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## Civil Team Newsletter

### Introduction

Welcome to the first Civil Team Newsletter. We hope you will find it both informative and interesting. Please feel free to forward it to colleagues. If they wish to be added to our mailing list, they just need to send an email to [clerks@4kbw.co.uk](mailto:clerks@4kbw.co.uk).

Chambers has a wide-based common law experience across many different areas of work. In this month's newsletter, David Sawtell writes about recent changes to *Polkey* reductions in the Employment Tribunal, and John Denniss introduces his recent paper on the new 6<sup>th</sup> edition Ogden Tables. There are also summaries of selected recent case law.

**Our next edition will be circulated in January 2008.**

### Chambers news

The Chambers website, [www.4kbw.co.uk](http://www.4kbw.co.uk), has just been relaunched. The members' profiles have been updated and expanded with links to full CVs, while the civil team area has been revamped. If you want to find out more about our areas of work, then do not hesitate to contact our civil clerks, Sandie and Tom, who will be happy to give you further information.

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## Justyn Turner



### Areas of Practice

After obtaining a first class degree in law from Durham University and upon completing a twelve month pupillage at 4 King's Bench Walk in 2001-02, I accepted an offer of tenancy in October 2002. From that time, I have continued to accept instructions in both criminal and predominantly personal injury civil work.

### Civil Experience

Whilst my civil cases are inevitably less high profile than my criminal practice, I appear in the County Court in all types of general civil actions. Although primarily personal injury based, I act for claimants and defendants in contract, landlord and tenant and tort cases. I have also appeared before High Court Masters in civil hearings.

### Education & Qualifications

|           |   |
|-----------|---|
| 1997-2000 | University of Durham, Hild & Bede College<br>LLB Law: First Class                   |
| 2000-01   | University of Northumbria<br>Very Competent<br><br>Called to the Bar (Inner Temple) |

### Interests

As something of a fan of adrenaline sport, it is not unknown for me to throw myself out of aeroplanes, off bridges or into the sea from cliff tops. I also enjoy clay pigeon shooting, golf and good food and wine.

For more information about Justyn and other members of chambers please visit our new website at:-

[www.4kbw.co.uk](http://www.4kbw.co.uk)



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### [The Ogden Tables 6th Edition](#) [Calculating Damages for Future Loss](#)

The Ogden tables have now been firm friends to personal injury practitioners for several years and have taken a lot of the guesswork out of calculating future loss. There is and has been a sense of unease that the future loss calculations are considerably undervaluing compensation: the base index rate of 2.5% is arguably too low and the reality of disproportionate increases in care costs effects the basis of calculation. It always worries me when an analysis is carried out of the benefits of an annuity (periodical payments/structured settlement) over an Ogden table calculated lump sum, and the factors which had to be taken into consideration of investing in a balanced equity/gilt fund with the gamble of reliance on historical trends for growth.

The Ogden committee have now produced their latest refinements of the actuarial tables for personal injury calculation of future loss. The good news is that most of us are living longer! The bad news is that a more sophisticated and complicated basis for calculating contingencies, other than mortality, has been introduced. I hope that the paper which I have produced will introduce and clarify the changes. While there are exciting changes on the horizon in relation to periodical payments, which may herald their use on a much wider basis, at present, in every day cases, the Ogden calculations leading to the finality of a lump sum award will be with us for a very long time.

**John Denniss**

[Click here to view the Ogden Paper](#)



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## **Polkey revisited: procedural defects and unfair dismissal in the Employment Tribunal**

### **Key points:**

- *If it is more likely than not that the claimant would have been dismissed if there had been a fair procedure, the dismissal will be held to be fair despite procedural failings*
- *If the employer cannot show this on the balance of probabilities, but there is still a chance that the employee would have been dismissed fairly, compensation should be reduced accordingly.*
- *When deciding if or when employment would have ended, the Tribunal must take into account any evidence it can properly rely on, as the process is always going to be 'speculative'*

As the continuous stream of decisions from the Employment Appeal Tribunal shows, the Employment Act 2002 is still causing problems for litigants. Over the last year, the EAT has ruled a number of times on section 98A(2) Employment Rights Act 1996, giving guidance on the approach Tribunals should take when the decision to dismiss is procedurally unfair, but the claimant might have been dismissed even if a fair procedure had been applied. This article aims to survey what principles can be extracted from the case law.

### **Background: Polkey reductions before the EA 2002**

Before the House of Lords decision in *Polkey v A.E. Dayton* [1988] AC 344, the courts applied the 'no difference' principle: if an employer could show that they would have dismissed the employee anyway if they had adopted a fair procedure, the decision to dismiss would be fair despite their procedural failings. *Polkey* made it clear that an unreasonably unfair procedure did render a dismissal unfair, unless a reasonable employer would have decided that it would have made no difference. Instead, the Tribunal was to go on to assess the chance that a fair dismissal would have occurred anyway and then apply a percentage deduction from the total loss accordingly.

### **Section 98A(2) ERA 1996: Polkey eroded**

Section 98A(2), which was brought into force on 1 October 2004, greatly reduced the ambit of the *Polkey* principle by effectively reinstating the 'no difference' rule. The subsection states that:



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*'Subject to subsection (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of section 98(4)(a) [determination of whether a dismissal is fair] as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.'*

#### What is a procedure?

The first difficulty for the EAT was to decide what was caught by section 98A(2). Unfortunately, two conflicting judgments given in ignorance of each other were handed down. That dispute was settled in *Kelly-Madden v Manor Surgery* (EAT/0105/06), which held that 'procedure' extends beyond breach of those procedures or policies that the particular employer had itself adopted, and included general criticism based upon a failure to comply with the procedural standards of a reasonable employer.

#### Applying both section 98A(2) and *Polkey*

In *Software 2000 v Andrews* (EAT/0533/06), the EAT outlined the principles the Tribunal should apply when considering a procedural unfairness case. The claimants in that case were made redundant when their employer went through economic difficulties. The redundancy procedure was applied unfairly in that managers were given no guidance on how to apply the selection criteria, although the claimants' scores themselves fell within the range of responses of a reasonable employer.

The EAT held that the effect of section 98A(2) is that if the employer satisfies the Tribunal on the balance of probabilities that the employee would have been dismissed even had fair procedures been adopted, then the dismissal must be held to be fair. If the chance of such a dismissal fell short of 50%, the Tribunal must find the dismissal unfair but then go on to reduce compensation accordingly in line with *Polkey*.

However, the real difficulty arises when a Tribunal has to make a hypothetical prediction as to what would have happened if there had been no procedural failing, especially if what went wrong was fundamental. The EAT cited the recent Court of Appeal authority of *Scope v Thornett* [2006] EWCA Civ 1600, which held that the Tribunal must wrestle with this difficulty if there is some evidence that supports a decision, "unless the evidence of countervailing factors is so slight that an indefinite continuation of the employment may be held to be an appropriate prediction" (para 37). The process of assessing future loss is necessarily a speculative one.

#### The EAT in *Software 2000* handed down the following principles:

1. In assessing compensation, the Tribunal must use its common sense, experience and sense of justice, and normally has to assess how long the employee would have been employed.



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2. If the employer seeks to contend that the employee would or might have been dismissed even if fair procedures had been followed, it is for them to adduce that evidence, although the Tribunal must have regard to all the evidence when making that assessment.

3. There will be circumstances where the nature of that evidence is so unreliable that the Tribunal takes the view that the exercise of reconstructing what might have been is so uncertain that no sensible prediction can be made properly.

4. This is a matter of judgment for the Tribunal, but in reaching that conclusion, it must direct itself properly.

5. An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative, but must interfere if the Tribunal has not directed itself properly.

6. Even if the employer's section 98A(2) submission fails on the balance of probabilities, it must take into account any evidence it can properly rely on when carrying out a *Polkey* exercise.

7. At this stage, the Tribunal may determine:

- a. That section 98A(2) applies on the balance of probabilities;
- b. That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly;
- c. That employment would have continued, but only for a fixed period; That employment would have continued indefinitely. This last finding should only be reached where the evidence that it might have terminated earlier is so scant it can be ignored.

#### **The difficulty of establishing certainty that employment would have continued indefinitely**

The recent case of *CEX v Mark Lewis* (EAT/0013/07) shows how far the Tribunal must go in rejecting a *Polkey* argument for lack of evidence. *CEX* was a redundancy case where significant procedural failings occurred and the ET ruled that there was a 100% chance that Mr Lewis would have remained working for his employer. The respondents succeeded in their appeal by showing that there was evidence that the claimant might not have been retained. For example, had the employer carried out a fair redundancy process, there would still have been an element of risk that Mr Lewis would not have got the job. The Tribunal could not be certain about the outcome of such a redundancy process. Applying the guidance in *Scope* and *Software 2000*, the Tribunal therefore erred.



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### Conclusion

Section 98A(2) and recent case law on the surviving part of *Polkey* have made it clear that both the claimant and the respondent must carefully consider what would have happened but for the procedural failing. Even if the Claimant can get past section 98A(2), *Polkey* remains a critical consideration when assessing offers to settle. For the respondent, careful case preparation can avoid a finding of unfair dismissal. *Polkey* still has an important role to play when considering the merits of a case.

### DAVID SAWTELL

#### Recent case law highlights

#### White v Greensand Homes Ltd and another [2007] EWCA Civ 643

##### *Withdrawal of pre-action admissions*

The Defendant made a mistaken admission that he had been the designer of a building in pre-action correspondence. He repeated this admission in his defence filed in proceedings. The action pre-dated the new rules in CPR 14 and PD 14. The Court should now have regard to para 7.2 of the PD when considering applications to withdraw admissions made in statements of case, which includes the relative prejudice suffered by each party if the admission is (or is not) withdrawn. Now, CPR r14.1A governs the making of pre-action admissions. However, if the admission was made in pre-action correspondence, was not repeated in its pleadings, and the case did not fall within 14.1A (which itself only applies to admissions made after 6 April 2007), the question for the Court was whether to allow it to be withdrawn in the party's pleaded case would allow an abuse of process of a course likely to obstruct the just disposal of the proceedings. The relative prejudice which would be suffered by each party if the admission was (or was not) withdrawn would usually be a factor. In *Greensand Homes*, the Claimant was barred by the limitation for one cause of action, although he might be able to pursue another against another defendant, the identity of whom he knew about before the relevant pre-action admission. However, the Defendant would have been forced to fight on a wholly artificial basis, namely that it was the designer when it was not. It was held that the Judge did not examine critically the prejudice alleged, and the appeal was allowed.



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### [Ellis v Bristol City Council \[2007\] EWCA Civ 685](#)

*Correct test to be applied to the construction of safety regulations in conjunction with the Code of Practice*

There are two important aspects to this case: the correct use of Codes of Practice that give guidance to employers as to how to comply with their duties under statutory regulations; and the correct construction of Regulation 12 of the Workplace (Health, Safety and Welfare) Regulations 1992. The Claimant was injured when she slipped in a pool of urine on the main corridor of Gleeson House, a home for the elderly and mentally infirm run by the Defendant, which had been left by one of the residents. The urine was lying on a smooth floor which had previously caused accidents. Regulation 12 provides for every floor to be "of a construction... suitable for the purpose for which it is used". The Claimant alleged that a non-slip floor should have been installed. The Judge held that the regulation related to the construction of the floor surface, and not a transient hazard, ignoring the Approved Code of Practice issued by the Health and Safety Commission. The Court ruled that he was wrong to ignore the Code as an aid to construction, even though it was not pleaded or put to the Defendant's witnesses. Such a Code might be wrong, and does not carry the authority of a decision of the courts, but was appropriate to be considered here. Furthermore, Regulations 12(1) and (2) do require the Court to consider suitability in the context of the circumstances of use, including temporary ones.

### [Howell and others v Lee-Millais](#)

*Apparent bias when judge has had personal dealings with firm of solicitors*

Rather than delving closely into the facts of this unusual case, this is a re-statement of the principles of bias that occasionally appear. Briefly, there were lengthy discussions between the judge and Addleshaw Goddard about the possibility of the judge joining the firm; the judge showed "considerable disappointment" at the fruitless outcome of this dialogue. Shortly after this, Addleshaw Goddard were later involved in a hotly contested application before the Judge, despite leading counsel's representations that he should recuse himself. The Court of Appeal held that the judge gave evidence in the course of counsel's submissions. The principles in *AWG Group v Morrison* [2006] 1 WLR 1163 were applied. The test to be applied is that of a fair-minded and informed observer with knowledge of the relevant circumstances, deciding whether there is a real possibility of bias. If there is ground for doubt, that doubt should be resolved in favour of recusal. The disqualification of a judge from hearing a case on grounds of apparent bias is not a discretionary case management decision reached by weighing various relevant factors, such as inconvenience, costs or delay; either there is a real possibility of bias or there is not.



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### [National Westminster Bank plc v Rabobank Nederland \[2007\] EWHC 1742](#)

#### *Criteria to be applied when considering whether to award costs on indemnity basis*

This case distils the case law on the discretion to award costs on an indemnity basis, as opposed to the usual standard basis. In a substantial commercial case, the Court dismissed the Defendant's counterclaim. The Defendant had alleged a structure of corporate fraud involving a number of the Claimant's senior officials. CPR 44.4, which gives the Court jurisdiction to award costs on an indemnity basis, does not lay down factors to be taken into account. However, subsequent case law has made it clear that a lack of moral probity or conduct deserving moral condemnation is not the appropriate criteria. In some cases, an order can be made without any implicit expression of disapproval of the way in which the paying party conducted the litigation. The frontier to be crossed before an order of indemnity costs is justifiable is conduct of the litigation in a manner which is, at least to some extent, unreasonable, going beyond that which could be categorised as merely wrong or misguided with the benefit of hindsight, and which is out of the norm. Where a claim is speculative or opportunistic, the pursuing party is taking a high risk and can expect to pay indemnity costs if it fails. Presenting a constantly changing case only to suffer defeat can take a case out of the norm.

### [Marcan Shipping \(London\) v George Kefalas and another \[2007\] EWCA Civ 463](#)

#### *Approach to be taken by parties when conditions of an unless order are met*

Unless orders are one of the most powerful weapons in the court's case management armoury. The Court of Appeal described their venerable history, stretching from the nineteenth century, and noted that in the event of default the order operated without further intervention by the court. Subsequent case law has blurred the distinction between the operation of this sanction and the exercise of the court's discretion to grant relief, but it has not been lost. In fact, paragraph 1.9 of Practice Direction 3 directs that where an order states "will be struck out or dismissed" the striking out or dismissal will be automatic and that no further order of the court is required. Three consequences follow. Firstly, it is unnecessary to apply to the court for the sanction to be 'activated'; if an application to enter judgment is made under r3.5(5), the court's function is limited to deciding what order should properly be made to reflect the sanction which has already taken effect. Secondly, the party in default must apply for relief from the sanction under r3.8 if he wishes to escape its consequences; although the court can act of its own motion, it is under no duty to do so. Finally, before making conditional orders, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case.



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### [Hanifa Dobson et al v Thames Water Utilities Limited](#) [\[2007\] EWHC 2021](#)

*Action for nuisance, negligence and damages under the Human Rights Act against a statutory undertaker where a statutory scheme for enforcement of statutory duty exists*

This is a decision on preliminary issues arising out of an action by multiple claimants against Thames Water, complaining about odours and mosquitoes emanating from the Mogden Sewage Treatment Works in Isleworth, Middlesex. There were three issues: the liability of a statutory undertaker after the decision in *Marcic v Thames Water Utilities Ltd* [2004] AC 42, which Thames Water relied on to submit that no common law remedy or remedy under the Human Rights Act lies where failures of its duties under the Water Industry Act 1991 are relied on, as they are enforceable only by the statutory scheme in the Act; issues relating to damages; and issues relating to limitation periods. With regards the first issue, it was held that an action in nuisance alone cannot lie when it is caught by the statutory duty, as the claimants are simply trying to enforce the statute in a way that the statute itself precludes. The Court cannot take a policy decision on the allocation of resources away from the statutory regulator, OFWAT. However, if the nuisance is based upon negligence by the statutory undertaker, the claimants were not precluded from bringing a claim in nuisance involving allegations of negligence where, as a matter of fact and degree, the exercise of adjudicating on that cause of action is not inconsistent and does not involve conflicts with the statutory process: in effect, the Court can rule on an operational matter, such as whether an allegation that a filter should be cleaned, but not on policy matters, such as whether enough sewers have been provided, which is a matter for the regulator. The Court left open the question of whether there would be circumstances where a claimant without a legal right to occupy may have a right to a separate remedy under the Human Rights Act.



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Jackie Bond  
Kemi Ojutiku  
Tamala McGee  
Susan Monaghan  
Amanda Millmore  
Nadia Chbat  
Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell

#### Principal Clerk

Lee Cook

#### **Douglas Bee v Carl Jenson [2007] EWCA Civ 923**

*Recoverability of damages for hiring a replacement vehicle while claimant's car is being repaired where insurance company has been given commercial inducements to use a particular hire company*

Although this Court of Appeal case settles a relatively minor point, it usefully rehearses and applies the principles of recoverability of hire charges that have been applied in a number of cases. While Mr Bee's car was being repaired, he took advantage of the replacement hire car scheme in his insurance policy. The costs of this hire were brought in a subrogated claim. It was accepted that it was reasonable for Mr Bee to hire a replacement car, that the car which he hired was a reasonable replacement for his own car, and the trial Judge found that the rate was good value for money compared with other spot rates. This finding was not appealed. However, Mr Bee's insurance company received commercial inducements to use that particular hire company. Mr Jenson's insurance company argued that the commercial inducement should be credited against the claim for hire charges, saying that the claimant or his insurance company should only recover what they 'truly' paid. This argument was rejected by the Court. Mr Bee was entitled to recover damages for the loss of his use of his car. As Lord Scott noted in his (albeit dissenting) speech in *Lagden v O'Connor* [2003] UKHL 64 (para 76), the claim could be regarded as either a special damages claim or a general damages claim. Where the claimant, such as Mr Bee, did not himself pay for the hire vehicle himself because he was fully indemnified, the Court found that his general damages claim should be assessed by reference to the spot hire charge for a comparable vehicle. The defendant is protected by the requirement that the claimant can recover no more than the reasonable cost of hiring the necessary replacement.

#### **Corus UK Ltd v A. M. Mainwaring (EAT/0053/07)**

*Employment law; range of reasonable responses in carrying out investigation, triggered by an anonymous tip-off, as consequence of which the employee was dismissed for exaggerating back complaint which prevented him from working*

The claimant was a long standing employee of Corus. He went off sick for protracted periods because of his back condition. He was assessed by the company occupational health advisor, a GP, who assessed him as not fit for work. However, the company received an anonymous tip-off from that he was doing things inconsistent with being genuinely off work for back problems. No statement was obtained from this source; instead, Corus filmed the claimant on three occasions, and asked their OHA to advise. He reported that the tasks the claimant was doing on the film was inconsistent with what he was told. The claimant was dismissed for dishonesty. There was an appeal, which having considered a letter from the claimant's GP, upheld the decision to dismiss. The Employment Tribunal decided that the claimant had been unfairly dismissed as the tip-off source was not questioned, the employer did not ask the claimant for permission to obtain a report from his own GP, and that it was outside the range of reasonable responses to rely on a GP and not a specialist back doctor. Corus appealed. The EAT held that the ET had erred in finding that Corus stepped outside the range of reasonable responses by failing to obtain a statement from the informant, as his tip-off did not play a part in the decision to dismiss. The Tribunal overlooked the letters from the claimant's GPs. With regard to the criticism that a specialist had not been instructed, the EAT held that it could not be said that no employer could be said to be acting reasonably if he did not obtain a consultant's report when he had sought and obtained the advice of an independent occupational health physician.