

Appeal No. UKEAT/0145/07/DM

**EMPLOYMENT APPEAL TRIBUNAL**  
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal  
On 4 September

2007

Judgment handed down on 5 November

2007

**Before**

**MR RECORDER LUBA QC**

**MR D BLEIMAN**

**SIR ALISTAIR GRAHAM KBE**

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MR A SINCLAIR

APPELLANT

WANDSWORTH COUNCIL

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

For the Appellant

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For the Respondent

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## **SUMMARY**

### **Unfair Dismissal. Dismissal for Misconduct.**

Dismissal for consumption of alcohol in the workplace and for being unfit to work through drink. The majority of the Tribunal find unfair dismissal by the employer for failure to follow its own procedures and Alcohol Policy. Compensatory award limited to 4 weeks. Contribution reduction of 25%. No error of law found in the finding of unfair dismissal or in the limitation of compensation. Remitted to the Tribunal to reconsider contribution in the light of a misdirection of law (that misconduct induced by alcoholism could not be culpable or blameworthy).

## **MR RECORDER LUBA QC**

### **Introduction**

1. In December 2006 the Employment Tribunal at London South heard and upheld (by a majority) the Claimant's claim of unfair dismissal brought against his former employers, the present Respondent. We shall refer to the parties as Claimant and Respondent throughout this judgment.

2. Having found by a majority that the Claimant had been unfairly dismissed, the Tribunal unanimously held that the basic and compensatory awards otherwise payable should be reduced by 25% and further that the period of future loss for the purpose of assessing the compensatory award should be limited to four weeks.

3. By the appeal before us, the Claimant seeks to overturn both the limitation on the duration of the compensation for unfair dismissal and to remove the 25% reduction. By a cross-appeal the Respondent seeks to set aside the finding of unfair dismissal and, if that fails, to secure an increase in the percentage reduction in compensation. We heard both the appeal and cross-appeal together.

### **Facts**

4. The Claimant was employed from 2001 to 2006 by the Respondent as a Business Support Assistant in its Technical Services Department. Until the events which were to lead to his dismissal, the Claimant had an unblemished disciplinary record. On 17 January 2006 he was observed drinking alcohol while on duty. The matter was promptly investigated and the Claimant admitted that he had been drinking. He told the investigating manager that he had a drink problem and that he considered himself an alcoholic. He was offered and accepted an opportunity to meet the Respondent's Occupational Health physician. The Employment  
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Tribunal found that he was told by the investigating manager that drinking on duty was a serious disciplinary offence but that if he agreed to a referral to the Occupational Health Service (OHS) the disciplinary action would be put on hold.

5. The OHS doctor whom the Claimant then saw on 6 February 2006 advised him to seek specialist help with his drink problem: but the Claimant's response was that he would prefer to try and stop drinking himself. He declined to complete a consent form enabling the OHS doctor to contact his own GP.

6. The manager investigating the drinking incident received a report from the OHS doctor and later, in February 2006, himself saw the Claimant again. The Claimant again confirmed that he had been drinking on duty on 17 January and that he wished to sort out the drink problem himself. He advised that he had not seen his own GP about his problems with alcohol.

7. From what the Claimant was told by the investigating manager in February 2006, he gained the clear impression that to keep his job he would need to co-operate with the Occupational Health Service and he completed and returned the GP consent form together with a covering note (to which we shall refer later) indicating that he would do "what it takes" to keep his job.

8. The investigating manager presented a report and a disciplinary hearing was held on 31 March 2006. The result, notified by letter, was a final written warning. In the letter, the Claimant was reminded that he had been advised to seek help for his addiction.

9. A little over three weeks later, on 27 April 2006, the Claimant was sent home from work as he was unfit to work because of drink. He was suspended and an investigation was

conducted. The Claimant admitted in interview with the investigating officer that he was an alcoholic and the Employment Tribunal found that, despite his denial, the probability was that he had been drinking before coming to work on the morning of 27 April 2006. He told the investigating manager that the Occupational Health Service were referring him for some form of counselling. The Employment Tribunal were satisfied that although no such referral had been made it was possible that the Claimant had wrongly formed the impression that it had been. The manager investigating the April incident presented a report in which it was confirmed that the OHS doctor had not made any referral for counselling for the Claimant. Two managers then reviewed the question of whether disciplinary action should go ahead and decided that it should. A disciplinary hearing was fixed for 26 May 2006.

10. On 24 May the Claimant failed to attend a further Occupational Health Service appointment because he was unwell on that day. On the following day he tried to attend a clinic at a drop-in centre but found it to be closed on that day.

11. At the hearing on 26 May 2006 the Claimant's representative sought an adjournment on the basis that because the Claimant had taken up referral to the Occupational Health Service, and signed a consent form allowing his records to be disclosed by his GP, the disciplinary proceeding should be suspended. The adjudicating officer refused that request in the exercise of his discretion and decided to proceed with the disciplinary hearing. The upshot was that the adjudicating officer found that the Claimant had indeed been unfit to work through drink on 27 April 2006 and that the case against him was proven. He reached a decision to dismiss the Claimant and that decision was notified by letter dated 31 May 2006.

12. The Claimant exercised his right under the Respondent's disciplinary procedures to appeal against the dismissal decision. For reasons which we do not need to set out, there was

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some delay in convening the appeal hearing which took place on 28 September 2006. All the evidence relating to the incident on 27 April 2006 was reconsidered, the witnesses were called and re-examined, and all available mitigation was advanced on behalf of the Claimant. In the event, the appeal was dismissed.

13. It is an essential feature of the factual background, that we have summarised above, that the employers in this case have both a written disciplinary procedure and a written alcohol policy. We shall have to refer to both documents in the course of dealing with the appeal and the cross-appeal.

**The finding of unfair dismissal and the appeal against it**

14. The reserved judgment of the Tribunal sets out an appropriate summary of the relevant legal principles in determining a claim for unfair dismissal under s98 of the **Employment Rights Act 1996**. No issue is taken by either party to the appeal before us as to the accuracy or otherwise of the summary which the Tribunal distilled. In particular, that summary includes at paragraph 35:

**“In considering the fairness of a dismissal, the Tribunal should also consider whether an employer has complied with its own internal policies and procedures. A failure to follow those procedures may make a dismissal unfair, on the basis that any reasonable employer will generally adhere to its own published procedures.”**

15. The first function of the Employment Tribunal was to determine the reason for dismissal. In terms, at paragraph 43 of its reserved judgment, the Tribunal says:

**“The reason for his dismissal, the Tribunal considers, related to his conduct for the purposes of s.98(2) ERA.”**

That is a clear finding that this was a “conduct” dismissal and not, as Mr Pullen for the Claimant suggested, a finding that this was in reality a “capability” dismissal. If any further indication were needed that the Tribunal was so directing itself it is to be found in the passages

at paragraphs 32 to 35 in which the Tribunal is quite plainly directing itself as to the relevant law relating to a misconduct dismissal.

16. As to whether the dismissal was a fair dismissal or an unfair dismissal, the Tribunal expressly found that the adjudicating officer who took the decision to dismiss had a genuine belief that the Claimant was guilty of misconduct in that he had attended for work under the influence of alcohol on 27 April, and that it was this belief which caused him to decide to dismiss the Claimant. That much was, it appears, not in dispute.

17. The Tribunal was satisfied that there had been (paragraph 50 of their decision):

**“a full and reasonable investigation into the circumstances of the events of 27th April and that, in view of the earlier written warning given to the Claimant and the limited steps he had taken to address his alcohol problem, dismissal was within the range of sanctions open to a reasonable employer.”**

The Tribunal rejected complaints from the Claimant that there had been breaches of the statutory disciplinary procedure or of the employer's own disciplinary procedure by reason of the delay in relation to the convening of the appeal.

18. However, the point at which the majority (the lay members) departed from the minority (the legal chairman) was on the issue of the role of the published alcohol policy on the question of fairness of the dismissal.

19. At this point it is necessary to say something further about the alcohol policy which had been adopted by the Respondent.

20. On 21 June 1990 the Respondent's Establishment Committee had adopted an alcohol policy set out as Appendix A of a longer document itself entitled the "Alcohol Policy". The

strategy in relation to the appended Alcohol Policy was set out in the covering document and included at paragraph 2A that the policy would be for distribution to all employees within the Council. The strategy made provision for the distribution of information to relevant staff and for training. That programme of action was described as including the formation of close links with organisations offering specific facilities for the treatment and counselling of staff. (Paragraph 3(iv) of the preface to the policy.)

21. As to the policy itself, a preamble described its aim as being

**“to motivate staff with drinking problems to seek and accept the appropriate counselling or treatment in the knowledge that management, including the staff in supervisory positions, and colleagues understand their difficulties.”**

22. The first guideline in the alcohol policy reads:

**“The Council recognises that the problem drinker requires special assistance and treatment to assist recovery.”**

23. As to the body of the alcohol policy the most important provisions are those set out in paragraphs 3 to 7 which read as follows:-

**“3 Employers who recognize that they may have a drinking problem should be encouraged to seek help and treatment voluntarily. This assistance and treatment may include help from their trade union representative, supervisor/manager, departmental Personnel Officers, Occupational Health Service or any outside agency as appropriate.**

**4 Employees may come to the notice of management either by observation or through normal disciplinary, sickness absence or poor performance procedures or any of the factors referred to in paragraph 2 above. Management should take steps to ensure that any apparent or claimed drinking problem is fully investigated, seeking medical and/or personnel advice as appropriate. Where during the course of formal procedures it is accepted, as a result of investigation, that the matters under review have been influenced by a drinking problem, consideration shall be given to the suspension of the action and the employee encouraged to seek assistance. Any cases where there is dispute as to whether or not the matters have been influenced by a drink problem should be referred to the Chief Personnel Officer, who will advise on the course of action to be taken, taking such further medical or other advice as may be necessary in the particular case.**

**5 The encouragement to seek and accept treatment is on the clear understanding that the employee will be granted the necessary leave to undergo treatment and such leave will be treated as sick leave. In the event of any referral for treatment and/or assistance, the reason for referral should be discussed by the manager concerned with the employee.**

**The employee, after treatment, will return to the same job unless resumption of that job would be inconsistent with the full recovery from the illness. In the case of redeployment, the Council’s current policies on protection of earnings will apply. Where there are particular welfare problems, departure from this policy will be considered on the merits of the individual case.**

- 6 In the event of an employee declining to accept offers of assistance or discontinuing an agreed course of treatment, management will monitor the situation, and, depending on the individual circumstances of the case, further offers of assistance will be made. Any suspended formal proceedings may be reopened in an endeavor to remedy the situation, after due and proper warning to the employee concerned.
- 7 If following treatment a relapse into problem drinking should occur, a further opportunity to accept and co-operate with treatment will be provided. Where the severity of the problem results in permanent unfitness for work, consideration will be given to the termination of services on the grounds of ill health. Expungement of records will be in accordance with the current Code of Practice on Staff Sickness.”

24. It is plain that the Employment Tribunal considering the Claimant’s case had fully in mind the alcohol policy. Indeed, the fundamental submission of Mr Pullen, who appeared before that Tribunal for the Claimant (as he does before us today), was that the employer’s conduct so far departed from the alcohol policy as to be wholly unfair.

25. That submission, to a limited extent, carried the day with the majority. Their reasons are expressed in the Tribunal’s decision in the following terms:

“53. The members consider that the dismissal was unfair in relation to the application of this Policy. They consider that any reasonable employer would have clearly informed the Claimant of the Alcohol Policy and would have made it clear to the Claimant that if he did not seek treatment, the disciplinary action would continue and it could not be suspended. The letter of 3 April confirming the final warning did advise the Claimant that he had been previously advised to seek help but did not allude to a possible reason for doing so - that is, potential suspension of disciplinary action under the Alcohol Policy. They consider that there may have been some uncertainty in the Claimant’s mind as to whether treatment was to be arranged by OHS (see his hand-written note at p 128, and the reference to his belief about this at the hearing of 26 May (paragraph 58 at p 213)). In those circumstances the members take the view that any reasonable employer would have made it clear to the Claimant that disciplinary action could only be suspended if the Claimant actively sought to address his alcohol problem, with e.g. a programme of treatment. They consider that any reasonable employer would have informed the Claimant about the terms of the Policy and would have given him an opportunity of accepting treatment as an alternative to disciplinary action, in accordance with that Policy.”

26. That then is the judgment of the majority. Despite the very wide criticisms made by Mr Pullen of the deficient application of the written alcohol policy to the circumstances of this particular Claimant, it is plain that the majority were satisfied that there were only two material defaults. The first was that the Claimant had not been informed of the Alcohol Policy. As to that, there is no dispute that despite the terms of the policy the document had not been circulated to the Claimant or to a number of other employees including those responsible for his UKEAT/0145/07/DM

supervision. The Claimant himself was not provided with a copy of the Alcohol Policy until immediately prior to the adjudicatory hearing on the second incident, that is to say immediately before the disciplinary hearing of 26 May 2006. It is right to note, however, that he was able to refer to the policy in his written statement for that hearing and in the submissions made by his representative on that occasion.

27. The second element, that the Tribunal majority were satisfied contributed to unfairness in respect of the Alcohol Policy, was that it was not made clear by the Respondent to the Claimant, as it should have been, that if he did not seek treatment any disciplinary action being taken against him would continue and would not be suspended. That latter conclusion is supported, in the judgment of the majority, by the two matters to which they specifically refer in paragraph 53. They considered that two documents were indicative of the element of uncertainty that ömayö have been present in the Claimant's mind as to whether treatment was being arranged for him by the OHS.

28. First, there is the handwritten note that the Claimant sent with his GP consent form to the OHS doctor.

**“At our meeting on 6 February 2006 I thought that I was clear that I wished to “go it alone” if possible. After my meeting with S Tucker, Investigating Officer, yesterday I was told that I was not at liberty to do that if I wished to “toe the line”. I was surprised that their apparent information was that I was uncooperative. I did say to you that I would do what it takes to retain my employment. Hence this form is returned to you, by hand, today.”**

That was dated 21 February 2006. The second material that the Tribunal referred to as evidencing the state of belief of the Claimant was constituted in an extract of the proceedings of the disciplinary hearing which took place on 26 May 2006. The relevant paragraph (paragraph 58) reads as follows:

**“...Mr Sinclair said that his note [of 21<sup>st</sup> February 2006] meant that he would be awaiting help. [His representative] referred to Appendix 4 of his documents, which showed the details of drug and alcohol services and stated that Mr Sinclair had gone to the community services there and had found it was closed. This was a copy of a card given to Mr Sinclair by his GP**

when he went to get his notes sent through to Occupational Health. [His representative] said that [the adjudicating officer] should be aware of the action taken by Mr Sinclair to seek professional help on 25 May [2006] and agreed that there was a lapse between February and May but this was because Mr Sinclair thought that Occupational Health had taken over the case but they hadn't put enough effort in."

29. With respect to the careful way in which paragraph 53 of the Employment Tribunal's decision is framed, it seems to us that the message is clear. The two matters contributing to the unfairness of dismissal found by the majority were, firstly, the failure to actually give the Claimant the terms of the Alcohol Policy directly relevant to his circumstances; and, secondly, the failure to spell out in terms to him precisely what he would need to do in order to stop the disciplinary action which was taking place in particular in relation to the second incident.

30. For the Respondent, Mr Jones asserted on the cross-appeal that the reasoning of the majority discloses two errors of law. First, he asserts that the majority are here impermissibly interfering with the reasonable exercise of judgment by the employer and substituting their own approach for the approach taken by the employer. Under the Alcohol Policy, he submits, it is entirely a matter within the discretion of the employer whether in the particular circumstances to suspend, or to proceed with, disciplinary action. Further, and to the extent that there were in fact irregularities in not disclosing the Alcohol Policy in terms to the present Claimant or making it explicitly clear to him what treatment was required, those deficiencies were cured by the subsequent full reconsideration of the matter on appeal.

31. In support of the first formulation of the asserted error of law, Mr Jones developed helpful submissions which were largely in support of the dissenting judgment of the Chairman set out at paragraph 54 of the Tribunal's decision:

**"54. The Chairman disagrees. He considers that, even if the Alcohol Policy was not expressly referred to by name, the Claimant was sufficiently informed that disciplinary action could be put on hold if he underwent treatment (see notes of meeting of 19 January 2006 at p 137). The letter of 3 April 2006 also reminded the Claimant of the importance of seeking treatment, as did Mr Tucker at the meeting on 20 February. Yet by the date of the disciplinary hearing on 26 May the Claimant had done virtually nothing to address his problem. In these circumstances he considers**

that it was open to the Respondent to decide not to suspend disciplinary action, in accordance with the discretion given to it under the Alcohol Policy (see paragraph 4, p72). He notes that the Policy confers a discretion on the employer and is not said to be mandatory (contrast the policy in *Edgely* - see p 12 of transcript), he considers that the discretion was exercised for proper reasons and he thinks it would be wrong to penalise the Respondent when it took steps to help the Claimant with his problem (unlike many employers). In addition, he considers that any unfairness prior to the disciplinary hearing was cured on appeal. Before the appeal the Claimant clearly knew of the Alcohol Policy and of the importance of showing to the Respondent that he was undergoing treatment to address his problem; but, apart from attending Alcoholics Anonymous, he had done nothing to seek treatment for his alcoholism.”

As may be seen, the Chairman’s answer to the point about non-distribution of the full terms of the Alcohol Policy to the Claimant, was that the message that it contained (i.e. “comply with a course of treatment or else”) was made plain to the Claimant by the events which had occurred in relation to the first disciplinary incident. The Chairman was quite satisfied that in the events which had happened the employers had made plain to the Claimant what precisely needed to be done to invite the successful application of the discretion to suspend disciplinary action. Moreover, the Chairman finds that the employers had conscientiously considered and exercised (albeit not in the Claimant’s favour) the discretion whether or not to suspend.

32. We have no hesitation in rejecting this aspect of the Respondent’s cross-appeal. It seems to us that here the Tribunal was engaged in answering precisely the right legal question (as to which there is no demur from Mr Jones). They were asking themselves whether these matters in relation to the Alcohol Policy undermined the fairness of the dismissal by virtue of the fact that no reasonable employer would ordinarily depart from its own published procedures. True it is that the determination of that issue is the determination of only the majority. However, provided a majority does not misdirect itself in law or have regard to irrelevant considerations, its finding is not to be disturbed. We are not in a position to revise the majority’s decision so as to substitute our own view or the view of the dissenting Tribunal Chairman. There is, with respect, nothing in Mr Jones’s helpful reminder of the various background matters which were before the Tribunal. It is not in dispute that the Tribunal had all of the matters that he advances before them. The simple fact of the matter is that the majority were satisfied that there was an

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unfair departure from the published procedure and the Chairman was not. This aspect of the cross-appeal is accordingly rejected.

33. As indicated, there was a second string to Mr Jones's bow on the cross-appeal, relating to the alcohol policy and unfairness. He contended (as indeed the Tribunal Chairman would have found) that the subsequent appeal "cured" the deficiencies identified by the members who formed the majority. As we have already recounted, the Claimant was in fact provided with the policy albeit only shortly before the final disciplinary hearing and he certainly had it for several months before the appeal hearing. Likewise, immediately before the disciplinary hearing and certainly before the appeal hearing he knew plainly what was necessary in order to secure successful exercise of the discretion to suspend disciplinary action.

34. As the authority cited to us (**Taylor v OCS Group Limited** [2006] IRLR 613) plainly shows it is possible for a subsequent appeal hearing to cure earlier deficiencies in an employer's procedure which have led to unfairness. We have therefore carefully examined the scope and function of the appeal in the context of the present case. We have been shown an extract from the employer's published disciplinary procedure and in particular section 11 entitled Rights of Appeal. That provides at paragraph 11.1:

**"An employee shall have the right of appeal against a disciplinary decision taken at any level, and all such appeals shall be dealt with under this code. Such appeals shall only be accepted on the grounds that:-**

**(a) the original decision was unreasonable or unfair in the light of all the circumstances ... "**

As to the jurisdiction of the individual official hearing the appeal, paragraph 11.6 of the disciplinary code provides that:

**"The Director or chief officer shall hear and determine the case in all respects ... and may uphold the original decision or otherwise decide on the case on behalf of the Council as employer."**

Those provisions, submitted Mr Jones, provided the Appeal Officer with the widest possible range of functions including the ability to review matters which had taken place after the decision under appeal and to exercise again at large the Council's function as employer. He drew our attention to the fact that in the course of the appeal hearing the Appeal Officer had enquired of the Claimant as to the steps he had taken post-dismissal. Mr Jones submitted that this plainly showed that the Appeal Officer had been exercising his powers at large and was therefore in a situation to fully and comprehensively deal with the matter in the round. If the Appeal Officer had in those circumstances been satisfied that the Claimant had in fact embarked with vigour on a course of treatment post-dismissal he could have reversed the dismissal and directed the reinstatement of the Claimant.

35. That submission obviously impressed the Tribunal Chairman as is apparent from the final sentence of paragraph 54 of the reserved judgment set out above. It did not, however, carry the day with the lay members. Mr Jones takes the point that the lay members give no reasons for rejecting the submission. In our judgment that is because it is tolerably clear that the submission was not made out on the facts before the Tribunal. It is plain from the terms in which the Appeal Officer rejected the appeal (by letter dated 5 October 2006) that he had confined his consideration of the matter to whether or not the decision to dismiss made on 26 May 2006 was (or was not) correctly and fairly made. If he did have jurisdiction to reverse that decision based on events post-dismissal he was not exercising it. In those circumstances, the deficiencies identified by the lay members in the majority (that is to say that the employee had not had the Alcohol Policy in sufficient time before the disciplinary hearing and had not a clear understanding of what needed to be done to suspend the disciplinary action in sufficient time) could not have been and were not cured by the appeal in this case. In those circumstances, the second basis upon which the Respondent's cross-appeal against the finding of unfair dismissal is brought is likewise rejected unanimously by us.

### **The limitation in the period of compensatory award**

36. It is not disputed that the Employment Tribunal correctly directed itself in law that it had a discretion, when considering what amount of compensation it would be just and equitable in all the circumstances to award, to take into account the possibility or likelihood that the employee may have been fairly dismissed in any event. This particular facet of the exercise of the Tribunal's discretion or judgment is called "the Polkey deduction" after the well-known case of **Polkey v A E Dayton Services Ltd** [1988] ICR 142. The exercise of judgment by the Tribunal in considering the Polkey deduction involves a consideration of what would have occurred had the employer not made the particular error of procedure which had led to the finding of unfairness in the dismissal.

37. The Tribunal unanimously concluded that if the Respondent had acted fairly (i.e. had provided an early copy of the relevant policy and made it clear to the Claimant that disciplinary proceedings would only be suspended if he positively embarked on a course of treatment) the consequence would only have been to delay the dismissal for a period of some four weeks. It is plain from paragraphs 56 and 57 of their reserved judgment that the reason for the Tribunal so concluding was that they were satisfied that the Claimant would not in fact have embarked on a course of treatment with sufficient vigour to have caused the disciplinary proceedings to have been suspended. That was an assessment that they were entitled to make having regard to the factual findings they made in relation to the steps which the Claimant had taken (or more importantly not taken) since his first referral to the Occupational Health Service and to his GP.

38. Mr Pullen, for the Claimant, asserted that the Tribunal here erred in law in failing to set out in terms its reason for identifying a period of four weeks as being an appropriate "estimate" of the period after which dismissal would inevitably have followed. He took us to the decision of the Court of Appeal in **Thornett v Scope** [2006] EWCA Civ 1600 reported at [2007] ICR UAEAT/0145/07/DM

236 as authority for the proposition that it was important, in the circumstance of a Polkey deduction, for the Tribunal to give their reasons for making such a deduction and to identify the factors that they had relied upon. In one sense, therefore, Mr Pullen's appeal on this limb is a "Meekö appeal, that is to say an assertion that the Tribunal have not provided sufficient reasons for finding that the Claimant's dismissal would have been delayed by only four weeks.

39. We cannot accept Mr Pullen's submissions on this aspect of the appeal. It seems to us clear that at paragraph 56 of the reserved reasons the Tribunal (who are at this stage unanimous) have identified the particular features which went to their assessment of whether there should be a Polkey deduction and as to the relevant period. It is quite plain that they were directing themselves to the whole of the relevant history including the fact that a period of four months had passed between the dismissal and the appeal hearing during which the Claimant incontrovertibly knew that the employer was not satisfied as to the steps he was taking and that, in order to secure any prospect of reversing the dismissal decision, he had to demonstrate that he was embarking on a course of treatment. We accept Mr Jones's submission that it was not necessary for the Tribunal to set out in terms what precise form of treatment the Claimant might properly have embarked upon, what nature of treatment that would have been, how long it would have been taken to demonstrate any measurable benefit etc etc. The Tribunal simply had to identify how long it would have taken the relevant employers to appreciate that the Claimant was not seriously embarking upon any sufficient course of treatment. They were fully entitled to assess that in the round as being a period of four weeks. All the building blocks necessary to see why they made that assessment are contained in paragraphs 56 and 57 and we reject the proposition that there is inadequacy of reasoning here.

### The contribution to dismissal aspect

40. Again there is no dispute between the parties but that the Tribunal correctly directed themselves to the jurisdiction given to them by s122 of the **Employment Rights Act 1996** to reduce the basic award of compensation where a Tribunal considers that any conduct of the Claimant before dismissal makes it just and equitable to reduce such an award. Likewise, the similar power in s123(6) of the **Employment Rights Act 1996** in relation to the compensatory award.

41. What is contended by Mr Pullen for the Claimant is that the Tribunal erred in law in this particular case in making any reduction at all. The Tribunal identified (at paragraph 59) the relevant failure by the Claimant which they took into account in reducing the compensatory and basic awards as follows:

“...the failure of the Claimant to take steps to address his condition prior to the hearing on 26 May, despite the strong advice of Dr Cooper [of the OHS] and the further indication in the letter of 3 April [2006], was contributory conduct for the purposes of [the Act]. The Claimant knew of the importance of showing that he was trying to address his problem but did almost nothing about it. We consider, however, that the conduct was not particularly serious.”

42. In those circumstances therefore the Tribunal was taking into account as relevant conduct the Claimant's effective failure to engage with treatment notwithstanding the firm indication he had had prior to dismissal that such engagement was necessary. Mr Pullen submits that it was essential for the Tribunal in reaching such a conclusion to identify what specific treatment he should have engaged-with beyond the steps that the Tribunal found he had in fact taken. Moreover, submits Mr Pullen, a reduction should only be made where there is blameworthy or culpable conduct on the part of the employee (see **Nelson v BBC (2)** [1980] ICR 110). He drew attention to the earlier finding of the Tribunal majority (paragraph 53) that there may have been some uncertainty in the background to the Claimant's failure to positively engage with treatment. In those circumstances of uncertainty, he said, it is not clear that there was any failure by the Claimant.

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43. We have no hesitation in rejecting Mr Pullen's submissions. The Tribunal here had correctly directed themselves as to their relevant powers. They were asking themselves whether there was any relevant pre-dismissal conduct or deficiency on the part of the Claimant which contributed to his own dismissal. Having asked that question they clearly answered it for reasons that they gave, and those reasons were legitimately open to them on the facts that they found. The Tribunal did not need to go further in the elaboration of their reasoning than they have done in the relevant paragraphs of their reserved judgment. Accordingly, we reject the appeal against the imposition of a reduction in this case.

44. However, the Respondent brings a cross-appeal asserting that the assessment of the 25% reduction was based on a misunderstanding of the relevant law. Most particularly, Mr Jones submits that it is striking that in making their assessment of contribution towards dismissal the Tribunal have left wholly out of account the fact that there were two serious breaches of the employer's disciplinary code, i.e. drinking while at work in February 2006, and subsequently being unfit to work through drunkenness in April 2006. Added to that, submits Mr Jones, there is the fact that the Claimant sought to mislead the employer by suggesting that his being under the influence of alcohol on the second occasion was the inadvertent result of late night drinking on the previous night rather than, as the Tribunal found, his drinking earlier on the same day.

45. We are satisfied that those submissions of Mr Jones do pose the rhetorical question as to why the Tribunal did not in making an assessment of contributory conduct consider and deal with those matters. The answer provided by Mr Jones is that the Tribunal were led into error of law by a submission made by Mr Pullen which they adopt in the opening words of paragraph 59 of the reserved judgment in these terms:

**“As to contributory conduct, the Tribunal accepts Mr Pullen's submission that alcoholism is an illness and cannot properly be characterised as contributory conduct.”**

Mr Pullen confirmed to us that he had made a submission to the effect that because alcohol-related incidents were themselves related to an underlying problem in relation to alcohol consumption by the employee they *could not* be properly taken into account as a matter of law by the Tribunal in assessing whether to make any contribution.

46. That submission, which the Tribunal adopted, Mr Jones argued to be wholly contrary to established legal principles. He took us to the decision of the Employment Appeal Tribunal in **Edmond Nuttall Ltd v Butterfield** [2005] IRLR 751. In that appeal an employee affected by a mental illness had engaged in conduct unacceptable to his employers (which was also criminal conduct) and had misled his employers about it. In that case the Employment Tribunal had found that the Claimant was not guilty of culpable and blameworthy conduct such as to attract a reduction. This Appeal Tribunal found that that conclusion was perverse i.e. irrational in the legal sense. In short (see paragraphs 39 to 40 of the EAT judgment) the EAT found that the fact that the matters were said to have arisen as a result of the mental illness of the Claimant in that case was no excuse. With respect, we agree with that conclusion. It cannot be said that totally unacceptable conduct in an employment context (or in a criminal context) can be excused by reference to a background or underlying illness. The fact is that the employer has been faced with unacceptable conduct in the workplace. In certain circumstances the protection of the **Disability Discrimination Act** is available to an employee where there is a link between the disability and the conduct in question. However, the present case was not determined on a disability basis. In those circumstances, the submission made by Mr Pullen that the Tribunal could not take into account conduct related to an underlying alcohol problem was wrong in law and ought not to have been accepted by the Tribunal. It is right to remark however that the Tribunal did not have the benefit of the citation of authority from the **Nuttall** case to which we have referred nor were they directed to **Perkin v St George's Healthcare NHS Trust** [2005] IRLR 934, which we were also shown.

47. But for the misdirection in law in accepting the submission of Mr Pullen, the Tribunal might well have increased the contribution element taking into account the actual conduct of the employee in the two disciplinary incidents and the fact of his rejected explanation as to the circumstances of his drinking on the second occasion. Mr Jones invited us, if we were satisfied that there had been an error of law, to substitute our own assessment of the degree of contribution or culpability in the particular circumstances of this case. Although we are prepared to allow the appeal to the limited extent of setting aside the Tribunal's finding on the percentage of contribution (as opposed to contribution itself) we do not consider this is an appropriate case in which we can substitute our own view for that of the Tribunal. The sensible and appropriate course is for the question of the degree of contribution (beyond 25%) to be remitted to an employment tribunal of the same constitution to further consider.

48. Mr Jones submitted that the reconstituted Tribunal could essentially consider the matter on short submissions. Mr Pullen suggested that full reconsideration would be needed by the Tribunal of the extent to which the Claimant's own contribution to his dismissal was interlinked with the employer's own failure to comply precisely with its Alcohol Policy. We are attracted to the view that only short submissions may be needed. However, the conduct of the remitted hearing is entirely a matter for the Employment Tribunal and we invite it to give the necessary directions to the parties as to the assistance it requires in reconsidering, absent the error of law which we have identified, the correct reduction (beyond 25%) to be imposed in this case.

49. For those reasons the appeal brought by the Appellant is dismissed. The cross-appeal of the Respondent is dismissed in so far as it attacks the finding of unfair dismissal, but the cross-appeal is allowed to the limited extent that the Tribunal erred in law in making its assessment of contribution at 25%, and that aspect (the assessment of contribution) is remitted to the same Employment Tribunal for further consideration.

