Neutral Citation Number: [2011] EWCA Civ 545

Case No: A2/2010/1905/EATRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE KEITH sitting with lay members
UKEAT/0535/09 AND UKEAT/0536/09

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2011

Before :

THE MASTER OF THE ROLLS
LADY JUSTICE SMITH
and
LORD JUSTICE ELIAS

- -

Between :

WARDLE	**Appellant**
- and -	
CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK	**Respondent**

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- -

Mr Simon Cheetham and Ms Amy Stroud (instructed by Messrs Pritchard Englefield) for the **Appellant**
Mr Christopher Jeans QC and Mr Paul Nicholls (instructed by Messrs Osborne Clarke) for the **Respondent**

Hearing date : 12 April 2011

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Approved Judgment

Lord Justice Elias:

1. This case raises a number of issues concerning the calculation of compensation by an employment tribunal. The appellant, Mr Wardle, (hereinafter referred to as "the claimant" as he was before the Employment Tribunal) was found to have been unfairly dismissed, the dismissal being an act of victimisation by the respondent (hereinafter "Calyon") because the claimant had taken proceedings for nationality discrimination. In addition, the claimant was found to have been refused promotion prior to his dismissal by reason of his nationality. Liability is not challenged. The only question is whether the Tribunal properly assessed the compensation flowing from these unlawful acts. Both parties submitted before the Employment Appeal Tribunal ("EAT") that in certain, albeit different, respects it did not, and the EAT (Keith J presiding) accepted some but not all of these challenges. Both parties now contend that the EAT in turn erred in various ways.

2. The issues before us now fall into two categories. The first relates to the compensation awarded by way of statutory uplift. Section 31(3) of the Employment Act 2002 (which is no longer in force but was at the relevant time) obliges an employment tribunal, where it finds that the employer has acted in breach of certain statutory procedures for handling dismissals or grievances, to increase the compensation otherwise payable to reflect that fact. The second category of issues relates to the calculation of future loss. There are a number of detailed points which the parties have raised with respect to the way in which the Employment Tribunal, and subsequently the EAT, assessed that loss.

The background.

3. The claimant was employed by Calyon in a post with the interesting designation of Global Head of Exotic Interest Rate Derivatives Risk Management. He applied to be promoted to Head of Risks Management but the application failed and a French national obtained the post. Had the claimant been promoted, the new job would have taken effect from January 2008. The rejection of his application for promotion was held to be an act of discrimination on the grounds of nationality, which contravenes the Race Relations Act 1976. The claimant was subsequently dismissed with effect from 31 July 2008. The Tribunal held that this dismissal was both unfair and an act of victimisation discrimination under the 1976 Act in that the reason for dismissal was a protected act, namely the fact that he had commenced the promotion proceedings in the Tribunal alleging discrimination under that Act.

4. In its judgment on remedy, the Employment Tribunal made certain findings which informed its assessment of compensation. The material findings were as follows:

   i) The claimant's salary at the time of his dismissal was £104,000.

   ii) If he had been promoted to Head of IRD Risk Management his salary would have increased from £104,000 to £120,000.

   iii) In that role he would have received a bonus in each of the years 2009 and 2010 of 70% of his salary. (No express finding was made with respect to later years.)

iv) The claimant secured employment with the Financial Services Authority (FSA) on 3rd November 2008 at a salary of £105,000 (paragraph 26). The FSA would also pay a bonus in that year and thereafter but only of 20% of salary.

v) This job involved a significant reduction both when compared with what he was earning and what he would have earned had he not been denied his promotion. However, the Tribunal found that the FSA job qualified him well for a return to banking. The Tribunal said this (para 29):

> 'The Claimant was recruited as part of the FSA's drive to recruit experienced and talented people from the private sector at higher salaries than were normally paid in the public sector. Although his title is Associate, it was quite clear when he described to us the details of the job he carries out that it is a job at a fairly high level. He acts as a consultant and goes into banks and reviews their risk operations. He assesses their risk practices and whether they have adequate capital and does stress testing. He has meetings with Chief Risk Officers in the large banks and has first hand experience of seeing how things work at the board level. He has experience of and insight into the relationship between the Bank of England and the FSA. The Claimant is diligent and ambitious and we have no doubt that he will quickly learn and master his new role and that he will do well in it. The experience he will gain and the contacts that he will make from his job will stand him in good stead should he decide to go back into a career with a bank in a market risk / regulatory role. With increased regulatory drives, a risk manager who has regulatory experience as well is likely to be in demand.'

vi) The Tribunal then made certain findings on two matters which figure significantly in this appeal. The first was what would have happened to the claimant had he not been dismissed. The Tribunal noted that the claimant's previous working history showed that in the previous 15 years he had worked for four different employers and that the longest he had stayed with any single employer was five years. It observed that the banking crisis of late 2008 was likely to be resolved by an improvement in market conditions, and that the claimant still had contact with head hunters. In the light of these factors it found that there was :

> "a very strong chance, which we put as high as 80%, that the Claimant would have left the Respondent's employment at the beginning of April 2010, having collected his loyalty premiums."

vii) The second concerned the likelihood of the Claimant leaving the FSA and returning to his banking career. The Tribunal's analysis of this reflected much of what it had already said about the prospects of going back into banking (para 36). This is an important paragraph in this appeal and I set it out:

> "We next considered the likelihood of the Claimant leaving the FSA and returning to a better paid role in banking. The Claimant has worked for 20 years (the greater part of his working life) in banks, and appears to have had little difficulty in finding new jobs and moving from one bank to another. He had a successful career in trading and risk management. The only reason that he had difficulty in finding a job in banking in late 2008 was because of the extraordinary circumstances that prevailed at that time in the financial services sector. We accept that the Claimant will remain at the FSA for some time so that he can derive the full benefits of learning new skills and gaining experience as a regulator. Having done so, he will be well equipped to return to a risk management/regulatory role in banking. As we have said before, the indications are that in the future regulatory work and risk management will pay a larger part in the role of banks. The Claimant, having had experience of both risk management and regulatory procedures and controls from within the FSA, will be in a good position to seek a high level post within the banking sector. He is also in his current role in a good position to make useful contacts with senior risk officers and managers in banks. The Claimant is diligent and ambitious and will not resign himself to a post where his earnings are lower if there is a potential for him to move into better paid work. Having carefully considered all the evidence it is our conclusion that after the Claimant has been with the FSA for about a period of three years, i.e. at the end of 2011, there is a 70% chance that he will return to banking and be able to secure employment in banking that will pay at the same salary level as he enjoyed before. We took into account that the Claimant will be aged 47 at that time."

I refer hereafter to a job in banking at the same salary level as the claimant would have enjoyed if promoted as "equivalent employment".

viii) The Tribunal then considered whether Calyon had complied with the statutory procedural obligations imposed upon them, both with respect to a grievance raised by the claimant when he was not promoted, and when he was dismissed. The Tribunal held that the grievance had been dealt with in accordance with the relevant procedures, albeit somewhat ineptly, but that there had been a fundamental failure to comply with the dismissal procedure. As to the latter, the Tribunal said this (para 40):

> "We next considered whether we should uplift any award of compensation for the dismissal on the ground that the statutory dismissal and disciplinary procedure had not been completed. The statutory procedure requires the employer to inform the employee in writing of the grounds that have led the employer to contemplate dismissing the employee, to inform him of the basis for those grounds, and then when the employee has had reasonable time to consider that

> information to hold a meeting with him to discuss the matter and thereafter to make a decision on whether to dismiss the employee. In the present case, the Claimant was suddenly called into a meeting and was told that he was being dismissed immediately. There was no step one letter and no step two meeting to discuss matters before reaching a decision. The meeting that took place was to inform the Claimant of a fait accompli, it was not a step two meeting. The Respondent is a large employer with huge resources available to it. It knew what the procedures were, it made a conscious and deliberate decision to ignore them. There was no good reason why the procedure could not have been followed. In those circumstances, we think it just and equitable to uplift any award we make by 50%."

5. Having made these findings, the Tribunal then assessed compensation by considering the losses suffered by the claimant in various distinct chronological periods:

   i) It assessed the claimant's loss between January and July 2008 based on comparing his actual pay with the pay he would have received if he had been appointed to the Head of IRD Risk Management position (paragraph 42).

   ii) It also assessed loss from the end of his employment until he obtained a job with the FSA on the same basis (paragraph 43).

   iii) For the period between 3rd November 2008 (when his employment at the FSA commenced) and 1st April 2010 (when the Tribunal had assessed that there was an 80% chance that he would go elsewhere), the Tribunal calculated the claimant's loss by reference to pay he received in his role at the FSA compared with what he would have received had he been promoted (paragraph 44-45).

   iv) In relation to the period 2nd April 2010 to 31st December 2011 (the point at which the Tribunal found there was a 70% chance that he would obtain an equivalent job), the Tribunal adopted the same approach in determining loss but it reduced the sum so calculated by 80% to reflect its conclusion that there was an 80% chance that the claimant would leave Calyon in April 2010 (paragraph 46).

   v) It then awarded compensation for the whole of the period 1st January 2012 to 31st December 2024 which was the date when it found that he would retire. In effect therefore, it was calculating this head of loss by reference to the whole of the claimant's career. It again made this calculation by reference to the difference between the pay earned at the FSA compared with what the claimant would have received had he carried out the equivalent job, and then it reduced that sum by reference to the findings it had already made as to the likelihood that the claimant would still have been employed by the FSA during that period. First, it reduced it by 80% to reflect its conclusion that there was an 80% chance he would have left Calyon in April 2010; and then it reduced that sum by a further 70% to reflect its conclusion that there was a 70% chance that at the end of 2011 he would return to banking in equivalent employment

(paragraphs 47-48). The consequence was that only 6% of the total difference in pay throughout that period was awarded.

vi) The Tribunal added certain additional heads of loss, including a small sum for loss of statutory rights, and £15000 for injury to feelings. (This in fact included £5000 aggravated damages which the EAT subsequently held had been wrongly awarded.)

vii) The Tribunal applied a 50% uplift to the total sum calculated. These were all net payments. The overall loss was assessed at almost £180,000 net of tax, and the uplift was half of that. After grossing up, the total award was almost £375,000.

At this point I simply note that although this was not an illogical way of calculating the loss, it did not in terms distinguish the loss flowing from the dismissal from that which flowed from the discriminatory failure to promote.

The appeal to the EAT.

6. Both parties appealed aspects of the Tribunal's judgment to the EAT. The conclusions of the EAT with respect to those grounds of appeal which are now the subject of further appeal to this court can be summarised as follows:

(i) The EAT allowed the claimant's appeal against the Tribunal's decision that the compensation awarded for the period after April 2010 should be reduced by 80% (or indeed by any amount) to reflect its conclusion that there was an 80% chance that he would have left Calyon's employment in April 2010 (paragraphs 15-18). The EAT considered that this was an irrelevant finding because it did not help identify the claimant's loss. It should have had no bearing on the assessment of compensation.

(ii) The EAT dismissed Calyon's appeal that the Tribunal had been wrong to award career long loss at all (paragraph 24). Contrary to the submissions of Calyon, it held that the exercise was not too speculative and that the Employment Tribunal had had enough evidence to make a sensible prediction about the claimant's future.

(iii) The EAT allowed Calyon's appeal that having found that there was a 70% chance that the claimant would have obtained an equivalent job by the end of 2011, the Tribunal ought to have increased the reduction in respect of years subsequent to 2011 to reflect the fact that the 70% chance must have improved with each passing year (paragraphs 26-27). Indeed, the EAT considered that there was no answer to the appellant's submission on this point. The EAT then went on to determine for itself how the chances would increase. It did so by taking two later dates, namely 2015 and 2019, and calculating the likelihood of equivalence being achieved by that date. It concluded that the discount for the years 2011 to 2015 should stay at 70%; for the years 2015 to 2019 it should increase to 85%; and for the years 2020 to 2024 it should be 92.5%.

(iv) The EAT allowed Calyon's appeal against the uplift of 50% and substituted a figure of 10% (paragraphs 46-47). The EAT held, contrary to the submissions of Calyon, that the Employment Tribunal had been entitled to say that the gravity of the procedural breach would in a normal case justify the maximum 50% uplift, but it concluded that the Employment Tribunal had erred in failing to have regard to the very significant size of the award overall. The EAT held that following the reasoning of the decision of the Court of Appeal in *Abbey National v Chagger* [2010] ICR 397, this was a material misdirection entitling it to substitute its own conclusion. The additional compensation had to be proportionate and the payment of an extra £90,000 was wholly disproportionate. The EAT held that in the circumstances the uplift should be reduced to 10% before grossing up the tax.

(v) The EAT however rejected the argument that the employment tribunal had erred in law in applying the uplift to heads of damage in respect of which there had been no breach of procedures. The contention was that the uplift should apply to that part of the compensation which was attributable to the claimant's dismissal only and should exclude that which was attributable to the discriminatory failure to promote him, since with respect to the latter the Tribunal had found that there was no breach of procedure. The EAT held that given the substantial link between the discriminatory refusal to promote and the dismissal, the Tribunal was entitled to find that it was just and equitable to apply the uplift to the whole of the award.

The issues raised by the appeal and cross appeal.

7. As I have indicated, both the appeal and the cross appeal raise grounds relating to the statutory uplift and the calculation of future loss. I will deal with them in turn.

The statutory uplift.

8. In order to appreciate the nature of the arguments with respect to this aspect of the appeal, it is necessary to describe and analyse the relevant law.

9. The Employment Act 2002 introduced statutory procedures (now abolished but in force at the material time) which employers and employees had to follow prior to a dismissal by the employer, or where the employee had raised a grievance with his employer. The statutory procedure in a dismissal case requires the employer to give to the employee advance notice in writing of the grounds on which the employer is contemplating dismissing the employee, the basis of those grounds, and reasonable time to consider the information he is given. Thereafter the employer should discuss the matter with the employee before any final decision is made. The procedure also requires that there should be a right of appeal against any decision to dismiss.

10. Section 31(3) provides for the uplift of compensation. It is as follows:

> "If, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that

> (a) the claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies,
>
> (b) the statutory procedure was not completed before the proceedings were begun, and
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> (c) the non-completion of the procedure was wholly or mainly due to failure by the employer to comply with a requirement of the procedure,
>
> it must, subject to sub-section (4), increase any award which it makes to the employee by 10 per cent and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount but not so as to make a total increase or more than 50 per cent."

11. Sub-section (4) provides that the tribunal might reduce the uplift below 10% where "exceptional circumstances" mean that would be unjust or inequitable to award that percentage.

12. There is a corresponding provision in section 31(2) entitling the tribunal to reduce the compensation otherwise payable to an employee where he has failed to comply with the procedures. It is common ground, and in my view plainly correct in law, that the award subject to the uplift is the award referable to the particular claim in respect of which there was a breach of the statutory procedures.

Statutory uplift: the issues on appeal.

13. The issues raised with respect to the uplift can be characterised as follows:

(1) Is it relevant to have regard to the size of the compensation awarded when exercising the discretion to increase the award pursuant to section 31(3)?
(2) Was the Tribunal entitled to conclude that the circumstances of the breach were such as to attract an uplift of 50%?
(3) When applying the uplift, did the Tribunal apply it to the appropriate elements of the compensation?

Is the amount of the compensation relevant to the section 31(3) discretion?

14. In *Abbey National v Chagger* the Court of Appeal held that the size of the award could be an "exceptional circumstance" within the meaning of subsection (4). In that case the Employment Tribunal was held to be entitled to limit the uplift to 2% simply because the compensation was so large - it exceeded £2 million. Elias LJ, giving the judgment of the court (Lady Justice Smith, Rimer and Elias LJJ), said (para 102):

> "Parliament would not have intended the sums awarded to be wholly disproportionate to the nature of the breach".

15. Although *Chagger* was a subsection (4) case, in my judgment it would be illogical if the size of the award were not also a potentially relevant factor when the tribunal is exercising its discretion whether or not to increase the compensation pursuant to subsection (3). The principle of proportionality is equally applicable in those circumstances. The size of the award ought in an appropriate case to be a factor informing the tribunal's determination of what is just and equitable under that provision. No doubt in most cases where the compensation is modest it will not affect the tribunal's analysis. But in other cases it can be a highly material consideration.

16. It follows that I do not accept the claimant's submission that unless the tribunal finds the case to be exceptional, it cannot have any regard to the amount of the award when exercising its discretion under subsection (3). That is unjustifiably to import into subsection (3) the condition which triggers the operation of subsection (4).

17. Mr Jeans submitted that if the Tribunal ought to have had regard to this factor and did not, then given the size of the award in this case, its decision was inevitably flawed and for this reason alone must be set aside. The EAT accepted that submission and so do I.

Was the Tribunal entitled to find a 50% uplift?

18. Before answering this question, it is necessary to consider the principles which should inform a tribunal when exercising its section 31(3) discretion.

19. I confess that I do not find the subsection at all easy to apply. In *Chagger* the court stated that its purpose was to operate "as an incentive to encourage parties to make use of the statutory procedures." It is a stick rather than a carrot, and the sanction for failing to comply has a significant punitive element since failure leads to additional compensation irrespective of the adverse effect on the employee. It is no doubt because the penalty should be commensurate with the offence that the EAT has expressed the view on a number of occasions that the degree of culpability is a highly significant factor when assessing the appropriate uplift. Culpability will include such considerations as the extent of the breach and whether it is deliberate or inadvertent: see the observations of the EAT President, Underhill J, in *Virgin Media v Seddington* UKEAT/00539/08, para 20 and *Lawless v Print Plus* UKEAT/0333/09 para 10.

20. Whilst I do not dissent from that analysis, I think it would be wrong to see the uplift purely in penal terms. The breach does have adverse consequences for the other party. In the case of a dismissal, the employee is deprived of the opportunity to persuade the employer, before the axe falls, that the dismissal would be inappropriate or unfair. Instead he is compelled to go to law to vindicate his position.

21. The consequences of the breach for an employee will vary from case to case. For example, it may be felt particularly harshly where the dismissal is for misconduct, and especially so if there are what turn out to be false allegations of fraud or dishonesty which can then only be successfully challenged in the tribunal, where they necessarily become aired in public. In my judgment this would render the breach more culpable than would otherwise be the case and would be a potentially important factor justifying an uplift significantly above the 10%.

22. I do not think that the ability of the wrongdoer to pay is in itself a relevant factor when considering the degree of culpability. Having said that, a large company which infringes the procedures will often be more culpable than a small business because it has less excuse for being ignorant of its obligations and the potential consequences of its actions.

23. The curiosity about these provisions - both as they affect the employer and employee - is that the sanction is defined by reference to the compensation awarded to the employee which is in turn a function of the employee's loss. Yet that depends on a whole host of factors some of which are entirely fortuitous and have no bearing on the employer's conduct at all. For example, if the employee is unfairly dismissed in flagrant and deliberate disregard of the procedures, but he secures equivalent employment immediately following the dismissal, the compensation will be very small and even the maximum uplift will only result in a very modest sum of money. By contrast, an employer who inadvertently commits a relatively minor breach in circumstances where considerable loss is suffered will have to pay much more even if the uplift is limited to 10%. The stick strikes more harshly on the wrong dog. That, however, is what Parliament has enacted, and tribunals must seek to give effect to Parliament's intention, however difficult or arbitrary the consequences may appear to be.

24. In my view, some understanding of Parliament's intention can be gleaned by a careful consideration of the structure of the subsection. As the EAT has observed (e.g. in the *Lawless* case) the tribunal is not charged with fixing a percentage somewhere between 10 and 50% as it deems just and equitable. Had that been the formulation then I can see that it may well have been appropriate for a tribunal to choose 10% for the least serious breaches and 50% for the most flagrant with the rest falling at the appropriate point within the range. Rather the tribunal is enjoined to start with 10% and it must then consider whether it is just and equitable to increase that percentage and, if so, by how much.

25. As Lady Smith pointed out giving the judgment of the EAT sitting in Scotland in *McKindless Group v McLaughlin* [2008] IRLR 678, para 13, this requires a tribunal to explain what facts or circumstances surrounding the failure to comply make it just and equitable to go beyond the minimum at all. This should not be an automatic response whenever the tribunal thinks that the breach is more than minor. On the contrary, there must be something about the particular circumstances which justifies the conclusion that 10% would be inappropriate and ought to be increased. The circumstances need not be exceptional, otherwise that word would have been used here as it is in subsection (4), but in my judgment they must be such as to clearly justify concluding that the starting point of 10% would not adequately reflect the degree of culpability.

26. In my opinion an increase to the maximum of 50% should be very rare indeed. It should be given only in the most egregious of cases. An example given by Lady Smith in the *McKindless* case which would at any event get close to the maximum is where there is a clear finding that the employer is determined to dismiss the employee whatever the merits and has deliberately and cynically ignored the procedures in case they get in the way of his being able to do so. However, the mere fact that the employer has ignored the procedures altogether would not in my view justify an increase to the maximum, although it would often justify some increase beyond 10%.

27. Once the tribunal has fixed on the appropriate uplift by focusing on the nature and gravity of the breach, but only then, it should consider how much this involves in money terms. As I have said, this must not be disproportionate, but there is no simple formula for determining when the amount should be so characterised. However, the law sets its face against sums which would not command the respect of the general public, and very large payments for purely procedural wrongdoings are at risk of doing just that. The EAT referred to the case of *HM Prison Service v Johnson* [1997] ICR 275 when Smith J, as she then was, observed, with respect to the level of compensation for injury to feelings, that it was necessary to have regard to "the view which members of the public would have to the amount of the award." In my judgment, that is *a fortiori* the case where the award is either unrelated, or at least only partially related, to any specific injury to, or loss suffered by, the employee.

28. In considering the sort of sum which would be proportionate and acceptable, it is, in my view, of some relevance to have regard to the sums which the courts are willing to award for injury to feelings and for aggravated damages. The former cases involve compensation for injury but they could bear some comparison with cases where the employee feels aggrieved at losing the opportunity to try to correct what he or she sees as an injustice. Aggravated damages are exceptionally awarded in discrimination cases where there is malice or spite, or the complaints of the employee have been trivialised. That is often more offensive to the employee than a simple failure properly to follow procedures. The level of awards for injury to feelings was laid down by the Court of Appeal in *Vento v Chief Constable of West Yorkshire* [2003] ICR 318. The court held that the most serious case should attract an award of compensation no greater than £25,000 (now slightly adjusted to take account of inflation since then: *Da'Bell v NSPCC* [2010] IRLR 19. The sum of £65,000 awarded in that case by the Employment Tribunal was held to be seriously out of line. For aggravated damages, the amounts are in fact much lower and rarely exceed £5,000. (That was in fact the sum awarded in *Vento* in addition to the compensation for injured feelings.)

29. I do not suggest that these are entirely analogous situations, but I think that save in very exceptional cases, most members of the public would view with some concern additional payments following an uplift for purely procedural failings which exceeded the maximum payable for injured feelings.

Was the Tribunal entitled to apply a 50% uplift in this case?

30. Mr Jeans submits that the Tribunal erred in two respects when determining the uplift and as a consequence fixed it far too high. The first was the failure to have regard to the size of the award. As I have indicated, given the substantial sums awarded here, that submission must succeed, as it did before the EAT.

31. The second ground is that even disregarding the size of the award, a 50% uplift was not justified. That should be reserved for the most serious cases, and this did not fall into that category. The Employment Tribunal erred in concluding that this was the appropriate uplift, and the EAT also was wrong to say that the Tribunal was entitled to reach that conclusion. Given the fact that the EAT fixed the uplift at 10% because of the size of the award, this submission may have no practical significance. However, it is advanced in the event that this finding may ultimately have some effect on the appropriate uplift.

32. In support of this submission, Mr Jeans makes the point that there was not in this case a complete disregard of the statutory procedures. Furthermore, the Tribunal found in terms that the failings were not themselves acts of victimisation. As the Tribunal found, there had been compliance with the obligation to provide a right of appeal. It is true that the Tribunal was critical of the way in which the appeal was conducted. In particular, it said that Mr Donaldson, who had carried out the appeal, had failed properly to grasp the nature of the employee's case. This led the EAT to find that there had been compliance in name only with this aspect of the procedure and that since the failure to comply was deliberate and without justification, the 50% reduction was appropriate.

33. In my judgment, this was not a finding open to the Employment Tribunal or the EAT. It was not suggested that Mr Donaldson had acted in bad faith or that the appeal was simply cynical window dressing. Certainly there is no such express finding to that effect by the Tribunal and I do not think that it would be right to infer that that was what the Tribunal was intending to say. It follows that whilst there had been a deliberate and wilful refusal to comply with the procedures at the first stage, it was unjust to apply that epithet to the appeal hearing as well.

34. Mr Jeans further submits, and I accept, that one can certainly imagine more serious cases. An example might be where the flagrant and deliberate refusal to comply is for a discriminatory reason, or, to take the example I have already given, where the employer wilfully denies the employee an opportunity to counter an allegation of fraud or dishonesty.

35. As I have indicated, in my judgment the maximum uplift should be very exceptional indeed, and only applied in the most serious cases. I do not think that the breach in this case warrants being so characterised. I therefore respectfully disagree with the view expressed by both courts below that a 50% uplift was justified or, in the case of the EAT, would have been justified but for the size of the award. I would have concluded that the appropriate uplift, disregarding the size of the award, was in the region of 30%.

36. However, that percentage then has to be translated into money terms and reconsidered. That is what the EAT did and they concluded that 10% gave an appropriate proportional sum. The claimant submits that if any reduction at all was justified, this was far too large.

37. In this case even the application of a 30% uplift would lead to a sum of around £55,000 net. As I have indicated, it is a nice question to what extent the uplift should be further modified to take account of the size of the award, and there is much room for legitimate disagreement. However, I consider that even that sum is outside the permissible range. I may not have been inclined to reduce the figure quite as far as the EAT did, but we are now reviewing their assessment, and I do not think that the 10% figure which it identified was outside the range legitimately open to it given the particular award. If that award were to stand, I would not interfere with that figure. However, since for other reasons I would uphold aspects of this appeal which may reduce the overall compensation to which the uplift attaches, that would undermine the premise on which the EAT made its assessment. There may, therefore, need to be a reconsideration of this percentage figure in the light of the overall award. I return to consider that point at the end of this judgment.

Was the uplift applied to the appropriate elements of compensation?

38. Mr Jeans also submits that the Tribunal erred in failing to relate the uplift solely to the element of the compensation which related to the dismissal. The loss in this case resulted from two unlawful acts, namely the dismissal and the discriminatory failure to promote. The Tribunal found in terms that there was no failure to comply with the statutory grievance procedures with respect to the latter; the failure related solely to the dismissal.

39. As I have indicated, it is plain from the statute that the uplift must relate to the particular claim in respect of which the statutory procedures were infringed. Mr Cheetham does not seek to contend otherwise. The Tribunal did not focus on this issue. The EAT did and concluded that the Tribunal was entitled to say that since the two causes of action - the discrimination and the dismissal - were interlinked, it was reasonably open to the Tribunal in determining what was just and equitable to treat the losses together. In my judgment the legislation does not permit such a flexible approach.

40. In my view, the Tribunal plainly erred in applying the uplift to the elements of compensation referable to injury to feelings, which cannot be awarded in an unfair dismissal case, and also to that element of damage representing the loss of income resulting from the failure to promote from the date promotion would have occurred until the date of dismissal itself. Plainly that loss was not referable to the dismissal. The only question is whether, following the dismissal, the continuing loss resulting from the failure to promote can as a matter of law thereafter properly be attributable to the dismissal itself rather than to the earlier act of unlawful discrimination.

41. In the course of argument Lady Justice Smith floated the possibility that it might on the grounds that the dismissal constituted a *novus actus interveniens* such that thereafter that loss, although originally rooted in the discriminatory act, is properly to be treated as referable to the dismissal.

42. I respectfully do not think that this element of loss can be so treated. I accept that the dismissal might alter the calculation of the compensation referable to the discriminatory act. To take a simple example, but for the dismissal the Tribunal might have found that the employee would have been promoted by the employer in the very near future to an equivalent position to that which had been denied him by the discriminatory refusal to promote. Following the dismissal it might take the employee longer than that to find an equivalent job. If the Tribunal is making its determination after the dismissal, as in this case, then the fact of the dismissal will in that example increase the element of compensation referable to the act of discrimination.

43. In my view, however, it does not transmute the character of the loss itself: it still has its roots in the discriminatory act rather than the dismissal. This conclusion is reinforced, in my view, by the fact that unfair dismissal compensation is calculated by reference to what the employee is actually paid at the date of dismissal, not what he ought to have been paid had there been no earlier independent unlawful act.

44. Furthermore, the alternative view would have potentially damaging consequences for the employee. Let us assume in the example I have given that the employee is unfairly dismissed but in circumstances where the cap on unfair dismissal compensation applies (compensation for unfair dismissal is capped unless the dismissal is for a discriminatory reason). If the loss resulting from the discriminatory failure to promote

is now deemed to be attributed to the dismissal, it would be subject to the cap on compensation. In a case where the cap would be exceeded even without any reference to that loss, it would mean that the employee would not be compensated at all for the loss flowing from the discrimination with respect to the period following the dismissal. In my judgment, that cannot be right.

45. Accordingly, I would dismiss the appeal on this point and uphold the cross appeal. The EAT was entitled in view of the size of the award to limit the uplift to 10%. It ought, however, to have applied the increase only to the loss referable to the act of dismissal itself.

Future loss.

46. The grounds relating to this aspect of the assessment of loss can, I think, be analysed under the following four questions:
(1) Was the Tribunal entitled to assess the claimant's loss by reference to his whole career?
(2) If so, was it entitled on the evidence to limit the likelihood of his gaining equivalent employment by the end of 2011 to a 70% chance?
(3) Ought the Employment Tribunal, as the EAT held, to have concluded that the likelihood would necessarily increase in subsequent years; and if so, ought the assessment of that increase to have been done in a more precise way than was adopted by the EAT?
(4) Was the EAT entitled to treat the Tribunal's finding that there was an 80% chance that the employee would have left by 1 April 2010 had he not been unlawfully dismissed as irrelevant to the calculation of future loss?

Future loss: should it have accrued over the whole career?

47. Mr Jeans launched a sustained attack against the principle that in a case of this kind, it was appropriate to calculate loss as though the claimant's career would be permanently blighted. The Tribunal should have done what tribunals typically do when assessing loss of this nature, namely determine when the employee is likely to get another job on a equivalent terms and calculate the loss down to that date. This provides a cut off point beyond which no damages should be awarded. In this case, the findings of the Tribunal in paragraphs 29 and 36 in particular showed that the Tribunal considered that the experience gained from working with the FSA well equipped the claimant to return to banking, either in risk management or in a regulatory role.

48. Mr Jeans raised the spectre of floodgates. He submitted that it will always be possible to say for any dismissed employee that there is some chance, however small, that he will never again secure such economically valuable employment. It requires only a small risk multiplied over many years until retirement to result in very large levels of compensation way outside the normal levels awarded in cases of this kind and providing unjustified windfall compensation to the employee. Furthermore, it was wholly speculative to predict what would happen so many years into the future. There were too many variables to permit the Tribunal to make any sensible judgments and it should not have been tempted to do so.

49. Mr Cheetham submitted that there was nothing wrong with the Tribunal's approach. The claimant was almost 47 and seeking work in a recession. There was every chance

that in the circumstances he would suffer long term damage to his career and to assess that at 30%, which he submits was essentially what the Tribunal did, was a permissible conclusion. The Tribunal had the advantages of hearing this case over a lengthy period, and there was no obvious error or misdirection which would justify the intervention of this court.

50. I agree with Mr Jeans that it will be a rare case where it is appropriate for a court to assess compensation over a career lifetime, but that is not because the exercise is in principle too speculative. If an employee suffers career loss, it is incumbent on the Tribunal to do its best to calculate the loss, albeit that there is a considerable degree of speculation. It cannot lie in the mouth of the employer to contend that because the exercise is speculative, the employee should be left with smaller compensation than the loss he actually suffers. Furthermore, the courts have to carry out similar exercises every day of the week when looking at the consequences of career shattering personal injuries. Nor do I accept a floodgates argument. The job of the courts is to compensate for loss actually suffered; if in fact the court were to conclude that this required an approach which departed from that hitherto adopted, then we would have to be willing to take that step.

51. However, in my view the usual approach, assessing the loss up to the point where the employee would be likely to obtain an equivalent job, does fairly assess the loss in cases - and they are likely to be the vast majority - where it is at least possible to conclude that the employee will in time find such a job. In this case the Tribunal has in effect approached the case on the assumption that it must award damages until the point when it can be *sure* that the claimant would find an equivalent job.

52. In my judgment, that is the wrong approach. In the normal case if a tribunal assesses that the employee is likely to get an equivalent job by a specific date, that will encompass the possibility that he might be lucky and secure the job earlier, in which case he will receive more in compensation than his actual loss, or he might be unlucky and find the job later than predicted, in which case he will receive less than his actual loss. The Tribunal's best estimate ought in principle to provide the appropriate compensation. The various outcomes are factored into the conclusion. In practice the speculative nature of the exercise means that the Tribunal's prediction will rarely be accurate. But it is the best solution which the law, seeking finality at the point where the court awards compensation, can provide.

53. Exceptionally, a tribunal will be entitled to take the view on the evidence before it that there is no real prospect of the employee ever obtaining an equivalent job. In such a case, the tribunal necessarily has to assess the loss on the basis that it will continue for the course of the claimant's working life. *Chagger* is an example of such a case. By the time the tribunal came to assess compensation in his case he had already been out of a job for some years. The evidence was that he had made every effort to obtain employment in his chosen field, having made countless applications for new employment. There was a suggestion that he had been stigmatised in the eyes of other employers as a result of the manner of his dismissal. He had taken reasonable steps to mitigate his loss by going into teaching. In these circumstances the Tribunal was entitled to conclude that he had suffered permanent career damage and should be compensated accordingly. Where such a loss is established, a tribunal has to undertake that task, however difficult and speculative it may be.

54. The Tribunal's findings here demonstrate that this was not such a case. The Tribunal found that the claimant had a 70% chance of returning to banking in an equivalent job by the end of 2011. It follows that the Tribunal was on any view wrong to assess any compensation after that date, and arguably the cut off date should have been sometime before then, when the prospects of an equivalent job would still have been greater than 50%. I return to this issue below.

70% reduction.

55. It follows that in my judgment the various issues surrounding the 70% assessment are no longer material. That was the percentage by which the Tribunal reduced the loss after the end of 2011, but since there was no relevant loss after that date, the finding becomes immaterial.

56. However, I will make some very brief observations about the issues raised under this heading. On the assumption that the tribunal was properly entitled to calculate the loss over the claimant's whole career, it would have had to assess what the claimant would have been likely to earn over that period had he not been treated unlawfully compared with what he is now likely to earn. The difference would then be subject to reductions to reflect the vicissitudes of life (e.g the possibility that he might have been fairly dismissed anyway or the risk that he would die or might have to retire early) and the benefit of accelerated payment.

57. Mr Cheetham submits that this is in effect what the Tribunal did. He says that if one reads the decision fairly, the Tribunal was making a finding that the difference in pay should be reduced by 70% to reflect the uncertainties of the respective career paths. I do not accept that. The Tribunal stated in terms in paragraph 36 (see para 4(vii) above) that there was a 70% chance that the claimant would be able to return to an equivalent job by the end of 2011. That is a very different finding.

58. Mr Jeans submitted that the Tribunal was wrong to assess the claimant's chances of obtaining a job on the same terms within three years as only 70%. The factors identified in paragraphs 29 and 36 all pointed towards a much stronger likelihood that he would have obtained an equivalent job by that time. I do not agree; it may be that other tribunals would have found a greater likelihood, but in my view Mr Jeans cannot say that this was a perverse conclusion.

59. Mr Jeans' related submission was that in any event, the Tribunal was bound to find that the likelihood of obtaining an equivalent job must have increased over time. If he had a 70% chance after three years, it must have been greater with the passing years. The EAT found this argument compelling and so do I. It is inevitably the case that the if the claimant has longer than three years to obtain an equivalent job, the prospects of his doing so must have been greater than they were if he only had three years to secure such a job. They cannot be worse. The 70% chances that he would find an equivalent job after three years are bound to improve. How far they were likely to improve over time is a more difficult matter to assess, but some improvement was inevitable. It may be, as Mr Cheetham argued, that as the claimant got older and had been out of banking longer, the prospects of obtaining an equivalent job would deteriorate. But that is no answer to this point. That simply shows that there may come a point some years down the line - let us say 10 years - when the likelihood of securing an equivalent job will

have virtually vanished. Thereafter the likelihood will not improve. That does not change the fact that the likelihood of obtaining an equivalent job was greater over the ten year period than it was over the three year period.

60. The EAT recognised the error and sought to correct it by looking at the position in 2015 and in 2019 and in a rough and ready way assessing the increased likelihood of the claimant securing an equivalent job from those dates. So it assumed that the 70% chance remained up to 2015, and then it increased to an 85% chance from 2016-19, and then rose to a 92.5% chance from 2020 to 2024. Mr Jeans submits that the EAT was not entitled to approach the matter in that way. It was wrong, for example, to assume that the chances did not improve between 2011 and 2015. Indeed, they might have improved significantly over that period. So he says that a more nuanced approach should have been adopted. I do not think that it would necessarily have been more beneficial to the employers had the EAT adopted such an approach, but in principle I agree that they should have done so, provided at least they were given the material to enable them to do so. In fairness to the EAT, however, it ought not to have been in this position in the first place. So the whole exercise was perforce artificial and unsatisfactory.

61. In my view, therefore, even if the Tribunal had been entitled to consider the loss over the claimant's career - and in my opinion, in view of their own findings, they were not - then their approach to that issue was flawed. The EAT in part corrected the errors.

The 80% reduction.

62. The submission here is that since the Tribunal had found that the claimant had an 80% chance of leaving the employer in any event by April 2010, this ought to have been factored into the assessment of his compensation. The Employment Tribunal had properly done just that, and the EAT was wrong to say that it was wrong to do so and that this finding was irrelevant.

63. This submission is potentially significant even if the Tribunal had assessed compensation by considering by what date the claimant would have secured an equivalent job. Plainly if there is evidence that the employee would have been dismissed before that date, or indeed that there is a realistic chance that this would have occurred, then this must be factored into the calculation of loss. To take a simple example, if the business closed three months after the claimant's dismissal, he can only recover damages up to that point (together with any redundancy pay which he might otherwise have been entitled to receive.) He would only have received his pay up to that date and therefore that is all he will have lost as a result of the dismissal. But in general evidence about what the employee would have done but for the discriminatory dismissal does not assist a Tribunal in assessing loss. The reason was explained by Elias LJ in the *Chagger* case (paras 69-72):

> "69. … The task [of the employment tribunal] 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 would 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.
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> 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.
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> 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."

64. Mr Jeans does not dispute that principle. His case is that the Tribunal's finding should be read as a conclusion that there was an 80% likelihood that the employee would voluntarily have left Calyon whatever the circumstances and even if the job had been at a lower pay. The Tribunal did not in terms say that he would only be likely to leave if he had secured an equivalent job and it should not be assumed that this is what it meant.

65. I agree that if the Tribunal did indeed make the finding which Mr Jeans relies upon, then this would be a matter which would have to be factored into the assessment of compensation. If the claimant had simply resolved to leave Calyon come what may, whether to a lower paid job or indeed no job, it would set a limit to his actual loss. But in my judgment, that is an impermissible reading of the Tribunal's conclusion. I have no doubt that it was envisaging that if nothing untoward had happened to the claimant in his employment, there was an 80% chance that he would have left for an equivalent or better job at that time. However, in the event, that was overtaken by events. I do not accept that this is an unfair reading of the Tribunal's conclusion. It is the natural meaning of its finding given that employees only rarely voluntarily leave a job for lower paid employment. In my view, Mr Jeans has adopted a distorted construction of the Tribunal's finding. This construction is the premise of his argument on this point, and once it goes the submission necessarily fails.

66. It follows that in my judgment the Tribunal was wrong to say that damages after April 2010 should be reduced by 80%. However, if contrary to my view it is appropriate to

treat the loss as accruing over the whole of the claimant's career, some reduction should have been made for the vicissitudes of life such as the possibility that the claimant would have been fairly dismissed in any event or might have given up employment for other reasons. That is, however, a general reduction calculated on a broad brush basis and it does not involve calculating any specific date by which the claimant would have ceased to be employed.

Re-assessing compensation.

67. In my judgment the approach of the Tribunal to compensation was flawed. It ought not to have assessed it by considering loss over the claimant's career. Both counsel accepted that if we were to find that the Tribunal had erred in its approach, and if we thought that there were sufficient findings to enable us to map out the way in which the compensation should be assessed, it would be desirable for us to do so. That is better than incurring additional costs which a remission inevitably entails and is in accordance with the overriding objective.

68. In my judgment, we are in a position to set out the relevant principles relying on the findings of the Tribunal itself. The Tribunal found that there was a 70% chance that the claimant would obtain equivalent employment in banking by the end of 2011. It must be the case that there must have been a better than evens chance that he would have obtained an equivalent job sometime before that date. However, I do not think that the Tribunal anticipated that it would be very much earlier. The basis on which the Tribunal concluded that the claimant had this 70% chance was that he would remain with the FSA for a sufficient period to enable him to learn the skills of, and gain experience as, a regulator, and to make contacts with senior risk officers and managers in banks. In my view, it is reasonable to conclude that the claimant would probably have been able to leave the FSA and obtain an equivalent job by the end of June 2011. He would have gone from his FSA salary (including bonus) to the equivalent he would have had if he had not been unlawfully refused promotion within Calyon.

69. The damages referable solely to the unfair dismissal would then need to be calculated and the statutory uplift applied to that sum. Since the appropriate uplift may be influenced by the amount of the loss, I would not at this stage fix that percentage uplift but would hear written representations from counsel about it once the amount of compensation has been calculated. I do not anticipate any difficulties in working out the relevant figures, but if there is disagreement, that too should be the subject of written submissions.

Disposal.

70. It follows that, in my judgment, the appeal should be dismissed and the cross appeal upheld on some, but not all, of the grounds advanced by Mr Jeans. The compensation should be recalculated in the light of the principles set out in this judgment. The parties should seek to agree the compensation but to the extent that they are unable to do so, further representations on issues which remain in dispute should be the subject of written submissions.

Lady Justice Smith:

71. I agree.

The Master of the Rolls:

72. I also agree.

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