Appeal No. UKEAT/0447/05/DM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 5 January 2006

Before

HIS HONOUR JUDGE McMULLEN QC

MR B BEYNON

MR T STANWORTH

COMPASS GROUP UK & IRELAND LTD
t/a ESS SUPPORT SERVICES WORLDWIDE — APPELLANT

MR C BALDWIN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR R MARVEN (of Counsel) Instructed by: Messrs Gregsons Solicitors St Christopher's House Tabor Grove Wimbledon London SW19 4EX
For the Respondent	MR D PANESAR (Of Counsel) Instructed by: Messrs Worthington Solicitors 28 Cheriton Gardens Folkestone Kent CT20 2AS

SUMMARY

Unfair Dismissal: Reasonableness of Dismissal & Compensation

Employment Tribunal correctly applied the objective test of the band of reasonable responses to the facts it found. Appeal against liability dismissed.

On the basic award of compensation, it did not err when it did not reduce the award by 50% as it had for contributory fault in respect of the compensatory award. It was aware of the different statutory provisions. Employn1ent Rights Act 1996 s 122(2) is not regulated by loss as s 123(1) is but reflects redundancy pay. It was open to the Employment Tribunal to exercise its discretion not to reduce the award in the light of the possibility of redundancy had the dismissal not occurred. There is no restriction on what factors the Employment Tribunal hold to be a just and equitable reason for refusing to reduce. Impending redundancy at the time of the unfair dismissal cam10t be said to be an error of law.

The Employment Tribunal did not err in holding that had a fair procedure been adopted, as the employer accepted it was not, the employee would not have been dismissed, and there was an apt direct comparator for this purpose.

The Employment Tribunal erred in failing to apply its findings on the prospect of redundancy when considering **Polkey v A E Dayton Services Ltd** [1987] IRLR 503**.** This aspect is remitted to the Employment Tribunal and it will be at liberty to reconsider its finding as to the prospect of the employee obtaining new employment.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about unfair dismissal for gross misconduct and the assessment of compensation following a finding of contributory fault by an employee. The judgment represents the views of all three members. We will refer to the parties as Claimant and Respondent.

Introduction

2. It is an appeal by the Respondent in those proceedings against a reserved judgment of an Employment Tribunal sitting at Ashford, Kent, Chairman: Mr G Sutton, registered with reasons on 1 June 2005. The Claimant represented himself and is today represented by Mr Deshpal Panesar of Counsel. The Respondent was represented by its HR Director and today by Mr Robert Marven of Counsel.

3. The outline of the dispute is as follows in the words of the Employment Tribunal:

> **"1. By his Claim lodged with the Tribunal on 10 February 2005, the Claimant who had worked for the Respondents and their predecessors at Dungeness Power Station as a cleaning supervisor from 9 April 1996 to 12th November 2004, claimed that he had been unfairly dismissed. The circumstances of his dismissal were that he had been found to have assisted a fellow employee, Mrs Mandy Pickup, in removing clients' property, namely a 5 litre container of disinfectant, from Dungeness."**
>
> **2. By their Response lodged on 28 February 2005, the Respondents claimed that the Claimant had been suspended and subsequently dismissed for allowing unauthorised removal of company stock by a member of staff in breach of company policy, following which he was dismissed for gross misconduct, his conduct having justified his summary dismissal.**
>
> **8. The issues which the Tribunal was called upon to determine were :**
>
> **8.1 Whether on the facts (which were largely not in dispute) the Claimant's conduct merited summary dismissal.**
>
> **8.2 Whether the Respondents carried out a reasonable investigation and had a genuine belief in the Claimant's gross misconduct.**
>
> **8.3 Whether the Respondents' decision to dismiss was within the band of reasonable responses".**

The Tribunal decided in the Claimant's favour and awarded him £31,472.50 after a deduction of 50% for his contributory fault. The Respondent appeals against that judgment in respect of liability and in the assessment of compensation.

4. Directions sending the appeal to a preliminary hearing were given in Chambers by HHJ Ansell including directions under the **Burns/Barke** principle. The Chairman answered two questions put to him on behalf of the Tribunal. The matter was then dealt with at a preliminary hearing by HHJ Peter Clark and members who dismissed one ground, narrowed another (the **Polkey** point) and ordered it with broadly three grounds to be heard today.

The law

5. The relevant provisions of the legislation begin with the **Employment Rights Act 1996**, s98 which deals with potentially fair reasons and includes, as here, conduct. Fairness is dealt with by s98(4), as the Employment Tribunal put it:

> **"11. Once an employer has shown a potentially fair reason for dismissal, the Tribunal must decide whether that employer acted reasonably or unreasonably in dismissing for that reason. Section 98(4) of the Employment Rights Act 1996 provides that**
>
> **'…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.'**
>
> **12. In other words, it is not enough that the employer has a reason that is capable of justifying dismissal. The Tribunal must be satisfied that, in all the circumstances, the employer was actually justified in dismissing for that reason.**
>
> **13. In the case of a dismissal for misconduct there is a threefold test which requires the employer to show that:**
>
> **13.1 He believed the employee was guilty of misconduct.**
>
> **13.2 He had in his mind reasonable grounds on which to sustain that belief;**
>
> **13.3 At the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.**

> **14.** **When assessing whether these tests have been met, the Tribunal must ask itself whether what occurred fell within a 'range of reasonable responses" of a reasonable employer".**

There is no dispute that those are correct self directions as given by the Employment Tribunal here.

6. Compensation, in a successful claim of unfair dismissal, consists of a basic and a compensatory award. The following provisions are relevant:

> **"118. - (1)** **Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of-**
>
> **(a) a basic award (calculated in accordance with sections 119 to 122 and 126), and**
>
> **(b) a compensatory award (calculated in accordance with sections 123, 124, 126 and 127).**
>
> **122. – (1)** **….**
>
> **(2)** **Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly**
>
> **123 (1)** **Subject to the provisions of this section and sections 124 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".**

The basic award is almost always the same as a redundancy payment and is based upon length of continuous service, age and pay.

7. The test of perversity in an appeal against a judgment of Employment Tribunal is high: see **Yeboah v Crofton** [2002] EWCA Civ 794, [2002] IRLR 634 per Mummery LJ.

8. Interference in a judgment based upon discretion is rarely justified unless a Tribunal has gone wrong in principle or has taken into account wrong factors in exercising its discretion.

9. Where a case may involve dishonesty, an allegation must be put squarely to the Claimant who is the subject of such a criticism (see **Strouthos v London Underground Ltd** [2004] IRLR 636 CA.

10. In the award of compensation, it is possible to make reductions on account of conduct of different amounts in respect of the basic and compensatory awards; but usually they will be the same: **Parker Foundry Limited v Slack** [1992] IRLR 11 CA. The wording in the two provisions is different and a different award can be made.

11. The principle for the making of a compensatory award is to provide what is just and equitable and that phrase is used again in respect of deductions which may be made in cases where a basic award is to be reduced. An award of compensation for unfair dismissal may be limited and capped in circumstances set out in the judgment which I gave on behalf of the EAT in **Gover v Property Care** UKEAT/0458/05. These include the principles generally known as **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 which, again, will usually be applied where a procedure has been adopted which has been described as defective and constitutes unfairness. However, the principles in **Gover** also include circumstances where compensation is capped when an event would occur which would prevent the running of forward losses such as, for example, the closure of the factory or the individual employee's ill-health.

12. The Employment Tribunal directed itself in accordance with the principles set out above in relation to unfair dismissal and compensation, both in its original judgment and in its additional comments. Without objection of the parties, we have bolted together both the judgment and the additional comments to form one continuous judgment.

The facts

13. The findings of fact are made succinctly by the Employment Tribunal.

> **"9.2** **He reported to Gilbert Turner until August 2004, when Mr Turner went on sick leave. At the time of his dismissal he reported to Mr Ray Murray.**
>
> **9.3** **There were no complaints about the Claimant's work and or his record.**
>
> **9.4** **The Tribunal accepted evidence from several witnesses, including Mr Turner, Mrs Blake and Mrs Pickup and the Claimant himself, that there was a practice at Dungeness allowing company equipment and materials to be used privately for the most part by employees of British Energy, but occasionally by employees of the Respondents.**
>
> **9.5** **This practice did not take place regularly. It usually occurred when special circumstances arose, e.g. when someone's home was flooded (Mr Grice).**
>
> **9.6** **This practice was known to middle management, but was not known to senior management, who were relatively uninvolved operationally.**
>
> **9.7** **On 10 November 2004, Mrs Mandy Pickup, an evening supervisor reporting to the Claimant, had a crisis with her mother who was taken into hospital with a terminal illness from which she died shortly afterwards having left her flat in a deplorable state. The local authority said that it would cost between £500 and £600 to clean the flat up- Mrs Pickup decided to do the cleaning herself and asked the Claimant if she could use disinfectant and other materials from a storage container at Dungeness.**
>
> **9.8** **The Claimant agreed that she could. The two of them were in the process of removing the disinfectant from the storage container when they were seen by two British Energy employees, Della Middleton and Alan Carter. They were reported to Mr Ray Murray.**
>
> **9.9** **Mr Murray obtained an oral statement from Ms Middleton. On the same day he suspended the Claimant with immediate effect. The Claimant's suspension followed a meeting with Mr Murray when he admitted that he had agreed that Mrs Pickup could have the 5 litres of disinfectant, some gloves, and a disposable plastic overall. The reason for his suspension was given as 'the alleged passing of ESS consumable products to another ESS employee for personal use' on the above date at 11.45 a.m. which could constitute an alleged breach of contract or act of gross misconduct.'**
>
> **9.10** **When told that this was in breach of company policy, the Claimant had come out with the full facts and had said that he did not see anything wrong with what he had done. 'He had also said that he was unaware that the property taken (the disinfectant) in fact belonged to British Energy.**
>
> **9.11** **The Claimant admitted that he was aware of the policy of forbidding the removal of client property, and accepted that he should have checked with senior management.**
>
> **9.12** **The letter confirming the Claimant's suspension and informing him of the disciplinary hearing on 12 November (p.25) made no mention of the fact that the Respondents considered the Claimant's action to be theft, nor did it put him on notice that his job might be at risk.**
>
> **9.13** **….**
>
> **9.14** **The allegation that the Claimant had authorised and assisted a subordinate to remove cleaning materials from site, knowing that she was using them for personal use, was not put to him.**
>
> **9.15** **The Claimant again 'admitted that he had authorised and assisted Mandy Pickup to obtain the disinfectant. In answer to the question 'Were you aware you were breaking company policy?', he replied 'I presume so, I didn't consider the rights and wrongs of doing someone a favour that needed help.'**

9.16 **At a later stage in the interview, the Claimant made the point that in the past people had borrowed materials and chemicals for British Energy staff, and said that it was a culture that had always been there. "I had always told Gill (Turner) in the past of what had happened and it's a practice that happens on occasions'.**

9.17 **The statements of Della Middleton and Alan Carter (pp23 and 24) were available to the Claimant for the first time at the disciplinary meeting. These set out the bare facts which had been admitted".**

The finding was that the Claimant was guilty of gross misconduct for which the penalty was summary dismissal.

14. Mr Murray quoted an extract from the company handbook which provides as follows:

"9.22 **He quoted an extract from the company Handbook which states:**

> **'You are not allowed to remove either stock or equipment from your place of work. Removal of stock or equipment without written authorisation will be treated as theft and will result in summary dismissal.'**

9.23 **Mr Murray took the view that extenuating circumstances were not relevant and that as the statement in the company's Handbook was unequivocal, the penalty of dismissal was almost automatic. He did not make any investigation into the alleged past practice of taking materials other than his conversation with Mr Morgan in which he had been assured that "it was not common practice".**

The Claimant was dismissed. The letter of dismissal raised a new point not previously raised against the Claimant, namely that his action had jeopardised the company's relationship with British Energy but there was no direct evidence of that. The Claimant, in due course, appealed. His appeal was not a re-hearing and it was dismissed.

15. Meanwhile, Mandy Pickup the other party in the transaction was disciplined for her part in it. She appealed and was successful because the Claimant had given her permission to remove cleaning items from the site and also because the disciplinary procedures which followed were not robust enough to allow fair process. That was the judgment of Mr Hogland, the manager dealing with her case and the Claimant's.

16. Finally, the Tribunal dealt with the relationships between people working at Dungeness in the following terms:

> **"9.29 The Tribunal accepted the evidence of the claimant's former manager, Mr Gilbert Turner, who was later made redundant, that had he been consulted he would have advised Mr Murray that 'Dungeness was like a family affair and we would help each other out' and that when reporting to him the Claimant was allowed to make decisions of this kind which he approved later, also that he would have approved of the Claimant's action and 'made the decision to help Mandy out'".**

17. The conclusion of the Tribunal was as follows having, as it expressly said, applied the facts to the law.

> **"17. The Respondent's investigation was deficient in that:**
>
> **17.1 It did not take any account of the Claimant's past work record.**
>
> **17.2 It did not investigate or give sufficient weight to the practice of lending equipment which had grown up.**
>
> **17.3 It did not make enquiries of Mr Turner, who was on sick leave at the time, but who gave evidence which the Tribunal accepted, that he 'would have taken the decision to help Mandy out'.**
>
> **18. The Respondents also failed to tell the Claimant that his job was at risk or allow him to speak to witnesses, or to see the witness statements they had obtained until the dismissal hearing.**
>
> **19 In the circumstances, the Tribunal has come to the conclusion that the Respondents acted unreasonably in dismissing the Claimant for gross misconduct in the particular circumstances of the case, and that their actions were outside the range of reasonable responses".**

18. In the additional comments made by the Chairman on behalf of the Tribunal, there was this.

> **"(a) The cleaning operations were being re-structured and redundancies were taking place, see Mr Hogland's letter to Ms Pickup page 80 of the bundle.**
>
> **(b) The Claimant was relatively highly paid and had become an employee of the Respondent's through a TUPE transfer.**
>
> **(c) Mr Hogland's brief was to deliver profitability (paragraph 2 of his statement page 73).**
>
> **(d) The Tribunal considered that the Claimant was correct in being concerned that his position was at serious risk of redundancy, eg his statement top of page 44 before the events which led to his dismissal.**
>
> **(e) The Tribunal considered that if he had been made redundant as a cost cutting exercise he would have received his redundancy payment in full, and that it was not just and equitable that after such long service his basic award should be reduced, notwithstanding his stupidity which led to the reduction in his compensatory award. It considered in its discretion that it was appropriate to apply different percentage reductions to the basic and compensatory awards".**

The submissions and our conclusions on unfair dismissal

19. We will take the submissions made by Counsel and our conclusions on unfair dismissal together before we deal with remedy. On behalf of the Respondent, eight points are taken on appeal. First, it is said that the Tribunal substituted its view as to whether the investigation was sufficient. In our judgment, these criticisms of substitution are ill-founded. It requires us to find that when the Tribunal expressly said that it was applying an objective standard to create a range of reasonable responses, it was doing the opposite. It says on three occasions, in its description of the issues, in its findings of fact and in its conclusions that it was applying the test of a range of reasonable responses. That is the correct test.

20. Secondly, the Tribunal uses the word "reasonable" in the context of reasonable grounds and reasonable belief and reasonable investigation on at least three other occasions. That, of course, connotes an objective and not a subjective test being adopted. The language of the Employment Tribunal is not such as to attract the criticism that it was itself deciding what it would do. We are satisfied that there is nothing in this ground of appeal either as a matter of language or of substance which will give grounds for a fear that it illegitimately substituted its judgment for that of the Respondent.

21. As part of this illegitimate substitution it is submitted the Tribunal made criticisms of certain aspects of the investigation. First, the Respondent failed to consider the Claimant's personnel file or work record. It is submitted by Mr Panesar (and we agree) that this is both a finding of fact which is accurate, and a fair criticism of the Respondent. What must be borne in mind is that it is appropriate to consider the manner in which the decision to dismiss was made and that must include the material which was available or not available for coming to the conclusion which the relevant manager did. As it happened, this Claimant had an unblemished work record and had been in the service of this employer or its predecessors (following TUPE transfers) for some six years and was aged 61. The failure to consider the fact that the Claimant

had an unblemished record is a fair criticism to make. It certainly cannot be depicted as either perverse or as substitution of the Tribunal's own judgment. It is at least a factor we hold in considering the fairness of the decision making in the ultimate conclusion.

22. Three deficiencies were noted in the investigation including the failure to take account of the work record and the Claimant's file. Most important in our judgment is the failure to give sufficient weight to the practice of lending equipment which had grown up. As is clear from the Tribunal's findings, there was a culture in which such practices were condoned and thus, it is a legitimate criticism for the Tribunal to have made set against the standard of what a reasonable employer would have done. Again, we consider that this finding cannot sustainably be attacked.

23. In addition, the Tribunal made criticisms of the failure to make enquiries of Mr Turner who, it will be recalled, was the Claimant's supervisor. He was critical in these proceedings because his attitude to what he was told the Claimant had done is illustrative of the culture obtaining within this work place. It is directly analogous to the position of Ms Pickup who, too, was the subject of express permission by her supervisor – in this case, the Claimant himself. The fact that Mr Turner would have approved the Claimant's actions and was aware that such matters had been taking place was a matter which the Respondent should have investigated further. It could have asked him about this and we are in no doubt that had that material come to light at the time, the Claimant's position would have been very different. Miss Pickup was an apt comparator. She was the other party to the fated transaction. She was also a junior employee who had permission and the Claimant, himself, would have had permission from his superior.

24. It is further submitted that the Tribunal confused the issue of consumables with lending equipment. In our judgment, a careful review of paragraphs 9.4 and 9.1.6 of the reasons, which we have set out above, indicates that this criticism is itself confused. There is no basis for such a criticism.

25. It is further contended that the Tribunal erred in law by what is apparently a criticism of the Respondent for not taking notice by the HR Department. In our judgment, that is unsustainable. The relevant officer, Mr Murray, did not take the matter further once advice was sought from Ms Grady who advised him that if it was proven that property had been misappropriated, it would constitute gross misconduct.

26. Finally, it is contended that the Tribunal acted perversely when it held that the Respondent did not investigate the practice of lending equipment. From what we have said above, it follows that this criticism is inapt; in any event, it certainly does not reach the required threshold set out in **Yeboah** above.

27. It follows, therefore, that the conclusion we reach on liability is that the appeal is dismissed. No error of law has appeared in the judgment of the Employment Tribunal and we now turn to consider compensation.

Compensation

28. The challenge on compensation relates to a number of aspects. First, the basic award was not reduced to the same extent as the compensatory award was. We have set out the Chairman's answers to the points raised. It is contended that, generally speaking, a Tribunal should award the same percentage for both compensatory and basic awards and should at least explain, if it is not doing so, the grounds. We agree.

29. Applying s122(2), Mr Marven submits that the material available for the exercise of discretion under this head must relate to conduct of the Claimant prior to the dismissal. Once such conduct has been found, then it is obligatory upon the Tribunal to make such a deduction. Here, it is common ground that the material is the same. It is the admitted stupidity and culpable conduct of the Claimant and it is difficult to see why the same conclusion should not have been reached on the basic award.

30. The approach, however, to this section is different from that under s123, where the guiding principle is loss. No such principle occurs in s122. This is inextricably linked to the concept of redundancy pay since the formula is almost exactly the same. It is generally regarded in the employment law community and, we dare say, amongst working people, that a redundancy payment is something that you store up by continuing to work for the same employer and if, through no fault of your own, you lose your job, you will be compensated by a redundancy payment.

31. The focus of this section is broader than conduct prior to the dismissal because that is the basis upon which it is reduced. Once such conduct has been identified as here, all matters are open to the Employment Tribunal in the assessment of what is just and equitable. The Court of Appeal in the **Parker** case does not give any illumination of the issues which may be taken into account in the exercise of the discretion. True it is, that it is the conduct of the Claimant and not the conduct of some other employee. That is not the issue before us.

32. We have to consider whether the Tribunal committed an error of law in paying attention to the five factors which it set out in its comments as being the grounds upon which it declined to make the deduction. In this case, it fully acknowledged the contributory conduct and yet it

decided that the Claimant would not have his basic award cut at all. This was because if he had been made redundant in due course, he would have received his redundancy payment in full and that it was not just and equitable that he should lose all of that by reason of his conduct. We cannot see any limit on what may be taken into account in justice and equity in refusing to award a deduction. The Tribunal here in paying attention to what would be forthcoming in redundancy pay cannot be said to have erred in law or taken into account a wrong factor. Indeed, the monetary linkage between a basic award and redundancy pay makes this clear, as do the facts in this case. This ground of appeal is dismissed.

33. We then turn to the ground of appeal based upon the failure to make a **Polkey** reduction. Two points emerge. The first is in relation to a comparison with Miss Pickup. As we have held above, she is appropriate. Given the Respondent's acknowledgment that its procedures were not robust enough to constitute fairness and that those procedures applied in both the Claimant's and Miss Pickup's cases, it is correct to say that the Tribunal has here made an assessment that it was 100% likely that the Claimant would not have been dismissed had fair procedures been adopted. Often, there is no straight comparison to be made and the Tribunal must make its assessment and evaluation based upon the evidence. But here, there was an actual comparator: it was Miss Pickup. The Tribunal held her to be apt; it was correct to do so. It has failed to attribute a percentage figure which would normally be required in a **Polkey** case, but its finding in language amounts to a finding in respect of an arithmetic solution. It is 100%.

34. The next issue relates to whether or not some account should have been taken of the findings made by the Tribunal on the Claimant's own case that he was himself at serious risk of redundancy so that, at some future stage, he would have been made redundant according to whatever chance the Tribunal assessed and he would then have had his compensation capped. The way in which this case was developed before us contained, as Counsel suggested to us, a

number of ironies and might, as is going to happen, involve a remission to the Employment Tribunal where the parties may reposition themselves, as it was engagingly put. The problem is this: in the comments made by the Chairman on behalf of the Tribunal, a very large part of the reasoning relates to the possibility that the Claimant will be made redundant in due course. Why then does that not apply in respect of the assessment under the **Polkey/Gover** principles? The evidence for the risk of redundancy came from the Claimant himself, but his concern is regarded as being correct. As a matter of fact we hear today, there have been redundancies. Of course, Miss Pickup was one but there are presently consultations going on in the cleaning supervisory function with a view to achieving redundancies of two out of the four supervisors. Thus, if the Claimant had survived, as we hold he would, until some later stage, he would now be part of that consultation exercise and at serious risk of redundancy if all four candidates are of equal merit.

35. On the other hand, the evidence from the Respondent at the Tribunal was that redundancy was not a matter which would affect the Claimant for Mr Hogland said his role was never under the risk of redundancy. We were concerned, therefore, to understand, how the matter had been put to the Employment Tribunal. It certainly was not put that the forward losses should be capped at a date in the future because there was a certainty or a chance that the Claimant would be made redundant. Nevertheless, we have allowed the point to be argued today.

36. As is clear from the authorities cited in paragraph 4 of the judgment of the EAT at the preliminary hearing in this case, only exceptionally will a new point be allowed to be raised. This is an exceptional circumstance because it reflects the evidence of the Claimant himself and so it is difficult to see how he could complain about it. Secondly, there is a logical conclusion. We understand that the point being made by the Claimant was that his dismissal for misconduct

was a sham and that the real reason was redundancy. The employers wished to get rid of him on that ground without expressly saying so. To that, Mr Hogland's answer is complete and was accepted. His dismissal was for the reasons upheld by the Tribunal and was not disguised redundancy. However, when it comes to the prospect of forward losses, it is not inconsistent to consider whether or not the Claimant would have lost his job as a result of redundancy in future and since there was evidence before the Tribunal of that and since most unusually, the Employment Tribunal in its further comments, has ventilated this matter for us, it is right that we should investigate it.

37. We have decided that in the light of the Tribunal's finding on basic award, it was inconsistent not to follow this through in respect of future losses for the compensatory award, albeit it can in part be excused because this point was not expressly put to it.

38. What we have decided to do is to remit this matter to the Employment Tribunal for it to make a decision as to whether there would have been a redundancy of the Claimant and when. As we have indicated, on the present time scales, this Tribunal awarded losses up to the date of the hearing and forward losses of three years. The practical effect of what we have been told today is that once the consultation is over and assuming that the proposal for two redundancies remains, there is a likelihood that two people will be made redundant by about May 2006. On our assumption that all are equal, the Claimant's chance of survival is 2 in 4. If he is much better than all the others, then it will be a matter for the Tribunal to consider if it has to adjust the percentage chance. Thus, the Tribunal will be required to direct its attention to the possibility of a redundancy occurring and the principle which we have set out in **Gover**.

39. It will also, as a result of that exercise, be open to it to consider the percentage chance of the Claimant finding work before his retirement. The Claimant assessed it at 50% (see page

10). In other words, his compensation was cut down by a further 50% because it was considered that he had a 50% chance of obtaining future employment. The older he gets, the longer he is out of work, the less likely it is that he will obtain future employment and therefore that figure itself may be open to further examination by the Employment Tribunal. The result is that the appeal on liability is dismissed. The appeal on compensation is allowed in part.

40. Having canvassed disposal with Counsel, it is agreed that this matter will go back to the same Employment Tribunal with a copy of our judgment with a direction that it consider the matters which we have set out. We would very much like to thank both Counsel for their very helpful and concise submissions to us today. We draw attention to the fact that now that this case is back before the Employment Tribunal, ACAS is available for assistance in conciliation over what is essentially a monetary matter and in the light of what we have said today, we would very much urge the parties to consider either a negotiated settlement with both parties focusing realistically on what remains at stake and if not, then to consider the assistance of ACAS.

Appeal

41. An application has been made for permission to appeal to the Court of Appeal. No compelling reason has been put forward to reasons which suggest a real prospect of success have been advanced. The first relates to substitution of view. For the reasons which we gave, we consider no real prospect exists of success in the appeal against liability on that point.

42. In respect of the construction of s122, it is of course a question of law, but we consider that it has no reasonable prospect of success either and we draw attention to the proportionate approach to this case, given that the Claimant was awarded £34,000 odd and is likely to have some of that reduced when this case goes back to the Employment Tribunal and the effect of

the judgment on basic award is something less £1,700. We will decline to give permission to appeal.