Neutral Citation Number: [2022] EAT 23

Case No: EA-2020-SCO-000048-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 03 February 2022

Before :

THE HONOURABLE LORD FAIRLEY

- -

Between :

MR H WILKINSON **Appellant**

- and –

DRIVER AND VEHICLE STANDARDS AGENCY **Respondent**

- -
- -

Ms G Churchhouse, of Counsel, instructed by AM Employment Law for the **Appellant**
Dr A Gibson, Solicitor, Morton Fraser LLP for the **Respondent**

Hearing date: 21 January 2022

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JUDGMENT

SUMMARY

TOPIC NUMBER 11 – Unfair Dismissal; remedy; Polkey reduction; contributory fault

The Employment Tribunal found that the Appellant had been unfairly dismissed, but made no monetary award to him "because of his conduct".

Held:

1) A reduction of compensation under section 123(6) **ERA** could still be made even where it could be said that, but for the factor(s) which made the dismissal unfair, a dismissal would not have occurred.
2) Once section 123(6) was engaged by the existence of blameworthy conduct on the part of the employee which contributed to the dismissal, fault of the employer (including factors which made the dismissal unfair) could also be taken into account in determining the appropriate percentage reduction to compensation.
3) Contrary to the position taken by both parties to the appeal, the Employment Tribunal had not made a **Polkey** reduction in this case. It was clear, however, from the Tribunal's analysis of **Polkey** that it had reached an important factual conclusion for which there was no evidence. That error had also coloured its approach to its assessment of what would be a "just and equitable" reduction for contributory conduct under section 123(6) **ERA**, and the Tribunal's conclusion that a 100 per cent reduction was appropriate in this case was therefore wrong.
4) The Tribunal also appeared to have failed to recognise factors about the Respondent's conduct which potentially mitigated the level of reduction that was appropriate.

The appeal was allowed and the case remitted to the same Tribunal to reconsider remedy.

THE HONOURABLE LORD FAIRLEY:

1. In a Judgment dated 23 March 2020, an Employment Tribunal at Aberdeen (Employment Judge Hendry, sitting alone) found that the Appellant had been unfairly dismissed from his employment with the Respondent, but made no monetary award to him. The Appellant now appeals against the latter part of that Judgment.

2. The Notice of Appeal contained six grounds of appeal, all of which were permitted to proceed to a full hearing following consideration under Rule 3(7). At the full hearing of the appeal, the grounds numbered 3 and 4 were not insisted upon, and only grounds 1,2, 5 and 6 were argued.

Facts

3. The Appellant is a former police traffic officer. Following his retiral from the police service, he obtained employment with the Respondent as a driving examiner with effect from 25 April 2016.

4. One of the Respondent's policies to which the Appellant was subject related to the situation where a driving test required to be terminated early. When that situation arose, the examiner was required to fill in a form known as a DL25 with a description of the circumstances in which the test was stopped.

5. The induction training received by the Appellant included a slide presentation. One of the slides dealt with the situation of early termination of a test. It stated:

> **"Once a test has been terminated the candidate must not be allowed to drive back to the test centre.**
>
> **The examiner must not drive the candidate's car**

6. Clause 7.29 of the Respondent's examiner guidance stated:

> **"Examiners must not drive candidates' vehicles. Strict observance of this instruction is essential as there are many situations in which insurance cover for the examiner might not be effective. Candidates are rarely familiar with details of motor vehicle insurance conditions or in a position to give the necessary permission. In any case, only third party risks might be covered. Similarly, an examiner's own motor insurance policy may not provide full cover when they are driving someone else's vehicle even with the owner's permission."**

The Appellant was aware that he should not drive a candidate's car.

7. On 2 November 2018 the Appellant was conducting a driving test. The test was terminated early approximately four and a half miles from the test centre on a country road outside Elgin. The Appellant contacted the candidate's driving instructor, whose car the candidate was using, and was told by the instructor that the Appellant was insured to drive the car back to Elgin.

8. The Appellant thereafter drove the candidate back to the test centre. Prior to doing so, he did not contact his manager to discuss what he intended to do. On arrival at the test centre, the Appellant filled in a logbook for terminated tests. He recorded the reason for the early termination of the test as a "code 4" which denoted "fail in the interests of public safety, candidate's conduct unsafe for the public". He also filled out the DL25 form. He did not record either in the test log or in the DL25 form that he had driven the candidate's car back to the test centre, nor did he inform his manager, Mr Neill, that he had done so.

9. Mr Neill did not become aware of the 2 November incident until almost seven weeks later on 19 December 2018 when he heard about it by chance from a third party. Having made further inquiries about the incident, which included speaking to the driving instructor whose car the Appellant had driven, Mr Neill spoke to the Appellant on 4 January 2019. The Appellant accepted

that he had driven the vehicle back and that he had been wrong to do so. He explained that he had done so in order to prevent the next test which he was due to carry out from having to be cancelled.

10. Mr Neill reported the incident to his line manager, Ms Archer. They discussed whether or not the Appellant should be suspended. It was agreed that the Appellant would not be suspended. He continued to work as normal with no additional supervision.

11. Ms Archer thereafter appointed an investigating officer. She wrote to the Appellant on 7 January 2019. The letter advised the Appellant that the purpose of appointing the investigating officer was "to investigate allegations made that on 2 November 2018 you terminated your 10.24 am test and then drove the driving instructor's car back to the driving test centre". Ms Archer described this as "potentially gross misconduct". She noted that, in his discussion with Mr Neill on 4 January, the Appellant had indicated that he was aware of the correct process but had nevertheless driven the car. The terms of Ms Archer's letter did not refer to the Appellant's record-keeping of the incident (in the test log and DL25 form) either as a potential aggravation of the incident or as a separate incident of misconduct by dishonesty.

12. The Appellant met the investigating officer on 13 February 2019. He gave a full account of the 2 November 2018 incident as set out at para 29 of the Employment Judge's Reasons. In summary, it was the Appellant's position that his actions had been in the best interests of the candidate and the Respondent. When asked by the investigating officer why he had not reported the incident to his manager at the earliest opportunity, the Appellant responded:

> **"…I didn't feel it was necessary as nothing had happened and didn't want to incriminate myself."**

When asked why his completion of the test termination report in this case was different from reports prepared by him in similar situations in the past he replied:

> **"I knew I'd breached the policy but was not going to lie about it so I left it vague."**

13. On 14 February 2019, Mr Neill sent an email to the investigating officer. Throughout that email the Appellant was referred to by his first name, Harry. The email stated:

> **"I have trained Harry from when he came out of his training at Cardington and throughout our working relationship we have always got on well. I always held Harry to be a trustworthy member of my team. He works away for many days on his own, and I always trust him to do a good job and had no reason not to.**
>
> **Now that I have the issue of Harry not informing me of what he did when driving the instructor's car with the candidate back from a terminated test I now find it very hard to trust he is doing what he should be. I cannot monitor this when he is working at the mainly outstations. The incident was brought to my attention by a third party this was seven weeks after it happened, Harry had sufficient time to inform me of what he had done, unfortunately he didn't. When I spoke to him about it he didn't think he should tell me as he had dealt with the situation.**
>
> **With this I am now realise (*sic*) that the trust I had with Harry has been broken. I'm sure Harry has learned a valuable lesson and may not do this again however the trust between employer and employee is a serious one of which it is hard to repair."**

14. The investigating officer did not discuss Mr Neill's email of 14 February 2019 with the Appellant. On 25 February 2019, he wrote to Ms Archer enclosing *inter alia* his notes of his meeting with the Appellant, his investigation report, and the email of 14 February 2019 from Mr Neill.

15. On 27 February 2019, Ms Archer wrote to the Appellant inviting him to a disciplinary meeting. Ms Archer used a pro-forma template letter which had not been properly completed. Whilst the letter made reference to a finding of gross misconduct being a possibility, it contained no details of the allegations that the Appellant faced, nor did it include the date or time of the meeting. The Appellant was aware, however, that Ms Archer would be visiting Elgin on 7 March 2019, and emailed her to ask her to confirm that the disciplinary meeting would be on that date.

16. The disciplinary meeting took place on 7 March 2019. It was chaired by Ms Archer. Mr Neill was in attendance as a note-taker, but did not give evidence. Mr Neill's email was not put to the Appellant, nor were its contents discussed with him. The Appellant was, accordingly, wholly unaware of what Mr Neill had said in the email.

17. After 24 minutes, Ms Archer adjourned the hearing. She returned eight minutes later and informed the Appellant that her decision was that he should be dismissed for gross misconduct. It appears from the Employment Judge's findings in fact that three important parts of Ms Archer's thinking included (i) a conclusion that the Appellant had "lied by omission" by not recording the means of return to the test centre on the termination log or the DL25; (ii) the potential for reputational damage to the Respondent; and (iii) her interpretation of Mr Neill's e mail of 14 February. At para. 44, the Employment Judge set out Ms Archer's explanation as to why the Appellant was being dismissed:

> **"1. You returned to the office and said nothing about what you had done.**
>
> **2. You lied by omission by not adding the necessary information to the DL25.**
>
> **3. You put trust in an ADI candidate that they wouldn't say anything.**
>
> **4. Mark [Mr Neill] found out and you still chose to hide information and he had to dig for the information.**
>
> **The minute recorded your actions of broken trust between the employer and the employee and when this incident came to light Mark and I discussed suspending you. We agreed suspending you would not provide an opportunity for the trust to be repaired. It was important that your manager made you aware of your actions and had an assurance that this would not happen again. As a driving examiner you need to be trusted to work on your own and unfortunately you have planted the seed of doubt and that trust cannot be restored. As such it is unfortunate that your actions have resulted in your dismissal with immediate effect."**

18. In a subsequent letter to the Appellant, Ms Archer stated (per para. 45 of the Employment Judge's findings):

> **"It needs to be said that if you had returned to the test centre and told your manager what you had done the outcome would most certainly be a different one. The fact that you lied and chose to cover this up leaves your integrity and honesty in doubt."**

19. The Appellant sought to appeal against his dismissal. The appeal was a review of the decision to dismiss to determine whether or not that decision was reasonable, rather than a full re-hearing of the case.

20. The Appellant highlighted the fact that he had been trusted to continue working unsupervised between January and March 2019 and had not been suspended for any period of time. He submitted that insufficient weight had been given to the unusual mitigating circumstances, and gave an assurance to the appeal officer, Mr Owens, that he would not "do it again". He submitted that that a warning would have been a more appropriate sanction. Mr Owens refused his appeal, stating:

> **"Driving examiners regularly work unsupervised and hold a position of significant trust. This is particularly true in the north of Scotland where examiners often work alone in remote, rural locations and are trusted to apply all areas of the agency's established policies and procedures correctly and consistently. My view is that the significance of this particular incident has damaged a relationship of trust and on that basis I am unable to uphold your appeal."**

The Employment Tribunal's analysis of the fairness of the dismissal

21. The Employment Judge noted that the "focus of the investigation, disciplinary hearing and appeal was the use of the candidate's vehicle and that matter not being recorded or disclosed". He was accordingly satisfied that the Respondent's reason for the dismissal was misconduct consisting of "the incident that had occurred when the test was terminated".

22. Turning to the issue of section 98(4) fairness, the Employment Judge noted that Ms Archer had confirmed in her evidence that she did not put either the terms or the substance of Mr Neill's email of 14 February 2019 to the Appellant. The Judge also expressly rejected evidence given by Ms Archer that a corrected copy of the letter inviting the Appellant to the disciplinary meeting had been sent to him which contained the allegations that he was facing. He further noted (at para 103):

> **"Disappointingly…the investigatory report only refers to one allegation being before Ms Archer namely the allegation that the claimant drove the car back to the centre and not what came to be the main issue for the respondents the failure to disclose / record the irregularity leading to the breakdown of trust. This is unfortunate as the letter should have reflected exactly what the allegations being pursued were otherwise the [Appellant] would find it difficult to know exactly what factors were being considered that might lead to the loss of his job."**

23. On the issue of what happened between January and March 2019, the Employment Judge also noted that:

> **"…allowing the [Appellant] to continue with a responsible job without any additional restrictions does not sit well with an allegation discovery of the original offence destroyed any trust." (para 104)**

> **"…it poses the question that if the [Appellant] could be trusted to continue his work without any additional supervision, involving as it did working on his own and unsupervised at times, with the compulsitor being the threat of further disciplinary action then why a final written warning, with a similar threat if the rules were disobeyed, was not sufficient punishment." (para 105)**

and

> **"[t]he evidence on these matters from the respondent's witnesses was not particularly well thought out or indeed particularly convincing…" (para 106)**

24. At paragraph 111, the Employment Judge noted, with what might be said to be commendable restraint, that:

> **"…there were areas which could have been handled better at both the investigation and particularly the disciplinary stage…"**

25. Noting, however, that the Tribunal had to look at the matter in the round the Judge took the view that only one matter stood out above the other deficiencies in the disciplinary process. That related to the question of the alleged irretrievable breakdown in trust. The Judge noted that the Appellant was disadvantaged by that matter not being explored at the investigatory meeting on 13 February, stating:

> **"The email from Mr Neill which was so heavily relied upon by Ms Archer and Mr Owens was only received on 14 February. The Report itself refers to Mr Neill's position in rather ambiguous terms, recording that the claimant often works away for days on his own and was found to be trustworthy but then he says the trust is broken and finally the trust is 'hard to repair'. This is dealt with rather summarily by Ms Archer who does not tell the claimant what her manager is saying or more accurately her interpretation of what he is saying and simply adds that a breakdown of trust and confidence can constitute gross misconduct without any exploration of the evidence. The disciplinary meeting, leaving aside the announcement of the decision, took only 24 minutes and the notes show that the issues were not fully or fairly explored particularly the significant issue of the alleged breakdown of trust and confidence. It would be unfortunate if the simple assertion of a belief that trust and confidence has irretrievably broken down was accepted as being sufficient. A reasonable employer would not take such a matter as read except perhaps in the clearest of cases. There was material before Ms Archer…that undermines the assertion and yet it was not engaged with. This finding was crucial to the decisions made by Ms Archer and later Mr Owens.**

26. Having also concluded that the appeal process did not cure the defects identified in the earlier disciplinary process, the Employment Judge found the dismissal to be unfair.

The Employment Tribunal's approach to remedy

27. The focus of the appeal before me was on remedy. The Employment Judge dealt with that issue at paragraphs 115 to 117 of his Reasons in the following way:

> **"115. The first question is the so called 'Polkey' question namely what would have happened if the claimant had been alerted earlier to the stance being taken by his line manager over trust issues. I am of the opinion that it is not certain what Mr Neill would say about the issue of trust or how he would explain that he seems to have trusted the claimant to work unrestricted including working on his own at outstations for some weeks after the incident came to light. The evidence is not satisfactory as Mr Neill did not give evidence nor were the difficulties with his position even put to him. Nevertheless looking at the matter broadly I would expect that there was probably a fifty-fifty chance that Mr Neill would stick to his position that he could not trust the claimant in the future and that the implied term had been irretrievably broken.**
>
> **116. [On t]he issue of contributory fault…[i]t is the employee's conduct which is the proper focus of the Tribunal's attention when considering a reduction under section 123(6) of the ERA. The section requires the Tribunal to consider a reduction where the dismissal was caused or contributed to by the claimant. The claimant was a former Police Officer. He knew the importance of following rules and his own description of events makes clear that he initially refused to drive the car back. He is wholly the author of his own misfortune here. He knew it was a strict rule both from his training, his experience in the role and from the [examiner guidance document]. In addition, he deliberately kept quiet about the matter. His conduct was blameworthy and culpable and led to his dismissal. In my view it would be inequitable to make any compensatory award.**
>
> **117. The Tribunal has a discretion under section 122(2) to reduce or not reduce a basic award because of a claimant's actions before the dismissal if it is just and equitable to do so. It is only in unusual cases that the deductions vary between the basic and compensatory award and I see no reason why the basic award should not be reduced to nil for the same reasons as I have outlined above."**

28. For these reasons, the Judgment of the Employment Tribunal was expressed as:

> **"1 That the claimant was unfairly dismissed from his employment.**
>
> **2. That no monetary award will be made because of his conduct."**

Summary of submissions

Appellant

29. For the Appellant, Ms Churchhouse submitted that the Employment Judge had found that there should be a 100 per cent reduction to the compensatory and basic awards, which failing a 50 per cent **Polkey** reduction.

30. In relation to **Polkey**, (Ground 5) the Judge had erred at para. 115 (i) by incorrectly defining the issue which he required to determine; and (ii) in failing to apply the third stage of the test identified in **Whitehead v. Robertson Partnership** EAT 0333/01 – *viz*: "even if a fair dismissal was a possible outcome, would the employer in fact have dismissed as opposed to imposing some lesser penalty". He had also erred (Ground 6) by (i) in engaging in impermissible speculation about what Mr Neill's response would have been if his position had been challenged; and (ii) in reaching a conclusion about breach of trust which was perverse having regard to the fact that the claimant had worked for around three months after the incident came to light with no suspension and no additional supervision.

31. On the issue of contributory conduct (section 123(6) **ERA**), Ms Churchhouse submitted (Ground 1) that the Judge had erred in wrongly conflating the question of the *employer's reason* for dismissing with the *cause* of the dismissal. To the extent that support for such an approach was found certain observations of Simler J in **British Gas Trading Limited v. Price** EAT 0326/15 at para. 21, those observations were wrong. Where it could be said that, if the employer had acted fairly, a dismissal would not have occurred at all there was, as a matter of law, no room for any contributory deduction because the employee's conduct, however blameworthy it might have been, had neither caused nor contributed to the dismissal.

32. In any event, in making a contributory reduction, the Judge had relied upon factors such as the Appellant's former role as a police officer, his decision to drive the car back to the test centre and his knowledge of the rule against doing so that were not causal in the decision to impose the sanction of dismissal rather than some lesser sanction. That these factors were not causative was clear from what Ms Archer had said in the letter sent by her immediately after the dismissal (para. 45 in the findings in fact).

33. Under Ground 2, Ms Churchhouse submitted that the decision to make a 100 per cent reduction was wrong in law and perverse. If matters which were not causal in the decision to dismiss had been taken into account by the Employment Judge (per Ground 1) then the amount of any deduction could never logically be 100 per cent. Such a conclusion was also inconsistent with the Judge's conclusion on **Polkey**. In making a 50 per cent **Polkey** reduction, the Tribunal had accepted that there was a 50 per cent chance that the Appellant would have remained in employment but for the unfair decision to dismiss him. That was inconsistent with a 100 per cent contributory reduction. In any event, on the facts found by the Tribunal the "rare" or "unusual" step of a 100 per cent reduction was not justified and was perverse (**Lemonious v. Church Commissioners** EAT 0253/12 and **Moreland v. David Newton (t/a Aden Castings)** EAT 435/92).

34. In these circumstances, Ms Churchhouse invited me to set aside part 2 of the Judgment of 23 March 2020 and substitute my own decision.

Respondent

35. In relation to **Polkey**, Dr Gibson submitted that on a fair reading of para. 115 of his Reasons, the Employment Judge had applied his mind to the correct questions and had properly reached the view that a 50 per cent reduction was appropriate on **Polkey** grounds. In reaching that conclusion, it was plain that he must have balanced the terms of the email of 14 February 2019 from Mr Neill

on the one hand with, on the other, the fact that the Appellant had worked for some three months after the incident came to light in early January 2019 without supervision and without any further problems or disciplinary issues.

36. Thereafter, the Judge had turned to look at contributory conduct under section 123(6). Having regard to his finding in fact at para. 81 that the employer's reason for dismissal was "the use of the candidate's vehicle and that matter not being recorded or disclosed", it could not be suggested that the Employment Judge had taken account of irrelevant matters. Both the use of the vehicle and the failure to record or disclose that he had done so had been admitted by the Appellant. In applying section 123(6) it was appropriate only to look at the conduct of the employee and not at that of the employer. The Judge had been correct to conclude that the Appellant had caused or contributed to his dismissal. He had also been correct to conclude that the Appellant was "wholly the author of his own misfortune" and that a reduction of 100 per cent was appropriate.

37. Dr Gibson's primary position was therefore that the appeal should be refused. If I was against him on that, he did not object to me substituting an alternative decision if I felt able to do so on the material contained within the Employment Judge's Reasons.

Analysis and decision

Polkey

38. As Ms Churchhouse correctly noted, when applying **Polkey** in the context of a dismissal for conduct, one element of the three part test described in **Whitehead v. Robertson Partnership** requires a tribunal to consider the question: "even if a fair dismissal was a possible outcome, would the employer in fact have dismissed as opposed to imposing some lesser penalty?". That is consistent with what was said in **Software 2000 v. Andrews** [2007] ICR 825. The task for the tribunal is to identify and consider, on the evidence, what would have happened had there been no unfair

dismissal. That, in turn, requires the tribunal to consider the likelihood (expressed either as a probability or as a chance) that a fair dismissal would nevertheless have resulted. In some cases, a tribunal may be able to conclude, on a balance of probabilities, that the employee would or would not have been dismissed fairly. In other cases, there may be insufficient reliable evidence to enable the tribunal to say whether an employee would, on a balance of probabilities, have been fairly dismissed, but sufficient evidence for it to conclude that there must have been some realistic chance that he would have been.

39. Whilst both parties to this appeal approached matters on the basis that the Employment Judge had made a 50 per cent reduction on **Polkey** grounds, that does not seem to me to be correct. I say that for three cumulative reasons. First, the analysis of **Polkey** at para. 115 of the Judge's Reasons does not address to any extent the issues identified in **Whitehead** and **Software 2000** which are summarised in the preceding paragraph. It would have been essential for the Judge to have addressed those issues in order properly to have made a **Polkey** reduction. Secondly, paragraph 2 of the Judgment does not mention the **Polkey** principle or section 123(1) **ERA** at all. Instead, it states only that no monetary award will be made to the Appellant "because of his conduct". Thirdly, paragraph 115 of the Judge's Reasons makes no reference to any **Polkey** reduction having been made by him.

40. Instead, what the Judge did at para. 115 was to make an assessment – in percentage terms – of the likelihood of a witness, Mr Neill, changing his position in some way. Mr Neill's email of 14 February appears to have formed an important part of Ms Archer's decision to dismiss, albeit that it may not have been the sole factor. Before the Employment Judge could have made any **Polkey** reduction, however, it would have been necessary for him to have considered what would (or might) have happened if Mr Neill's position had been tested and properly scrutinised as it could have been if the Respondent had disclosed it to the Appellant.

41. This raises a further point of difficulty with the Judge's analysis at para. 115. The factual premise from which the Judge appears to have started was that Mr Neill had stated that "he could not trust the [Appellant] in the future and that the implied term had been irretrievably broken". Mr Neil never spoke to the investigating officer, nor did he give evidence either at the disciplinary meeting or at the Tribunal hearing. It follows, therefore, that the sole basis for the conclusion by the Judge as to what Mr Neill said about this issue must be the email of 14 February. On no view of that email, however, could it be read as a statement by Mr Neill that his working relationship with the Appellant had broken down "irretrievably" such that it could never be repaired. Taken at its highest, what Mr Neil actually said in the email was that trust had been broken by the 2 November incident, that he now found it very hard to trust that the Appellant was doing what he should be and that, as a generality, trust is a serious issue which is "hard to repair". It is also important to note that the agreement of Mr Neill and Ms Archer not to suspend the Appellant was "to provide an opportunity for the trust to be repaired". That was consistent only with a belief that trust could be restored. In adding the important word "irretrievably" to his finding as to what Mr Neill said in the email, the Employment Judge erred by reaching a conclusion for which there was no evidence.

Contributory conduct – section 123(6) ERA

42. For two reasons, I do not accept Ms Churchhouse's argument that section 123(6) could not, as a matter of law, be applied in this case.

43. First, I do not accept her submission that the analysis of section 123(6) by Simler J in **British Gas Trading Limited v. Price** was wrong. That analysis was based upon a careful consideration and application of what was said in **Gibson v British Transport Docks Board** [1982] IRLR 228. In **Gibson**, the Employment Tribunal had assessed the extent of contribution to an unfair dismissal at 100 per cent. On appeal it was argued that the conduct of the employee did not cause or contribute

to the dismissal; rather, the dismissal was caused or contributed to by the failure of the employers to follow the necessary and proper procedures. That approach was rejected by the Employment Appeal Tribunal which noted that:

> **"…what has to be shown is that the conduct of the applicant contributed to the dismissal. If the applicant has been guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy, then it is open to the Tribunal to find that the conduct contributed to the dismissal. That is how the section has been uniformly applied." (para. 29)**

44. On the particular facts of **Price**, Simler J rejected a similar argument to that advanced in **Gibson**, stating:

> **"Even if the Respondent's conduct significantly contributed to the dismissal… it is impossible on the Tribunal's findings to conclude that the Claimant's culpable conduct played no part and made no contribution at all. As the Tribunal found, the Claimant did not dispute that she should not have acted as she did and that her conduct amounted to misconduct. At best, there were two causes, each of which contributed to this dismissal to different extents." (para 21)**

45. The analysis in **Price** is entirely consistent both with what was said in **Gibson** and with the way in which section 123(6) **ERA** has uniformly been applied. A reduction for contributory conduct of the employee is not excluded even where it can be said that, if the employer had acted fairly, a dismissal would not have occurred at all. That situation might exclude any **Polkey** reduction under section 123(1) but it would not prevent section 123(6) from being engaged by the presence of blameworthy contributory conduct by an employee which ultimately contributed to the dismissal in the sense described in **Gibson**. Thus, even where an employer's decision to dismiss falls outside the band of reasonable responses, the employee may, by blameworthy conduct, nevertheless be said to have "contributed to" the dismissal in terms of section 123(6).

46. Even if – contrary to the weight of authority – I am wrong about the correct approach to applying section 123(6), my second reason for rejecting Ms Churchhouse's argument on this point is that, as I have already noted above, the Employment Judge did not, in this case, find that if the employer had acted fairly there would have been no dismissal. That was principally because he did not complete his **Polkey** analysis at para. 115. Clearly, if he had completed a **Polkey** analysis, such a conclusion might have been reached by him on a more accurate reading of the 14 February email taken with the finding as to Ms Archer's thought processes at para. 45 and what was said by him at paras. 104-106. I accept, however, that whilst a conclusion of "no dismissal" may have been the most likely one having regard to these factors, it was possibly not the only possible conclusion looking at the evidence as a whole.

47. I also reject the submission by Ms Churchhouse that the factual matters referred to by the Judge at para 116 were wholly irrelevant to the issue of contribution. Rather, I accept Dr Gibson's submission that the conduct of the Appellant which required to be considered under section 123(6) encompassed the whole of the incident on 2 November including the driving of the vehicle by the Appellant and his lack of candour about the fact that he had done so. The matters described at para. 116 were relevant to an assessment of the degree to which the Appellant could be said to be blameworthy and thus to the level of contributory reduction that was appropriate.

48. I do not, however, accept Dr Gibson's submission that fault on the part of the employer is wholly irrelevant to the exercise of the Tribunal's discretion under section 123(6). Once section 123(6) is engaged, the task of determining the appropriate level of contributory reduction frequently becomes, in practical terms, an exercise in apportionment of culpability between the employee and the employer. It follows that, once section 123(6) is engaged, conduct of the employer which caused the dismissal to be unfair frequently becomes relevant in assessing the appropriate percentage reduction. It is clear from the way in which the percentage bands of culpability were defined in

Hollier v. Plysu Limited [1983] IRLR 230 and what was said in **Price** that this involves an apportionment of fault between employee and the employer in relation to the matters which contributed to the dismissal.

49. Turning to Ms Churchhouse's final argument that setting the level of contribution at 100 per cent was perverse, I consider that the Employment Judge's erroneous conclusion about what Mr Neill's email said plainly also coloured his approach to contributory conduct under section 123(6) **ERA**. In particular, once the limits of what Mr Neill actually said in the email of 14 February are properly recognised, it is hard to understand how it could ever be said that the Appellant was "wholly the author of his own misfortune" and thus how a contributory reduction of 100 per cent could ever be appropriate. Other factors which mitigate the appropriate level of reduction include *inter alia* (i) the failure of Ms Archer to disclose to the Appellant at any time prior to the disciplinary meeting the particular allegation of misconduct which ultimately proved to be central to her decision to dismiss him (ii) Ms Archer's own apparent misinterpretation of the email of 14 February; (iii) the importance of that error in Ms Archer's decision to dismiss (per the evidence of Ms Archer recorded by the Employment Judge at paras. 44 and 45); and (iv) the Employment Judge's comments at paras. 104-106 that Ms Archer's conclusion that trust had completely broken down did not sit well with having allowed the Appellant to continue working unsupervised in a responsible position for over two months after the incident came to light.

50. It follows that whilst I have rejected Ms Churchhouse's submission that it was not open to the Judge to make any reduction under section 123(6), I agree with her that the making of a 100 per cent reduction was plainly wrong on the evidence. By extension, the reduction of the basic award by the same percentage under section 122(2) was also wrong.

Disposal

51. Although I have concluded that the Employment Judge erred in finding that there should be no monetary award made for the unfair dismissal of the Appellant, I do not consider that it would be appropriate for me to substitute my view for that of the Employment Judge on the issue of remedy. There was more than one possible conclusion that could properly have been reached by him, and the issues which arise under section 123 **ERA** are pre-eminently matters for the Employment Tribunal.

52. I have concluded that the Employment Judge did not ultimately make a decision as to whether or not a **Polkey** reduction was appropriate. That is an issue which can appropriately be resolved by a remit to the same Employment Judge to enable him to consider and determine that issue, having regard to the observations made in this Judgment. Such consideration should include an evidence-based assessment of what would (or may) have happened if there had been proper consideration of Mr Neill's email at the disciplinary meeting and if the terms of that email had been correctly understood by Ms Archer.

53. The errors which I have found to exist in the application of section 123(6) **ERA** again relate primarily to the erroneous interpretation of the email of 14 February. There were also, however, other aspects of fault on the part of the Respondent which appear not to have been taken into account by the Employment Judge in his consideration of the percentage bands of culpability (per **Hollier v. Plysu Limited** [1983] IRLR 230). All of those issues are relevant to the amount of the appropriate reduction for contributory conduct. They could again be reconsidered by the same Employment Judge on the basis of the observations within this Judgment.

54. In considering these matters, the Employment Judge will, of course, require to bear in mind that although it is always competent to make both a **Polkey** reduction and thereafter a further

reduction under section 123(6) (see **Rao v. Civil Aviation Authority** [1994] ICR 495), if that course is to be taken it is necessary clearly to explain why both deductions are being made and what is the basis for each. Importantly, it is also necessary to avoid any element of double-counting of the same factors in a way which is unfairly detrimental to the Claimant (**Rao**; **Granchester Construction (Eastern) Limited v. Attrill** EAT 0327/12; and **Dee v. Suffolk County Council** EAT 0180/18).

55. I will therefore set aside paragraph 2 of the Tribunal's Judgment of 23 March 2020 and remit the case to the same Employment Tribunal for it to reconsider the appropriate amount of the basic and compensatory awards.