Neutral Citation Number: [2009] EWCA Civ 1202

Case No: A2/2008/2827/ETRF
AND A2/2008/2827(A)/FC3

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE UNDERHILL sitting with Lay Members, Mr P Gammon MBE and Mr R Lyons
UKEAT/0606/07/RN UKEAT/0037/08/RN UKEAT/0041/08/RN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2009

Before :

LADY JUSTICE SMITH
LORD JUSTICE RIMER
and
LORD JUSTICE ELIAS

Between:

BALBINDER SINGH CHAGGER	**Appellant**
- and -	
ABBEY NATIONAL PLC & Anor.	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr JOHN BOWERS QC and Ms JOANNA HEAL (instructed by **Winckworth Sherwood**) for the **Appellant**
Mr CHRISTOPHER JEANS QC and Mr MARK SUTTON (instructed by **DLA Piper UK LLP**) for the **Respondent**

Hearing dates: 7 and 8 JULY 2009

Judgment
As Approved by the Court

LORD JUSTICE ELIAS : This is a Judgment of the Court.

1. The appellant, Mr Chagger, was employed by Abbey National PLC ("Abbey") from November 2001 until his dismissal for redundancy with effect from 18 April 2006. He presented a complaint to the Employment Tribunal alleging unfair dismissal, race discrimination, and breach of contract.

2. The Employment Tribunal found that all the claims were established against Abbey. The Tribunal also found that the second respondent, Mr Hopkins, was liable for race discrimination with respect to the dismissal. The parties were notified of that decision on 15 December 2006. Brief oral reasons were given at that stage but regrettably no formal judgment or reasons were promulgated until 23 August 2007.

3. For various reasons the remedies hearing was not completed until late August 2007 and judgment, with reasons, was sent to the parties on 8 November 2007.

4. The outcome was that the appellant was awarded compensation amounting to £2,794,962.27 (plus interest). This figure was essentially calculated on the premise that Mr Chagger would never again be able to obtain employment in his chosen field in the financial services industry. It included compensation for refusal to comply with an order for reinstatement following the unfair dismissal finding, and compensation for injured feelings. It also included a 2% uplift in accordance with section 31 of the Employment Act 2002. Section 31(3) provides that a tribunal must order an uplift in compensation of between 10% and 50% where there has been a failure to comply with the relevant disputes procedures laid down by that Act. There is, however, an exception in section 31(4) which entitles a tribunal to award no increase or a lesser increase "if there are exceptional circumstances which would make…an increase of that percentage unjust or inequitable." The Tribunal held that the amount of the award constituted an exceptional circumstance and that it would be inequitable to impose even the 10% uplift, given the consequences.

5. Abbey appealed both the liability and aspects of the remedies decisions, and Mr Chagger cross-appealed that aspect of the remedies decision which had limited the uplift to 2%. He contended that it should have been significantly more than that, and at the very least the minimum 10% laid down by the legislation.

6. The appeal was heard by the Employment Appeal Tribunal (Underhill P, Mr P Gammon MBE and Mr R Lyons) ("the EAT"). They rejected in its entirety the appeal on liability, but upheld aspects of Abbey's appeal on remedy and dismissed Mr Chagger's cross-appeal on the uplift. They remitted the matter to the same Tribunal to re-assess the amount of compensation in the light of their conclusions.

7. Mr Chagger now appeals that decision insofar as it relates to remedies. Save with regard to the uplift, he seeks to restore the judgment of the Employment Tribunal. Part of his appeal is directed at the EAT's rejection of his cross- appeal. He submits that the Employment Tribunal was not entitled to limit the uplift to 2%.

8. Abbey, for their part, no longer seek to challenge the Tribunal's finding on liability. They contend that the EAT was correct in its analysis of the disputed issues on remedy, and the only question which they now pursue is whether the matter should have been remitted to the same Tribunal. They contend that fairness, and more

particularly the perception of fairness, requires that the re-assessment of compensation should now be determined by a fresh tribunal.

The relevant law

9. Section 54 of the Race Relations Act 1976 ("the 1976 Act") provides that a person may make a complaint that an act of racial discrimination has been committed against him by an employer.

10. Sections 56 and 57 of the 1976 Act deal with remedy. They provide so far as material:

> "56. (1) Where an [employment tribunal] finds that a complaint presented to it under s. 54 is well-founded, the tribunal shall make such of the following as it considers just and equitable -
>
> ...(b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a county court or [in Scotland] by a sheriff court to pay to the complainant if the complainant had fallen to be dealt with under s. 57.
>
> 57. (1) A claim by any person ('the claimant') that another person ('the respondent') -
>
> (a) has committed an act of discrimination against the claimant …
>
> (b) … may be made the subject of civil proceedings in like manner as any other claim in tort or (in Scotland) in reparation for breach of statutory duty …
>
> (4) For the avoidance of doubt it is hereby declared that damage in respect of an unlawful act of discrimination may include compensation for injury to feelings whether or not they include compensation under any other head."

11. The starting point, therefore, is that race discrimination is treated as akin to a tort and compensation has to be assessed on tort principles. In accordance with those principles, the measure of damages is the loss flowing from the unlawful act. The classic formulation of the underlying principle is by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25, at p. 29, where he said:

> "… Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

12. Furthermore, the loss must flow "directly and naturally" from the tort. There is no requirement that the loss should be reasonably foreseeable. This was confirmed by

the Court of Appeal in *Essa v Laing Ltd* [2004] IRLR 313 where Pill LJ observed (para 37):-

> "I see no need to superimpose the requirement or prerequisite of reasonable foreseeability upon the statutory tort in order to achieve the balance of interests which the law of tort requires. It is sufficient if the damage flows directly and naturally from the wrong. While there is force in the submission that, to prevent multiplicity of claims and frivolous claims, a control mechanism beyond that of causation is needed, reliance upon the good sense of employment tribunals in finding the facts and reaching conclusions on them is a sufficient control mechanism, in my view. As a mechanism for protecting a defendant against damages which, on policy grounds, may appear too remote, a further control by way of a reasonable foreseeability test is neither appropriate nor necessary in present circumstances."

13. In the same case, Clarke LJ, as he then was, recognised that damages might be limited by the possibility of a break in causation or the failure of the claimant to mitigate his loss (para 53):

> "In all the circumstances we agree with Pill LJ that there is no need to add a further requirement of reasonable foreseeability and that the robust good sense of employment tribunals can be relied upon to ensure that compensation is awarded only where there really is a causal link between the act of discrimination and the injury alleged. No such compensation will of course be payable where there has been a break in the chain of causation or where the claimant has failed to take reasonable steps to mitigate his loss."

The facts

14. Given that the question of liability is no longer in issue, the background relevant to the matters now in dispute can be briefly summarised. Mr Chagger was a qualified chartered accountant and was employed as a trading risk controller with Abbey. He was chosen for dismissal following a redundancy selection exercise. There was one other trading risk controller, namely Katerina Mastronikola. They constituted a pool of two from which one employee was to be made redundant.

15. The selection was made by Mr Hopkins. He ostensibly adopted an objective system using a selection matrix. This involved giving marks for certain qualities. He gave Ms Mastronikola, a white woman, maximum points but Mr Chagger, an Asian of Indian extraction, scored two points fewer.

16. The Tribunal found that Mr Hopkins had been influenced by the fact that Mr Chagger was an Asian and therefore the decision was on racial grounds.

17. In assessing compensation, the Tribunal identified three adverse consequences which flowed from the race discrimination. The first was the dismissal of the appellant. The other two consequences were the dismissal of the grievance which Mr Chagger had lodged against his dismissal, and the failure to pay him a proper bonus. The last detriment was successfully pursued as a breach of contract claim. Finally, the Tribunal also found that Mr Chagger was automatically unfairly dismissed because of a complete failure by Abbey to comply with the statutory dismissal procedures set out

in Schedule 2 to the Employment Act 2002. It was this finding that caused them to uplift the compensation by 2%. In this appeal, we are concerned principally with the award of damages flowing from the discriminatory dismissal. More specifically, we are concerned with the assessment of future loss and the statutory uplift.

The remedies decision

18. Initially, Mr Chagger had limited his claim for future loss of earnings flowing from the discriminatory dismissal to a little under £300,000. This was based on the premise that a reasonable period over which to assess future loss would be 24 months. Subsequently, however, he changed his position and submitted a fresh schedule of loss claiming that the consequence of his discriminatory dismissal was that he had lost the ability to pursue his career. He assessed that loss at some £4,000,000.

19. The rationale for this change of position was the experience which Mr Chagger had when seeking to mitigate his loss. The Tribunal made extensive findings about that. He said he had applied for 111 roles and had been considered for even more than that. They were not limited to the market risk control field in which he had operated, and some were of a lower status than his Abbey job. He had made applications to Abbey itself, and had been unsuccessful. He had offered to work on a voluntary basis in a number of their departments in order to increase his employability. He had used a large number of recruitment agents, up to about 26 in all, but all his attempts to mitigate failed.

20. In July 2007, he was given a place to do a post-graduate certificate in education to train to become a teacher in mathematics. He accepted that offer, although he continued to seek to mitigate his loss whilst undergoing that course, but still without success.

21. Mr Chagger identified a number of particular difficulties which he felt were damaging his prospects in the job market. Four matters in particular were identified: first, the stigma attached to him for taking legal proceedings against an employer; second, the issue surrounding his departure; third, the length of time for which he was unemployed; and fourth, the fact that for someone with his experience, the roles which he was seeking would generally be filled by internal promotion rather than external recruitment.

22. As far as the stigma contention is concerned, he identified and gave evidence about four specific companies which he believed had refused him employment at least in part because he had taken proceedings against Abbey.

23. The Tribunal were plainly very impressed with his attempts to mitigate. They concluded as follows (para 34):

> "So far as the claimant's search for employment within the financial field was concerned, the extent of the claimant's job search and the extent to which he had documented and addressed his attempts to mitigate his loss were the most thorough, extensive and well-documented any member of the tribunal could recall ever having seen."

The hearing before the Employment Tribunal

24. Abbey contended that this approach to future loss was wholly misconceived. The question was what loss had resulted from the discriminatory dismissal. The first error in Mr Chagger's approach was that the loss had to be assessed by asking what would have happened had there been no discrimination. In this case it was plain that Mr Chagger would have been dismissed by Abbey in any event. The company's redundancy selection procedures required that if there were a tie in the application of the selection matrix then the individual with the greater absence record over the previous year would be dismissed. Since Ms Mastronikola had maximum points, the best that Mr Chagger could have achieved was to have been ranked equally with her. But even if he had been, he would nonetheless have had to be dismissed in accordance with the absence criterion. Alternatively, Abbey submitted that even if this argument were unsustainable, there was plainly a very significant chance that Mr Chagger would have been selected for dismissal even had there been no act of discrimination, and that chance had to be assessed and taken into account in fixing compensation.

25. This argument was identified before the Tribunal as the *Polkey* argument; this is because a similar principle applies in cases of unfair dismissal. The House of Lords held in *Polkey v A E Dayton Services Ltd* [1988] AC 344 that where a dismissal is unfair for procedural reasons, it is not rendered fair merely because the dismissal would probably have occurred in any event even if proper procedures had been adopted. The dismissal remains unfair but the compensation is calculated by reference to the extent of the chance that the employee would have remained in his job had proper procedures been adopted. If dismissal was a certainty, there is no loss.

26. Mr Chagger contended that the *Polkey* principle was inapplicable. He submitted that, once it was established that race played a significant part in the decision to dismiss, it was not open to the Tribunal to ask what would have occurred had there been no discrimination. That would fail to give effect to the well established principle, reflecting a mandatory requirement of EU law, that an employee should be compensated for the full loss flowing from the unlawful act, which in this case was the discriminatory dismissal.

27. In any event, it was not true that Mr Chagger would necessarily have been dismissed even had there been no discrimination. The effect of the discriminatory conduct was not merely to mark Mr Chagger down, but also to mark Ms Mastronikola up. So it could not be assumed that the tie break would necessarily have come into play had there been no discrimination. There was also, at least before us, some dispute as to whether the Abbey had properly identified the tie break.

28. (An additional argument raised in the original claim was that the unlawful discrimination did not simply taint the actual selection for redundancy, but also the earlier decision to select an employee from amongst the risk controllers. It was said that Mr Chagger had been targeted for dismissal from the very beginning; the pool itself was always a sham. There was some argument below as to whether this constituted an additional reason why it could not be said that dismissal would have occurred even had no discrimination taken place. However, Mr Bowers QC, counsel for Mr Chagger, properly accepted that the issue had never in fact been argued before the Employment Tribunal, and could not be raised now. Accordingly we need say no more about it.)

29. The Tribunal accepted that the *Polkey* point, as they had called it, was not available to the employers. They said this:

> "Weighing those arguments the Tribunal accepted the submission of the Claimant. On the basis of the Tribunal's earlier findings there was no doubt that the acts of discrimination relied upon and found by the Tribunal had made a material contribution to the loss and that, applying tortious principles the "*Polkey*" basis for a reduction in the award was not available to the Respondent."

30. In view of this finding, the Tribunal did not go on to consider what the chances were that dismissal would have occurred in any event even had there been no discrimination.

31. The Tribunal then turned to consider a second argument which Abbey submitted should be adopted in the calculation of future loss. That argument was developed as follows. Abbey submitted that even assuming that there was some chance that Mr Chagger would have retained his job, any future loss should be limited to the period during which he would have remained in employment *with Abbey*. It was simply not open to the Tribunal to accept Mr Chagger's submission that the future loss should be calculated by reference to the whole of the period during which Mr Chagger might have pursued his career in the financial services field. It could not sensibly be said that he would have spent his working life with Abbey.

32. Abbey identified a number of reasons why Mr Chagger would not have remained in employment with them for long, even had he not been compulsorily made redundant. It was said that he had a highly unsatisfactory relationship with his immediate boss, Mr Hopkins, as witnessed by emails between them; that he wanted a more dynamic career; that his past history demonstrated a tendency to make frequent employment changes; and that he had made some enquiries about voluntary redundancy in mid 2004. In addition, statistical evidence showed that there was a high turnover within Abbey for persons with Mr Chagger's age and job band. When calculating future loss, the Tribunal had to factor into its assessment the chance, which Abbey claimed was strong, that Mr Chagger would voluntarily have left the company at some point in the relatively near future, and certainly a very long time before retirement.

33. Furthermore, Mr Chagger had identified as one of the causes of his failure to obtain employment the stigma he suffered as a consequence of taking proceedings against Abbey. It was not legitimate to make Abbey liable for any "stigma" loss resulting from the actions of third party employers when they were considering whether or not to recruit Mr Chagger. As a matter of law, those employers were not entitled to discriminate against Mr Chagger because he had taken proceedings against Abbey. This constituted victimisation discrimination contrary to sections 2 and 4 of the Race Relations Act. It would be quite wrong to require Abbey to pay compensation to make good any loss resulting from the unlawful action of these third parties. These losses were not the direct consequence of Abbey's discriminatory act and were too remote to be recovered. The action of the third party employers constituted a break in the chain of causation.

34. Mr Chagger submitted that it was wrong to limit compensation to the likely period for which he would have remained with Abbey. That approach did not do justice to the disadvantage which Mr Chagger faced by being placed on the labour market. The Tribunal summarised the submissions on this aspect of the case as follows:

> "The Claimant's submission was that it was proper for the Tribunal to consider the starting point of compensation and to compensate the Claimant under Section 123 for the loss suffered in consequence of the dismissal. Ms Heal submitted the Claimant was entitled to be compensated for the disadvantage that the Claimant suffers on the labour market arising out of the dismissal and she submitted that had there been no dismissal the Claimant would have continued to work for the Respondent to age 65 or until he left voluntarily to take up better paid employment elsewhere. She submitted he would not have put himself in the position in which he now found himself, namely having left employment with no income and without the secure platform from which to look for alternative work. She submitted that if he in fact has been stigmatised he would be further disadvantaged and as a result of dismissal he was less able to find alternative employment. She submitted that even if the Respondents statistics proved Mr Chagger would have resigned they did not show his loss would then have stopped."

35. The Employment Tribunal upheld Mr Chagger's submissions on this point also. They were not impressed by Abbey's arguments. The Tribunal engaged with the factors which Abbey said supported the conclusion that Mr Chagger would have left Abbey, and they did not find them particularly persuasive. They accepted that whilst there was evidence that Mr Chagger may have left at some stage, he would not have done so to place himself in a situation where he would be without income or work.

36. The Tribunal summarised its conclusion as follows :

> "… In the circumstances the Tribunal does not accept the submission that the Claimant would on the balance of probabilities have left at some stage. *In the Tribunal's judgment he almost certainly would not have left to put himself in a position of disadvantage in the way that has in fact occurred.* The Tribunal accepts that there is a chance that there would be some breaks in career of a slight degree, bearing in mind that there is a requirement to give long notice and sometimes a requirement to defer bonuses. The argument that is raised by Mr Sutton can in the Tribunal's judgment be met by making an appropriate albeit slight reduction in the multiplier used in considering the Claimant's continuing losses." (Emphasis supplied.)

37. We do not find this reasoning entirely clear. On one reading it might suggest that the Tribunal was making a finding on the balance of probabilities that if there been no discriminatory dismissal, Mr Chagger would have stayed with Abbey until retirement age. That is how the EAT interpreted their decision. However, the italicised words suggest that they were focusing on what had in fact happened rather than what would have happened had there been no dismissal. They were concluding on the balance of probabilities that there would not now be an equivalent job for Mr Chagger to go to,

and so the loss is measured as if Mr Chagger had stayed with Abbey throughout his career until retirement. That is consistent with the way in which counsel put the case. The compensation so assessed then had to be reduced by a small amount to reflect the fact that there may well have been small breaks in the career had the career path been that which would have occurred but for the discriminatory dismissal.

38. It is important to note that the Tribunal made no explicit findings at all about whether and to what extent Mr Chagger had been stigmatised in seeking to obtain further employment.

39. The Tribunal then went on to consider mitigation and, as we have indicated, they were satisfied that all reasonable efforts to mitigate had been taken. In this context they also expressly rejected a suggestion that Mr Chagger had deliberately told future employers more than was necessary about his dispute with Abbey in order to fail in his job applications and thereby increase Abbey's liability.

40. In essence, therefore, the Tribunal was assessing compensation on the basis that the effect of the unlawful discrimination was that Mr Chagger had lost his job and could not find another comparable one. Abbey had to indemnify him for that career loss. In the circumstances the Tribunal considered that it was sensible to assess the damages by adopting a multiplier/multiplicand approach as is conventionally adopted in personal injury cases where loss of a career results. They then gave credit for the pay he would earn as a teacher.

41. Finally, the Tribunal focused on the statutory uplift that should be awarded for failure to comply with the statutory dismissal procedures. Initially, they had led the parties to believe that this would be 35%. That, however, was on the mistaken assumption that the uplift would only apply to the relatively small award for unfair dismissal. When it was pointed out that it would apply to the whole sum awarded, including the compensation to be paid for the unlawful discrimination, the Tribunal considered that this would be unjust and involve a disproportionate uplift given the quantum of damages involved. Accordingly, they decided to exercise the power conferred by section 31(4) to award less than 10% where the circumstances are exceptional. Having regard to the very large sums which they were awarding independently of the uplift, they considered that 2% would be the appropriate amount.

The hearing before the EAT

42. The submissions before the EAT were in substance those which had been advanced before the Employment Tribunal. On the principal issues affecting the calculation of future loss, the EAT upheld Abbey's grounds of appeal.

43. The EAT considered that the Employment Tribunal had been wrong to fail to apply *Polkey*, or at least an equivalent principle in the tort field. The EAT cited the classic formulation by Lord Blackburn in *Livingstone*, to which we have made reference: what would the employee have earned if he had not suffered the wrong? They concluded that the 'wrong' here was not the dismissal itself, but rather the act of race discrimination. Accordingly, the question was not what would have occurred had there been no dismissal, but what would have occurred had there been no *discriminatory* dismissal. That required consideration of the question whether dismissal might have occurred even had there been no discrimination.

44. The EAT then considered the submission that it would undermine the principle of full compensation to allow Abbey to act as though a patently unlawful dismissal might have been carried out lawfully. It was asserted that this would be wrong since discrimination made a material contribution to the dismissal. The EAT refuted this submission (para 90):

> "We believe that the reliance placed by Ms Heal and the Tribunal on "material contribution" is, with respect to them, misconceived. In order to establish liability in the case of common law torts where damage is a necessary part of the cause of action, a claimant only has to show that the alleged tortfeasor materially contributed to the damage in respect of which he claims, and not that his wrongful act was the only or main cause. There is of course a similar rule in cases of discrimination, though the label "material contribution" is not generally used. But that rule is not relevant to the different issue which arises here – namely whether in assessing compensation it is relevant to take into account the chance that the respondent might have caused the same damage lawfully if he had not done so on discriminatory grounds."

45. The EAT agreed that strictly it was inappropriate to refer to this calculation as the application of *Polkey* calculation because that doctrine was developed in connection with the assessment of compensation for future loss in unfair dismissal cases. However, they considered that the relevant common law tort principle is in substance precisely the same; the purpose is to focus on the actual loss resulting from the unlawful act and where that is necessarily speculative, to carry out the assessment by quantifying relevant chances.

46. Having reached that conclusion, the EAT then went on to consider the evidence relevant to the question whether or not dismissal would have occurred in any event. The rival submissions were as they had been before the Employment Tribunal. Abbey submitted that the dismissal was a certainty given that Ms Mastronikola had been given top marks and would be kept on even if Mr Chagger did likewise and the tie break were applied, whilst Mr Chagger submitted that Ms Mastronikola would not necessarily have obtained full marks had a non-discriminatory selection been made. Accordingly, it could not with confidence be said what the outcome would be.

47. The EAT accepted Mr Chagger's submission and concluded that the matter had to be remitted to the Tribunal on this issue.

48. The EAT then considered what principles ought to determine the calculation of future loss. They record that Abbey's submission was that damages should be limited to the period of employment with Abbey. It seems that they may have understood Mr Chagger's counsel to have conceded this, save for her contention that it did not deal with the issue of stigma damages. We merely note that it would be surprising if it had been conceded, given the way in which the case had been advanced before the Employment Tribunal. The EAT pointed out that any stigma loss did not affect the question how long Mr Chagger would have remained with Abbey. It became material only once he was pursuing other employment. They also noted that the Employment

Tribunal had not in terms identified the extent or effect of any stigma and had in effect conflated employment with Abbey and potential future employments.

49. The EAT therefore concentrated on stigma loss. They held that, even if there were cogent evidence of the employee being unable to obtain alternative employment because he was being stigmatised, nonetheless it would be wrong for Abbey to be made liable for that loss since it resulted from the conduct of third party employers.

50. This was not a case where the stigma was the direct consequence of the unlawful act of the employer, as in *Malik v Bank of England (Bank of Credit & Commerce International SA* [1997] ICR 606 where the employers carried on a dishonest business which, it was alleged, had adversely affected the standing of the employees in the banking industry. Any stigma arose because of the act of the employee in bringing proceedings against the employer, albeit that that was a response to the employer's unlawful act. In the context where the loss was only indirect and was caused by the unlawful conduct of third parties, it was too remote to be the subject of compensation. The EAT summarised their conclusion as follows (para106):

> "… In our view the risk that future potential employers may decline to employ the Claimant because of the claim which he has brought against the Appellants is not a matter which can be reflected in his compensation. It is well recognised that wrongdoers cannot be saddled with every consequence of their actions. The ways in which the limitations on recovery have traditionally been expressed and justified, employing sometimes the language of causation and sometimes of remoteness, are confused and confusing. It is increasingly recognised that these conceal what are in fact, and necessarily, intuitive and/or policy judgments about the extent of liability for consequences: see the speech of Lord Nicholls (extensively cited in *Essa Laing*) in *Kuwait Airways Corpn v Iraqi Airways Co* (nos. 4 and 5) [2002] AC 883 ([2002] UKHL 19), at paras. 69-71 (pp. 1091-2). It may therefore be too glib to say merely that stigma of the kind for which compensation is sought is not a "direct" or "natural" consequence of the Appellants' wrongful acts because it depends on the Claimant's choice to sue and/or on the (unlawful) acts of third parties; or that those same factors "break the chain of causation". Nevertheless in this particular context the fact that the loss in question arises only indirectly, and that the immediate cause is the unlawful conduct of third parties, does seem to us a powerful reason for holding it to be too remote.**"**

51. The EAT held that the Tribunal had been wrong to award compensation for anything other than lost earnings with Abbey and they directed that, on remission, compensation should be assessed on that basis.

52. In this connection, the EAT held that the Employment Tribunal had erred in assessing the likelihood of Mr Chagger's leaving Abbey on the "balance of probabilities" approach rather than by considering the loss of chance approach. Furthermore, they did not consider the Tribunal's reasons for finding that it was more likely than not that Mr Chagger would have stayed with Abbey convincing or satisfactory. Accordingly, they held that on any remission, the Employment Tribunal should consider that issue afresh.

53. Finally, the EAT considered whether the uplift of 2% was a conclusion open to the Tribunal. They held that it was. The short point was whether the amount of compensation could of itself constitute an exceptional circumstance within the meaning of section 31(4). The EAT held that it could. It was open to a tribunal to consider that the exceptional size of the award itself should be a relevant consideration in order to avoid disproportionate penalties. They noted that on Mr Chagger's primary case, which was that the Employment Tribunal should have awarded the uplift of 35% the additional compensation would have been in the region of £1,000,000.00 for a purely procedural failure.

The grounds of appeal

54. The parties have again largely reiterated, albeit in a more refined and sophisticated way, the arguments that were advanced at both stages below. There are essentially five grounds in issue, together with a number of subsidiary questions. The main issues are:

    i) Whether the Tribunal ought to have reduced compensation to reflect the chance that Mr Chagger would have been dismissed for redundancy in any event.

    ii) Whether the Tribunal ought to have limited the future compensation to the period during which Mr Chagger would have remained in employment with Abbey.

    iii) Whether Abbey should be liable for the so called "stigma" consequences of the dismissal, i.e. the decision by third parties not to employ Mr Chagger because he had taken proceedings against his employer.

    iv) Whether the 2% uplift was consistent with the statutory obligation to uplift where the statutory dismissal procedures are infringed.

    v) Whether the matter ought to be remitted to the same or a differently constituted tribunal.

The chance of dismissal in any event

55. Mr Bowers continues to submit that damages must be the whole of the loss flowing from the unlawful act which in this case was the dismissal. That obligation is also found in EU law, to which the UK courts must give effect: see *Marshall v Southampton and South West Hampshire Area Health Authority* [1986] ICR 335. This principle therefore required the Tribunal to focus on the loss flowing from the dismissal, which is precisely what the Tribunal did. It was wrong to ask whether a dismissal might have occurred in any event. This entitles the employer to seek to contend that he would have done lawfully what he had in fact done unlawfully. Moreover, there was not a shred of evidence to justify the inference that Mr Chagger would ever have been dismissed lawfully and hence that speculative exercise should not be undertaken. The EAT's approach fails to give effect to the need fully to

compensate for the evil of discrimination and it is tantamount to permitting the employer to rely on his own wrong.

56. We reject this submission. We do not dispute that the employee must be compensated for the full loss flowing from the unlawful act; that is precisely what the principles identified by the Court of Appeal in *Essa* are designed to achieve. Indeed, Pill LJ plainly considered that those principles are entirely consistent with the *Marshall* case: see paragraph 34. The fact that race is a significant factor in the decision is sufficient to establish liability for that loss, but that fact does not assist one iota in determining the measure of that loss.

57. We are satisfied that the analysis of the EAT, reproduced in paragraph 43 above, was entirely correct on this point. It is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss.

58. The justification for reducing compensation in that proportionate way is that even had there been no discrimination, Mr Chagger would have been at risk of being lawfully dismissed and if he had been, he would have been on the labour market in similar circumstances to those which actually occurred. Subject to one qualification, his difficulty in obtaining new employment would have been just the same following a non-discriminatory termination as it was following a discriminatory one. The qualification is this: the position is not equivalent if there is stigma resulting from his taking legal proceedings affected his ability to obtain future employment. This is a particular impediment which would not have occurred had there been a non-discriminatory dismissal because he would not then have had to take legal proceedings against Abbey. We consider the implications of this later in this judgment.

59. Contrary to the submission of Mr Bowers, the application of this principle does not permit the employer to rely upon his own wrong; it does not even allow him to say that he must be treated as if he would have acted so as to limit his liability, which is the principle applied by the courts, for example, when fixing damages for wrongful dismissal at common law. This exercise requires the court to determine what, in fact, were the chances that dismissal would have occurred had there been no unlawful discrimination. It focuses on what the employer would have done, not what he could lawfully have done. There is no injustice in this exercise.

60. Indeed, the appellant's submission, if correct, would lead to results wholly at odds with the compensatory principle. An example was given by Lady Justice Smith in the course of argument. Suppose an employee is properly selected for dismissal by reason of redundancy but the day before the dismissal takes effect, he is sacked on racial grounds. To give damages based on the assumption that the job would have continued indefinitely into the future simply flies in the face of reality. It sets the compensatory principle at nought and amounts to imposing a fine for the unlawful act. This is certainly not what EU law requires.

61. Mr Bowers advanced a further argument that even if this were an error by the Tribunal, it was plain that in fact there was no real chance that the claimant would have been selected for dismissal had a non-discriminatory procedure been adopted.

He points to certain findings made in the liability decision which demonstrate that the discrimination was serious and significant. It so infected the decision to dismiss, he submits, that it was not possible to say what might have happened had no discrimination occurred. He also contended that there was simply no evidence before the Tribunal from which it could properly infer that Mr Chagger might have been dismissed in any event.

62. We reject these arguments also. The gravity of the alleged discrimination is irrelevant to the question what would have happened had there been no discrimination. Here there was a genuine redundancy situation and there were two candidates from which one would be selected. It is pertinent to note that Mr Chagger himself had not claimed that he was necessarily superior to the other candidate. His complaint was that he had not been fairly considered alongside her. There was plainly a realistic prospect that he would have been dismissed even if the selection had been on a non-discriminatory basis, and the Employment Tribunal had to assess that prospect.

63. Nor are we in a position to know precisely what evidence was before the Tribunal from which it might have assessed what were the chances of dismissal. Mr Jeans QC, counsel for Abbey, says that Mr Bowers is factually wrong and that the evidence that Mr Chagger would have been dismissed was extremely strong. We cannot resolve that dispute. The point is that because the Tribunal did not consider it necessary to engage in that question, they did not identify the potential evidence which would have had to be considered to resolve it.

64. We therefore reject this ground of appeal. The matter will have to be remitted to the employment tribunal to determine what the prospects were of Mr Chagger being dismissed even had there been no discrimination. The compensation that would otherwise have been awarded will then have to be reduced by the proportion reflecting that chance.

Should the financial loss be limited to the loss of remuneration with Abbey?

65. This argument is interlinked with the stigma submission but we will consider them separately. The EAT held that no compensation could be recovered for stigma damage, and appear to have accepted Abbey's submission that once that was determined against Mr Chagger, the measure of loss was remuneration Mr Chagger would have earned from Abbey for the period during which he would have remained with Abbey had there been no discrimination.

66. We do not accept that this is the correct approach to the assessment of future loss. We would accept that, in many cases, the starting point in the case of a discriminatory dismissal will be the period for which the employee would have been employed by the discriminating employer. For example, if the employer can show that the dismissal would have occurred in any event after a specific period of time, for example because of redundancies or the closing down of the business, then this will normally set the limit to the compensation payable. If there is a chance as opposed to a certainty of this occurring, that should be assessed and factored into the calculation of future loss as the answer to the first question indicates. In such a case, the employee would have been on the labour market in any event once the employment had ceased, and the usual effect of the discriminatory dismissal would simply have been to put him on the labour market earlier than would otherwise have been the case.

67. Similarly, there may be circumstances – although in practice they will be rare – where the evidence is that the employee would voluntarily have left in the near future in any event, whether or not he had another job to go to. This could occur, for example, if the employee is dismissed shortly before he was due to retire, or if he had already given notice of resignation when the discriminatory dismissal occurred. It would be wrong to award compensation beyond the point when he would have left because there would be no loss with respect to any subsequent period of employment.

68. Abbey were seeking to rely on a principle of voluntary resignation, but in a different context. They were not suggesting that Mr Chagger would have given up work altogether, or would have resigned whether or not he had another job to go to. Rather they were seeking to establish that, if Mr Chagger had remained with Abbey, there was every reason to assume that he would voluntarily have chosen to make a career move sometime in the relatively near future. So it is said that this should set the outer limit of his loss.

69. In our judgment, this argument is unsustainable. The task is to put the employee in the position he would have been in had there been no discrimination; that is not necessarily the same as asking what would have happened to the particular employment relationship had there been no discrimination. The reason is that the features of the labour market are not necessarily equivalent in the two cases. The fact that there has been a discriminatory dismissal means that the employee is on the labour market at a time and in circumstances which are not of his own choosing. It does not follow therefore that his prospects of obtaining a new job are the same as they would have been had he stayed at Abbey. For a start, it is generally easier to obtain employment from a current job than from the status of being unemployed. Further, it may be that the labour market is more difficult in one case compared with another. For example, jobs may be particularly difficult to obtain at the time of dismissal and yet by the time they become more plentiful, when in the usual course of events Mr Chagger might have been expected to have changed jobs had he remained with Abbey, he will have been out of a job and out of the industry for such a period that potential employers will be reluctant to employ him. In addition, he may have been stigmatised by taking proceedings, and that may have some effect on his chances of obtaining future employment.

70. The result of these factors is that the discriminatory dismissal does not only shorten what would otherwise have been Mr Chagger's period of employment with Abbey; it also alters the subsequent career path that might otherwise have been pursued.

71. It follows that in our judgment the period during which Mr Chagger would have remained in employment with Abbey had there been no discrimination is irrelevant given that this is a case where he would only leave for another job. The Employment Tribunal concluded that Mr Chagger would not have left Abbey unless and until he was able to move to a post at least as favourable as his Abbey job. In our view that is a wholly realistic assumption; few employees voluntarily leave employment for a worse paid job. We are not sure that Abbey were contending otherwise.

72. On the facts as found by the Tribunal, the proper assessment of loss is therefore to be determined by asking when Mr Chagger might expect to obtain another job on an equivalent salary to his Abbey salary. His loss is fixed by that period. Whether that is shorter than the period he would have served with Abbey, or whether it is longer and

includes time when, but for the discriminatory dismissal he would have been employed elsewhere, is immaterial.

73. The best evidence available to answer that question is provided by the efforts Mr Chagger has made to obtain employment. This is the best indication of the labour market conditions at the time when the unlawful dismissal has occurred.

74. In this case the Tribunal concluded that following the discriminatory dismissal, Mr Chagger would in all probability not have been able to obtain an equivalent post to that which he held with Abbey. Accordingly they assessed future loss on the basis of loss of career. They were not saying that Mr Chagger would in fact have remained with Abbey for the whole of his career even had there been no unlawful act. We doubt whether a reasonable tribunal could have found that Mr Chagger would, in the normal way, have remained with Abbey for another twenty three years if there had been no discrimination. The evidence adduced by Abbey to show that he would likely have moved on at some stage was strong. But that is because he would in all probability have found equivalent or better paid employment. The premise that he could similarly find such employment following his dismissal was no longer sustainable in the light of his efforts at mitigation. The evidence was that he was finding it increasingly difficult to obtain any alternative employment in the industry, even in a lower grade job and that in the circumstances he acted reasonably in changing career. The loss was therefore not referable simply to the earnings he would have received from Abbey but included, on the facts of this case, the lost earnings from any future employment he would have had. On the premise that those earnings would have been at least as favourable as his earnings with Abbey (and that was arguably an assumption in Abbey's favour since they might have been greater), the loss could be assessed as though Mr Chagger had remained with Abbey throughout his working life, but taking into account his earnings from teaching. (Other uncertainties, such as the likelihood of early death, were taken into account by the use of the multiplier approach.)

75. It follows that, in our judgment, the approach adopted by the Tribunal, namely assessing compensation as though Mr Chagger would have remained with Abbey throughout his career in financial services, was justified on the evidence before them.

76. Mr Jeans submits that even if the Tribunal were entitled to adopt that approach, there were still two fundamental errors in their assessment of future loss. First, at various points in their analysis they make findings on the balance of probabilities, and they do so specifically when considering whether Mr Chagger would have remained with Abbey until retirement (see the extract from the Tribunal's judgment at paragraph 35 above.) The effect of this was that the Tribunal assumed that, if on the balance of probabilities something might happen, they should calculate compensation on the assumption that it would have happened. This is wrong; when looking at future loss it is well established that the assessment has to be made by focusing on the degree of chance: see *Allied Maples Group v Simmons* [1995] 1 WLR 1602. This has been fully recognised in the context of employment discrimination: see *Ministry of Defence v Cannock* [1994] ICR 918, endorsed by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police (no. 2)*[2003] ICR 318 per Mummery LJ at paragraph 32.

77. Second, he submits that a crucial step in the Tribunal's analysis was the effect of the stigma of taking legal proceedings on Mr Chagger's opportunity to obtain future employment. That was not a legitimate factor to consider. We return to consider that point below.

78. We would in principle accept the first submission. Indeed, Mr Bowers conceded that, if and insofar as the Tribunal calculated loss on the assumption that anything more likely than not to have happened should be deemed to have happened, that was the wrong approach. He accepts that the assessment should be on a chance rather than on a balance of probabilities approach.

79. However, we do not think this is a material error in the particular circumstances of this case. As we have already indicated, we do not think that the Tribunal were saying that Mr Chagger would in fact, absent discrimination, have remained with Abbey all his working life. They were calculating his loss on that assumption because either he would have remained with Abbey, or he would have moved to earn a similar salary elsewhere. Even if there was a real chance he would have left Abbey, there was virtually no chance that he would have done so to disadvantage himself. In short, there was a very strong likelihood indeed that he would have stayed in employment at an equivalent salary throughout his career. His dismissal had defeated that expectation.

80. Accordingly, although in our view the Tribunal did err in talking of the balance of probabilities with respect to the anticipated period of employment with Abbey, that was not a relevant issue and therefore the error had no practical consequences in this case.

Stigma loss

81. Mr Bowers submitted that to talk in terms of stigma is something of a red herring in the circumstances of this case. It did not really enter the equation when assessing loss at all. It was relevant only in the context of considering mitigation. Mr Chagger lost his employment and the remuneration that went with it, and some loss would continue until he obtained other equivalent employment. It was for the employer to show that he had acted unreasonably in failing to obtain such employment, and they were not able to do that. They have not appealed against the finding that he had taken reasonable steps to mitigate his loss and therefore the decision on this point cannot now be overturned.

82. Mr Jeans submitted that if a claimant who has suffered a discriminatory dismissal is alleging that the reason (or one of them) that he has not been able to find work is because he is stigmatised by having taken proceedings against his former employer, the responsibility for the effects of that stigma should lie not with the dismissing employer but with the employer who has been unlawfully influenced by the claimant taking proceedings. If one of the reasons for Mr Chagger failing to get a job was stigma, that element of his difficulty was not, as a matter of law, Abbey's responsibility but the responsibility of the firms who were unlawfully turning him

down. If that were right, it would be necessary for the Tribunal to identify the extent to which stigma was the effective cause of his inability to find work and to assess future loss accordingly. It was possible that the tribunal might conclude that, but for the stigma, Mr Chagger would have found work within a relatively short time. In those circumstances, the loss for which Abbey was responsible would be limited to that period.

83. We can see that there may be some cases where, if stigma loss is not recoverable from the dismissing employer, a tribunal may need to identify and evaluate the effects of the stigma. But we doubt whether this was such a case. If stigma loss is irrecoverable, the question arises as to who bears the burden of showing that the loss flows from the stigma. We recognise that in general it is for the employee to prove loss. However, in our judgment, in a case such as this where there is plainly continuing future loss and the question arises in the context of attempted mitigation, it would necessarily have to be the employer. We do not see how the employee could prove that his inability to find a job was not the result of being stigmatised. That would require him to prove a negative. In practice it would be almost impossible for the employer to be in a position to discharge that burden since he would necessarily have to rely on the evidence of the employee himself. That of course, is what Abbey is seeking to do here. We suspect that given the anecdotal and flimsy nature of the evidence, the tribunal would have said that Abbey had not been able to demonstrate the likely effect of the stigma, and that it was altogether too uncertain properly to be evaluated.

84. We would accept, however, that there could in theory be exceptional cases where the evidence would be sufficient for the Tribunal to make an assessment. So it is necessary to know whether stigma loss is in principle recoverable. Furthermore, for reasons we give below, there is one situation at least where the only potential loss results solely from stigma factors. In that situation too it is vital to know whether, as a matter of principle, it is a recoverable head of loss. So the issue must be faced.

Is stigma loss recoverable?

85. Should the dismissing employer bear what is termed "stigma loss"? Or should the employee be expected to recover that from the employers who stigmatise him? The contending arguments can be shortly stated. Mr Chagger submits that it is a direct and natural consequence of the unlawful act of dismissal that other employers may be unwilling to offer employment to the claimant because he has taken proceedings against his employer. Indeed, it is a reasonably foreseeable consequence, although in law that need not be established, as the *Essa* case shows. It was incumbent upon Mr Chagger to take proceedings in order to vindicate his right, and it would be wholly unjust if Abbey could avoid liability for losses which are the direct consequence of their discriminatory conduct.

86. Abbey contend that it cannot be said that losses flowing from the action of third party employers can be characterised as a "direct" consequence of the discriminatory act at all. It is indirect both because it only arises because of the action of Mr Chagger in taking proceedings, and more importantly, because the direct and immediate cause of the loss is the decision of other employers to refuse to offer employment to Mr Chagger for an unlawful reason.

87. In addition, there is a real risk that tribunals will fix an employer with liability simply on the assertion by the employee that he has been stigmatised. Since the new employers have never been brought to court, there can be no more than a suspicion that they are acting unlawfully. That means that the dismissing employer - Abbey in this case - is not in a position to challenge that evidence. Furthermore, there is no procedure in the employment tribunals whereby the original employer can bring other allegedly discriminatory employers into the proceedings so as to recover a contribution from them towards the damages.

88. Mr Jeans also contends that there are powerful policy arguments against imposing any such liability. If the appellant is correct, then every employee who is dismissed for a discriminatory reason and successfully takes tribunal proceedings will be able to advance the same argument. There is no reason to think that this case is exceptional; employers would be indemnifying employees for career losses on a regular basis. It would also discourage employees from taking proceedings against those employers who victimise job applicants and who should be primarily responsible for any consequential losses. Indeed, if they can recover from the original employer, they will have suffered no further loss.

89. We see considerable force in Mr Jeans' argument, but ultimately we reject it. We consider that the original employer must remain liable for so-called stigma loss. First, we do not accept Abbey's broad submission that the mere fact that third party employers contribute to, or are the immediate cause of, the loss resulting from their refusal to employ of itself breaks the chain of causation. If those employers could lawfully refuse to employ on the grounds that they did not want to risk recruiting someone who had sued his employer and whom they perceived to be a potential trouble maker, we see no reason why that would not be a loss flowing directly from the original unlawful act. Indeed, it is now firmly established that if a stigma attaches to employees from the unlawful way in which their employer runs his business, then the employer will be liable for losses which may result from the fact that other employers will not want to recruit employees because of their link with the business: see *Malik v BCCI*.

90. We recognise, of course, that *Malik* concerned a different kind of stigma than arises here, but it shows that the mere fact that third party employers are the immediate cause of the loss does not free the original wrongdoer from liability. The fact that the direct cause is their decision not to recruit does not of itself break the chain of causation. Nor can the action of the employee in taking proceedings conceivably be treated as such an act. It is a necessary step in order to obtain a remedy for the employer's wrong; it would be absurd if it were to distance the employer from the effects of that wrong.

91. The crucial question, in our judgment, is whether the position is altered by the fact that the actions of the third party employers are unlawful. Legally, the question is whether these unlawful actions break the chain of causation, or whether they cause the loss flowing from them to be too remote. The answer to that question is inevitably influenced by considerations of policy.

92. An important feature, in our view, is that it can be very difficult for an employee to make good his suspicions that he is subject to unlawful victimisation discrimination, and he ought not to be criticised for being reluctant or unwilling to devote the time,

money and stress necessary to advance that claim. Furthermore, we doubt whether Parliament in passing the victimisation provisions intended thereby to weaken the extent of the protection which the discriminated victim would have against his own employer.

93. It is also material to note that it is only in the context of discrimination laws that the concept of victimisation discrimination has been developed. Each of the discrimination statutes provides for a free standing wrong of victimisation, but it is not always unlawful for third party employers to refuse to recruit someone who has sued his own employer. For example, an employee who has taken proceedings for unfair dismissal could be stigmatised in that way quite lawfully. It would be unsatisfactory and somewhat artificial if tribunals were obliged to discount stigma loss in the context of discrimination law but not in other contexts.

94. In our judgment the stigma loss is in principle recoverable. It is one of the difficulties facing an employee on the labour market.

Determining the stigma loss

95. Once it is accepted that stigma loss is in principle recoverable, in most cases it need not be considered as a separate head of loss at all. There will be evidence about the steps which have been taken by the employee to mitigate loss, and this will in practice guide the tribunal to reach a view on the likely period of unemployment. The stigma problem will simply be one of the features which impacts on the question how long it will be before a job can be found. Indeed, we suspect that in practice many tribunals fixing compensation will already have this in mind as one of the features of the job market when they determine how long it will be before alternative employment is secured.

96. We understand the concern of Mr Jeans that allowing recovery for stigma damages will lead to unrealistically high awards by tribunals, but we think it is exaggerated. It is far from the common experience that those taking proceedings against their employer thereafter become virtually unemployable in their chosen field. Moreover, the fact that in a discrimination context it is unlawful to refuse employment for that reason ought further to reduce the likelihood of employees being adversely affected in this way. No doubt such discrimination will sometimes occur, which is why it was thought necessary to pass legislation in the first place. But its impact is likely to be small when compared to other factors, such as job opportunities generally in the labour market for jobs of that kind.

97. A tribunal should take a sensible and robust approach to the question of compensation, as the Court of Appeal emphasised in *Essa*. Plainly it would be wrong for them to infer that the employee will in future suffer from widespread stigma simply from his assertion to that effect, or because he is suspicious that this might be the case. If he is unwilling to make good his suspicions by taking proceedings against the alleged wrongdoing employers - notwithstanding that it may be understandable why he is reluctant to do so - he cannot expect the tribunal to put much weight on what is little more than conjecture. This is particularly so given that it will in practice be impossible for the employer effectively to counter that evidence.

98. However, where, as in this case, there is very extensive evidence of attempted mitigation failing to result in a job, a Tribunal is entitled to conclude that whatever the reason, the employee is unlikely to obtain future employment in the industry. That is essentially what the Tribunal did in this case, and that is why it was both undesirable and unnecessary for them to reach a concluded view on the particular contribution that the stigma factor may have played in the difficulties Mr Chagger faced in obtaining fresh employment.

99. There is one exceptional case where it could be necessary for a tribunal to award compensation specifically by reference to the impact of stigma on future job prospects. This is where this is the only head of future loss. An example would be if in a case such as this a tribunal were to find that the claimant would definitely have been dismissed even had there been no discrimination. He would be on the labour market at exactly the same time and in the same circumstances as he would have been had he been dismissed lawfully. Accordingly, the damage to his employment prospects from the stigma of taking proceedings would be the only potentially recoverable head of future loss. Here, however, the employee would be asserting that this is a head of loss, and the onus would be on him to prove it. In practice this would be a difficult task. If he does establish such a loss, the Tribunal will then be faced with the almost impossible task of having to assess it. The tribunal would have to determine how far difficulties in obtaining employment result from general market considerations and how far from the stigma. In the unlikely event that the evidence of the stigma difficulties is sufficiently strong, it would be open to the tribunal to make an award of future loss for a specific period. But, in the more likely scenario that the evidence showed that stigma was only one of the claimant's difficulties, it may be that a modest lump sum would be appropriate to compensate him for the stigma element in his employment difficulties. This approach would be analogous to the lump sum awards sometimes made in personal injury cases to compensate an injured claimant for the risks of future disadvantage on the labour market: see *Smith v Manchester Corporation* [1974] 1 K.I.R. 1. Even then, however, this should not be an automatic payment; there should be some evidence from which the tribunal can infer that stigma is likely to be playing a part in the difficulties facing the employee who seeks fresh employment.

Uplift

100. We turn to the question of uplift. Strictly, in view of the conclusions we have already reached, this may no longer be a live issue. This is because, as the EAT recognised and as Mr Jeans accepts, once the quantum of damages is reduced – as it in all probability will be in the light of this judgment - then the justification for limiting the uplift to 2% disappears. So the Tribunal will have to determine on remission what the appropriate uplift should be.

101. The short issue is whether the level of compensation is of itself capable of being an exceptional circumstance within the meaning of section 31(4) of the Employment Act 2002 entitling the Tribunal to reduce the uplift below what would otherwise be the minimum of 10%. If it is, then the Tribunal must award such lesser percentage as it considers just and equitable. It is accepted that if the amount of compensation can be an exceptional factor, then the 2% stipulated cannot be challenged.

102. We would agree with both Tribunals below that it is capable of being an exceptional circumstance. As the Court of Appeal noted in *Redcar and Cleveland Council v Bainbridge* [2008] IRLR 776 para.311 the uplift operates as an incentive to encourage parties to make use of the statutory procedures. We do not think Parliament would have intended the sums awarded to be wholly disproportionate to the nature of the breach. In our view that would have been the effect of awarding even a 10% uplift. There is no definition of "exceptional circumstance" and we are satisfied that it was open to the Tribunal to conclude that the size of the award was one such circumstance.

103. Accordingly, we reject this aspect of the appeal. However, on reconsideration the tribunal will not be limited to its 2% finding if the compensation is reduced. Even if the Tribunal still considers that the size of the award is an exceptional circumstance justifying an uplift below the 10% minimum, it may decide that some higher figure than 2% would be just and equitable in all the circumstances.

The cross-appeal

104. The cross appeal raised the short point whether the case should be remitted to the same or a different tribunal. We see some force in Mr Jeans' submission that it is unsatisfactory that the case should go back to the same Tribunal. He relies upon the delays that have occurred which will necessarily mean that the Tribunal will have forgotten much of the evidence in any event; the fact that the Tribunal was somewhat tardy in giving its reasons for its decision on liability; and most importantly, that Abbey cannot be expected to have confidence in a tribunal which, as a result of misapplying established legal principles, has subjected them to a very substantial and he submits unjustified liability. It will be difficult for the Employment Tribunal loyally to apply the principles now set down for it, and impossible for Abbey to believe that they will.

105. As against that, however, the Tribunal will have the benefit of having a detailed knowledge of the case, and Mr Bowers told us that there were transcripts of the proceedings available to them. Moreover, their findings with respect to the substantive decision may well have some bearing on the remedies outcome, particularly on the question of the chances that the decision to dismiss would have been the same even had there been no unlawful discrimination. There is a real risk that a fresh tribunal would have to hear much of the evidence again with respect to aspects of both liability and remedy, thereby increasing costs to the parties.

106. We also bear in mind that the issue here is whether the EAT was entitled to send the matter back to the same Tribunal. It is not whether we would have reached the same conclusion. The EAT obviously thought it appropriate to do so, and we do not think that it can be said that this displayed any error of law. There are arguments pointing both ways, but in our judgment, this was a decision which was open to the EAT.

Disposal

107. We would uphold the appeal in part. In our judgment, the EAT erred in law with respect to the following two issues. First, they erred in concluding that future loss was limited to the period during which Mr Chagger would have remained with Abbey had he not been the subject of unlawful discrimination. That approach failed to have

regard to the extent to which the discriminatory dismissal affected Mr Chagger's career prospects.

108. Second, they erred in finding that Abbey could not be liable for the losses resulting from the fact - to the extent that it was a fact - that Mr Chagger was unlawfully stigmatised by future employers who were unwilling to employ him because he had taken legal action against Abbey. On the facts of this case as presently found, the employment tribunal adopted the correct approach to the evidence of stigma, by treating it as a part of the evidence relating to Mr Chagger's attempts to mitigate his loss.

109. With regard to the other issues, both the appeal and the cross appeal fail. This means that in our judgment the EAT were right to hold that, in assessing loss, the Tribunal ought to have considered whether to reduce the compensation referable to future loss to take account of the chance that Mr Chagger would have been dismissed in any event.

110. The case must therefore be remitted, to the same Tribunal if possible, for it for it to determine that question. It will be for that Tribunal to consider whether and to what extent they need to hear further evidence on any factual matters.