

Appeal No. UKEAT/0409/09/JOJ

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 3 June 2010

Judgment handed down on 18 February 2011

Before

HIS HONOUR JUDGE HAND QC

MRS M V McARTHUR BA FCIPD

MR D NORMAN

MR M J GREENWOOD

APPELLANT

NWF RETAIL LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR JONATHAN DAVIES
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Free Representation Unit

For the Respondent

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(of Counsel)
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SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

An Employment Tribunal decision must comply in both form and substance with 30(6) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** SI No. 1861 and failure to do so will amount to an error of law; **Balfour Beatty Power Networks Ltd v Wilcox** [2006] EWCA Civ 1240; [2007] IRLR 63 applied. Where issues arise as to whether there has been substantial compliance the approach in **Meek v City of Birmingham District Council** [1987] IRLR 250 will need to be kept in mind. In so far as **Short v Hayman** UKEAT/0379/08/CEA can be read as suggesting that a decision may not be erroneous despite non-compliance with the Rule, it would not be followed. Here the judgment did not comply and the case was remitted for a rehearing.

UNFAIR DISMISSAL - Compensation/ Section 98A(2)

Section 98A(2) of the **Employment Rights Act 1996** has no application when there has been a breach of “Statutory Procedures”. Appeal allowed and the case remitted for a rehearing.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal by Mr M J Greenwood (“the Appellant”) from the judgment of an Employment Tribunal, comprising an Employment Judge and two lay members, sitting at Leeds on 30 March 2009, the reserved judgment having been sent to the parties on 29 May 2009. By that judgment it was held that the Appellant had been automatically unfairly dismissed pursuant to section 98A (1) of **the Employment Rights Act** (“the Act”) but that otherwise his dismissal had been fair; in the result he was awarded compensation of £1,320.00. He appeals against the finding that his dismissal was fair and against the amount of compensation he was awarded.

The Issues

2. The Employment Tribunal described one issue at paragraph 1 of the Reasons part of the judgment (see page 3 of the bundle) as follows:

“This is a complaint of unfair dismissal. In short, the Claimant complains that he was not dismissed by reason of redundancy, as the Respondent argues, but that the real reason for his dismissal is that he raised various matters in 2006 and 2007 and that the “redundancy” was a sham which was used by the Respondent to cover up the real reason for his dismissal.”

3. Mr Davies of counsel, who appeared on behalf of the Appellant at the substantive appeal hearing under the auspices of the Free Representation Unit on a pro bono basis, has submitted that there were other issues. On 24 February 2010 he had also appeared on behalf of the Appellant (then under the auspices of the Employment Law Appeals Advice Scheme) at a preliminary hearing when a division of this Tribunal comprising His Honour Judge Richardson, Mr Clancy and Mrs Palmer considered the case and ordered the case to proceed to a full hearing on an amended Notice of Appeal in which the grounds of appeal were to be the matters set out in a document entitled “Skeleton Argument For Preliminary Hearing”, which is at pages 9 to 11 of the bundle.

4. Two main points are made in that document. Firstly, by paragraphs 1(e) to (f) it is said that the Employment Tribunal has failed to deal with a number of specific issues and articulate a reasoned conclusion in relation to each of them. Much of the focus of the argument was as to the adequacy of reasons issue and by the close of the oral argument, it had become clear that an important issue was whether a failure to comply with rule 30(6) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** SI No. 1861 amounts to a substantive error of law or whether the rule only provides a procedural template so that failure to articulate one of more of its components will not amount to an error of law if the decision as a whole either expressly or by inference enables the parties to understand how the case has been won or lost.

5. Alternatively, even if the rules impose no more exacting a standard than the common law, the issue would still be whether the reasons were adequate by those standards.

6. Secondly, in relation to compensation, the issue was whether the Employment Tribunal had wrongly concluded that the Appellant made a concession (paragraph 2 of the skeleton argument referred to at paragraph 3 above) and then had ignored the burden of proof in relation to section 98A(2) and the **Polkey** doctrine (paragraph 3 of the skeleton).

The Judgment

7. The Employment Tribunal's judgment is at pages 3 to 6 of the bundle. At paragraph 2 (pages 3 to 4 of the bundle) the Employment Tribunal records the 2006 incident, which the Appellant suggested formed an important part of the Respondent's real motive for his dismissal. There had been an accident and the Appellant had provided information about it. So it was contended that there had been a protected disclosure. The Employment Tribunal did not regard UKEAT/0409/09/JOJ

these facts as giving rise to a section 43B disclosure and found that no protected disclosure had been made. The other matter upon which the Appellant relied as being part of the real motive for his dismissal was that he had raised a grievance about the Respondent's refusal to pay sick pay. The Employment Tribunal considered this at paragraph 3 of the judgment (see page 4 of the bundle). The conclusion was that since the Respondent had acted lawfully in withholding sick pay, nothing said by the Appellant in relation to the sick pay scheme could amount to a protected disclosure within either section 43A or 43B of the Act.

8. Paragraph 4 of the judgments proceeds on the alternative basis that the matters considered at paragraphs 2 and 3 did amount to protected disclosures. Even so, given the lapse of time between these events and the dismissal process, the Employment Tribunal found that the dismissal process was not causally linked to any disclosures made. So the Appellant also failed on causation.

9. The dismissal process itself was examined by the Employment Tribunal in the subsequent paragraphs of the judgment. Paragraph 5 amounts to a finding that in all four garden centres operated by the Respondent the post of Plant Manager was eliminated from the management structure and the duties assigned to the General Manager. Of the Plant Managers only the Appellant was dismissed because of that decision. One colleague had been dismissed for poor performance, one had left voluntarily and a third was terminally ill and on long term leave of absence. In fact the Appellant was also absent through illness and so the discussion about his future employment was conducted in writing, which the Employment Tribunal found to have been proper and adequate consultation; moreover, although offers of alternative employment were made there was no suitable alternative employment (see paragraph 5 at page 5 of the bundle). But the Employment Tribunal found that no right of appeal had been offered to the Appellant (see paragraph 6).

10. The Employment Tribunal concluded that the Appellant had been dismissed by reason of redundancy (see paragraph 8) and, apart from the failure to offer an appeal, the procedure was faultless (see paragraph 7). Arguments as to whether the Plant Manager post could be dispensed were rejected as was a rather more technical issue as to the existence of, or definition of, a pool of potentially redundant employees. All the above findings resulted in the conclusion that there had been an automatically unfair dismissal pursuant to section 98A (1) of the Act but that otherwise the dismissal was fair. The Employment Tribunal put it thus at paragraph 8 on pages 5 and 6:

“It follows that we find that the reason for the Claimant’s dismissal was that he was redundant within the statutory definition of that term. We find that the Claimant was automatically unfairly dismissed pursuant to the provisions of Section 98A(1) because the Respondent failed to follow the Statutory Procedure. The Claimant’s complaint that he was otherwise unfairly dismissed pursuant to the provisions of Section 98 and Section 108 of the Employment Rights Act 1996 is not upheld. The Respondent otherwise acted reasonably in treating the reason for dismissal as a sufficient reason in all of the circumstances. We do not regard the failure to offer an appeal as a sufficient reason to hold that the dismissal is otherwise unfair. Alternatively, if we are wrong in that regard, we apply Section 98A(2) and hold that that the offer of an appeal and an effective appeal would have made no difference. We make that finding on the Claimant’s own concession, in answer to the Tribunal, that any appeal would have been unsuccessful. In the light of the finding that the Appellant was automatically unfairly dismissed, he is of course entitled to a Basic Award, calculated pursuant to the statutory formula of four weeks’ pay at the then statutory maximum of £330.00, namely £1,320.00. We do not consider that the Claimant is entitled to a Compensatory Award because, even if such an appeal had been offered, then, as indicated above, such an appeal would have made no difference to the eventual outcome. The Claimant would not have been reinstated and, accordingly, applying Section 123(1) ERA 1996, it would not be just and equitable to make any award of compensation by reason of the finding of unfair dismissal.”

The Appellant’s Submissions

11. Mr Davies’s skeleton argument started with a general criticism of the adequacy of the reasons in the judgment, typified by the fact that the ET has not even identified the date of dismissal. At paragraph 8 he made a series of specific points as to factual matters in the Appellant’s witness statement, which he said should have been addressed specifically by the ET but have not been. These are:

- a) that 3 Plant Managers were not dismissed (see pages 80 – 81);

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- b) that available alternative work as a Plant Area Assistant was not offered to him (see pages 81 and 85);
- c) that letters, said to be part of the consultation process, were never sent to him (see page 88);
- d) that a witness called on his behalf, Robert Harrison, gave evidence that
 - 1. there was no redundancy situation;
 - 2. volunteers were never called for;
 - 3. Plant Area Managers at 3 locations remained in post until October 2008;
 - 4. that there was a vacancy for a Plant Area Manager at a garden centre at the time of the Appellant's dismissal and that post was filled by recruitment (see pages 92 and 93).

12. On an allied, but separate, point he submitted that there are insufficient findings to enable the reader to understand the conclusion that the dismissal was fair in terms of general principle and that denial of a fair procedure had not altered the outcome, which would have been the same, irrespective as to the procedure followed.

13. He developed this in his oral submissions and referred us to rule 30(6) of the Rules and submitted that there had been what he described as a "wholesale failure" on the part of the Employment Tribunal to comply with the requirements of the rule. In his witness statement the Appellant had made the allegations set out at paragraph 12 above; Mr Harrison's witness statement (see pages 90 to 93) supported those allegations. Long before the procedure was

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governed by as prescriptive a rule as rule 30(6) of the current Rules, this Tribunal had made it clear in the case of **Levy v Marrable & Co Ltd** [1984] I.C.R. 583 that the duty of the Employment Tribunal was to articulate why it had reached a conclusion on disputed factual matters; he referred us to a passage in the judgment of Waite J at 587D-H (set out below at paragraph 38 of this judgment).

14. In the instant case, the Employment Tribunal had neither set out the competing factual contentions nor indicated how they had been resolved. One illustration (out of several which could be cited) of this was the issue of alternative employment. The Employment Tribunal had said at paragraph 5 of the judgment (see page 5 of the bundle) that the Respondent had offered such alternative employment as was available but the Appellant has asserted that there was a vacancy for a Plant Assistant due to a dismissal and the decision is completely silent as to how that point had been dealt with and, presumably, rejected. The approach of the Employment Tribunal offended against both paragraphs (c) and (e) of rule 30(6) by failing to explain what had been found and why. It would not, he observed, even be sufficient to satisfy the well known formulation of the law in **Meek v City of Birmingham District Council** [1987] IRLR 250 in paragraphs 8 to 12 (pages 251 – 252) of the judgment of the Court of Appeal given by Bingham LJ (set out below at paragraph 39 of this judgment). The approach of the Court of Appeal in **Meek**, submitted Mr Davies, is really no different to the common law approach as enunciated by the Court of Appeal in **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409.

15. Mr Davies submitted that paragraphs (c) and (e) of Rule 30(6) set a more demanding standard than the common law in terms of the articulation of reasons. He acknowledged, in a short written submission forwarded more or less immediately after the hearing, that in **Balfour Beatty Power Networks Ltd v Wilcox** [2006] EWCA Civ 1240; [2007] IRLR 63 there is a UKEAT/0409/09/JOJ

passage in the judgment of Buxton LJ, which appears to maintain the approach suggested by the Court of Appeal in Meek but although Meek was cited to the court, Mr Davies submitted the judgment is not directly in point as it does not deal with the issue of whether rule 30(6) has replaced Meek and he maintained that the approach in Meek had been supplanted by the more rigorous requirements of the Rule.

16. Even if that were to put the matter too high, his alternative position was that the approach of the Employment Tribunal in the instant case would not satisfy the common law as set out in the passage quoted above.

17. Taking only the first of the four matters set out in the skeleton argument, namely that the redundancy was a sham, Mr Davies submitted that it was not enough for the judgment to acknowledge, as it did at paragraph 2, that the Appellant had raised that case, if it then failed to identify what had happened to other Plant Managers, failed to consider what other sites there were and what had happened at those other sites and failed to identify the issues properly at paragraph 2 of the judgment. Moreover, the Employment Tribunal had failed to understand at paragraph 3 that the “whistleblowing” case was really more about the motive of the employer than about “Protected Disclosure”. The finding at paragraph 5 that there had been a policy decision to remove the post of Plant Manager at four garden centres was simply a general statement, which did not deal with the fact that the Appellant had challenged its veracity or explain why, as a matter of fact, the evidence showed it to be correct. In particular, the Employment Tribunal had simply been wrong about the Rivendell Plant Manager. She had never had terminal cancer and had been confused by the Employment Tribunal with somebody else at that site, who had cancer and the factual findings were simply inadequate. In short, the Appellant did not know what had been accepted and what had been rejected and if accepted, why the outcome was not affected. We shall refer to this as “the Reasons Point”.

18. The second set of submissions made by Mr Davies related to the quantum of compensation. At paragraph 8 of the judgment (quoted above at paragraph 10 of this judgment) the Employment Tribunal purport to apply section 98A(2) of the Act but Mr Davies submitted that cannot be correct where, as here, a dismissal has been found to be automatically unfair. section 98A(2) is “subject to” section 98A(1) and has no application once those provisions have been satisfied. Section 98A(2) does not apply where the dismissal is automatically unfair because of a failure to follow statutory dismissal procedures (see **Alexander v Brigden Enterprises Ltd** [2006] ICR 1277).

19. Then the matter needs to be addressed from the point of view of section 123(1) of the Act and the case of **Polkey**. That approach requires consideration of what is “just and equitable” (see **Gover v Propertycare Ltd** [2006] ICR 1073, **Scope v Thornett** [2207] 1 ICR 236 and **Software 2000 Ltd v Andrews** [2007] 1 ICR 825 at para 54). Although questions of section 98A(2) may involve consideration of the same evidence as **Polkey** the two are essentially different animals; the former relates to fairness, the latter to compensation.

20. Thirdly, the compensation finding was said to be based on a concession (see also paragraph 8 of the judgment) but no such concession had ever been made by the Appellant. What he had said was that, given the redundancy was to his mind a sham, no appeal could have made any difference. That was not a concession but simply a reaction to the Respondent’s unlawful action. As such it was an error of law for the Employment Tribunal to have treated it as a concession.

21. Fourthly, the Employment Tribunal never analysed what the position might have been had an appeal been conducted (assuming that the denial of an appeal was the only procedural
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defect). Such an appeal would have had to be approached from the point of view of evidential material not dealt with by the Employment Tribunal and the analysis would have to be from the perspective that it was for the Respondent to show that, acting reasonably, it would have confirmed the dismissal.

22. We shall refer to these three points collectively as “the Compensation Point”.

The Respondent’s Submissions

23. The amended answer of the Respondent (pages 15 to 17 of the bundle) points out that the Employment Tribunal considered the contents of the Appellant’s witness statement at paragraphs 2 to 5 of the judgment and Dr Hardy submitted that this was a complete answer to the criticisms raised by paragraphs 1(a), (b) and (c) of the amended Notice of Appeal. Moreover, findings of fact made by the Employment Tribunal at paragraph 7 of the judgment about the matters raised by Mr Harrison’s witness statement deal with the complaint at paragraph 1(d) of the amended Notice of Appeal. After all, this had been a one day case and the judgment showed that the Employment Tribunal had picked its way through the material presented to it. Thus, when read as a whole, the judgment is adequately reasoned and, in so far as it does not deal explicitly with any matter, the Employment Tribunal must be taken to have found against the Appellant. Those paragraphs deal adequately with the point so as to make the decision “**Meek** compliant”. This was a decision by an industrial jury and it must be looked at as such. It heard the evidence and from its decision it can clearly be inferred that the ET rejected much of the evidence of and on behalf of the Appellant.

24. Dr Hardy, in his post hearing written submission, also referred to the judgment of Buxton LJ in **Balfour Beatty**. In addition he pointed out that case had been considered by a division of this Tribunal presided over by His Honour Judge Serota QC in **Short v Hayman** UKEAT/0409/09/JOJ

UKEAT/0379/08/CEA. He drew our attention to paragraphs 35 to 42 and paragraph 60 of the judgment. In his submission rule 30(6) had not replaced Meek but had clarified it. Before and, more significantly, after the 2004 Rules took effect this Tribunal had consistently applied Meek as a template. Where this happened after the 2004 Rules had taken effect it was an illustration that, in essence, the common law approach to a reasoned decision and that required by rule 30(6) were the same and if the letter of the rule had not been complied with then compliance with the essence of Meek and English would be sufficient to avoid an error of law.

25. In any event the judgment did comply with the requirements of the Rule. Paragraphs 5 to 7 contained findings of fact and the conclusion were elucidated in paragraphs 6 to 9. Thus the issues, the findings of fact and why certain matters had not been determined are all to be found in those paragraphs. The common law approach to a reasoned judgment is that it suffices if it tells who has won and lost and why and the purpose of the draftsman in relation to rule 30(6) is simply to provide a check list to ensure “Meek compliance”. The rule seeks to ensure consistency and clarity in decision making by employment tribunals but it does not impose a standard; it is a “guide” and not a “straitjacket”.

26. Secondly, the Employment Tribunal’s approach to the question of what loss had been suffered by the Appellant as a result of the unfair dismissal found by the Employment Tribunal was orthodox and justified by the evidence. In any event, the conclusion arrived at in respect of section 123(1) of the Act is unchallenged and therefore the award made cannot be upset.

27. There was no misdirection in relation to or misapplication of section 98A(2). The impact of section 98A(2) had been explained by this Tribunal in Kelly-Madden v Manor Surgery [2007] 203 (see paragraph 49 at 213G-H). The Employment Tribunal had only referred to section 98A(2) as a belt and braces. The likelihood of dismissal was high; that was UKEAT/0409/09/JOJ

the significance of the Appellant's concession. The relationship between section 98A(2) and Polkey is that once it is established under section 98A(2) that the procedural step had no impact on the reasonableness of the dismissal that may be the same as indicating that it would have made no difference to the outcome, i.e. the application of Polkey. This was not a case where they had become conflated (see paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825 at 836F-G) and the description "98A(2)/Polkey" was apt because there comes a point factually where they intersect and become, from that point, for all intents and purposes, the same thing. In other words this is not an erroneous conflation but a natural conjunction.

28. Having approached section 98A(2) correctly, the ET then turned to section 123(1), which they considered and applied in an orthodox fashion.

Discussion and Conclusions – the Reasons Point

29. In order to reach a conclusion on the competing arguments on the Reasons Point, consideration of both the legislative history and previous authority is unavoidable.

The Reasons Point – Legislation and Authorities

30. More or less the first words on the need for a reasoned decision are those of the then President of National Industrial Relations Court, Sir John Donaldson, in the case of Alexander Machinery (Dudley) Ltd v Crabtree [1974] ICR 120 at 122B-C:

“We have already said that it is unsatisfactory and amounts to an error of law for a tribunal simply to state the amount of compensation which is to be awarded without showing how the figure is arrived; see *Norton Tool Co. Ltd. V. Tewson* [1972] I.C.R. 510. The basis of this proposition is that in the absence of reasons it is impossible to determine whether or not there has been an error of law. Failure to give reasons therefore amounts to a denial of justice and is itself an error of law.”

31. At that time the relevant rules were to found in the **Industrial Tribunals (Industrial Relations etc.) Regulations** 1972 SI No. 38. Rule 11(2) read:

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“The decision of a tribunal shall be recorded in a document signed by the chairman which shall contain the reasons for the decision.”

Exactly the same rubric appeared in the next iteration of the rule (see Rule 8(2) of the **Industrial Tribunals (Labour Relations) Regulations** 1974 SI No. 1386). This was in effect when the soon to be president of this tribunal, Phillips J, sitting in the Queen’s Bench Division heard the appeal in **Cooper v British Steel Corporation** [1975] ICR 454. At page 457A, in a short passage, which was later to attract criticism from the Court of Appeal, he said:

“There is no doubt that tribunals should give full reasons for each part of their decision, for two purposes: first, so that the parties can know why the tribunal has decided as it has, and secondly, because there is an appeal only on a point of law and it is desirable that this court, in reviewing as it is obliged to do the decisions of tribunals, should be able to determine precisely upon what grounds they have arrived at their decisions.”

32. But there was a contrary view. It was trenchantly expressed by Lord Russell of Killowen at p 444 of the judgment of the Court of Appeal in **Retarded Children’s Society v Day** [1978] ICR 437 in these terms:

“I think care must be taken to avoid concluding that an experienced industrial tribunal by not expressly mentioning some point or breach has overlooked it, and care must also be taken to avoid, in a case where the Employment Appeal Tribunal members would on the basis of the merits and the oral evidence have taken a different view from that of the industrial tribunal, searching around with a fine tooth comb for some point of law.”

33. So on the one hand reasons were to be given but on the other the failure to deal with all points would not be critical. This theme was pursued in **Union of Construction, Allied Trades and Technicians v Brain** [1981] ICR 542 by Donaldson LJ.

34. At page 551D he said:

“The real complaint here is not a complaint that ... [the industrial tribunal] ... made a finding of fact without any evidence but that, if they were relying on this, as they plainly were, they should have made an express finding of the fact – and by “the fact” I mean that the employers knew that the employee had been so advised. That is a criticism not really of substance but of

the way in which the tribunal formulated its reasons and that I think is wholly misplaced. Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law. This was a reserved decision, but in practice they are more usually given off the cuff, and by that I do not mean to say without thought but I do mean extempore, to the parties present in court by people who, though lawyers, are not professional judges. The reasons are then recorded and no doubt tidied up for differences between spoken English and written English. But their purpose remains what it has always been, which is to tell the parties in broad terms why they lose, or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon such an analysis. This, to my mind, is to misuse the purpose for which reasons are given."

35. All these cases were commenting on reasons against the statutory background of a rule, which provided only that the decision should contain reasons. Rule 9(2) of the **Industrial Tribunals (Rules of Procedure) Regulations 1980** SI No. 884 did not alter that and so it was the same rubric, which was considered by the Court of Appeal in two cases in 1983, **Martin v Glynwed Distribution Ltd** [1983] ICR 198 and **Varndell v Kearney & Trecker Marwin Ltd** 1983 1 ICR 683. In the former Sir John Donaldson MR said:

"The duty of an Industrial Tribunal is to give reasons for its decision. This involves making findings of fact and answering a question or questions of law. So far as the findings of fact are concerned, it is helpful to the parties to give some explanation of them, but it is not obligatory. So far as the questions of law are concerned, the reasons should show expressly or by implication what were the questions to which the Industrial Tribunal addressed its mind and why it reached the conclusions which it did, but the way in which it does so is entirely a matter for the Industrial Tribunal."

36. In **Varndell** the argument addressed to the Court of Appeal by Mr John Hendy appears at 693C-F. We need not cite it; suffice it to say that what he submitted should be the components of a properly reasoned decision bears a distinct resemblance to the parameters of the current rule 30(6). The argument was roundly rejected, however, in the judgment the Court of Appeal given by Eveleigh LJ, with whom the other judges agreed.

37. He said at 693F-695C:

"In my judgment the passage to which I have referred¹, taken from *Cooper v. British Steel Corporation* [1975] I.C.R. 454, 457, cannot be regarded as establishing a rule of law governing the format of the decision of an industrial tribunal, and I would respectfully question the use

¹ Cited above at paragraph 31 of this judgment.
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of the expression "full reasons" which Phillips J. there adopted if that is meant to support the contention put forward by the employees in this case as to the necessity for detail. In fact I feel quite confident that Phillips J. did not intend his words to be treated in that way. I cannot do better than adopt the words of Donaldson L.J. in *Union of Construction, Allied Trades and Technicians v. Brain* [1981] I.C.R. 542, 551, to which I have already referred. The appeal tribunal clearly did find some difficulty in applying the various dicta on the question because of apparent inconsistencies or conflicts. In *Alexander Machinery (Dudley) Ltd. v. Crabtree* [1974] I.C.R. 120, Sir John Donaldson, giving the judgment of the National Industrial Relations Court, said, at p. 122:

[and he quotes the passage cited above at paragraph 30 of this judgment]

It seems to me quite obvious that that passage is unimpeachable. It is simply stating that the tribunal cannot announce a figure at the end of the day and no more. Where various losses may have to be compensated in an award, it is necessary to know which aspects of the claim are being dealt with, but I do not regard that passage as saying that there must be a detailed analysis of the reasons for a tribunal's decision and, in so far as it might be thought to do so, it would be in conflict with the same judge's decision in *Union of Construction, Allied Trades and Technicians* [1981] I.C.R. 542 from which I have already quoted.

Further extracts from *Alexander Machinery* were invoked before the appeal tribunal, but I cannot read Sir John Donaldson's words as saying any more than that the decision was wrong because no reasons at all had been given. The rest of his observations which were relied upon by the employers, and I am not going to quote them all, are no more than general guidelines and they are not rules of law. This is made quite clear when we see that he said, at p. 122:

"We trust that the tribunal will record those contentions" - that is to say, the contentions of the parties - "and make all necessary findings of fact in relation to them. The tribunal should also state briefly, if appropriate, why they find or do not find a particular fact - stating, for example, that they are not satisfied in relation to the evidence given by a particular witness, or that they are satisfied, and so on."

Then come the important words:

"It is impossible for us to lay down any precise guidelines. The overriding test must always be: is the tribunal providing both parties with the materials which will enable them to know that the tribunal has made no error of law in reaching its findings of fact? We do not think that the brief reasons set out here suffice for that purpose."

He is not, as I read that judgment, saying that in every case all these points to which I refer must be adhered to, otherwise there will be an error of law in the decision of the tribunal.

The rule that governs the decision is set out in Schedule 1 to the Industrial Tribunals (Rules of Procedure) Regulations 1980. There, rule 9(2) says:

"The decision of a tribunal shall be recorded in a document signed by the chairman which shall contain the reasons for the decision."

One may find, and one often does find, reasons being given in the decision of the tribunal which are very similar to those in a judgment of the court. This may be commendable in many cases as a public relations exercise: it does not follow that it is necessary as a matter of law. I regard the guidelines of Sir John Donaldson as being virtually a public relations exercise. To the extent which they may be interpreted to the contrary, they are in conflict with his subsequent words in the Court of Appeal and of course the latter must prevail.

There is today too great a tendency to seize upon words in a judgment and use them as though they were laying down some new rule of law. The reference in the *Alexander* case to no reason being stated was simply a recognition of what was already a rule of law, namely, rule 9(2) to which I have already referred. The rest of the observations are, as I say, just general observations, and they do not purport to be a complete exposition in any event. We must not strive to create a body of judge-made law supplementing the law as laid down in the Employment Protection (Consolidation) Act 1978. The Act itself provides quite enough law in all conscience and it is not part of the judicial function to increase the potential area of appeal, which is given by section 136 and is only on a point of law, by increasing the numbers of points of law governing the determination of a case."

38. In the Employment Appeal Tribunal in Varndell the then President, Browne-Wilkinson J, had referred to the two strains of authority (i.e. on the one the hand reasons were to be given but on the other there was a need to restrict appeals and a failure to deal with all points would not necessarily be a fatal error), as “Scylla and Charybdis.” That, the decision of the Court of Appeal in Varndell notwithstanding, some care might still be necessary in order to navigate safely between these hazards was made clear in Levy v Marrable & Co Ltd [1984] ICR 583 by the passage in the judgment of Waite J at 587D-H, to which Mr Davies referred us and which reads:

“What is our duty in those circumstances? We think the principle involved is the following: where there has been a conflict of evidence at the hearing before an industrial tribunal on a significant issue of fact, then the industrial tribunal's finding (i.e. their acceptance or rejection of such evidence) must be made plain one way or the other. Express words are not necessary. That is clear from *Union of Construction, Allied trades and Technicians v. Brain* [1981] I.C.R. 542, and in particular the judgment of Donaldson LJ at p.551. But the language must be sufficiently full and clear to make it possible for anyone to tell from a reading of the decision as a whole whether the members have believed the relevant witnesses or not. Failure by the industrial tribunal to provide that indication, expressly or by reasonably clear implication from the overall language of their decision, amounts to an error of law: see *Alexander Machinery (Dudley) Ltd v. Crabtree* [1974] I.C.R. 120, 122. This principle has not, we think, been affected - indeed it derives implicit support from - the recent decision of the Court of Appeal in *Varndell v. Kearney & Trecker Marwin Ltd* [1983] I.C.R. 683. Application of that principle to the circumstances of the present case has driven us to the conclusion, on the grounds already indicated, that the industrial tribunal failed to make it sufficiently clear, on a plain reading of their decision as a whole, whether they accepted (and if so to what extent) or whether they rejected the evidence on the one side or the other. Thereby they fell into an error of law which it is our duty to redress.”

39. When the next step in this history, the subsequently much quoted decision of the Court of Appeal in Meek v City of Birmingham District Council [1987] IRLR 250, was taken, the statutory background was somewhat different, although the judgment does not acknowledge that change. Rule 9(3) of the **Industrial Tribunals (Rules of Procedure) Regulations 1985** SI No. 16 introduced two types of decision; it reads:

“The tribunal shall give reasons, which may be in full or summary form, for its decision.”

The succeeding sub-paragraphs of the Rule went on to indicate in what circumstances full reasons should be given. The concepts of “full” and “summary” are not defined.

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40. In **Meek** the judgment of the court was given by Bingham LJ. Henceforth it became the benchmark to the extent that if a decision was inadequately reasoned it was said not to be “**Meek** compliant”². The famous passage appears at paragraphs 8 to 12 (pages 251 – 252) and it reads:

“8 It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted.

9 Nothing that I have said is, as I believe, in any way inconsistent with previous authority on this subject. In *UCATT v Brain* [1981] IRLR 225, Lord Justice Donaldson (as he then was) said at p.227:

[and he quotes the passage cited above at paragraph 37 of this judgment]

10 A further statement was made by my Lord in *Alexander Machinery (Dudley) Ltd v Crabtree* [1974] IRLR 56, and these observations are cited by Lord Justice Eveleigh in *Varndell v Kearney & Trecker Marwin Ltd* (1983) ICR 683:

[and he quotes the passage cited above at paragraph 35 of this judgment]

Lord Justice Eveleigh adds the comment at p.694G:

'He is not, as I read that judgment, saying that in every case all these points to which I refer must be adhered to, otherwise there will be an error of law in the decision of the Tribunal'.

11 Lastly, in *Martin v Glynwed Distribution Ltd* [1983] IRLR 198 at p.202, my Lord said:

[and he quotes the passage cited above at paragraph 34 of this judgment]

Judged by those yardsticks, the decision of the Industrial Tribunal did in this case, as the EAT rightly held, fall far short of the minimum necessary. There was no account of the basic story of what had occurred, there was no statement anywhere in the reasons of what the Council believed the employee to have taken of the materials belonging to them or of the nature and the circumstances in which they believed him to have misused their vehicle. There is no account of the questions put to him or the answers given. There is no detailed account of the investigation which was made or of the investigations which, in the judgment of the Tribunal, the Council should have made and did not make. There are various criticisms expressed without any statement of the basic underlying facts upon which those criticisms were based.”

41. At this point it is convenient to step forward and consider the latest word on the common law position, which, it has been submitted to us, is equivalent to the approach in

² An expression probably coined by Sedley LJ in the case of **Tran v. Greenwich Vietnam Community** [2002] IRLR 735.

Meek. This comes in the form of the decision of the Court of Appeal in English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409. At paragraphs 16 to 19 (see 2418G to 2412E))

of the judgment of the Court the position at common law is explained thus:

“16 We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.

17 As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example *Flannery's* case [2000] 1 WLR 377, 382. In *Eagil Trust Ltd v Pigott-Brown* [1985] 3 All ER119, 122 Griffiths LJ stated that there was no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case:

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

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

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

It is obvious that there is a strong family resemblance between the above and the passage from Meek set out at paragraph 40 above.

42. The relevant rule was changed somewhat in 1993. By rule 10(3) of the **Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993** SI No. 2687:

“(3) The tribunal shall give reasons for its decision in a document signed by the chairman. That document shall contain a statement as to whether the reasons are given in summary or extended form and where the tribunal-

(a) makes an award of compensation, or

(b) comes to any other determination by virtue of which one party is required to pay a sum to another (excluding an award of costs or allowances),

the document shall also contain a statement of the amount of compensation awarded, or of the sum required to be paid, followed either by a table showing how the amount or sum has been calculated or by a description of the manner in which it has been calculated.”

The word “full” was replaced by the word “extended” and the requirement to state the amount, and the basis of calculation, of compensation appeared for the first time. Although the rules were replaced in 2001, Rule 12 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001** SI No. 1171 made no further change in respect of reasons and the position remained the same until 1 October 2004 when the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** SI No. 1861 came into force.

43. Rule 30(6) of those rules provides

“Written reasons for a judgment shall include the following information –

a) the issues which the tribunal ... has identified as being relevant to the claim;

b) if some identified issues were not determined, what those issues were and why they were not determined;

c) findings of fact relevant to the issues which have been determined;

d) a concise statement of the applicable law;

e) how the relevant findings of fact and applicable law have been applied in order to determine the issues; and

f) where the judgment includes an award of compensation or a determination that one party make a payment to the other, a table showing how the amount or sum has been calculated or a description of the manner in which it has been calculated.”

44. Following the introduction of the new Rule, in the case of **Balfour Beatty Power Networks Ltd v Wilcox** [2006] EWCA Civ 1240, [2007] IRLR 63 an argument was addressed to the Court of Appeal that the decision had failed to comply with the requirements of rule UKEAT/0409/09/JOJ

30(6) and, therefore, was erroneous in point of law. In his judgment Buxton LJ dealt with this as follows:

“24 The appellants adduced two particular complaints about the employment tribunal's reasoning. First, that the decision did not comply with the comparatively recently introduced rule 30(6) of the 2004 Employment Tribunals (Constitution and Rules of Procedure) Regulations. That rule obliges an employment tribunal to include in its written reasons:

'the following information –

- (a) the issues which the tribunal has identified as being relevant to the claim;
- (b) if some identified issues are not determined, what those issues were and why they were not determined;
- (c) findings of fact relevant to the issues which had been determined;
- (d) a concise statement of the applicable law;
- (e) how relevant finding of fact and applicable law have been applied in order to determine the issues'.

25 I do not doubt that in future employment tribunals would be well advised to recite the terms of rule 30(6) and to indicate serially how their determination fulfils its requirements, if only to avoid unmeritorious appeals. But the rule is surely intended to be a guide and not a straitjacket. Provided it can be reasonably spelled out from the determination of the employment tribunal that what rule 30(6) requires has been provided by that tribunal, then no error of law will have been committed.

26 In our case, looking at the requirements, (a) the issues were identified in terms of the *Cheesman v Brewer* questions. I do not accept the further submission of Mr Jeans, that rule 30(6)(a) required in itself consideration of the further and more detailed issues, that he sought to put before the court. (b) No issues were left undetermined. (d) There was a concise statement of the applicable law, which was contained in the agreed statement. Requirements (c) and (e) are certainly fulfilled in form, but the complaint is that the findings were unjustified or incomplete and that there was no sufficient demonstration of how such facts had been found fulfilled the legal requirements of the TUPE regulations. That is a matter which I will have to address shortly.

27 That latter complaint also leads to the second specific criticism of the fact-finding process, that the employment tribunal had relied on the agreed statement of facts without specifically analysing how those facts related to the two issues that were before it. For that criticism the appellants relied on observations expressing concern about reliance simply on an agreed statement of facts that were made by the employment tribunal in *ISG v Mattinson* in 2003. It should be noted, however, that those observations by that constitution of the Employment Appeal Tribunal were immediately followed by reference to the requirement stated by this court in *Meek v City of Birmingham District Council* [1987] IRLR 250, in less detailed and mandatory terms, that the employment tribunal's decision must be sufficient to enable the parties to know why they had won or lost. I have that criterion in mind when turning to the various issues identified in the grounds of appeal. I should also add that in considering the employment tribunal's judgment it will have to be borne in mind that much of it is worked out in the context of the Balfour Beatty jointing contract, which was seen by the tribunal as raising much the same issues as did the Interserve RASP contract.”

It is neither necessary to quote more extensively from what follows nor necessary to quote from the other substantial judgment, that of Maurice Kay LJ³, because the matter was summed up with characteristic precision and brevity by the third judge, Sir Peter Gibson.

45. He says at paragraph 69:

“That said, I have not been persuaded by Mr Jeans that the decision of the employment tribunal was open to the serious attack which he made on it. In particular, it seems to me, for the reasons which my Lords have given, that the requirements of Rule 30(6) of the employment tribunals' Rules of Procedure have been met, and that Interserve cannot properly say that it does not know why it has lost this case.”

46. In the case of **Short v Hayman** UKEAT/0379/08/CEA one of the issues was whether the judgment complied with rule 30(6). Dr Hardy pointed us to paragraphs 35 to 42 but we think it is sufficient for present purposes to quote only part of paragraph 41, which reads as follows:

“41. It is clear, however, that an Employment Tribunal is bound to include in its written reasons a number of matters including a concise statement of the applicable law; we refer of course to Rule 30(6) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004 Schedule 1.”

47. Rule 30(6) is then quoted and in the next paragraph of the judgment, paragraph 42, reference is made to **Balfour Beatty** and paragraph 25 of the judgment of Buxton LJ is quoted. Then at paragraph 48 of the judgment of the Employment Appeal Tribunal the following appears:

“48. As a general point, before we consider the specific grounds of appeal it appears to us that although the Employment Tribunal did not identify (as it should have identified, the legal principles and how they were applied to the facts, the Employment Tribunal had in mind the appropriate legal principles and applied them to the facts as found by the Employment Tribunal. This is apparent from the findings made by the Employment Tribunal and the order in which it made those findings. So far as we can tell there is nothing to suggest that the Employment Tribunal either misunderstood or misapplied the law.”

³ The reference to Keene LJ in the headnote of the IRLR report is clearly in error; Maurice Kay LJ is correctly identified in the body of the judgment itself.

48. To us, this suggests a finding that rule 30(6)(e) has in fact been complied with in substance but paragraph 60 potentially contradicts this when it says:

“60. We would, however, in conclusion express our great concern that the Employment Tribunal failed to comply with Rule 30(6) and its failure to do so has given rise to what would otherwise have been an unnecessary appeal.”

The Reasons Point – our conclusion on the law

49. As will be appreciated from the above digest of authority and legislation, the tension arising over the first 15 years or so of the unfair dismissal jurisdiction between the problems created for appellate tribunals by inadequately reasoned decisions, on the one hand, and the need to prevent appeals based on an over-scrupulous analysis of the rubric of a decision, on the other hand, was largely resolved by the application of what might be termed general common law principles as to the adequacy of reasoning in judgments. The suggestion by Phillips J that “full reasons for each part of their decision” should be given by tribunals had been rejected by 1987 when the seminal case of **Meek** explained the previous authorities. By then the statutory language, which had always required reasons, had divided decisions into those which gave *summary* reasons and those which gave *full* reasons. Later *full* was replaced by *extended*. We think there was little significance in that change and in subsequent cases frequent recourse has been had to **Meek** in order to explain what *full* or later *extended* meant in practice.

50. But from 1991 onwards an additional statutory requirement to explain the basis of any award of compensation was introduced. We find it difficult to interpret the change as other than a mandatory requirement to explain the basis of an award of compensation and it seems to us that from 1991 onwards, to that extent, the rule had become prescriptive⁴.

⁴ It might be observed this represents a codification of what Sir John Donaldson had said in **Alexander Machinery v Crabtree**.

51. The major change occurred, however, in 2004 with the requirements of rule 30(6) and it seems to us difficult to interpret the language used by the draftsman as permissive. The already existing requirement to explain the basis of an award of compensation became the sixth in a series of matters, which “shall” be included in written reasons for a judgment. This strikes us as mandatory language.

52. Mr Davies submitted that rule 30(6) represents a watershed and that henceforth any decision, which does not comply with the requirements of the rule must be erroneous in law. At the other end of the spectrum Dr Hardy suggested that the rule was not mandatory and, provided the reasons in a judgment satisfied the criteria set out in **Meek**, no error of law would arise, even if the parameters set by rule 30(6) had not been fulfilled. Some support for that might be found in paragraph 25 of the judgment of Buxton LJ in **Balfour Beatty** when he says the rule is a guide and not a straitjacket.

53. But, as it seems to us, the next sentence of paragraph 25:

“Provided it can be reasonably spelled out from the determination of the employment tribunal that what rule 30(6) requires has been provided by that tribunal, then no error of law will have been committed.”

disposes of all arguments that the rule is merely permissive. The requirements of the rule have to be met; if they are not then the judgment will be erroneous in law.

54. Any lingering doubt is further dispelled by paragraph 26 where Buxton LJ considers each of the first five subparagraphs of the rule⁵ and whether the decision conforms to them. The question that then arose for consideration in **Balfour Beatty** was whether compliance with rule 39(6)(c) and (e) had been purely formal and not substantial. If the former had been an

⁵ Rule30(6)(f) was not under consideration in the appeal.
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adequate compliance with rule 30(6) it would not have been necessary for Buxton LJ to concern himself with the resolution of that question, which occupies several more paragraphs of the judgment, the detail of which is not relevant for present purposes. What is relevant, however, is that Buxton LJ “spelled out” of the decision that there had been substantial compliance with those subparagraphs of the rule.

55. Sir Peter Gibson clearly decided that the judgment of the employment tribunal complied with the requirements of rule 30(6) and that was also how he interpreted the conclusions of Buxton and Maurice Kay LJ (see the passage quoted at paragraph 45 above). Accordingly, it seems to us that the remarks made by Buxton LJ about the rule being “intended to be a guide and not a straitjacket” cannot be understood as sanctioning non compliance with the rule.

56. We take him to mean that a judgment will not be erroneous in law simply because the structure of the rule is not visible on the surface of the decision so long as its constituent parts can be unearthed from the material beneath. On the other hand, the constituent parts will need to be more than a formal statement paying lip service to the subparagraphs of the rule; the judgment must demonstrate substantial compliance. As in **Balfour Beatty** itself, the controversy will usually be as to rule 30(6)(c) and (e) and it will not be enough to set out the terms of the rule if there cannot be found in the rest of the judgment material that demonstrates substantial compliance with the terms of the rule.

57. So we accept the submission of Mr Davies that there will be an error of law if an employment tribunal fails to comply with rule 30(6). In so far as paragraph 60 of the judgment of this tribunal in **Short v Hayman** (set out in this judgment at paragraph 48 above) suggests that a judgment not complying with rule 30(6) may not be erroneous in point of law, we do not think it should be followed. We wonder, however, having regard to the reasoning, which

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precedes paragraph 60 of the judgment, whether that division of this tribunal meant to say any more than that it was the failure of the employment tribunal to structure its decision so as to demonstrate clearly compliance with the rule that had led to an otherwise unnecessary appeal.

58. If that was what was intended it was no more than a reiteration of the extremely sound advice of Buxton LJ given in the first sentence of paragraph 25 of his judgment (see paragraph 44 above). We would wish to add our voice in support of that sentiment. Costly appeals will be avoided if employment tribunals, whilst not confining themselves in a straitjacket, set out their judgments in a structure that clearly recognises and demonstrates both the formal and substantial requirements of rule 30(6).

59. The above conclusion does not, however, completely dispose of the dispute between Mr Davies and Dr Hardy. Mr Davies submitted that **Balfour Beatty** had not really addressed the relationship between rule 30(6) and the approach in **Meek** and his submissions certainly set out towards the conclusion that the rule had supplanted **Meek**, although, to be fair, he never claimed to have arrived there. Dr Hardy's position was that **Meek** is equivalent to, and to be equated with, the common law as set out in **English**, so that even if some matters are not mentioned by an employment tribunal no error will arise so long as the judgment discloses in a comprehensible fashion why the parties have won or lost. We have already largely disposed of this argument but out of deference to Dr Hardy's argument add what follows.

60. Whilst we accept that it is correct for Mr Davies to say that the relationship between the rule and **Meek** is not specifically addressed by the judgments in **Balfour Beatty** we cannot read that part of paragraph 27 of the judgment of Buxton LJ, where having referred to another authority, he said the following:

“It should be noted, however, that those observations by that constitution of the Employment Appeal Tribunal were immediately followed by reference to the requirement stated by this court in *Meek v City of Birmingham District Council* [1987] IRLR 250, in less detailed and mandatory terms, that the employment tribunal's decision must be sufficient to enable the parties to know why they had won or lost. I have that criterion in mind when turning to the various issues identified in the grounds of appeal.”

as being anything other than an incorporation of the **Meek** approach into his analysis of whether or not there had been substantial compliance with rule 30 (6). It seems to us crucial that he did not reject **Meek** as irrelevant and in so far as Mr Davies’s submission tended to consign **Meek** to a purely historical category we reject it. In our judgment **Meek** remains a helpful guide as to whether rule 30(6) has been complied with.

61. On the other hand, we also reject Dr Hardy’s submission that **Meek** is to be equated with the common law position represented by **English** and therefore the adequacy of reasons is to be judged by that matrix rather than rule 30(6), which is really an advisory guide. It is true that paragraph 8 of the judgment of Bingham LJ in **Meek** (see paragraph 40 above) is similar to paragraph 19 of **English** but **Meek** is not referred to in the latter and was not cited (either in the judgment or the argument). This is not all that surprising; **Meek** is a judgment in a jurisdiction created and controlled by legislation; **English** is about the extent to which the common law requires a reasoned judgment to be given in the courts.

62. **Meek** explained and, in effect, reconciled differing judicial views as to the need for detailed reasons. Earlier authorities had suggested that it was illegitimate to complain that express findings of fact as to this or that had not been made, that tribunals were not obliged to explain findings of fact and that failures to explain reasoning would not necessarily be an error of law. **Meek** set limits to this and did so by concluding that reasons must be sufficiently detailed as to enable the parties to know how the outcome has been reached and to explain why one party has won and the other lost. It did so against a statutory background that required

reasons to be given in a full or summary form but otherwise said nothing as to their content. Meek said something about content; there must be an outline of the story leading to the complaint, there must be a summary of factual conclusion and reasons as to why those conclusions have been reached on those facts. All this must be in sufficient detail to enable the parties to know why each has won or lost and to allow the appellate tribunals to see whether or not an error of law arose.

63. Since 2004 rule 30(6) has set out what the contents of a decision should be. In our view the continuing utility of Meek relates to issues as to whether there has been substantial compliance with the rule. It seems to us that is why Buxton LJ kept it in mind when considering whether there had been substantial compliance with rule 30(6)(c) and (e) in Balfour Beatty. Substantial compliance with the rule can only be achieved by sufficient detail in respect of each of its components as to enable a party to understand the conclusions reached and how their application has resulted in the outcome. It seems to us that however closely Meek may resemble English, Tribunals would be better to refer to Meek, which is the Court of Appeal decision relevant to this jurisdiction. Furthermore, without attempting to lay down any rigid guidance and mindful that all cases are different, we think most cases are likely to call for rather more explanation than that envisaged by the last sentence of paragraph 19 of the judgment in English:

“If the critical issue is one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.”

The Reasons Point – the outcome of this appeal

64. Although the Employment Tribunal judgment has already been summarised above (see paragraphs 6 to 8 of this judgment) it will enable a better understanding of our conclusions on this point if we briefly restate the shape and content of the Employment Tribunal’s judgment.

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65. The substance of the judgment takes up less than 3 pages but then the case occupied the Employment Tribunal for a day and so brevity, in itself, unsurprising. The issue articulated by paragraph 1 of the judgment is whether the stated reason for dismissal, redundancy, was a real reason or a sham. Facts relating to that issue are set out at paragraphs 2 and 3, which also conclude that on those facts there were no protected disclosures. Paragraph 4 deals with the alternative, namely that the Tribunal was wrong to conclude there were no protected disclosure and on that premise concludes that there was no causal connection between such disclosures and the dismissal.

66. The process referred to in the first sentence of paragraph 5 of the judgment must relate back to the “substantive claim of unfair dismissal”, which phrase ends the last sentence of paragraph 4. Consideration of that must involve identifying the reason for dismissal. It is clearly to be inferred from the factual findings set out in the rest of paragraph 5 that the Employment Tribunal found redundancy to have been the reason for dismissal and that is expressly stated to be so at paragraph 8 of the judgment. Although the judgment does not say so expressly, the Employment Tribunal then considered section 98(4) of the Act (i.e. the “reasonableness” of the dismissal) in terms of the adequacy of consultation and the issue of alternative employment. Paragraph 6 dealt with the failure to offer any right of appeal and concluded that failure infringed the “Statutory Disciplinary and Dismissal Procedures” with the result that the dismissal was automatically unfair. Paragraph 7, however, returned to section 98(4) (again by implication rather than expressly) with a discussion of selection and its rejection of the criticisms made by the Appellant about the Respondent’s approach to selection.

67. Paragraph 8 draws all these threads together. We set it out in full at paragraph 10 above but for convenience we offer this summary. It makes clear that the reason for dismissal was

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redundancy, that the procedural failure to offer an appeal was not unreasonable in terms of section 98(4) although it was a failure of “Statutory Procedure” rendering the dismissal automatically unfair. If the Employment Tribunal was wrong to find that the failure to afford the Appellant a right of appeal was not unreasonable (and, we imply, therefore the dismissal was “substantively unfair”) then section 98A(2) would have applied and the Employment Tribunal would have held that the failure made no difference because of the concession made by the Appellant that an appeal would have been unsuccessful and would have made no difference to the outcome.

68. As set out above (see paragraphs 23 to 25 of this judgment) Dr Hardy submitted that the judgment adequately reflects consideration of the issues raised by the Appellant and contains sufficient material to explain how they have been resolved. The judgment passes all the common law tests for adequacy of reasons, it passes the **Meek** test because the Appellant knows that his challenge to the veracity of the reason for dismissal has been rejected and why that conclusion has been reached. Further, he knows that the Employment Tribunal have concluded that his objections to his selection for redundancy are misconceived and why that conclusion has been reached and he knows that his procedural objections have only been accepted in a very limited context and why that conclusion has been reached. Although the judgment does not adopt a formal structure related to rule 30(6) he submitted all the substance is there either expressly or by implication.

69. Mr Davies’s main criticisms were twofold. The first group related to the issue of redundancy. The Employment Tribunal identified the issue as being whether or not the redundancy was a “sham” but confined it to “whistleblowing” when there were other components. He accepted that some of the other aspects had been addressed at paragraph 5 but that failed to refer to, let alone resolve, a number of the contentions made by the Appellant and UKEAT/0409/09/JOJ

his witness in their evidence to the Tribunal. Some important issues could be inferred to have been decided against the Appellant. But if it was inferred that his evidence had been rejected, he did not know why the Employment Tribunal had rejected his evidence that the Rivendell Plant Manager had not been seriously ill, why the fact he had not received letters had been rejected, why his challenge to the alleged policy of looking at 4 sites instead of 6 had been rejected and why he was said not to be suitable for the post that had been filled by recruitment.

70. The second criticism was the simple and discrete complaint that the fifth sentence of paragraph 8 of the Employment Tribunal's judgment is totally unreasoned and unexplained. As set out in the judgment it is no more than an assertion that the failure to offer an appeal was not a sufficient reason to regard the dismissal as unfair.

71. We have been prepared to travel as far as we can down Dr Hardy's road. Even though we have concluded that since 2004 a judgment must fulfil the requirements of rule 30(6), we have been prepared to look for the structure of rule 30(6) and, using the approach in Meek, to seek to unearth the substance of the rule even though it might be obscured by the narrative form of the decision. We have reminded ourselves that this Tribunal should not see rule 30(6) as a straitjacket. But having done so, we think this judgment neither articulates the issues as fully as the rule requires nor sets out the facts relating to those issues adequately nor explains its reasons for reaching the conclusions adequately. Ultimately Dr Hardy was constrained to say of facts and matters that were not discussed in the judgment that we must conclude the Employment Tribunal had rejected them. In our judgment when that approach has to be taken, it is a good indication that the judgment does not comply with the rule and is not adequately reasoned. Applying our conclusions on the law to this judgment and, having examined it with care, we are driven to the conclusion that the judgment does not comply with Rule 30(6) either in form or substance and, is inadequately reasoned to the extent that it is erroneous in law.

Discussion and Conclusions – the Compensation Point

72. We can dispose of this part of the appeal far less discursively. The Employment Tribunal found the dismissal to fall within section 98A(1) of the Act because the failure to offer a right of appeal was in breach of what it called “Statutory Procedures”. Irrespective as to whether that omission might also have rendered the dismissal unfair under section 98(4) of the Act, which the Employment Tribunal found, without adequate explanation, it did not, once the dismissal falls within section 98A(1) section 98A(2) cannot apply. This is the consequence of the introductory words of the latter, which are “*Subject to subsection (1)*”. We cannot accept Dr Hardy’s submission that this was some kind of duplication of an analysis of compensation under section 123 of the Act involving **Polkey** considerations. In our judgment, it was one or the other but cannot have been both.

73. If the procedural deficit was not a breach of the “Statutory Procedures” then section 98A(2) could apply and if the employer could prove that he would have decided to dismiss if he had followed the procedure then the subsection would operate to eliminate that procedural deficit from consideration under section 98(4) of the Act. But if there is a breach of a “Statutory Procedures”, then that procedural deficit will have rendered the dismissal automatically unfair and the next matter for consideration will be remedy. In turn that may involve **Polkey** issues.

74. What the Employment Tribunal said at paragraph 8 was:

“We do not regard the failure to offer an appeal as a sufficient reason to hold that the dismissal is otherwise unfair. Alternatively, if we are wrong in that regard, we apply Section 98A(2) and hold that that the offer of an appeal and an effective appeal would have made no difference. We make that finding on the Claimant’s own concession, in answer to the Tribunal, that any appeal would have been unsuccessful. ... We do not consider that the Claimant is entitled to a Compensatory Award because, even if such an appeal had been offered, then, as indicated above, such an appeal would have made no difference to the eventual outcome.”

75. It seems to us that the above betrays a confusion on the part of the Employment Tribunal as to the context in which section 98A(2) operates. It cannot operate as an alternative because it does not apply if the dismissal falls within section 98A(1), as the Tribunal had found that it did.

76. If it does not apply, then even if the outcome would have been inevitably the same that does not mean axiomatically that there will be no compensatory award. It may mean that the employment would have continued only a little longer but that may need to be reflected in a compensatory award. We think that here the Employment Tribunal has been confused into thinking that where the outcome would be the same compensation will be nil; that is an erroneous conclusion.

77. But sitting astride this legal analysis is the “concession” apparently made by the Appellant that he accepted an appeal would have made “unsuccessful”. It is not recorded as an acceptance that the appeal would not reasonably have made any difference. The statement was made by a layman representing himself. It was made by a litigant whose case was that the reason for his dismissal was a sham. It was the result of a question addressed to him by the Employment Tribunal. Mr Davies told us that the Appellant had never intended to concede that a reasonable employer acting bona fide would inevitably have dismissed the appeal.

78. All the members of this constitution were uncomfortable about the true nature and extent of the concession. As recorded it seems to us ambiguous. If it was intended to be an acceptance that a reasonable employer acting bona fide would inevitably have dismissed the appeal then, although concessions can be withdrawn, it would be very late in the day to allow

such a course. We simply cannot tell and if it was made, its withdrawal or further explanation as to its meaning and scope is not a matter for us but for the Employment Tribunal.

Disposal

79. Counsel made submissions as to disposal. Mr Davies submitted that the matter should be remitted for rehearing to a differently constituted Employment Tribunal. Dr Hardy submitted that if the only flaw in the judgment was found to be as to remedy, then the matter should be remitted to the same Employment Tribunal with appropriate directions. If this Tribunal found fault with the reasons he accepted that the matter should be remitted for a rehearing by a differently constituted Employment Tribunal.

80. In the event, the appeal has been allowed on both the Reasons Point and the Compensation Point. Therefore the matter will be remitted for a complete rehearing before a differently constituted Employment Tribunal.