Appeal No. UKEAT/0300/14/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 19 May 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR L SMALL — APPELLANT

THE SHREWSBURY AND TELFORD HOSPITALS NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR PHILIP JONES
(of Counsel)
Direct Public Access

For the Respondent

MR GILES POWELL
(of Counsel)
Instructed by:
Hill Dickinson LLP Solicitors
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SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

UNFAIR DISMISSAL - Compensation

The Claimant succeeded on a claim that he had lost his (agency) employment for making a public interest disclosure. At a subsequent Remedy Hearing he argued that if he had not suffered the discrimination he would have become a full-time employee of the Trust and would have remained in its employment until retirement, and on that basis claimed a continuing future loss of earnings. The Employment Tribunal ("ET") found that he would actually have been dismissed on 14 November 2013, a date prior to the ET Remedy Hearing, and made no further award for future loss. However, it awarded him compensation for injury to feelings, in the assessment of which it observed that he had effectively been shut out of the labour market because he had to reveal that he lost his job with the Trust for making a public interest disclosure. It was argued on appeal that the ET was bound in law to have considered whether to make an award for "stigma" damages/loss of employability in future, as it was recognised in **Abbey National v Chagger** could be claimed in appropriate circumstances. *Held* that this was not such an exceptional case that an argument not advanced below could be heard for the first time on appeal. The ET had not heard it: indeed, it had heard an argument as to future loss which was premised on a very different basis.

Some further facts might need to be established. Although in principle such an award could be made, and did not need first to be formally pleaded (see **Chang Wai Tong v Li Ping Sum**; **Thorn v Powergen plc**) it was not so exceptional that it should be heard: the ET had made no error of law in addressing the submissions made to it in circumstances, as distinct from those relevant to redundancy or conduct dismissals, where it could not simply be expected to deal with the argument.

A claim for stigma loss/labour market disadvantage was comparatively unusual, and in finding the facts relevant to the claim for injury to feelings the ET had not been addressing the question of future loss of earnings.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal from a Decision in respect of quantum of a Tribunal (Employment Judge Warren, Mr Wagstaff and Mr Bagnall) sitting at Birmingham & Stoke, which on 2 April 2014 came to the conclusion that, in respect of the way in which the Claimant had been treated, which amounted to discrimination by the former end user of the agency services which he supplied, he being a worker and they being an employer within the meaning of the relevant statutory provisions, he should be entitled to a total of just over £54,000 compensation. He claims that the Tribunal was in error in limiting the future loss claim as it did.

2. The underlying circumstances are these. Mr Small was employed as a Project Manager through an agency by the Respondent National Health Service Trust. He began his service for them in May 2012 and he was dismissed two months later, in July 2012. His employment came to an end because he raised concerns that he had identified asbestos fibre board. He was concerned that those who had worked with it and in its vicinity had not been advised as to the potential risks to their health. The Tribunal, in an earlier Liability Decision, Reasons which were delivered on 11 March 2013, concluded that the claim could proceed on the basis that the Claimant was a worker, and it found that he was dismissed on the ground that he made a public interest disclosure and suffered a detriment, when as a worker employed by the Respondent he was dismissed for that reason.

3. When it came to remedy, which it adjourned to a subsequent hearing, it was presented with a Schedule of Loss, which further developed a schedule which had been before it at the liability stage. At that earlier stage the Claimant, of whom the Tribunal recorded that he had remained unemployed since dismissal, argued for a net loss of earnings of just short of £38,000

and a future loss of just short of £80,000, being the losses of earnings he anticipated between 2013 and 2015. That was updated on 23 September 2013. He set out a future loss of earnings claim in which he claimed the salary which he expected to have received from year to year until his anticipated retirement age in 2022. His case, as I understand it, from counsel (of whom Mr Powell for the Respondent was at the Tribunal but Mr Jones who appears for the Claimant was not) was that he anticipated that after a short period of agency work he would have been offered full-time employment by the Respondent Trust. That prospect was denied him because of the discrimination against him.

4. The Schedule of Loss advanced on that basis was replaced at the very start of the remedy hearing by a Schedule of Loss which claimed a total net past loss of earnings and an injury to feelings award amounting to just short of £70,000 in total, but which made no claim, on the face of it, for future loss. It appears that was an error. The Claimant later said to the Tribunal, when he sought reconsideration, that he had omitted the words "future losses to be assessed by the Tribunal" in any event. I understand from Mr Powell, and it is not disputed by Mr Jones, that as between the parties the Claimant was arguing that he would have been maintained in a job by the Respondent Trust. The Respondent for its part argued that he would have been employed only for a short period of time, but in any event to no later than the date which the Tribunal ultimately concluded upon.

5. In the light of those arguments the Tribunal had to determine the question of loss, and it had to determine the question of injury to feelings. As to loss there was no issue, on the evidence, that the Claimant had acted unreasonably in failing to mitigate his loss. Far from it, he had applied for over 600 posts for which he was qualified. He had worked on only one temporary contract since losing his post and was living on his pension and savings.

6. The Tribunal set out at paragraph 7 what it thought its role was:

> **"7. We have looked at his actual loss resulting from the dismissal, and have had to consider how long his temporary contract would have continued. We have already rejected the respondent's assertion that his contract was for a fixed period of 3 months."**

That was the primary contention raised by the Respondents.

7. It then examined the evidence relating to the appointment of a replacement, a Mr Butler, whose contract came to end on 14 November 2013. It came to the conclusion, as a matter of fact (paragraph 15), contrary therefore to the case which the Claimant was advancing, that:

> **"15. … had the claimant remained and not been dismissed, he would have continued as a project manager through to the date when Mr Butler left."**

They went on to say:

> **"17. … We believe on the evidence we heard that the claimant would have been dismissed on the 14 November 2013, when Mr Butler left."**
>
> **18. We have not therefore awarded any future loss beyond that date."**

8. It examined the question whether there was any evidence to suggest there was a chance of him being dismissed lawfully before that date and concluded that there was effectively none. Accordingly it had attempted, and it thought had achieved, a conventional analysis of future loss.

9. By those means it came to a total, as I have said, of just short of £34,000. When it came to the question of injury to feelings, the Tribunal noted that the Claimant had said very little about how he felt, but the Tribunal thought it knew that he considered that he had suffered a detriment. Paragraph 2 under this heading noted that he had applied for over 600 similar roles and been turned down, and was very distressed by what had happened. It noted, paragraph 3,

that his contract was temporary; it was unlikely that there would be a long-term ongoing employment relationship; and:

> **"3. … As an interim worker, we accept that his career is dependant on the outcome of his last job, he is only as good as his last reference, which is, we were advised, an absolute and common requirement within the field in which he works predominantly public sector.**
>
> **4. The outcome of the dismissal has it appears, been career ending for the claimant. The claimant, a man of few words, and not given to exaggeration, we found to be principled and professional. He has been honest with prospective employers, who, once told of the circumstances of his dismissal, do not progress his applications."**

10. It went on to award a sum which it identified as being towards the top end of the middle band of **Vento** and added aggravated damages of £5,000 for the refusal by the Respondent to provide a satisfactory reference. It thought the effect of that was realistically to remove the Claimant from the work environment. It did not (it was not asked to, so far as I can see) identify that as a further act in itself of discrimination against the Claimant. It noted that without a reference from his last employer:

> **"1. … he will not qualify for further temporary contracts from the NHS, which is the work environment which has a significant market demand for his skills, and where he wants to work. A significant element of his career has been in the public sector, which generally has similar requirements for a reference from the last place of work. The fact that he has applied for 600 suitable positions since his dismissal and has failed to achieve work in any other that [sic] one for 7 weeks (where no reference was required), speaks volumes."**

There were then two other matters taken into account in respect of aggravated damages.

11. It was unclear, on preliminary sift, whether any arguable ground of appeal was raised amongst the several grounds which Mr Small acting in person advanced. The Preliminary Hearing came before Singh J. He thought two matters were arguable. The second ground no longer troubles this court. One ground only remains. That is whether the Employment Tribunal should have taken into account "stigma loss". What this amounts to is an argument that the Tribunal erred in law by failing to award the Claimant any such thing as compensation for loss of earnings after 14 November 2013.

12. The sum it should have awarded as compensation for loss of earnings after 14 November is said to have been the equivalent of that which in personal injury cases would be known as an award to compensate for disability on the open labour market. In employment cases it is recognised that the circumstances in which an employer and employee part and the way in which the employer has behaved prior to the ending of the relationship may have an effect upon the subsequent employability of the Claimant. Thus, in **Malik v Bank of Credit and Commerce International SA** [1997] ICR 606 the House of Lords recognised that damages could be awarded in respect of the breach of the employer's obligation, implied in the contract, that he would not carry on a dishonest or corrupt business and that, since it was reasonably foreseeable in consequence of any such corruption that there would be a serious possibility that an employer's future employment prospects would be handicapped, damages would be recoverable for any such continuing financial losses sustained.

13. The decision does not rest purely on the remarkable circumstances of the BCCI collapse. In **Abbey National plc & Anr v Chagger** [2010] ICR 397 the Court of Appeal, in a collective judgment, departed from the view which the Employment Appeal Tribunal had taken in circumstances in which the Claimant had succeeded in a claim for race discrimination, unfair dismissal, automatic unfair dismissal and breach of contract. The Appeal Tribunal had held that the natural scope of liability for discriminatory dismissal did not extend beyond the injury inherent in the loss of employment in question: the risk that potential future employers might decline to employ the Claimant because of his claim against the employer as opposed to any impact it might have on his ability to mitigate his loss was not a matter that could be reflected in compensation. That principle was rejected on appeal. The test to be applied was to ask what would have occurred if there had been no unlawful discrimination. As observed at paragraph

69, that is not necessarily the same as asking what would have happened to the particular employment relationship had there been no discrimination:

> **"69. … 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."**

14. The stigma being referred to there was the stigma of having made a claim for discrimination against the previous employer. In respect of that, the court examined whether stigma loss was in principle recoverable and concluded at paragraph 94 that it was, as one of the difficulties facing an employee on the labour market. It then said this:

> **"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."**

15. It went on to note, in the second sentence of paragraph 96, that in the view of the Court of Appeal:

> **"96. … It is far from the common experience that those taking proceedings against their employer thereafter become virtually unemployable in their chosen field. …"**

16. The way in which it therefore saw the evidence in respect of stigma loss as impacting on damages was in its interaction with the question of when, if ever, efforts made in mitigation might be successful. But that would not deal with a case in which the Tribunal could, from other evidence, be sure that the Claimant would have lost his job for reasons which were not

discriminatory by the time of the Tribunal hearing. As to that, the court gave its view at paragraph 99:

> **"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] 17 KIR 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."**

It was there describing a set of facts which fit those the Tribunal had to consider in respect of remedy in the present case.

17. What Mr Jones submits is that the Tribunal here had identified a consequence of the discrimination (the treatment by way of dismissal for making a public interest disclosure being analogous to and treated in the same way as discrimination (see **Virgo Fidelis Senior School v Boyle** [2004] ICR 1210)) but had failed to deal at all with any element of future loss by imposing the cut-off date to the employment relationship which it did. Yet it had gone on in the next breath to say, albeit under the head of assessing injury to feelings, that the outcome of the dismissal had "been career-ending for the Claimant". Thus it was recognising as a matter of fact, albeit qualified by the word "it appears", that the Claimant had a long-term and permanent loss of earnings, on the one hand, but failed to award him anything in respect of that when it might have assessed a future loss of earnings. Mr Jones recognised that, in effect, he was inviting this court to hold that the Tribunal was under a duty to consider an argument that the

Claimant, by virtue of the way in which he had been treated, should have his damages assessed upon the footing that they included a sum to represent his loss of the chances of obtaining a replacement job, which otherwise on the findings of fact the Tribunal would have expected him to do.

18. It was accepted that the matter had not been pleaded as such. Mr Jones contended that it did not need to be. In my view, he was on a sound footing so far as that was concerned. In **Chagger** the Court recognised the analogy between this head of assessment of future loss of earnings and that of loss of earning capacity in personal injury cases. Two authorities, both of high authority, independently of each other, came to the same conclusion: that it is not necessary in order to advance such a claim that the matter should, in civil cases, specifically be pleaded. The first in time was an opinion of the Privy Council in the case of **Chan Wai Tong v Li Ping Sum** [1985] AC 446. In that case the Court of Appeal of Hong Kong decided to award the Claimant HK$108,000 for loss of future earning capacity arising out of injuries she sustained in a road traffic accident, although that loss had been neither pleaded nor claimed before the Master. As to whether it should have been pleaded, their Lordships thought it was good practice that it should specifically be pleaded but the failure to do so did not necessarily bar the plaintiff from recovering such damages.

19. That view as to there being no need specifically to plead the issue was repeated in the domestic context by the Court of Appeal in **Thorn v Powergen plc**, a decision of the Court of Appeal of 11 October 1996 ([1997] PIQR Q71). There, in words redolent of those used in **Chan Wai Tong**, although **Chan Wai Tong** was not cited, the Court of Appeal said, as summarised in the headnote:

> **"Although it is good practice to plead it expressly where a claim for *Smith v Manchester* damages is part of the plaintiff's case, the possible consequences to the plaintiff from his**

> **exposure were pleaded, and this clearly gave rise to the consideration of whether a Smith v Manchester award was appropriate …"**

20. Accordingly, submits Mr Jones, if the question was whether or not the Tribunal should have raised a claim, albeit that it was not formally pleaded, the answer was that it did not have to be. As to that, he submits that in **Tidman v Aveling Marshall Ltd** [1977] IRLR 218 the Tribunal recognised that in some circumstances there was a duty on a Tribunal to consider issues even though they had not been raised by the parties. Given the Judgment of the Appeal Tribunal in that case, Kilner-Brown J said at paragraph 5:

> **"We are of the opinion that in future cases it is the duty of an Industrial Tribunal to raise itself the five different categories of compensatory award. …"**

21. The five it identified were those which derived (see paragraph 2) from the case of **Norton Tool Co Ltd v Tewson** [1972] IRLR 86, being (1) the immediate loss of wages; (2) the manner of dismissal; (3) future loss of wages; and (4) loss of protection in respect of unfair dismissal. To that Kilner-Brown J added a fifth, which was loss of pension rights. Those were the five elements of loss which a Tribunal should direct itself to consider in every case in which compensation was concerned. Therefore, in this particular case, submits Mr Jones, the Tribunal should have looked at future loss. Moreover this is not simply the chains of the past clanking inappropriately in the present because, as recently as 1998, this Tribunal in the case of **Langston v Cranfield University** [1998] IRLR 172 modified the generally accepted principle that a party will not be permitted to take new points on appeal which could have been ventilated below. It observed that that principle must be seen in the context of cases where a principle is so well established that "an Industrial Tribunal may be expected to consider it as a matter of course". That was a case which concerned dismissal for redundancy. The parties and the Tribunal had focussed on the question of whether the Claimant had been unfairly dismissed on the grounds of redundancy without considering whether there had been consultation prior to

dismissal and whether the employers had taken reasonable steps to find alternative employment for him. Those issues had not been directly raised before the Tribunal. Nonetheless the landscape of redundancy claims was so familiar to Tribunals that, in the view of the Appeal Tribunal it might have been expected to consider those questions as a matter of course (see paragraph 21). On that basis the conclusion which the Appeal Tribunal reached was that it was implicit in a claim for compensation for unfair dismissal by reason of redundancy that unfairness incorporates unfair selection, lack of consultation and the failure to seek alternative employment on the part of the employer; exactly the same as might happen, axiomatically, in the case of a claim for unfair dismissal when the threefold or fourfold test deriving from **BHS v Burchell** [1978] IRLR 379 and **Iceland Frozen Foods v Jones** [1983] ICR 17 is such familiar territory that it hardly needs to be argued at all before a Tribunal for it to be bound to apply that approach.

22. I accept the force of those authorities for those points. Indeed Mr Powell does not take issue with them. I would go so far as to say that it is important where there are litigants in person, ever more familiar in Tribunals, that a Tribunal should approach what is a matter of such familiarity as the redundancy questions addressed in **Langston v Cranfield** or the unfair dismissal liability criteria addressed in **Burchell** and **Iceland Frozen Foods** or in general terms the heads of loss identified in **Norton Tool v Tewson** in dealing with compensation. But this approach is one which is not of universal application. It applies only where the principle is so well-established that an Industrial Tribunal might be expected to consider it as a matter of course.

23. What occurred here, submits Mr Powell, was that the Claimant did advance a claim of future loss. That claim of future loss was that he would have been employed by the Respondent

Trust in a full-time capacity as a direct employee. The discrimination against him had the effect that he was not. It was on that basis that he claimed a lifetime loss of earnings. That claim was answered by the Tribunal. It rejected the Respondent's first answer to it, but it accepted the second as a matter of fact. This was therefore a case in which there was a specific argument addressed to the question of future loss, which the Tribunal considered. It has not been suggested before me that any argument was addressed before the Tribunal to the effect that the Claimant would suffer a stigma or disadvantage on the labour market as a consequence of his admitting to would-be employers that he had been dismissed for raising a matter of health and safety concern with the Trust.

24. That, submitted Mr Powell, was not something which would come within the scope of the **Langston v Cranfield** or **Tidman v Aveling Marshall** approaches. Indeed he points out that in **Chan Wai Tong v Li Ping Sum** itself the Privy Council refused to uphold the award of HK$108,000 by the Court of Appeal of Hong Kong because the claim had been considered for the first time on appeal, and there had been no exceptional circumstances which permitted this. He invites me to have regard to the principles which are set out in a number of cases in the employment appeal jurisdiction, which echo the approach taken in that case in what was a personal injury appeal from Hong Kong. Thus in **Jones v Governing Body of Burdett Coutts School** [1999] ICR 38, EAT Familiar Authority 9, the employer appealed against a decision by the Employment Appeal Tribunal to allow a new or conceded point of law to be raised. It was to the effect that that should only occur in exceptional circumstances. Robert Walker LJ at 44A-D summarised it thus:

> **"These authorities show that, although the appeal tribunal has a discretion to allow a new point of law to be raised or a conceded point to be reopened, the discretion should be exercised only in exceptional circumstances, especially if the result would be to open up fresh issues of fact which, because the point was not in issue, were not sufficiently investigated before the industrial tribunal. In [*Kumchyk v Derby City Council* [1978] ICR 1116] the appeal tribunal presided over by Arnold J. expressed the clear view that lack of skill or experience on the part of the appellant or his advocate would not be a sufficient reason. …"**

I interpose to say that that observation is capable of covering those who are litigants in person, at least where they have some ability, though are not professional lawyers. Continuing:

> **"… In *Secretary of State for Employment v Newcastle upon Tyne City Council* [[1980] ICR 407] the appeal tribunal presided over by Talbot J. said that it was wrong in principle to allow new points to be raised, or conceded points to be reopened, if further factual matters would have to be investigated. In *Hellyer Brothers Ltd v Mcleod* [[1987] ICR 526] this court, in a judgment of the court delivered by Slade L.J. which fully reviewed the authorities, was inclined to the view that the test in the appeal tribunal should not be more stringent than it is when a comparable point arises on an ordinary appeal to the Court of Appeal. In particular, it was inclined to the view of Widgery L.J. in *Wilson v Liverpool Corporation* [1971] 1 WLR 302, 307, that is, to follow:**
>
> > **"the well known rule of practice that if a point is not taken in the court of trial, it cannot be taken in the appeal court unless that court is in possession of all the material necessary to enable it to dispose of the matter fairly, without injustice to the other party, and without recourse to a further hearing below." "**

25. In **Glennie v Independent Magazines UK) Ltd** [1999] IRLR 719 CA, EAT Familiar Authorities 10, Laws LJ, in his decision agreeing with Brooke and May LJJ accepted that, although the Appeal Tribunal possessed a discretion which had to be exercised in accordance with established principles to allow a new point to be raised before it for the first time:

> **"18. … It is a general principle of the law that it is a party's duty to bring forward the whole of his case at the proper time. The reasoning of Robert Walker LJ in *Jones v Governing Body of Burdett Coutts School* [1998] IRLR 521 is, with great deference, consonant with this. A new point ought only to be permitted to be raised in exceptional circumstances, as Robert Walker LJ held at p.44B. If the new issue goes to the jurisdiction of the Employment Appeal Tribunal below, that may be an exceptional circumstance, but only, in my judgment, if the issue raised is a discrete one of pure or hard edged law requiring no or no further factual inquiry. There is a public interest, beyond the interests of individual parties, that statutory tribunals exercise the whole of but exceed none of the jurisdiction which Parliament has given them upon such facts as are proved or admitted before them. I do not consider that this case falls within that category, even if the facts required to be ascertained in order to determine the date of the termination of the applicant's employment were now capable of agreement. On the facts agreed before the industrial tribunal, that tribunal was correct to hold that it lacked jurisdiction. It was therefore necessary to show exceptional circumstances if the Employment Appeal Tribunal was properly to decide to allow the new point to be taken. The Employment Appeal Tribunal identified no such exceptional circumstances. In my judgment, there are none."**

26. The learning was collected together by HHJ McMullen in **Secretary of State for Health v Rance** [2007] IRLR 665, EAT Familiar Authorities 11, in particular where he drew together the principles which were applicable at paragraphs 50 and 51. He repeated the points which emerge from the citations I have just made. He considered the circumstances in which a point might be taken. None of those particular points seems to me to be particularly apposite to

the present case. He gave examples where the discretion should not be exercised. It is possible that that at 7(b), lack of skill by a represented party, might have something to say in the present case, although I rather doubt it. But otherwise this seems to have little to say in the other direction. I am left with the general statements of principle which I have identified.

27. The central point that Mr Jones makes in answer to those propositions as to proper procedure recognises that the argument was not put forward before the Tribunal. It was not suggested that the Tribunal should make an award of a sum of money in respect of the difficulty which the Claimant now had on the open labour market. As I have noted, that was not his case. The references which were analysed by the Tribunal in respect of injury to feelings were relevant to whether he had appropriately mitigated his loss, a matter which as it happens was not in contention, and as to the level of award which the Tribunal should make to him in respect of his damages including injury to feelings. It was plainly relevant to the latter. It might also (and Mr Jones would submit obviously) be capable of being relevant to the argument that an award for some future loss should and could have been made on that basis. Therefore, he submits that this an exceptional case. Though he did not quite put it this way, it might have been said that the Tribunal was blowing hot and cold at one and the same time in respect of the same evidence. The Tribunal did not appear to appreciate, he submits, that it could have made such an award. It appears to have thought it was precluded by its conclusion that the employment relationship would have terminated in any event on 14 November 2013.

28. The Employment Tribunal here had considered each and every factor which was relevant because it had actually looked at the evidence. It was not therefore a case in which to allow the point to be taken on appeal would involve the court having to look at fresh matters of evidence. These facts were truly exceptional.

29. In response Mr Powell argued that this was not an exceptional case. It was not one where the point had simply been missed by a Tribunal which ought, by reason of its other findings of fact, to have addressed it. It was a case in which central to the decision was the fact that the Claimant had run a contrary case. He did not, as he might have done, have said "Look, I cannot get a job on the open market because of the way in which I was discriminated against and in consequence you should pay for my continuing loss of earnings for it is that which causes me to continue to suffer a loss". If he had done so and if he had argued that, the point would have been raised.

Discussion

30. I am unclear as to how far the Tribunal would have had to undertake an examination of further fact had it wished to resolve this particular argument but must address it as best I can. The difficulties of a finding of fact in this area were eloquently spoken of by the Court of Appeal in what it said in paragraph 99 of **Chagger**. It regarded it as an exceptional case in which the evidence would be strong enough for there to be an award on its own for stigma of this sort. So many factors are likely to apply to prevent an employee obtaining employment.

31. In the present case I note that the Claimant himself, no doubt entirely consistently with the view which the Tribunal had of him as being a man of integrity and honesty, ascribed four reasons for his failing to obtain more than six interviews out of the 576 vacancies he said he had sought. He said that one was that he had been dismissed and unable to provide a reference; second that he had presented a claim relating to his dismissal. But, thirdly and fourthly, "I have been unemployed for a while and my work skills are outdated" and he says that his credit rating is no longer good. They are linked. It would be wrong to see them entirely in isolation. But it demonstrates, as it seems to me, that the decision as to the extent to which an award could be

made for this head of loss requires careful examination of the evidence and is far from simple. In saying this, I am merely echoing that which is in paragraph 99 of **Chagger**. Mr Powell notes that the words "it appears" qualify the view of the Tribunal in paragraph 4, under the heading "injury to feelings", that what happened was career-ending. The Tribunal went on, I note, to say that the failure to provide a reference was realistically to remove him from the work environment. But that in itself leads to a question as to whether that was a further wrong done to him for which he may be compensated in these proceedings. It seems to me that there were likely to be further findings of fact which needed to be made. Though much of the ground had been traversed and a view expressed, I cannot accept that it was simply a matter which a Tribunal could confidently address without the need for further inquiry. Taking that view (as I do), it is very difficult indeed to see that an argument which was not run as such below, should be permitted to be advanced here and now.

32. The argument was not one which it was difficult to make as a matter of observation from a Claimant in the position of this Claimant given his feelings about why it was he had not secured alternative employment. It was not one, as it seems to me, which one could expect a Tribunal to anticipate for awards for stigma damages or difficulties on the labour market arising purely as a result of the discriminatory act or the dismissal are far from commonplace. Again by reference to **Chagger**, they are referred to as unusual. It is a different category from the types of case considered in **Langston** and **Tidman**.

33. I regard it a very great pity in the present case that the claim was not advanced on the basis on which it now is by the Claimant. But I acknowledge that there is more than one party to an appeal, as Mr Powell was at pains to emphasise. The rule, exemplified by the strictness of the approach taken in **Glennie** and **Jones**, echoing that of the Privy Council in **Chan Wai**

Tong, exists because of the need for finality in litigation and the sense that, as Laws LJ put it, a party should advance the whole of his case at one time.

34. With some regrets, and despite the very best efforts of Mr Jones in an argument which I regard as impressive and potentially highly persuasive, that I have to accept that, applying the principles I do, it cannot be heard in this Tribunal, not having been advanced as an argument below and not having been an obvious matter to which the Tribunal should have paid regard.

35. Accordingly this appeal must be and is dismissed.