which he did have and making appropriate findings.

65. There is a number of authorities which consider the extent to which a tribunal is obliged to raise or ultimately consider issues which parties have not themselves raised, or having raised them have not pressed them, or which they may appear to have implicitly abandoned, for example by not including them in an agreed list of issues. The possible situations are numerous and one of the important themes which emerges from the authorities is that tribunals have a margin of appreciation as to the extent to which they assist parties in the presentation of their cases: see the discussion of **Drysdale** in **Moustache**. Similarly, in my judgment, the EJ was not obliged to raise the issue of contribution proactively with the parties, for example during their submissions, because it was already identified as an issue in proceedings where both parties were represented; he was certainly not obliged to interrogate the respondent's representative about what case he was putting forward.

66. In considering the EJ's reasons, it is helpful to look at what the EJ had to work with, which was a paucity of direct or indirect evidence about the conduct matters. The 'hearsay' evidence of the

decision-maker, Mr Hopkins, was what one could characterise as second tier hearsay, since he had not conducted the investigation. There was very little contemporaneous documentation in the bundle and the claimant was only cross examined about his culpability in respect of the screensaver incident.

67. It would also be fair to say that the EJ had minimal assistance from the respondent in terms of identifying evidence which supported findings of fact which established ‘that the dismissal was to any extent caused or contributed to by any action of the complainant’. As Mr Davies said, the respondent did not even make submissions about the issue. What appeared in submissions to this Appeal Tribunal to be some indignation on the claimant’s side about the respondent’s approach to the issue of contribution, which extended to a failure to take up the EJ’s invitation to present a further application for reconsideration, was in my view understandable.

68. There will no doubt be any number of cases where the findings of fact cry out for a conclusion that there was contributory fault and other cases where the evidence called is such that a tribunal, properly directing itself in accordance with section 123(6) ERA 1996, will err if it does not go on to make findings which lead to an assessment of contributory fault. The tribunal will, per **Swallow Security Services Ltd v Millicent**, in those cases need to raise the issue with parties who have not addressed it. There are also cases in my judgement where neither the facts nor the evidence require the tribunal to do more than what the EJ did in this case, which is to say that he found nothing which could support a finding of contributory fault. A tribunal is not generally required to pick over the evidence looking for material to support a case which has not been articulated by a party. **Hovis Ltd v Louton** requires the tribunal to make findings of fact insofar as it is able on the basis of such evidence as it has, where those facts are in issue and are necessary to determine issues which are fairly before the tribunal.

69. Where did this case fall on that spectrum? It is notable that the respondent has not specified what evidence the EJ failed to look at and what findings he should have made based on that evidence.

Looking at the materials the EJ had, the only matter the claimant was cross examined about was the screensaver incident. Finding the claimant culpable in relation to any of the other charges would have required the EJ to make findings about matters the claimant had not been given the opportunity to respond to, on the basis of what I have called second tier hearsay and very limited documentary evidence. Mr Kohanzad said that the failure to put these points in cross examination was not necessarily fatal. However he cited no authority for the proposition that an employment tribunal is entitled to make findings of fault by a party in respect of allegations not put to that party; that approach would be contrary to the well-established rule in civil proceedings and authorities in the employment sphere such as **Secretary of State for Justice and anor v Dunn** EAT 0234/16.

70. The EJ did not err in not finding that the claimant was at fault in respect of any charge in respect of which the claimant neither conceded fault nor was cross examined as to culpability. This leaves only the screensaver incident. The EJ found that the claimant had been asked to remove the screensaver and refused and that Dr Burnstone had warned him at a meeting about the matter (see the account at paragraphs 6 – 8 above). Did the EJ err in failing to make further findings of fact or draw conclusions from these primary facts which would have enabled him to make a finding of contributory fault? If one treats the reconsideration decision in these proceedings as an amplification of the reasons, as the respondent did in its amendment of its ground of appeal, in my conclusion he did not. He must be taken to have had his own judgment and the findings of fact he made in that judgment in mind. In relation to the limited facts he has found about the screensaver incident, he has said that he was not able to make findings which would have enabled him to assess the appropriate level of culpability. In other words he had found that there were not facts from which a finding of contributory conduct could be made, entirely in accordance with section 123(6), Swallow **Security Services Ltd** and **Carmelli Bakeries Ltd**.

71. For all of those reasons, there is no error of law and the appeal is dismissed.

Cross-appeal

Ground 2

72. The claimant pointed to a number of respects in which he said the reasons were inadequate.

73. In respect of the complaint that the EJ did not explain how Mr Hopkins came to his conclusions, in my judgement the reasons, whilst brief, are adequate. The EJ has said that Mr Hopkins accepted the recommendations of Mr Yeomans' report at the dismissal stage and the conclusions of Mr Thomas' report at the appeal stage. It is clear from that that the EJ found that Mr Hopkins adopted the findings of both reports in their entirety.

74. In terms of the findings that the EJ considered were supported by evidence, whilst this part of the reasons could have been more clearly expressed, it is clear enough from paragraph 38 that he found that the allegation that inappropriate use of devices had occurred in work time was not supported by evidence but did not find there were further findings unsupported by evidence. This marries up with the way the issue was pursued in Mr Davies' skeleton argument in the proceedings below.

75. It is undoubtedly the case that the EJ was not obliged to refer to every argument in front of him. The question is whether the EJ failed to consider any material argument: **Bah v Berendsen UK Limited** EAT 0256/19.

76. The claimant had raised a large number of criticisms of the dismissal. It is fair to assume that the EJ referred in his reasons to those he considered were material. The question is whether he was correct to disregard all of the others. In my judgment, he was not, at least in the following respects:

- The fact that the claimant was not shown the documents he was asked questions about during the investigation. This was at least reasonably capable of rendering the investigation unfair, on its own or in conjunction with other features of the investigation. It was a matter which needed to be weighed up;

- The asserted failure by the respondent to consider mitigation was also a feature which at least warranted consideration, given the importance of issues of mitigation when considering whether dismissal is a reasonable sanction. It is not a consideration which is somehow inherent or wrapped up in other findings the EJ made, as Mr Kohanzad submitted.

77. Some of the other arguments the claimant said were not considered were expressly addressed by the EJ. The argument about the claimant's devices being searched was discussed by the EJ over three paragraphs and he concluded that there was no unfairness; the submission that it was unfair to consider the screensaver incident since Dr Burnstone had previously decided not to pursue disciplinary action about it was also rejected for the reasons the EJ gave. There was also discussion in the judgment about the 'defence' pursued by the claimant that he had been given permission to make personal use of his work devices by a manager. The claimant may disagree with the EJ's conclusions and be unhappy about the level of detail contained in the analysis but I am not satisfied that there is a lack of **Meek** compliance in these respects.

78. Other arguments pursued by the claimant were ones which, in my judgement, the EJ was entitled to treat as not being material, for example the complaint that the charges included one about the claimant's attitude leading to a breakdown in trust and confidence. That might have been a submission the EJ was obliged to grapple with if, for example, this had been the only charge pursued but the EJ was entitled to consider it not to be material on the facts of this case, where it was one of a number of charges. As to the submission about the unfairness of the claimant not being able to question witnesses, it will rarely be necessary to fairness for an employee to be allowed to cross examine witnesses. It does not appear that there was in this case the kind of factual dispute or need to assess credibility which would have obliged the EJ to expressly consider the argument and explain why he had rejected it. Again the submission that Mr Yeomans was required to interrogate the evidence himself is not so obviously material that it was an error of law for the EJ not to deal with

the submission. The claimant has not explained on this appeal why the way in which the invitation of 29 November 2019 to an investigation meeting was framed materially affected the fairness of the dismissal in circumstances where this was an investigation rather than a disciplinary meeting. It was not in my conclusion an error of law for the EJ not to grapple explicitly with the claimant's submissions on these various points.

79. What about the fact that Mr Hopkins did not meet with the claimant either in his role as dismissing officer or in hearing the appeal? That fact does not of itself make the dismissal unfair, as **Charalambous** makes clear, but it is an unusual and generally undesirable procedure, and it raises the further question of whether the claimant was afforded a proper opportunity to explain himself to the decision-maker, including on issues of mitigation. That, in my judgment, was clearly a material question and one which was not answered simply by rejecting the claimant's complaint that the respondent had no right to contract out its responsibilities. Again the failure by the EJ to engage with that issue is in my conclusion a failure to provide adequate reasons.

80. In the respects I have identified, the claimant succeeds on this ground of appeal.

Ground 3

81. I agreed with Mr Kohanzad's submission that the EJ's conclusion that Mr Hopkins was the decision-maker did not meet the test for perversity. Limited evidence is not no evidence and I certainly cannot say that no reasonable tribunal would have accepted that evidence or reached that conclusion.

82. So far as the matters going to fairness which had been identified by Mr Davies as not having been dealt with in the reasons and which I have concluded were material are concerned, those matters succeed appropriately as a reasons challenge. I am not in a position to reach a conclusion as to how they should have been determined. The assessment of all of those matters is for an employment tribunal which has heard and seen all of the evidence. Insofar as there were other matters in Mr

Davies' list in respect of which the EJ did consider Mr Davies' submissions and rejected them, I did not hear detailed submissions from Mr Davies on these and none of them were conclusions which an employment tribunal properly directing itself on the law was not entitled to reach. The same is true by definition of the submissions which I have found were sufficiently immaterial that it was not an error for the EJ not to have expressly analysed them. In any event, these matters, although pursued by Mr Davies in his skeleton argument, were not advanced in the grounds of cross-appeal under Ground 3 and there was no application to amend.

83. I cannot say, insofar as the EJ found that there was no unfairness in the respondent farming out the disciplinary investigation and hearings to consultants, that that was of itself perverse. The assessment of whether, in all the circumstances, the claimant had a proper opportunity to explain himself to the decision-maker is again a decision for the tribunal. The problem is that the EJ has not addressed that question. That is a reasons issue and not a perversity issue.

84. The submission was made in the claimant's skeleton argument that it was perverse for the Tribunal not to consider the size and administrative resources of the respondent in determining whether it was fair for the respondent to outsource the investigation. It does not appear to me that this aspect of Ground 3 formed part of the claimant's grounds of cross-appeal and there was no application to amend. In those circumstances I do not consider this submission further. I would have wanted in any event to hear more developed argument on the point.

85. For all of these reasons, I have not upheld Ground 3.

Ground 5

86. Whether the assessment that there was a 66.66% chance that the claimant would have been dismissed in any event if the dismissal had not been unfair can stand depends on whether, on consideration of the further potential grounds of unfairness identified, further findings of unfairness are made. The number of ways in which a dismissal is unfair and the types of unfairness are factors

a tribunal has to look at in conducting the imaginative exercise of considering what would have happened had none of those factors been present. To that extent this ground succeeds and the **Polkey** assessment is set aside. If no further findings of unfairness are made, then the assessment will stand.

Disposal

87. This was clearly not a case in which I could substitute my own view and the matter will need to be remitted. I am inviting the parties' submissions on whether the case should be remitted to EJ Cadney to make further findings or to a new tribunal and, if so, on what terms. Given the limited scope of any remission, it would seem sensible for there to be an economic approach to the remission question.