Appeal No. UKEAT/0290/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 6 March 2020

Before

THE HONOURABLE MRS JUSTICE EADY DBE

(SITTING ALONE)

DR RICHARD EVANS — APPELLANT

THE LONDON BOROUGH OF BRENT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR LACHLAN WILSON (of Counsel) INSTRUCTED BY: Edwin Coe LLP 2 Stone Buildings Lincoln's inn London WC 2A 3 TH
For the Respondent	MS JENNIFER THELON (of Counsel) INSTRUCTED BY: London Borough of Brent (Legal Services) The Civic Centre Engineers way Wembley Middlesex HA90FJ

SUMMARY

Employment Tribunal – Practice and Procedure – Striking Out – Unfair Dismissal Claim

Given findings made in related High Court proceedings, the Employment Tribunal ("ET") concluded that the Claimant's unfair dismissal claim had no reasonable prospects of success save on the ground of procedural fairness arising from the Respondent's failure to adjourn the disciplinary hearing. Although it could not, therefore, be said that the entire claim had no reasonable prospect of success, the ET also found that there was no prospect of the Claimant receiving any financial award. Given there could be no declaratory remedy, and considering itself bound by the decision in **Nicolson Highlandwear v Nicolson** [2010] IRLR 860 EAT, the ET therefore concluded that the claim should be struck out. It further considered that it was not in the interests of justice for further substantial judicial time to be spent on this claim or for the Respondent to incur further costs. In the alternative, the ET stated that it would have made Deposit Orders on the question of fairness, save in respect of the procedural issue relating to the failure to adjourn the disciplinary hearing, and on any claim for a basic or compensatory award.
The Claimant appealed.
Held: *allowing the appeal*
The ET had wrongly failed to allow that a finding of unfair dismissal, even absent the possibility of any monetary remedy, could be of value (**Gibb v Maidstone & Tunbridge Wells NHS Trust** 2010 EWCA Civ 678 and **Telephone Information Services Ltd v Wilkinson** [1991] IRLR 148 EAT applied; **Nicolson Highlandwear v Nicolson** departed from). This had also led the ET to err when determining whether it was in the interests of justice for the claim to proceed. The ET having found that there were reasonable prospects of a finding of unfair dismissal on procedural grounds, it could not be said that such a finding would be of no value or that the interests of justice could not require that a Respondent be held to account, even if that could not lead to any financial award for the employee concerned. Other than the procedural unfairness issue it had identified, the ET had been entitled to find that all other parts of the claim of unfair dismissal should be struck out. That did not, however, justify the striking out of the entire claim and to that extent the ET's Judgment would be set aside.

THE HONOURABLE MRS JUSTICE EADY

Introduction

1. At the heart of this appeal is the question, what is the value of a finding of unfair dismissal absent any financial award or other remedy? In this case the Employment Tribunal ("the ET") struck out a claim of unfair dismissal having found that, whilst it could not be said there was no reasonable prospect of a finding in the Claimant's favour on liability, it was clear there was no reasonable prospect of his recovering any compensation, either as a basic or compensatory award. The question is whether the ET thereby erred in law.

2. In giving this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against the reserved Judgment of the Watford ET (Employment Judge R Lewis, sitting alone on 24 April 2019), sent out to the parties on 17 May 2019. Representation before the ET was as it has been today. Both counsel are to be commended for their highly focused submissions on the appeal.

The Factual Background

3. By the time of his dismissal on 2 November 2009, the Claimant had been employed by the Respondent as Deputy Head Teacher of the Copland Community School ("the school") for some 12 years. Between 1988 and 2009, the school's Head Teacher was Mr Alan Davies; Mr Davies has been described as having a domineering personality but had been viewed as having provided strong academic leadership at the school, which had attracted increasing numbers of students during Mr Davies's time in office.

4. In or about April/May 2009, however, another teacher at the school had sent a dossier to the Respondent relating to acts of alleged misconduct and financial mismanagement by members

of the senior management team, including Mr Davies and the Claimant, who were then suspended on 13 May 2009. At the same time, the school's governing body was suspended and replaced with an interim executive board and a formal investigation was commenced.

5. On 30 July 2009, the Claimant, accompanied by his sister, was interviewed as part of an audit review process. On 28 September 2009, he was notified that there would be a gross misconduct enquiry against him and three others. The others resigned before any disciplinary step was undertaken, but the Claimant remained in his employment.

6. On 15 October 2009, the Claimant was told that a disciplinary hearing would take place on 3 November 2009. On 21 October, he received a copy of the investigation report and annexes. That documentation was said to comprise over 800 pages of paperwork.

7. The Claimant applied for a postponement of the disciplinary hearing on two grounds. First, he wanted his sister to accompany him, as she had before, but she would be abroad on 3 November. Second, he did not consider he had been given sufficient time to master the paperwork.

8. The Respondent refused the application for a postponement and a disciplinary hearing proceeded in the Claimant's absence. The decision was taken that the Claimant should be dismissed as he had (relevantly): (1) enjoyed the receipt of bonuses which were unlawful under teachers' standard terms and conditions; (2) allowed, and participated in, the payment of allowances relating to the retirement of another member of staff; and (3) received payments for work managing a construction project that should not have been made or accepted.

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9. Subsequent to this decision, the Claimant lodged his claim of unfair dismissal with the ET. In defending that claim, the Respondent contended that the Claimant's employment had been terminated by reason of his gross misconduct and was fair. Alternatively, if there had been any unfairness there should be a reduction by 100% on **Polkey** grounds (see **Polkey v AE Dayton Services Ltd** [1987] UKHL 8) and/or by way of his contributory conduct. Specifically, the Respondent relied on the Claimant's unconscionable receipt of payments that were unjustified and excessive and that had been unlawful under teachers' standard pay and conditions.

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10. The ET proceedings were initially stayed pending criminal proceedings involving the Claimant and other members of the school staff.

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11. On 3 October 2013, Mr Davies pleaded guilty to six counts of false accounting, but the prosecution offered no evidence on the other charges against him, or on the charges against the Claimant and the other Defendants.

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12. Shortly after the termination of the criminal proceedings, however, the Respondent issued a High Court claim against the Claimant and five others and the ET claim was again stayed pending the determination of the High Court proceedings.

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13. The High Court trial ultimately took place over some six weeks between January and April 2018, with Judgments being issued by Zacaroli J on 17 August and 15 November 2018 (see, relevantly, [2018] EWHC 2214). It was accepted before the ET that the High Court Judgment was binding on the parties and would therefore also bind the ET.

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14. It is unnecessary for me to set out extracts from the High Court Judgment, but the relevant findings relating to the Claimant can be summarised as follows:

(1) The Respondent had made good its case on the allegations it had found proven against the Claimant in the disciplinary proceedings (as summarised above).

(2) The Claimant and Mr Davies had each enjoyed a basic salary at or near the top of the standard pay scale for teachers of their level.

(3) In addition, however, Mr Davies had introduced the payment of bonuses for himself and others, including the Claimant.

(4) The bonuses, which came to represent a significant proportion of annual and/or pensionable pay, had been described in language that was misleading, i.e., as payment for additional responsibilities that were either not real or were simply duties covered by normal basic pay. The Court rejected the Claimant's denial that he had seen memos relating to these payments.

(5) Other payments had been distributed from what was said to have been the salary of a former Deputy Head (a Mr Ali), albeit those payments were made on more than one occasion. Yet, others had been said to be in recognition of work carried out at another school by staff including the Claimant, albeit there was no explanation to why the school was not simply compensated for the time of its employees. Another payment that the Court found "*particularly difficult to justify*" was made to Mr Davies and the Claimant for their role in a potential construction project.

(6) Zacaroli J concluded that the Claimant's knowledge of these payments was such that it was unconscionable for him to retain the benefit of their receipt: he had been aware that, with a few exceptions, the

payments were not revealed to the remuneration committee and, given the sums and the frequency of the payments involved, could not have failed to appreciate that there was "*at least a risk that the payments could not be justified*."

(7) On the finding of the High Court, the Claimant had received over £250,000 in overpayments, albeit that the majority of the Respondent's claim in respect of that sum was time barred and the Judgment against him was therefore limited to £46,091.00, including interest.

The ET's Decision and Reasoning

15. The High Court claim having been determined, the stay was lifted in the ET proceedings and the matter set down for a Preliminary Hearing to determine whether the Claimant's claim should be struck out under Rule 37 Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"), or whether Deposit Orders should be made pursuant to Rule 39.

16. Having heard full submissions by the parties, the ET was clear: there could be no reasonable prospect of the sincerity of the Respondent's belief in the Claimant's misconduct being impugned and, given the findings of the High Court, no reasonable prospect of the ET finding other than that there were reasonable grounds for that belief. The Claimant was not suggesting that the investigation undertaken by the Respondent failed to meet the standard of reasonable enquiry to be applied by the ET and, although the Claimant had sought to argue that his dismissal could be found to fall outside the range of reasonable responses, the ET was "*utterly confident in finding that there is no prospect whatsoever of that happening in this case*."

17. All that said, the ET did not feel able to conclude that there was no reasonable prospect of a finding of unfair dismissal. Procedurally, a question of fairness arose in respect of the short period of time given to the Claimant to master the extensive paperwork served on him in advance of the disciplinary hearing. Further, the Claimant had made a reasonable request to be accompanied by his chosen representative, his sister, and, even if it had been possible for him to find an alternative representative who could get to grips with the documentation in the time available, he had been entitled to seek his first choice of representative. The Respondent would not have suffered any prejudice by a short delay and this one point meant it could not be said that the Claimant's claim of unfair dismissal had no reasonable prospect of success.

18. Accepting that the **Polkey** point (that is, whether a fair process would have made any difference; see **Polkey v AE Dayton Services Limited** [1987] UKHL 8) was also substantively answered by the High Court proceedings - it was inevitable that a fair procedure would have resulted in the Claimant's dismissal - the ET tentatively suggested that it might have taken a minimum of a further two weeks to provide this.

19. Turning then to the question of remedy, given the findings of the High Court the ET was satisfied that there was no prospect of the Claimant recovering any compensation, either as a basic or compensatory award. First, because the Court had found that it had no power to order the Claimant to repay some £200,000.00 to which he had not been entitled and it would not be just and equitable for any ET to make an award to the Claimant in those circumstances. Second, because the ET saw little prospect of contribution reductions of less than 100% for both awards. Third, and either event, the effect of the authority of **Nicolson Highlandwear v Nicolson** [2010] IRLR 860 EAT, was such that, in the absence of a declaratory remedy (which was not available in a claim of unfair dismissal), the Claimant had no prospect of making any recovery on his claim.

20. For all those reasons, the ET duly determined that the Claimant's claim should be struck out, further observing:

> "**89. In the exercise of discretion, I can see no interests of justice in this case proceeding further. These matters have been the subject of litigation for many weeks, in which Dr Evans, through counsel, has had the opportunity to put his case on the substance of these events, albeit not within the framework of unfair dismissal. It is apparent that many of his submissions to the Court were successful. I can see no interests of justice in devoting further substantial judicial resource, or the public funds of Brent, to litigate these events any further."**

21. In the alternative, the ET went on to make clear that, had it not struck out the Claimant's claim, it would have made the continued pursuit of the case subject to Deposit Orders in respect of the three separate points as follows:

> **"91.1 Little reasonable prospect of a finding of unfair dismissal on any ground other than the failure to adjourn the disciplinary hearing;**
>
> **91.2 Little reasonable prospect of receiving any basic award;**
>
> **91.3 Little reasonable prospect of receiving any compensatory award."**

The Appeal and the Parties' Submissions

22. The Claimant has pursued this appeal on a limited basis, on three grounds.

23. First, he contends that the ET took into account an irrelevant factor when postulating that no declaratory relief for an unfair dismissal claim is available under statute. In this regard, the Claimant observes that, were he to succeed on his claim for the purposes of Section 111 of the **Employment Rights Act 1996** ("the ERA"), he would be entitled to a finding to that effect under Section 112(1) - a finding that was important in itself, see **Gibb v Maidstone & Tunbridge Wells NHS Trust** [2010] EWCA Civ 678 and **Telephone Information Services Ltd v Wilkinson** [1991] IRLR 148. The Claimant had a right to a Judgment on his statutory claim of unfair dismissal and that was regardless of any separate question to any right to remedy.

24. Second, the Claimant argues that the ET erred in concluding that it was bound by the *obiter* remarks in a Judgment of the EAT in Scotland in **Nicolson Highlandwear v Nicolson**. The ET had thereby wrongly fettered its discretion.

25. Third, given the ET's finding that the Claimant *did* enjoy a reasonable prospect of success - in respect of the procedural unfairness relating to the disciplinary hearing - that was sufficient for the claim to proceed and the ET had erred in finding otherwise.

26. As for the Respondent's suggestion, that regard might relevantly be had to the potential value of the claim whether monetary or otherwise, the Claimant did not accept that a finding of unfair dismissal was without value in his case, but, even if that was correct, submitted that the statute did not provide for a preliminary assessment of the claim as the Respondent sought to suggest.

27. For the Respondent, it is argued, first, that the ET had not erred in rightly acknowledging that there was no formal provision for a declaratory remedy. It had considered what success might look like in this claim and was entitled to make clear that this could not include a formal declaration.

28. Second (and relatedly), the ET had applied **Nicolson** correctly. That case allowed that, when considering the likelihood of success, account could be taken of what a Claimant would get out of the case. In this case, the Claimant could achieve nothing. He could neither receive compensation nor clear his name. In its exercise of discretion under Rule 37, the ET was entitled to take a broad view having regard to all the circumstances of the case, including considerations

of public policy and the interests of justice more generally (see the observations of Stuart-Smith LJ at paragraph 12 **Ashmore v British Coal Corporation** [1990] IRLR 283 CA).

29. Third, as for the potential procedural defect identified by the ET, the ET had permissibly placed relatively little weight on a possible finding of procedural unfairness in this case. It had recognised that the facts were highly unusual, involving conduct that an ET might well find "*troubling and exceptional*." It was entitled to take into account the fact that the Claimant had already had an opportunity to put his case in the High Court proceedings and could neither rely on the ET proceedings to clear his name nor to obtain any financial award. The ET had not erred in concluding that the interests of justice would be served by striking out the claim.

The Relevant Legal Framework

30. The right not to be unfairly dismissed is provided by Section 94 of the **ERA**. Section 98 of the **ERA** then relevantly provides:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it—**
>
> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
>
> **(b) relates to the conduct of the employee…**
>
> **(c) is that the employee was redundant, or**
>
> **(d) is that the employee could not continue to work in the position which he held without contravention… of a duty or restriction imposed by or under an enactment…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**

(b) shall be determined in accordance with equity and the substantial merits of the case."

31. By Section 111 of the **ERA**, it is provided that a complaint of unfair dismissal may be presented to an ET; it is the ET that will carry out the determination of the questions thus identified at Section 98.

32. Section 112 of the **ERA** then provides:

> **"(1)This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.**
>
> **(2)The tribunal shall—**
>
> **(a)explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and**
>
> **(b)ask him whether he wishes the tribunal to make such an order [Section 113 relates to orders for reinstatement and re-engagement].**
>
> **(3)If the complainant expresses such a wish, the tribunal may make an order under section 113.**
>
> **(4)If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126 …) to be paid by the employer to the employee."**

33. When determining the question of fairness for the purposes of Section 98(4), the failure to adopt a reasonable procedure can render an otherwise fair dismissal unfair, even if the ET concludes that following a reasonable procedure would ultimately have led to the same decision; see **Polkey v AE Dayton Services Ltd** [1997] UKHL 8, where Lord Bridge of Harwich explained the point as follows (see p 12):

> **"If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by section [98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section [98(4)] this question is simply irrelevant."**

A dismissal can therefore be found to be unfair on purely procedural grounds.

34. In the present case, the ET allowed for that possibility but concluded that there was no reasonable prospect of the Claimant receiving any financial award as a result. There is no appeal against that finding but the question arises as to whether the ET erred in then proceeding to strike out the claim in its entirety.

35. In **Telephone Information Services Ltd v Wilkinson** [1991] IRLR 148, the employer had asked for the Claimant's claim to be struck out because he had been offered the maximum sum that the (then Industrial) Tribunal could award. The Tribunal refused to strike out the claim and, on the employer's appeal, the EAT upheld that decision. Tucker J, sitting with lay members in that case, explained the EAT's reasoning as follows:

> **"21 In our judgement, the respondent has a right … to have his claim decided by the Industrial Tribunal. His claim is not simply for a monetary award; it is a claim that he was unfairly dismissed. He is entitled to have a finding on that matter, and to maintain his claim to the Tribunal for that purpose. He cannot be prevented from exercising this right by an offer to meet only the monetary part of the claim. If he could be so prevented, any employer would be able to evade the provisions of the Act by offering to pay the maximum amount of compensation. If the appellants in the instant case wish to compromise the claim, it is open to them to do so by admitting it in full – they cannot do so by conceding only part of it.**
>
> **22 The view that we have reached is consistent with the decision in *Polkey v A E Dayton Services Ltd* … . Counsel for the appellants accepts on the basis of that authority that there may be cases in which the Tribunal finds a dismissal is unfair, but that no compensation is payable in respect of it. He argues that in such a case the Tribunal does not grant declaratory relief, and that the applicant brings his case to obtain compensation, but does not get any. …**
>
> **23 It follows that we agree with the decision reached by the Tribunal in refusing the application to strike out the applicant's claim. In our view nothing has occurred which causes the originating application to be frivolous or vexatious. That application was not made for the purpose of obtaining declaratory relief. It was made for the two-fold purpose of wanting the Tribunal to decide whether the applicant had been unfairly dismissed, and if so, obtaining compensation for it. Since the appellants have been unwilling to concede the basis of the claim, the respondent cannot be criticised for pursuing it, and for asking the Tribunal to decide it. …."**

36. That reasoning received approval in a rather different context, in the Court of Appeal's decision in **Gibb v Maidstone & Tunbridge NHS Trust** 2010 EWCA Civ 678. In upholding Ms Gibb's appeal against a High Court Judgment dismissing her claim for monies she said were due to her under a settlement agreement, Laws LJ observed (see paragraph 19):

> **"An unfair dismissal claim is not in all respects to be equated with a common law action which a Defendant can simply choose to settle by a monetary offer."**

Citing, with approval, **Telephone Information Services Ltd v Wilkinson**, Laws LJ further noted, relevant to Ms Gibbs claim:

> **"On all the facts it must, at the least, be highly problematic to suppose that the Trust might have been prepared not only to offer the maximum amount recoverable through tribunal proceedings but also to admit that the Appellant's dismissal was unfair."**

37. The Court of Appeal's Reserved Judgment in **Gibb** was handed down on 23 June 2010. On the same day the EAT in Scotland (Lady Smith sitting alone) gave Judgment in the case of **Nicolson Highlandwear v Nicolson** [2010] IRLR 859, allowing an appeal against an ET's refusal to make a costs award against the Claimant, in circumstances in which he was seeking to pursue a claim of unfair dismissal when he knew that he had been dismissed on grounds of dishonesty that were well-founded.

38. In **Nicolson**, Lady Smith did not have benefit of submissions from professional representatives from both sides as the Claimant appeared in person and - unlike the Court of Appeal in **Gibb** - she was not taken to the EAT Judgment in **Telephone Information Services**. In finding that the ET had erred in its exercise of discretion by refusing to make a costs award, Lady Smith included the following observation:

> **"39. …the Employment Judge was wrong to approach matters on the basis that it is open to a claimant to pursue an unfair dismissal claim purely for the purpose of obtaining a declaration that he was unfairly dismissed (not that that was what, according to the Claimant's ET1, he did seek). It may be that she had in mind that where a claimant alleges discrimination, there is provision in the relevant legislation for declaratory orders to be made. However, so far as unfair dismissal is concerned, there is nothing in the relevant provisions of the Employment Rights Act 1996 (sections 94, 98, 111, 112, 113, 114, 115, 116, 118, 119, and 123) to suggest that the obtaining of a declaratory order is a remedy that can be sought in an unfair dismissal claim. There are but three possible objectives in such a claim and they are reflected in three options that are available to a claimant in box 5.7 of the form ET1."**

39. In the EAT case **Mindimaxnox LLP v Gover** UKEAT/0225/10, His Honour Judge Mullen QC (sitting alone) had to determine whether the ET had erred in refusing to stay the

proceedings pending the determination of a High Court claim. Although allowing the employer's appeal, HHJ Mullen QC also recognised the importance of a finding of unfair dismissal even absent any monetary award, observing *obiter*:

> **"16. The Claimants wish the security of a declaration in their favour of unfair dismissal, a finding which I do not underestimate in any way, notwithstanding that in many cases it may be accompanied by modest compensation or even no compensation. A declaration a tribunal is empowered to give for unfair dismissal is valuable in its own right."**

40. Subsequently, in **Davies v Cornwall Council** UKEAT/0052/13, reference was made to the cases I have cited above but His Honour Judge Burke QC (sitting with lay members) did not consider it necessary to resolve any apparent conflict between them.

41. In the present case, the ET was concerned with the question whether the Claimant's unfair dismissal claim should be struck out or a deposit ordered. The power to strike out is afforded to ETs by Rule 37 of the **ET Rules**, which relevantly provides:

> **"Striking out**
>
> **37. (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**
>
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success…"**

42. In the alternative, the ET concluded that, if the Claimant's unfair dismissal claim was not to be struck out, a Deposit Order should be made. The power to make a Deposit Order is provided by Rule 39 of the **ET Rules**. For reasons I explain below, however, it is unnecessary for me spend further time on that provision.

43. Returning to the ET's primary finding that the claim should be struck out, it is common ground that Rule 37 affords the ET a discretion in this regard, such that its decision can only be challenged if the ET has misdirected itself in law, failed to have regard to that which was relevant

or took into account that which was irrelevant, or came to a conclusion that is properly to be described as perverse.

44. For the Claimant, it is urged that the ET erred in failing to recognise his right to have a determination of his claim of unfair dismissal. The Respondent counters, however, that there is no absolute right in this regard, noting the observation of Stuart-Smith LJ in **Ashmore v British Coal Corporation** [1990] IRLR 283, at paragraph 12 of that authority:

> **"A litigant has a right to have his case litigated provided it is not frivolous, vexatious or an abuse of the process. What may constitute such conduct must depend on all the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material. In Hunter v Chief Constable of The West Midlands Police & Ors [1982] AC 529 at page 536, Lord Diplock with whose speech the rest of the House agreed said:**
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> > **"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.""**

Discussion and Conclusions

45. The ET was concerned with the question whether the Claimant's claim of unfair dismissal should be struck out on the basis that it had no reasonable prospect of success. It had the power to make such an Order under Rule 37 of the **ET Rules**, in respect of all or part of the claim. Notwithstanding its acceptance of the relevance of the High Court Judgment - finding that that would be determinative of the substantive aspects of the claim - the ET was unable to say that the Claimant had no reasonable prospect of a finding of unfair dismissal. Given the issue of procedural fairness the ET had identified, there was a prospect that the Claimant's dismissal would be found to be unfair, although there was no prospect whatsoever that he would receive any monetary award.

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46. In recognising the possibility of a finding of unfair dismissal on this basis, the ET was acknowledging the importance of procedural fairness inherent in a claim of unfair dismissal. The fact that the ET might conclude that a fair procedure would have made no difference would not detract from that finding. The ET considered that it was, however, relevant that the **ERA** made no separate provision for a declaration as a remedy in unfair dismissal claims, contrasting this with the language of Section 124 of the **Equality Act 2010**, which provides (so far as relevant) as follows:

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> **"124 Remedies: general**
>
> **(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).**
>
> **(2) The tribunal may—**
>
> **(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate…"**

D

47. I am not, however, persuaded that this is a particularly helpful distinction. A declaration in either context will simply amount to a judicial statement that the employer has violated the employee's rights. In discrimination claims that may, however, be rather more complex than in other claims in the employment field, and that may explain the particular language used by Section 124 **Equality Act 2010**. Certainly, in **Mindimaxnox**, HHJ Mullen QC did not draw a distinction between a *finding* of unfair dismissal and a *declaration*. In any event, as Ms Thelen fairly acknowledged in her submissions, a mere finding of unfair dismissal can have value, as was recognised in **Telephone Information Services** and in **Gibb**. And, to this extent, I would respectfully disagree with Lady Smith in **Nicolson** – a decision reached without reference to the earlier authority of **Telephone Information Services** and apparently giving no weight to the possible finding that an ET might make upon determining a complaint of unfair dismissal under Section 98 of the **ERA**.

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48. That said, I agree with Ms Thelen that this need not necessarily be the end of the matter. Although Mr Wilson emphasises his client's right to a determination of his unfair dismissal claim, the fact that a finding of unfair dismissal remains a possibility cannot amount to a trump card on any consideration of the ET's power to strike out a claim. Although I consider it took a wrong turn in its reliance on **Nicolson** and its reference to the absence of any declaratory remedy, I accept that the ET still retained a discretion in this regard. The Claimant's right to have his claim determined would not outweigh the wider interest in ensuring cases do not proceed where it would amount to an abuse of process for them to do so; see **Ashmore**. With that in mind, I therefore return to the ET's decision to see how it explained the exercise of its discretion in this case.

49. There is no challenge to the ET's finding that the Claimant "*has no reasonable prospect of recovering any financial remedy*" (see paragraph 88 of the ET's Judgment), but the Claimant contends that the ET erred in then concluding that he therefore had no reasonable prospect of success "*following the reasoning of **Nicolson***."

50. I agree with the Claimant on this point: following the reasoning of **Nicolson** led the ET into error because it then failed to acknowledge the potential value of a mere finding of unfair dismissal.

51. The ET did not, however, stop there. It went on to find that it was not in the interests of justice for this case to proceed further (see paragraph 89 of the ET's Judgment). To the extent that it considered this was so because there was no interest of justice in devoting "*further substantial judicial resources or the public funds of Brent to litigate these matters further*," it seems to me that the ET lost sight of the impact of its conclusions as to the implications of the

High Court Judgment. Having found that that Judgment would effectively answer the substantive issues raised by the unfair dismissal claim – that is, the reason for dismissal, the question whether there were reasonable grounds for the Respondent's belief, or whether there had been a fair investigation - the ET had identified the remaining issue between the parties to be limited to that of procedural fairness, specifically relating to the failure to adjourn the disciplinary hearing. That being so, it is hard to see why that would require "*substantial judicial resources*" or expenditure on the part of Brent.

52. The ET did, however, also have regard to the fact that the Claimant had already had the opportunity, in the High Court proceedings, to put his case on the substance of the events that had led to his dismissal. As the Respondent observes, this was not a case where the Claimant could hope to clear his name in the ET proceedings, or where he had been denied a fair hearing of his case before an independent judicial body.

53. Although that is so, however, the High Court was not concerned with the question of procedural fairness. Indeed, as the ET recognised, the High Court was not looking at these matters within the framework of a claim of unfair dismissal and that, it seems to me, is an important point. The right not to be unfairly dismissed carries with it a right to be afforded a fair procedure before a decision is taken to end an employee's employment. What that procedure will entail will require the ET to have regard to the employer's size and administrative resources, and all the circumstances of the particular case, and may be informed by reference to the Acas Code on Discipline and Grievance. Absent something more (such as an express finding of bad faith), it is not an abuse of process to pursue a claim of unfair dismissal purely on grounds of procedural unfairness.

54. Ultimately, I do not know what the value of a pure finding of unfair dismissal on the basis postulated by this ET might be for this Claimant. However, having concluded that such a finding was a reasonable possibility, I consider the ET erred by holding that the claim should nevertheless be struck out in its entirety. It cannot be said that such a finding would be of no value, or that the interests of justice cannot require a Respondent to be held to account for a procedural unfairness in reaching a decision to dismiss an employee of some 12 years' service, even if that account cannot lead to any financial award for the employee concerned.

55. I therefore find that the ET in this case erred, not only in the approach it adopted but also in the broader exercise of its discretion. Having found that it could not be said that the Claimant had no reasonable prospect of a finding of unfair dismissal on the procedural grounds set out at paragraph 75 to 81 of its Judgment, the ET was wrong to strike out this claim in its entirety.

56. That said, as is acknowledged by the limited nature of this appeal, my Judgment in this regard does not impact upon the ET's finding that those parts of the Claimant's claim of unfair dismissal that relate to the substantive questions of fairness should be struck out – that is, to such aspects of the claim other than a complaint of procedural unfairness relating to the Respondent's failure to adjourn the disciplinary hearing.

57. I have already referred to the fact that the Claimant did not seek to appeal against the ET's alternative finding that the continued pursuit of his claim would, if not struck out, be subject to Deposit Orders. Once, however, it is accepted that all aspects of the unfair dismissal claim have been struck out other than the question of procedural fairness relating to the failure to adjourn the disciplinary hearing, and it is also accepted - as it must be, given the absence of any appeal on

these points - that there can be no monetary award, I cannot see that the Deposit Orders postulated by the ET at paragraph 91 have any further bite.

58. I therefore allow the appeal. I set aside the ET's strike out of the claim only insofar as it relates to that part of the Claimant's claim of unfair dismissal arising from what is said to be the procedural unfairness due to the failure to adjourn the disciplinary hearing.