Appeal Nos. UKEAT/0082/14/DXA
UKEAT/0204/14/DXA
UKEAT/0205/14/DXA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 & 18 December 2014
Judgment handed down on 5 March 2015

Before

THE HONOURABLE MR JUSTICE SINGH

(SITTING ALONE)

UKEAT/0082/14/DXA & UKEAT/0204/14/DXA

TIMOTHY JAMES CONSULTING LTD — APPELLANT

MS S WILTON — RESPONDENT

UKEAT/0205/14/DXA

MS S WILTON — APPELLANT

TIMOTHY JAMES CONSULTING LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Timothy James Consulting Ltd	MR AKHLAQ CHOUDHURY (of Counsel) Instructed by: Legal Counsel 60 Grosvenor Street Mayfair London W1K 3HZ
For Ms S Wilton	MR RICHARD O'DAIR (of Counsel)

SUMMARY

HARASSMENT

SEX DISCRIMINATION - Injury to feelings

SEX DISCRIMINATION - Other losses

The Claimant resigned from the Respondent company and was found by the Employment Tribunal to have been constructively dismissed as the result of three acts of harassment related to her sex. She succeeded in her claim, including claims for unfair dismissal and harassment. There was no appeal against the finding of unfair dismissal but the Respondent did appeal against the finding of unlawful harassment. In addition, the Respondent appealed against the finding that the act of constructive dismissal was in itself an act of harassment.

In a later Remedy Judgment, the Tribunal made various awards to the Claimant, including an award of £10,000 for injury to feelings, which it grossed up on the understanding that it would be liable to income tax. The Respondent appealed against that decision on the ground that such an award is not liable to tax.

The Tribunal dismissed her claim for compensation for loss of a chance: the Claimant had claimed that she would have acquired equity in the Respondent company and that she had lost several hundreds of thousands of pounds as a consequence of her dismissal. The Claimant appealed against that aspect of the Remedy Judgment.

Held:

(1) The Respondent's appeal against the finding of harassment would be dismissed. The finding that the acts of harassment were related to sex was one of fact which the Tribunal was entitled to reach on the evidence before it.

(2) The Respondent's appeal against the finding that the constructive dismissal was in itself an act of harassment would be allowed and a finding substituted that it was not an act of harassment. On the true construction of the **Equality Act 2010** a resignation which amounts to a constructive dismissal does not fall within the meaning of harassment.

(3) The Respondent's appeal against the award of compensation for injury to feelings would be allowed and the award reduced to the sum of £10,000. On the true construction of the **Income Tax (Earnings and Pensions) Act 2003** such an award is not liable to income tax. The earlier decision of the Employment Appeal Tribunal in **Orthet Ltd v Vince-Cain** [2005] ICR 324 would be followed in this regard, in preference to contrary decisions of lower tribunals dealing with tax appeals.

(4) The Claimant's appeal against the Remedy Judgment would be dismissed. The Employment Tribunal had correctly understood the law on loss of a chance and applied it to the facts of the case in a way which was open to it on the evidence before it.

THE HONOURABLE MR JUSTICE SINGH

Introduction

1. There are three appeals before this Appeal Tribunal from the Employment Tribunal at Bristol. The Tribunal comprised Employment Judge Harper sitting with two lay members, Ms S Pendle and Mr E Beese.

2. The first decision (the "Liability Judgment") was sent to the parties on 6 November 2013.

3. The second decision (the "Remedy Judgment") was sent to the parties on 3 February 2014. In a Judgment sent to the parties on 23 April 2014 that Remedy Judgment was corrected in order to rectify arithmetical errors which had occurred in the earlier Remedy Judgment, as was accepted by both parties.

4. By its Liability Judgment the Tribunal held, first, that the Claimant was unfairly dismissed. Secondly, it held that her claim for harassment succeeded. Thirdly, it held that her claim for victimisation succeeded. Fourthly, it held that her claim that the Respondent had unlawfully deducted her pay to the extent of 8.5 days also succeeded.

5. There is no appeal against the decisions in that Liability Judgment save for the second one: the decision that the claim for harassment succeeded. The Respondent does appeal against that decision.

6. By the Tribunal's Remedy Judgment the Respondent was ordered to pay the Claimant in respect of unfair dismissal a basic award, in the sum of £2,250, and a compensatory award, in the sum of £450. Secondly, the Respondent was ordered to pay the Claimant wages due, in the sum of £1,872.60 gross. Thirdly, the Respondent was ordered to pay the Claimant damages for injury to feelings of £10,000, which were grossed up for tax reasons to £16,666, together with interest in the sum of £89.24. The Respondent was also ordered to pay the Claimant in respect of financial loss, in the sum of £40,394.85, together with interest in the sum of £107.25.

7. The Respondent appeals against the third decision in the Remedy Judgment, by which damages for injury to feelings were grossed up, on the ground that such an award is not liable to tax.

8. The Claimant appeals against that aspect of the Remedy Judgment by which the Tribunal found that the Claimant had not established that she had a substantial chance of securing equity in the Respondent Company. The Tribunal concluded that there was no financial loss in this regard: see paragraph 58 of the Remedy Judgment.

9. I will turn to each of the respective parties' appeals in turn below.

Factual background

10. The Claimant began her employment with the Respondent on 17 January 2007.

11. On 9 December 2012 she resigned, giving one month's notice, and claimed that she had been constructively dismissed. The Employment Tribunal agreed with her on that point and there is no appeal against that finding nor against the finding that the dismissal was unfair.

12. From paragraphs 8 to 30 of its Judgment the Employment Tribunal found the relevant facts, from which this summary is taken.

13. The Claimant had a successful career in the recruitment industry. When she joined the Respondent in January 2007 she already had several years experience and was earning in the region of £100,000. She accepted the role of head of sales. She wanted to move to a smaller business where she could gain equity in the company. At that point Timothy James Consulting Limited was a company run by Chris O'Connell and Peter Bennett.

14. In May 2011 the Claimant began a personal relationship with Mr O'Connell.

15. In July 2011 she was promoted to the role of Permanent Director. Her colleagues, Andrew Backhouse and Ian O'Dair, were also promoted. Mr Backhouse became Contracts Director and Mr O'Dair Chief Operating Officer. All three became statutory directors.

16. In late 2011 Mr Bennett sold his shareholding in the company to an investment company called Hamilton Bradshaw Limited (HB).

17. In February 2012 the Claimant's relationship with Mr O'Connell ended by mutual agreement. They remained on friendly terms.

18. Also in February 2012 Rachel Docker began working for the Respondent under the Claimant's management.

19. Unknown to the Claimant, Mr O'Connell and Ms Docker began a personal relationship in late June 2012. Ms Docker was friendly with another member of the Claimant's team, Caroline Surtees.

20. By 9 July 2012 the Claimant had become aware of that relationship and she raised concerns with Mr O'Connell about the effect of the relationship on her team.

21. Between September and November 2012 a number of meetings took place, which were in due course to form the subject of complaint by the Claimant in the Tribunal proceedings.

22. In September 2012 the Claimant and Mr Backhouse were called into a meeting to discuss the part repayment of the loans which they had made to the company. A draft proposal had been prepared by the Respondent. Mr O'Connell ordered them to sign that draft document but they refused to do so without properly considering the implications. The Tribunal accepted the evidence of both the Claimant and Mr Backhouse that Mr O'Connell lost his temper, that he shouted a tirade of abuse at both of them and that he threw a pen at them. Both the Claimant and Mr Backhouse were shocked and humiliated by this tirade.

23. On 31 October 2012 the Claimant and Mr Backhouse were called into a meeting with Mr O'Connell. During this meeting he subjected the Claimant to a tirade of criticism regarding her management style, which lasted thirty minutes. The Claimant felt humiliated at being subjected

to such criticism in front of her colleague. In particular he called her "a green eyed monster", saying that he believed her to be jealous of Ms Docker.

24. On 13 November 2012 a meeting took place between Mr O'Connell, Mr O'Dair, Mr Backhouse and the Claimant. Mr O'Connell was very aggressive towards the Claimant and insisted that she should apologise for her conduct towards Ms Docker. The Claimant denied the allegations which had been made against her and refused to apologise for something she had not done.

25. Without the Claimant's approval or knowledge, by 13 or 14 November 2012, Mr O'Connell and others had agreed to a compromise agreement with Ms Docker, whereby she left the business. She was subsequently paid a sum in the region of £11, 275.

26. On 15 November 2012 the Claimant was called into a meeting by Mr O'Connell, who told her that he wanted to draw a line under the matter and move on. The Claimant asked him whether he believed that she had bullied Ms Docker but he did not answer. The Claimant was left with the impression that Mr O'Connell believed in the truth of Ms Docker's allegations even though no proper investigation had taken place. The Claimant as a result lost all trust and confidence in Mr O'Connell and the Respondent. The following day she left work and did not return.

27. As I have already indicated the Claimant resigned on 9 December, giving four weeks notice.

The Respondent's appeal against the Liability Judgment

28. There are two parts to the Respondent's appeal against the Liability Judgment. Grounds 1 and 2 in this appeal relate to the finding by the Tribunal that there had been harassment of the Claimant. Ground 3 in this appeal relates to the finding by the Tribunal that the act of constructive dismissal in itself amounted to an act of harassment of the Claimant. I turn to each of those matters separately.

Grounds 1 and 2: Harassment

29. Before the Employment Tribunal the Claimant was complaining about four specific events alleged to amount to harassment under section 26 of the **Equality Act 2010**. The Tribunal dealt with each of those four events in turn.

30. At paragraph 36 of its Judgment the Tribunal rejected the Claimant's contention that Mr O'Connell's conduct at the meeting in September 2012 constituted harassment contrary to section 26. The Tribunal said:

> **"Dealing firstly with the September meeting, we reject the claimant's contention that the conduct, which we found occurred during that meeting related to sex. The discussion and the subsequent tirade from Mr O'Connell was directed at both the claimant and Mr Backhouse but related to the financial proposal regarding the loan repayment. There is nothing to indicate that Miss Docker's complaints or anything relating to her situation affected this meeting. We therefore conclude that the claimant has not shifted the burden of proof in that regard. Mr O'Connell's conduct at the meeting did not amount to harassment related to sex."**

31. At paragraph 37 the Tribunal took a different view in relation to the October meeting. It said:

> **"We take a different view of the October meeting when the claimant's management style was criticised and she was called a green-eyed monster by Mr O'Connell with reference to alleged jealousy of Miss Docker. We are satisfied that a man would not have been subjected to such treatment by Mr O'Connell. The claimant received that treatment because she had previously had a relationship with him, *and because she was a woman to whom he ascribed jealousy*. It was related to the protected characteristic of sex. …" (Emphasis added)**

32. In the same paragraph the Tribunal also accepted that there was harassment in respect of exclusion of the Claimant from the investigation at the early stage when the allegations were solely against her team members.

33. Also in paragraph 37 the Tribunal accepted that the conduct of Mr O'Connell on 13 November 2012 constituted harassment, when he insisted that she apologise.

34. At paragraph 38 the Tribunal found that the purpose or effect of Mr O'Connell's conduct was to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. It found that the purpose of the conduct was to humiliate and undermine the Claimant in order to support Ms Docker, his current girlfriend. The Tribunal found that the burden of proof had shifted to the Respondent and it had not satisfied it that it did not unlawfully discriminate by way of harassment.

35. Section 26 of the **Equality Act 2010**, so far as material, provides:

> **"(1) A person (A) harasses another (B) if**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are … sex …"**

36. The Respondent submits that the Employment Tribunal was wrong in law to find that the claim for harassment succeeded. The Respondent advances two grounds of appeal in this regard:

(1) The Tribunal misdirected itself as to the appropriate test for determining the issue of harassment;

(2) The Tribunal reached a conclusion (that there was harassment) which was perverse.

37. The Respondent submits that it is clear from the wording of section 26 that the unwanted conduct complained of must be "related to" the relevant protected characteristic, in this case sex. The Respondent submits that the words "related to" are not materially different from the words "on the grounds of" to be found in the context of discrimination law. In that context it is well established that a Tribunal has to ask itself what was the "reason why" the conduct occurred.

38. The Respondent submits that, in approaching the issue of harassment, the following principles may be derived from the authorities:

(1) The Tribunal should consider whether the conduct was inherently discriminatory or (in the present case) whether the words spoken in this context were inherently related to sex;

(2) If not, then the question is whether the conduct was related to sex;

(3) In determining whether the conduct is related to sex, it may be necessary to consider the reason why the conduct occurred. At this stage, it may not be sufficient simply to consider the matter on a "but for" basis.

39. The Respondent submits that, applying those principles to the facts in the present case, the Tribunal did not comply with any of those requirements and erred in law. In particular the Respondent criticises the Tribunal's reasoning at paragraphs 36 and 37 of its Judgment. While the Respondent accepts that the Claimant experienced treatment from Mr O'Connell which was unacceptable and such as to entitle her to resign, it submits that the treatment was not "related to" her sex.

40. In the alternative, pursuant to its second ground of appeal, the Respondent submits that the Tribunal's conclusion was perverse. The Tribunal concluded that the treatment at the meeting in September 2012 did not constitute harassment related to gender. The only difference identified by the Tribunal between what occurred at the September meeting and the subsequent one is that Ms Docker's complaints had not affected the former and Mr O'Connell's use of the comment "green-eyed monster" in the latter. However, the Respondent submits that neither of those matters is inherently related to sex and accordingly it was perverse to conclude that otherwise similar treatment (a tirade of abuse) was not harassment related to sex in September but was such harassment later.

41. I do not accept these criticisms of the Tribunal's reasoning. In my judgment the Tribunal simply applied the words of section 26 of the **Equality Act** to the facts as it found them to be in this particular case.

42. My attention was drawn on behalf of the Respondent to the decision of this Tribunal in **Warby v Wunda Group plc** (UKEAT/0434/11/CEA), in which the judgment was given by the President, Langstaff J. In that case this Tribunal was concerned with the predecessor legislation

to section 26 of the **Equality Act** in so far as it related to the protected characteristic of sex. At paragraph 9 it was noted that the distinction between the words "on the ground of her sex" and the words "related to her sex" was not a material one. However, that proposition was common ground in that case. Moreover, what was common ground (and accepted by this Tribunal) was that the distinction was not material "in the circumstances of this case." This Tribunal was not seeking to lay down any general principle of law for other cases.

43. In my view, it is important in this context to give effect to the words that Parliament has used and not to substitute alternative words for them. It is also important that the statutory language should not become encrusted with a judicial gloss. The words used by Parliament are that the conduct must be "related to" the relevant protected characteristic. The Tribunal's task was to apply those words to the facts of the particular case before it and that, in my view, is precisely what it did.

44. It seems to me that much of the Respondent's complaint about the Tribunal's conclusion on this aspect of the case founders on the point that the Tribunal found as a fact that Mr O'Connell's conduct, on the relevant occasions, was indeed related to the Claimant's sex: see in particular the middle of paragraph 37, which I have already quoted above, which includes the passage "because she was a woman to whom he ascribed jealousy." This was a finding of fact and was not based on any erroneous approach in law.

45. In this context it is important to recall that the Tribunal had the opportunity to hear evidence from a number of witnesses, including the Claimant and Mr O'Connell. At paragraph 4 of the Liability Judgment it recorded that it found the Claimant to be a "convincing and

credible witness." In contrast, at paragraph 5 it recorded that it found Mr O'Connell to be "an evasive witness, totally lacking credibility." It made similar comments about his evidence at paragraph 38. The Tribunal had the opportunity to assess what kind of person Mr O'Connell was and, in the light of that assessment, formed the view that it did about whether his conduct was related to the Claimant's sex or not.

46. The fact that the Tribunal did not find that Mr O'Connell's conduct at the September meeting was related to sex is, if anything, an indicator that the Tribunal carefully considered the evidence before it separately in relation to each of the allegations of harassment. It is certainly not an indicator of perversity in the Judgment of the Tribunal. In relation to that incident, the Tribunal was not satisfied that the Claimant had shifted the burden of proof to the Respondent. As it explained at paragraph 36, the Tribunal concluded that on that occasion Mr O'Connell's treatment of the Claimant was the same as his treatment of Mr Backhouse and was not related to her sex but related to the financial proposal regarding the loan repayment.

47. In my judgment, the Tribunal did not err as a matter of law in reaching the conclusion which it did on this aspect of the case. Further, in my judgment, there was nothing perverse about the Tribunal's findings of fact. They were all open to it on the evidence, which it had the opportunity to hear and assess for itself. I therefore dismiss the first two grounds of appeal advanced by the Respondent.

Ground 3: constructive dismissal as harassment

48. At paragraph 39 of the Liability Judgment the Tribunal turned to the question of whether the constructive dismissal of the Claimant itself amounted to an act of harassment. It had

concluded that three of the significant events upon which the Claimant relied amounted to acts of harassment. Those three incidents were significant events which led her to resign. The Tribunal therefore concluded that the constructive dismissal itself also amounted to an act of harassment, for which the Respondent was liable.

49. Pursuant to its third ground of appeal, the Respondent submits that, as a matter of law, constructive dismissal cannot in itself amount to an act of harassment within the meaning of section 26 of the **Equality Act**.

50. The Respondent reminds me that section 26 appears in Part 2 of the Act, which is concerned with "key concepts." However, the application of this concept in the employment context is set out in Part 5 of the Act, which deals with employment etc.

51. Section 39 provides that an employer must not discriminate against an employee by, for example, dismissing him or subjecting him to any other detriment. Section 39(7)(b) makes it clear that for this purpose "dismissal" includes constructive dismissal.

52. Harassment in the employment context is dealt with separately by section 40. That provides:

> **"(1) An employer (A) must not, in relation to employment by A harass a person (B) -**
>
> **(a) who is an employee of A's;**
>
> **(b) who has applied to A for employment."**

53. The Respondent submits that it is notable that section 40 does not expand on the definition of harassment in section 26 so as to include constructive dismissal within its scope.

54. The Respondent accepts that prior acts of harassment may give rise to a constructive dismissal. However, the question is whether the fact that such acts have given rise to a constructive dismissal means that the constructive dismissal itself becomes an act of harassment. The Respondent submits that it does not, both as a matter of construction of the relevant statutory provisions and because of what constructive dismissal entails.

55. On behalf of the Claimant it was initially submitted that it was not open to the Respondent to raise this point of law on appeal because it had not been taken at first instance before the Employment Tribunal. However, this objection was not pursued at the hearing before me. As the Respondent submitted, the point was a live one before the Employment Tribunal and was not conceded by the Respondent.

56. At the hearing before me there was also briefly flagged the possibility that the Claimant would submit that the construction of the legislation advanced by the Respondent would result in a breach of the United Kingdom's obligations under European Union law and therefore should not be adopted. However, this line of argument was not developed at the hearing before me.

57. The main submission that was made before me on behalf of the Claimant was based on the fact that the Employment Tribunal had already found that there were three acts of harassment which entitled the Claimant to resign and therefore she was constructively dismissed as a consequence of those acts of harassment. The Claimant submits that the precise label therefore which is attached to what happened as a matter of fact is unimportant.

58. I do not accept that it is merely a question of labelling or that it is unimportant. The Tribunal must act in accordance with law. In my judgment, the Respondent is correct to submit that the act of constructive dismissal does not in itself fall within the meaning of harassment as defined by the **Equality Act**. It was therefore not open to the Tribunal as a matter of law to find that the constructive dismissal in this case was in itself an unlawful act of harassment.

59. At the hearing before me the Respondent made it clear for the record that, although it wished to pursue this ground of appeal as a matter of principle, it does not contend that the Claimant's resignation following on from the acts of harassment which the Tribunal found occurred in this case broke the chain of causation. It is accepted that the Tribunal found as a matter of fact that those acts of harassment caused the Claimant to resign. I endorse that concession and observe that there is no appeal before me against that finding of fact.

60. Nevertheless, the Respondent's appeal against the Liability Judgment will be allowed to the extent that the Employment Tribunal erred as a matter of law in finding (at paragraph 39 of the Liability Judgment) that the act of constructive dismissal in this case in itself amounted to an unlawful act of harassment. There will be substituted a finding that the act of constructive dismissal did not amount to an unlawful act of harassment.

The Respondent's appeal against the Remedy Judgment

61. The Respondent appeals against one aspect of the Remedy Judgment. There is no complaint about the making of an award for injury to feelings or its quantum as such. The Tribunal made an award of £10,000 for injury to feelings. However, it went on to gross this up,

to take account of income tax at the rate of 40%, and awarded a figure in the sum of £16,666: see paragraph 60 of the Remedy Judgment.

62. The Respondent submits that the Tribunal was wrong in law to gross up the figure because an award of damages for injury to feelings is exempt from tax. This is an important point of principle and turns on the correct interpretation of the tax legislation concerned.

63. The relevant legislation is now contained in the **Income Tax (Earnings and Pensions) Act 2003**. Section 401 of that Act, so far as material, provides that

> **"(1) This chapter applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with -**
>
> **(a) the termination of a person's employment …"**

64. By virtue of section 403(1), the amount of a payment or benefit counts as employment income of the employee or former employee for the relevant tax year if and to the extent that it exceeds the £30,000 threshold. It is then liable to income tax subject to any exemption.

65. Section 406, which has the side-note "Exception for death or disability payments and benefits", provides:

> **"This Chapter does not apply to a payment or other benefit provided -**
>
> **(a) in connection with the termination of employment by the death of an employee, or**
>
> **(b) on account of injury to, or disability of, any employee."**

66. There was similar legislation previously in the **Income and Corporation Taxes Act 1988**, in particular section 148.

67. Those provisions in the 1988 Act were considered by Lightman J in the Chancery Division of the High Court on an appeal by way of case stated from a Special Commissioner: **Horner v Hasted** [1995] STC 766. The decision under appeal in that case was made by a Deputy Commissioner, Dr A N Brice. It is important to note that, on its facts, that case did not concern an award of damages for injury to feelings in the context of a discrimination claim. It concerned termination payments that had been made by an employer. Further, the case concerned an issue about the meaning of the word "disability" and not the word "injury."

68. In her decision the Deputy Commissioner considered as the relevant question "were the termination payments made on account of disability?" in part 7 of her decision. At paragraphs 7.17 to 7.18 she stated:

> **"7.17. I first consider this issue by applying a subjective test and considering whether the persons who made the payments were of the view that they were made on account of disability. In the light of the evidence given … I find that the reason for the payment was because the partners considered that the taxpayer was 'past it' and he was not producing the level of fees required; these commercial considerations appear to be the only reason why the firm made the payments to the taxpayer. It is relevant to note that the documents referred to … were both prepared in 1988 and indicate that, at that time, the partners in the firm were concerned about the cash flow and financial position of the firm.**
>
> **7.18. I have then applied an objective test and have asked whether, in the light of all the facts and evidence before me, the taxpayer has satisfied me that he was suffering from a disability. Here I have considered the meaning of the word 'disability' in the context in which it is used. Section 188 exempts payments made in three circumstances, namely death, injury or disability. In my view, within this context, the word 'disability' means a medical condition which disables, or prevents, a person from carrying out his employment in the same way that death or injury are medical conditions which prevent persons from carrying out their employment."**

69. In his decision dismissing the appeal by the taxpayer, Lightman J said that he found the decision of the Special Commissioner to be "an impressive document clearly and comprehensively setting out the evidence, arguments and findings of fact and law": see page 798F.

70. Lightman J said at page 800H-J:

> **"It is clear from the language of section 188 that for the exemption to be available it must be established:**
>
> > **(1) that the disability alleged by the employee is a relevant disability, that is to say, a total or partial impairment (which may arise from physical, mental or psychological causes) of his ability to perform the functions or duties of his employment; and**
> >
> > **(2) that the person making the payment does so not merely in connection with a termination of employment (compare the language of the exemption of payment made on the death of employee) but on account of the disability of the employee. In short, there must be established as an objective fact a relevant disability and as a subjective fact that the disability is the motive for payment by the person making it."**

71. Unfortunately, as will become apparent, the decision in that case was not drawn to the attention of this Tribunal in a later case, **Orthet Ltd v Vince-Cain** [2005] ICR 324, in which it was decided that an award of damages for injury to feelings is not taxable. That is the only decision of this Tribunal which has considered that question. The judgment of this Tribunal was given by HHJ McMullen QC.

72. In **Orthet** the Employment Tribunal had made an award of compensation under the **Sex Discrimination Act 1975**. As Judge McMullen noted at paragraph 19 of his judgment, the way in which the issue of taxability of an award of damages for injury to feelings came before this Tribunal was highly unusual. In relation to the award for loss of earnings, the Tribunal had indicated that the figure should be calculated on the basis that it had to be grossed up to take account of income tax. However, in relation to the award of damages of £15,000 for injury to feelings, no mention was made of grossing up. At paragraph 20 of his judgment Judge McMullen said that this reflected the clear understanding on the part of the Employment Tribunal that its award for injury to feelings was not subject to tax. At paragraph 23 Judge McMullen noted that, strictly speaking, there was no ground of appeal in relation to this matter. Nevertheless, since both parties had made submissions about this issue to the Employment Tribunal, there should have been an express finding about it, so that the disappointed party

could appeal if it wished to. This Tribunal decided to determine the point of law and upheld the (implicit) decision of the Employment Tribunal to make an award for injury to feelings which was not grossed up, on the ground that it was not liable to tax.

73. Between paragraph 26 and paragraph 35 of his judgment Judge McMullen set out a lengthy and detailed consideration of the relevant case law and principles of law. At paragraph 29 he said:

> **"All of the foregoing indicates that the court's approach to the assessment of damages for injury to feelings is unrelated to special damages, for example for loss of earnings. The question is: should such awards be taxed? We are acutely conscious that decisions relating to tax liability may be appealed and determined only by general commissioners, pursuant to sections 31(1) and 31B of the Taxes Management Act 1970. On the other hand, once an issue is placed before an employment tribunal relating to how an applicant's loss is to be compensated, the tribunal must decide that issue by reference, if necessary, to the incidence of taxation, as demonstrated by the grossing-up principle in *Shove v Downs Surgical plc* [1984] ICR 532 and the net loss principles in *British Transport Commission v Gourley* [1956] AC 185."**

74. At paragraph 32 Judge McMullen said that it must be recalled that the principle of damages for injury to feelings is restitution, quoting what May LJ had said in **Alexander v Home Office** [1988] ICR 685, at page 692:

> **"As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution … For the injury to feelings … for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the [relevant tribunal]."**

75. At paragraph 33, in an important passage which deserves citation in full, Judge McMullen said:

> **"With these principles in mind, the central question in the instant case is whether the employment tribunal was correct to pay no attention to the tax implications of its award of £15,000 for injury to feelings. In our judgment, it was correct to make the award it did. At first sight it might appear to be the exercise by a tribunal of its decision on the balance of probability that no tax would be payable on the award, in the light of the evidence the tribunal heard that the revenue was inconsistent in its approach to such figures. If it were as simple as that, the tribunal's decision could not be disturbed as a finding of fact. If, on the other hand, a more rigorous analysis is called for, the result is the same. The factors point all in one direction and in our judgment are as follows.**
>
> > **(a) In *Vento v Chief Constable of the West Yorkshire Police* [2003] ICR 318, 330, para 46, the Court of Appeal acknowledged that this was the first time for many years that**

that court had had the opportunity to consider 'the appropriate level of compensation for injury to feelings in discrimination cases'. Not a word was said about the possibility of the award being taxed. There was no challenge to the principles in *British Transport Commission v Gourley* [1956] AC 185, which is that any award which has a tax implication must be reflected in the final award of damages.

(b) In *Vento v Chief Constable of the West Yorkshire Police* the approach previously adopted in *Prison Service v Johnson* [1997] ICR 275 of consideration of analogies for damages for 'pain and suffering, disability and loss of amenity' in personal injury claims was considered correct. Such an award is not subject to tax.

(c) In *Essa v Laing Ltd* [2004] ICR 746, 760, para 42, Pill LJ said:

> **'while there is a difference between 'injury to health or personal injury' and 'injury to feelings', the two are not inconsistent, may overlap and injury to feelings may contribute to injury to health.'**

(d) The assessment of such awards is to be based upon the guidelines of the Judicial Studies Board. Those guidelines say nothing about tax.

(e) The exception in the tax statutes of payments made on account of 'injury to or disability of the employee' is accepted to include mental and physical injury. Injury to feelings, as expressly included in section 66(4) of the Sex Discrimination Act 1975, carries the dictionary definition of 'hurt' and humiliation. Mr Evans argues that injury, wherever it appears, carries with it the same meaning. We agree.

(f) Where the award is in respect to injury to feelings occurring during the course of employment, section 19 of the Income and Corporation Taxes Act 1988 cannot apply, since the award is not made in respect of the employee's acting as employee, and section 148 of that Act cannot apply since the employment continues. See the guidance given to tribunal chairmen, under the heading 'Aims: to consider areas of tribunal work where the impact of income tax may affect the amounts of an award and give guidance to a chairman', promulgated to all chairmen and available to the parties in the instant case. If the award includes injury to feelings as a result of a dismissal, but is not separated from the overall award for injury to feelings occurring during employment, it seems invidious to conduct that exercise.

(g) The advice of the Equal Opportunities Commission, published on its website www.eoc.org.uk, is that an award of this nature is *arguably* not taxable and an award for injury to feelings and an award for injury to feelings pre-employment *should not be* taxable.

(h) In at least one appeal to special commissioners, it has been accepted by the revenue that such an award is not taxable: *Walker v Adams* SPC 344 (Mr B M F O'Brien, special commissioner), 15 April 2003, on a reference relating to the taxation of an award by the Fair Employment Tribunal in Northern Ireland, in respect of provisions relating to religious and/or political discrimination."

76. At paragraph 34 Judge McMullen said that this Tribunal had been referred to no authority and to no authoritative commentary which holds or asserts that tax is payable on such an award. He noted that, in practice, where a dispute arises between the parties, it is often resolved by an indemnity given by the paying party that, if the revenue attacks the award in the

hands of the receiving party, the paying party will make good. As I have already mentioned, it is unfortunate that the decision of the High Court in **Horner** was not cited to this Tribunal.

77. The relevant legislation has been considered by the First Tier - Tribunal (Tax Chamber) on two occasions.

78. In **Oti-Obihara v Commissioners for HM Revenue and Customs** [2011] IRLR 386, at paragraph 16, reference was made to the decision of this Tribunal in **Orthet**. The point was not the subject of argument, as it appears to have been the subject of concession on behalf of the Commissioners: see paragraph 18. There it is recorded that it was acknowledged that "to the extent that any part of the settlement payment comprised damages for injury to the appellant's feelings as a consequence of discrimination, then that is not taxable under section 6 **ITEPA** 2003, nor is it taxable under section 401 **ITEPA** as a termination payment even if it is paid on the occasion of the termination of the employment contract."

79. However, a more recent decision of the First Tier Tribunal (Tax Chamber) goes the other way: **Moorthy v Commissioners for Her Majesty's Revenue and Customs** [2014] UKFTT 834 (TC). At paragraphs 85 to 89 the Tribunal made reference to the decision of this Tribunal in **Orthet**, which it referred to as **Vince-Cain**. However, it declined to follow that decision, since it took the view that the leading case on the relevant legislation was **Horner**: see paragraph 90. At paragraph 92 the Tribunal stated:

> **"It is clear that ITEPA section 406 does not encompass payments for injury to feelings. It would of course be possible, on the facts of a given case, for discrimination to be the cause of relevant disability, such as a mental health condition, and for an employer to pay compensation in consequence. But as we understand the facts of *Vince-Cain*, that was not the position. To the extent that the EAT's decision rests on its misreading of ITEPA, we respectfully consider it to be unreliable."**

80. Further, at paragraph 101, the Tribunal stated:

> **"Neither *Walker* or *Oti-Obihara* is binding on this Tribunal, although we have respectfully considered both judgments. The EAT in *Vince-Cain* themselves accepted that 'decisions relating to tax liability' fell outside their jurisdiction and we concur: this Tribunal is not bound by a judgment of the EAT which purports to decide the scope of a taxing statute. We have inferred that the Special Commissioner in *Mr A* has taken the same approach as us in applying ITEPA section 401, while the only judgment of a higher court, *Norman*, does not shed any light on the issue."**

81. The reference to **Norman** is a reference to the decision of the Court of Appeal in **Norman v Yellow Pages Sales Limited** [2010] EWCA Civ 1395. In the main judgment, which was given by Pill LJ, reference was made to the decision of this Tribunal in **Orthet**: see paragraph 12. However, the issue does not appear to have been the subject of any argument, since it is recorded at paragraph 6 that:

> **"It is common ground that damages for injury to feelings are not generally subject to such a tax deduction."**

82. In the absence of any binding authority and in view of the conflicting state of such authorities as there are, I consider it important to start with the words of section 406 themselves:

> **"This Chapter does not apply to a payment or other benefit provided –**
>
> **(a) in connection with the termination of employment by the death of an employee, or**
>
> **(b) on account of injury to, or disability of, any employee."**

83. In particular the phrase that falls to be construed in the present context is "injury to … any employee."

84. It will immediately be apparent that that phrase is to be found in paragraph (b) and that that provision is not qualified by the words "in connection with the termination of

employment", as the words in the first paragraph are. On the face of it, therefore, it is any injury to an employee which will fall within the exemption.

85. Secondly, it should be noted that, although the side-note to a statutory provision can be an aid to its construction, it is no more than that. As Lord Reid put it in **R v Schildkamp** [1971] 1 AC, at page 10: "a side-note is a poor guide to the scope of a section, for it can do no more than indicate the main subject with which the section deals." Although the side-note to section 406 refers to an "exception for death or disability payments and benefits", it is clear from the express words of the provision itself that its scope goes wider than that, since the word "injury" is used as well. The question then becomes what is the correct interpretation of the word "injury" in this context: is it confined to physical injury, or at least personal injury of the kind that can be the subject of a claim for negligence, or is it capable of including injury to feelings?

86. Thirdly, it should be recalled that the decision of the High Court in **Horner** was concerned with the interpretation of the word "disability" and not the word "injury." At most what was said in that case about the meaning of the latter word was *obiter* and not necessary to the decision in that case. In contrast the decision of this Tribunal in **Orthet** was concerned with the meaning of the word "injury" and addressed in detail the question whether that concept could include the concept of injury to feelings. It should also be recalled that, on its facts, **Horner** was not concerned with an award of damages for injury to feelings, whereas **Orthet** was concerned with that issue and dealt with it at length. Although it is unfortunate that the decision of the High Court in **Horner** was not cited to, nor considered by, this Tribunal, I doubt if it would have led to a different conclusion given that it was not directly concerned with the issue which this Tribunal was addressing.

87. It was common ground before me that, whilst this Tribunal is not bound by its own previous decisions, they will only be departed from in exceptional circumstances or where there are previous inconsistent decisions: see **Secretary of State for Trade and Industry v Cook** [1997] IRLR 150, at page151 (Morison J).

88. I find that the reasoning of this Tribunal in **Orthet** is persuasive. I prefer that reasoning to that to be found in some of the other cases to which I have referred, in particular the recent decision of the FTT in **Moorthy**. I would reach the same conclusion as this Tribunal has done previously.

89. Accordingly, the Respondent's appeal will be allowed on this ground. The amount of the award for injury to feelings will be varied to be £10, 000.

90. This may not make a practical difference in the present case. This is because at the hearing before me the Respondent made the concession that, if (inconsistently with my judgment) the Revenue authorities should pursue the Claimant for tax on the award of damages for injury to feelings, it would indemnify her. However, since the issue is one of principle which may have importance for other cases and since I heard full argument on it, I have thought it right to set out my conclusions as above.

The Claimant's appeal against the Remedy judgment

91. The Claimant appeals against one aspect of the Remedy Judgment, in which the Employment Tribunal declined to make any award in her favour in respect of the alleged financial loss arising from the fact that her dismissal meant that she was unable to exercise the

right to purchase equity in the Respondent company: see paragraph 58. She contended before the Tribunal that this was a loss of a chance which had economic value and that she should be compensated for that loss. The Tribunal dealt with this aspect of the claim in the Remedy Judgment from paragraph 37. Because of the large number of criticisms which are made on behalf of the Claimant of this aspect of the Remedy Judgment, it is necessary to set out its reasoning at some length.

92. At paragraph 37 the Tribunal said:

> **"Financial loss in respect of loss of share options / shares. This is the most significant part of the Claimant's claim for financial loss, and in her current schedule of loss (5th schedule) the sum claimed is £317,000.49. This is the value that the Claimant places on the loss of chance of participating in the fruits of either a sale or a flotation of the respondent company. The respondent's primary contention is that this loss is purely speculative, and therefore no award should be made. Both parties have referred to the case of *Allied Maples Ltd v Simmonds*, which is relevant to consider in this regard."**

93. At paragraph 38 the Tribunal considered that it was appropriate first to consider whether the loss was dependent on the potential actions of a third party. It accepted the contention of the Respondent in the following terms:

> **"… The relevant settled law in these circumstances is that in order for the party seeking to recover losses to succeed, that party must show that he or she had a substantial chance rather than a speculative one. We agree with that contention since on the facts, whether or not a sale or flotation of the respondent company takes place is not in the gift of the respondent company but in the gift of the third party owner of the respondent."**

94. At paragraph 41 the Tribunal directed itself as to the questions which it would address in the following way:

> **"We consider that the appropriate way to deal with analysis of the claimant's claim for loss of chance is firstly to set out some background facts regarding the various elements of her claim under this head, then deal with whether the claimant has established that she would have had a substantial chance of acquiring equity in the business on the basis that she sets out, following the guidance in *Allied Maples Ltd v Simmonds*. Thereafter, if that substantial chance is established then carry out an analysis of the percentage chance that the various contingencies would occur, and then calculate the award."**

95. In accordance with that structure, the Tribunal first set out the background facts from paragraph 42. At paragraph 47 the Tribunal said that the Claimant's claim in respect of the loss of chance in gaining equity of £315,000 was based on a commercial proposal document entered into by her, Mr Backhouse (signed on 29 September 2012) and the Respondent. It said that this depended on a series of contingencies all occurring together in 2016. Those contingencies were as follows:

> **"(1) In 2016 there would be an exit by way of sale or flotation;**
>
> **(2) By the date of exit the claimant would have accumulated 3% of share options and equity having hit all the targets in the commercial proposal or renegotiated targets;**
>
> **(3) That she would have still been in employment with the respondent at the date of exit;**
>
> **(4) That the equity value of the respondent upon sale/exit would be £10.9 million;**
>
> **(5) The claimant would have exercised all of her options then; and**
>
> **(6) The value of her shares upon exercising her options would be £315,000."**

The Tribunal then proceeded to set out its conclusions on those various contingencies.

96. At paragraphs 48 to 52 the Tribunal dealt with the first contingency under the heading "Exit and HB." It observed that in 2011 HB's purchase of shares in the company from Mr Bennett had been with a view to selling or floating the business in a period of three to five years from the time of the investment. That was on the basis that the business would grow as projected. However, that growth had not come to fruition. It accepted the evidence of Mr Jalan, Chief Investment Officer of HB, that the Respondent company had consistently, since 2010, failed to meet its budgeted figures. It said that the documents supported this. The Tribunal also accepted Mr Jalan's evidence that in view of the Respondent's performance latterly, HB was very unlikely to agree to sell or float the business in 2016 or in the foreseeable future. It was of the view that this evidence was supported by Mr Backhouse, who gave candid evidence and was credible. He was quite clear in his evidence when he indicated that in his

view the shares that he had acquired under the commercial proposal and prospective share options were of little value to him. He explained that he could not sell them, they were only worth what someone would pay for them, and the value was pure speculation.

97. The Tribunal observed at paragraph 51 that Mr Jalan's evidence was supported indirectly by the evidence of Mr Backhouse. He was also a director of the Respondent company, he had the same financial proposal upon which the Claimant relied in establishing her loss of chance. He agreed that it could be several years before he got any return at all, that this was a risk, and that the value might rise and fall. His evidence was compelling, in the Tribunal's view, because he was actively working in the business and was likely to have an informed overview of the prospects of the business and its likely sale or flotation. In addition, he was giving evidence on behalf of the Claimant and was therefore not likely to understate his evidence to her detriment. It concluded this part of its Judgment as follows at paragraph 52:

> **"We therefore conclude that the Claimant's contention that a sale is likely to take place in 2016 or in the foreseeable future is just not supported by any credible evidence. As we have indicated before, she was unconvincing when asked why she had fixed the percentage chance of loss at 25% originally and why this had increased to 50% by the time of the hearing. There was no explanation for this and no additional evidence that there was a prospective buyer on the horizon. On the findings that we have made it is impossible for us to conclude that a buyer would be on the scene in 2016, or that the buyer would pay anything like £10 million for the business."**

98. Since the Tribunal had answered the first question in that way, against the Claimant, on one view (a view the Respondent supports), it was unnecessary for it to go on to address the other contingencies which it had identified earlier, at paragraph 47. Nevertheless, the Tribunal did go on to address the second contingency: that the Claimant would have to secure 3% of the equity in the Respondent company by sale or flotation. This required that she would have met personal targets and that the Respondent would have reached its budgeted target under the commercial proposal. At paragraph 53 the Tribunal concluded that, as a matter of fact,

although the Claimant had 1,500 share options as at the termination of her employment, to acquire another 1,500 shares the Respondent had to achieve an EBIT target of £1.8 million in the financial year 2012–2013. In fact it only achieved £562,000 as against that target. The Tribunal continued at paragraph 53:

> **"On that basis, whatever the Claimant's personal target was, she would not have achieved the additional substantial part of the share options she contends she would have acquired. There is no supporting evidence that she would have been able to renegotiate the EBIT performance target, and there has been no renegotiation of that target with Mr Backhouse, who is subject to the same proposal since the Claimant's departure. The contention that the claimant would have acquired 3% equity in due course is purely speculative."**

99. At paragraphs 54 to 56 the Tribunal addressed the third contingency which would have to be present to make good the claim, that the Claimant would still have been in employment at the date of the sale or flotation of the business. It concluded that there was no certainty of that, for a number of reasons which are criticised in the Claimant's grounds of appeal, to which I will return.

100. At paragraph 57 the Tribunal said that there were two further contingencies which would need to converge with the others in order for the Claimant to establish the losses that she sought and those were that the equity value of the business upon sale would be £10.9 million and that the value of her shares upon exercising her options would be £315,000. It concluded that, on the evidence, the likelihood of these two contingencies occurring was "purely speculative."

101. At paragraph 58 the Tribunal set out its conclusion on this aspect of the claim as follows:

> **"In view of our findings above in relation to the contingencies which must occur, we find that the claimant has not established that she had a substantial chance in securing equity in the respondent company. The value of prospective share options/shares is purely speculative. We therefore conclude that there is no financial loss in this regard.** ***We make no findings of fact in relation to the valuation of the respondent company or any shares or share options in that regard in view of our conclusion that this head of claim is pure speculation."*** **(Emphasis added)**

Introduction to the Claimant's appeal

102. On behalf of the Claimant no fewer than 12 grounds of appeal have been advanced before this Tribunal. I will address those grounds in turn later. However, the thrust of the submissions for the Claimant was that the Employment Tribunal committed so many errors that it fundamentally misunderstood the concept of compensation for loss of a chance. In particular it was submitted that the Tribunal failed to understand that it was only necessary for the Claimant to prove that she had lost a "real and substantial" chance and not a "negligible" one. It was further submitted that the Tribunal erred because it failed adequately to address the evidence of the expert witnesses in the case and to explain why it rejected their evidence in so far as it did so.

103. On behalf of the Respondent it was submitted that the Tribunal did not fall into any fundamental error of law as alleged. It was accepted that there may have been occasions when there was an infelicity of language in the Remedy Judgment. However, it was submitted that this did not detract from the fact that in essence the Tribunal correctly understood the legal principles about damages for loss of a chance, in particular as set out in the leading authority of **Allied Maples**, and then applied those principles to the facts as it found them to be. It was further submitted that the first and fundamental question which the Tribunal had to decide was one of fact, namely whether there was a real and substantial chance which the Claimant had lost at all. It was submitted that it was only if that question of fact was answered in the affirmative would there be any issue about valuation: expert evidence went to the question of valuation and not to the prior question, which was one of fact for the Tribunal to decide on the whole of the evidence, which it did. Finally, it was submitted that the Tribunal had reached findings of fact which were reasonably open to it on the evidence before it and that in substance most of the

Claimant's grounds of appeal amount to an attempt to challenge findings of fact rather than pointing to errors of law.

104. Before I address the Claimant's grounds of appeal in detail I will summarise some of the authorities which set out the relevant legal principles.

The role of this Appeal Tribunal

105. As is well-known, this Appeal Tribunal hears appeals on points of law, not fact. In **Fuller v London Borough of Brent** [2011] EWCA Civ 267 Mummery LJ gave wise guidance as to the approach which an appellate court or tribunal should adopt when considering an appeal on a question of law. At paragraphs 30 to 31 he said:

> **"30. … As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of law and a challenge to primary findings of fact dressed up as law.**
>
> **31. Another teaching of experience is that, as with other Tribunals and Courts, there are occasions when a correct self-direction of law is stated by the ET, but then overlooked or misapplied at the point of decision. The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hyper-critical of the way in which the decision is written; focussing too much on particular passages or terms of phrase to the neglect of the decision read in the round: hose are all appellate weaknesses to avoid."**

106. In this context it is as well to bear in mind the decision of the House of Lords in **Rhesa Shipping Company SA v Edmunds** [1985] 1 WLR 948, in which it was held that, although Bingham J at first instance had correctly set out where the burden of proof lay towards the beginning of his judgment, when he came later in his judgment to the point of actual decision, he appeared not to have given any consideration at all to the possibility that the burden of proof had not been discharged: see page 954D-E (Lord Brandon of Oakbrook). I am mindful of the possibility that, even where a Tribunal has correctly set out relevant legal principles towards the

start of a judgment, it may still have fallen into error when it comes later to the point of actual decision.

Authorities on loss of a chance

107. It is well established that, in principle, there will be circumstances in which damages can be obtained for loss of a chance. However, this area is one that continues to cause real difficulties of classification and application: see **Wellesley Partners LLP v Withers LLP** [2014] EWHC 556 (Ch), paragraph 188. In that passage Nugee J so far as material set out the relevant principles which can be derived from the authorities as follows:

> **"(1) There is a difference between the question whether a loss has been caused by the wrong complained of, and if it has, the quantification of that loss. The fact that there is a distinction is in principle clear; what is not always clear is where the line is to be drawn.**
>
> **(2) Sometimes what the Claimant has lost was only ever an opportunity to obtain something else, for example the chance to take part in a competition or the opportunity to bring litigation. Such an opportunity is a valuable right in itself, and what the Claimant proves (on the balance of probabilities) is that he has lost that right; the assessment of the value of the right then depends on the chances of success. As Patten LJ says in *Vasiliou* at [21] this is because what has been lost is by definition the loss of a chance. It will obviously be wrong to value the right to take part in a competition at the value of the prize that might be won as the Claimant never had a right to the prize, only the right to enter the competition. …**
>
> **(3) What Patten LJ makes clear, which had not I think been so clear before, is that this is not quite the same type of case as *Allied Maples*. In an *Allied Maples* case the Claimant has not lost a valuable right but he has lost the opportunity of gaining a benefit, albeit one that depends on a third party acting in a particular way. In such a case the Claimant is not required to prove that the third party would have acted in that way, only that there was a *real and substantial chance* that he would. This is still a question of causation, not of quantification … but if the Claimant does establish that there was such a real and substantial chance, then when it comes to quantification, his damages will be assessed not at 100% of the value of the benefit he would have obtained, but at the appropriate percentage having regard to the chances of his obtaining it. I only add the obvious point that in some cases, where the chance is found to be say 30%, the requirement that the Claimant only need show that he has lost a real and substantial chance is beneficial to him (as if he had to prove how the third party would have acted on the balance of probabilities, he would recover nothing); but in other cases, where the chance is assessed at say 70%, it has the effect of only enabling him to recover 70% of the damages he otherwise would. But as I read the authorities, the Claimant does not have a choice whether to adopt the *Allied Maples* approach; if the case is an *Allied Maples* type of case, this is the appropriate way to approach the issues of causation and quantification. …" (Emphasis added)**

108. As Nugee J mentioned in that case, the leading authority in this area of law remains the decision of the Court of Appeal in **Allied Maples Group Limited v Simmons and Simmons**

[1995] 1 WLR 1602. The main judgment for the majority was given by Stuart-Smith LJ. At pages 1609H to 1610C he said:

> **"… where the Plaintiff's loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.**
>
> > **(1) What has to be proved to establish a causal link between the negligence of the Defendants and the loss sustained by the Plaintiffs depends in the first instance on whether the negligence consists of some positive act of misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact. The court has to be determine on the balance of probability whether the Defendant's act, for example the careless driving, caused the Plaintiff's loss consisting of his broken leg. Once established on a balance of probability, that fact is taken as true and the Plaintiff recovers his damage in full. There is no discount because the Judge considers that the balance is only just tilted in favour of the Plaintiff; and the Plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury.**
> >
> > **(2) Questions of quantification of the Plaintiff's loss, however, may depend upon future uncertain events. For example, whether and to what extent he will suffer osteoarthritis, whether he will continue to earn at the same rate until retirement, whether, but for the accident, he might have been promoted. It is trite law that these questions are not decided on a balance of probability, but rather on the court's assessment, often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which it should be noted depends in part at least on the hypothetical acts of a third party, namely the Plaintiff's employer."**

109. At page 1611A-C Stuart-Smith LJ continued his statement of the relevant principles as follows:

> **"(3) In many cases the Plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the Plaintiff, as in this case, or independently of it. In such a case, does the Plaintiff have to prove on a balance of probability … that the third party would have acted so as to confer the benefit or avoid the risk to the Plaintiff, or can the Plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?"**

110. In addressing that question Stuart-Smith LJ referred to the well-known decision in **Chaplin v Hicks** [1911] 2 KB 786, in which the Defendant's breach of contract prevented her from taking part in a beauty contest and deprived her of the chance of winning one of the prizes. The Court of Appeal upheld the judge's award of damages on the basis that "while there was no certainty that she would have won, she lost the chance of doing so."

111. Although Millett LJ differed in the result from the majority in **Allied Maples**, he agreed in substance with the statement of principles given by Stuart-Smith LJ. At page 1623D-F he noted that loss of a chance is also a method used in the context of employment law, for example in cases of sex discrimination where it is a method used to assess a claim for the loss of promotion prospects: see **Ministry of Defence v Cannock** [1994] ICR 918, at page 953 (Morison J); and **Cleveland Ambulance NHS Trust v Blane** [1997] ICR 851, at page 860 (HHJ Peter Clark).

112. On behalf of the Claimant in the present case it is submitted that care needs to be taken not to focus too much on the word "speculative", which is used in some of the authorities, since by its nature a claim for the loss of a chance will inevitably involve some speculation as to what might have happened in the future if the unlawful act had not occurred. Emphasis was placed on the dictum of Simon Brown LJ in **Mount v Barker Austin** (unreported, 18 February 1998) at page 25:

> **"The legal burden lies on the Plaintiff to prove that in losing the opportunity to pursue his claim … he has lost something of value i.e. that his claim … had a *real and substantial* rather than merely a *negligible* prospect of success. (I say 'negligible' rather than 'speculative' – the word used in a somewhat different context in *Allied Maples* … - lest 'speculative' may be thought to include considerations of uncertainty of outcome, considerations which in my judgment ought not to weigh against the Plaintiff in the present context …" (Emphasis added)**

113. Similar comments were made by the Court of Appeal, in the context of unfair dismissal, in **Thornett v Scope** [2007] ICR 236, at paragraphs 36 to 37 (Pill LJ). See also **Eversheds Legal Services Limited v De Belin** [2011] IRLR 448, at paragraph 45 (Underhill J, President).

Grounds 1-3: Misunderstanding the law on speculation

114. On behalf of the Claimant these three grounds of appeal were put together in the first instance to advance the proposition that the Employment Tribunal misunderstood the law on loss of a chance and in particular that it erred in law because it regarded the loss claimed in this case as being "speculative." There is another aspect of the first three grounds (concerning expert evidence), to which I will turn below.

115. It is accepted on behalf of the Claimant that the Tribunal cited a number of authorities at paragraph 7 of the Remedy Judgment and said that they had been taken into account. Some of those authorities make it clear that a court or tribunal should not be deterred from the exercise it has to perform in a loss of a chance case merely because it has to engage in "speculation" as to the future. As I have mentioned in my citation of authority earlier, the Court of Appeal has, since **Allied Maples**, preferred to use the word "negligible" rather than "speculative." The Claimant observes that, later in its judgment the Tribunal made reference only to **Allied Maples**. It is also submitted that, even if the Tribunal correctly directed itself as to the relevant principles earlier in its judgment, it fell into error at the point when those principles had to be applied.

116. I do not accept these criticisms of the Tribunal's judgment. In essence I accept the Respondent's submissions. In my view, the Tribunal correctly understood the law on loss of a chance, especially as it applies to the context of a loss which depends on the act of a third party. It was entitled to refer principally to the leading authority on that subject, the decision of the Court of Appeal in **Allied Maples**. In so far as it used the word "speculative" to dismiss the Claimant's alleged loss, it was doing no more than repeating a word which the Court of Appeal

itself had used in that decision. The Tribunal was well aware that its task was to ask whether there was a "real and substantial" chance that had been lost: it used that phrase more than once in its judgment. That is conceptually the right question to ask, as has been confirmed by later authorities since **Allied Maples**, as I have mentioned above.

Grounds 1-3: failure to deal properly with expert evidence

117. The Claimant submits that the Tribunal failed properly to address the expert evidence which had been placed before it on behalf of both parties.

118. In this context it is submitted that the expert witnesses who gave evidence were found to be impressive by the Tribunal and there was a good deal of common ground between them. At paragraph 40 of the Remedy Judgment the Tribunal said:

> **"The Tribunal heard evidence from Mr Gilbey and Mr Simpson. Both came over as giving credible and straightforward evidence. Both agreed on the valuation approach in respect of the valuations of the equity of the TJC Professional, but both reached different conclusions on the prospective value of any share options/shares which the Claimant might acquire. Mr Gilbey's conclusions are that the Claimant's potential shares upon exit in 2016 amount to £315,000, whereas Mr Simpson values the Claimant's share options as of 8th January 2013 at between £0 and £13,300, if she held 1500 shares. He uses the method of valuation for share options known as the Black Scholes model. A method used to obtain a value of share options at a given time and widely used in this context." (sic)**

119. The Claimant submits that it was incumbent on the Tribunal to explain in its reasoning why it rejected the evidence of one expert in so far as it did so. Reliance is placed in particular on the judgment of Bingham LJ in **Eckersley v Binnie** (1988) 18 Con LR 1, at pages 77 to 78:

> **"In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reason."**

120. Reliance was also placed on the judgment of Henry LJ in **Flannery v Halifax Estate Agencies Ltd** [2000] 1 WLR 377, at page 381. When setting out the content of the duty to give reasons, Henry LJ said that the duty "is a function of due process, and therefore of justice." He went on to say that: "fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost."

121. Those statements of principle deserve great respect. However, in my judgment, they were not breached by the Tribunal in the present case. In my judgment it is important to recall the reasoning of the Employment Tribunal as set out at paragraph 58 of the Remedy Judgment, which I will set out again:

> **"In view of our findings above in relation to the contingencies which must occur, we find that the Claimant has not established that she had a substantial chance in securing equity in the Respondent Company. The value of prospective share options/shares is purely speculative. We therefore conclude that there is no financial loss in this regard.** ***We make no findings of fact in relation to the valuation of the Respondent Company or any shares or share options in that regard in view of our conclusion that this head of claim is pure speculation.*** **" (Emphasis added)**

122. I accept the Respondent's fundamental submission on this aspect of the appeal before me. The Employment Tribunal did not (and did not need to) move on to the question of the valuation of the Respondent company. This is because it had already found as a matter of fact that there was no substantial chance of the Claimant's securing equity in the Respondent company. Earlier in its judgment, from paragraph 37, the Employment Tribunal had correctly directed itself as to the relevant question which it had to address. It referred to this question at paragraph 38 and again at paragraph 41. At paragraph 47 the Employment Tribunal set out the contingencies which would all have had to occur before this head of claim was established. The first and fundamental of those contingencies was that in 2016 there would be an exit by way of sale or flotation of the company. The Employment Tribunal found as a matter of fact that there was no substantial chance of that happening.

123. The expert evidence which was before the Employment Tribunal from both sides was relevant to the question of valuation of the company, expressly a question which the Employment Tribunal did not need to address on its finding as to the primary fundamental question of fact, which it had already determined against the Claimant.

Ground 4: evidence of Mr Backhouse

124. The Claimant contends that the Tribunal erred because, at paragraphs 49 and 52, it treated the evidence of Mr Backhouse, who had been called on her behalf, as if it were expert evidence when he was only a witness of fact.

125. I do not accept that contention. In my view, the Tribunal was entitled to take the evidence of Mr Backhouse into account as part of the evidence as a whole, in addressing the fundamental question of fact which it had to decide. It did not treat his evidence as if he were an expert witness.

126. The Claimant further contends that the Tribunal mis-recorded the evidence of Mr Backhouse. My attention was drawn to the evidence given by Mr Backhouse at the hearing before the Tribunal. He had said that he had sold his interest in a house in order to buy his share options (which were similar to the Claimant's); that he thought making £1 million was "the dream"; but that, if he could achieve £300-500,000, that would be a "life changing" experience.

127. I have no doubt that such an experience would indeed be life changing. However, I fail to see how this supports the Claimant's contention that the Tribunal erred in law. The Tribunal

had the evidence in its entirety before it. I do not consider that its failure to mention every single part of the evidence that it heard in its Judgment leads to the conclusion that it failed to have regard to a relevant matter. The crucial part of the evidence relied upon depends on whether there was a real and substantial chance that the share options would be realised at the relevant time at all, in other words that the Respondent company would be sold. If there was such a chance, no doubt a life changing opportunity was lost. If there was no such chance, it was not lost: that is the finding of fact that the Tribunal made in this case.

Ground 5: failure to ask the right question when considering the value of the company in 2016

128. The Claimant submits that the Employment Tribunal erred in law in that it failed to ask the right question when considering the value of the company in 2016.

129. The Claimant observes that Mr Backhouse had been described by the Tribunal as an impressive and credible witness (paragraph 4). It also commented (at paragraph 51) that he was actively working in the business and was likely to have an informed overview of its prospects. His evidence was therefore regarded as compelling.

130. The Claimant observes that at the end of his first witness statement Mr Backhouse had said (at paragraphs 29 to 30) that, had the Respondent done what it ought to have done and sought a solution whereby the Claimant had remained with the company, it would now be the sort of profitable company which HB envisaged when it bought its shares.

131. On behalf of the Claimant it is submitted that the basic aim of a compensatory award is to put a Claimant in the same position that she would have been in had she not been unfairly dismissed. It is submitted that the Tribunal asked itself the wrong question at paragraph 52 of the Remedy Judgment, when it asked what the value of the company would be in 2016.

132. I do not accept the submission that the Employment Tribunal asked itself the wrong question at paragraph 52 of the Remedy Judgment. I accept the Respondent's submission that the Tribunal simply does not pose such a question at paragraph 52. Further, as the Respondent submits, its conclusion in paragraph 52 dealt with one of several contingencies which had to converge in order for there to be any value in the share options in 2016. It concluded that there was no credible evidence to support the Claimant's contention that a sale was likely to take place in 2016.

133. This was essentially a question of fact for the Employment Tribunal to determine and, in my judgment, it was entitled to reach the conclusion of fact which it did having considered all of the evidence before it.

Ground 6: perversity

134. The Claimant submits that the Employment Tribunal was perverse in its reasoning at paragraphs 50 to 52 of the Remedy Judgment. In particular complaint is made that the Tribunal said that there could be no prospect of sale of the company in 2016 because there was no buyer in sight in 2013. It also made the point at paragraph 51 that the recent sacking of its Chief Executive Officer meant that it would be impossible to find a buyer in 2016. The Claimant

submits that these were facts which could well have altered since there were three years to go before 2016.

135. The Claimant also submits that, in its Liability Judgment at paragraph 23, the Tribunal had described the disciplinary proceedings against Mr O'Connell as an exercise in damage limitation. On that basis, it is submitted, it was perverse to allow that exercise to limit the Claimant's compensation.

136. I do not accept these criticisms, which amount in substance to an attempt to appeal against various aspects of the Employment Tribunal's findings of fact. I do not accept the argument that its conclusions were perverse, since they were open to the Tribunal, which had the opportunity to consider the evidence as a whole.

137. I accept the Respondent's submissions in this regard. In particular, as the Respondent points out, the Tribunal was perfectly entitled to consider that Mr O'Connell's dismissal was a relevant factor given that the success of this type of business is largely down to its personnel. Furthermore, by the time of the Remedy Judgment (as distinct from the time of the Liability Judgment), Mr O'Connell had already been dismissed and was no longer simply being disciplined. I accept the Respondent's submission that the Tribunal was therefore entitled to take this development into account.

Grounds 7 and 12: errors in approach to acquisition of a 3% share

138. On behalf of the Claimant these two grounds of appeal were taken together at the hearing before me.

139. The Claimant submits that the Employment Tribunal erred in law in assuming that, because the Claimant would not have acquired the full 3,000 shares/share options in the company that she was seeking, her chances of acquiring equity were wholly speculative.

140. It is also submitted that the Tribunal erred in failing to recognise that the Claimant already had a 1.5% stake in the company.

141. In this regard criticism is made in particular of paragraphs 53 and 58 of the Remedy Judgment.

142. I reject these grounds of appeal. It is of fundamental importance to appreciate that the Claimant did not in fact own any of the equity in the company. She did not have shares in it but rather had share options. Furthermore, the principal contingency in this case was whether the company would be sold. Without such a sale, the share options would never achieve any value even if the Claimant had still been in employment with the Respondent in 2016.

143. The Tribunal had before it evidence, in particular the report of Mr Simpson, which valued the share options as at the date of termination (8 January 2013) using the Black Scholes model (paragraph 41 of the Remedy Judgment). The valuation given was between zero and £13,300. The Respondent's case before the Tribunal was that the share options were valueless and this was consistent with the evidence and consistent with the conclusion of the Tribunal based on the entirety of the evidence before it.

144. Finally in this context, the Tribunal was aware of the fact that the Claimant already had 1,500 share options: see paragraph 53 of the Remedy Judgment. It did not err in this regard.

Ground 8: error of approach in addressing whether the Claimant would still have been in employment

145. In this context complaint is made about paragraphs 54 to 56 of the Remedy Judgment. The Claimant submits that the Employment Tribunal erred in law because it assumed that her claim for loss of a chance failed unless it was a "certainty" that she would have remained in employment.

146. I reject that ground of appeal. First, I accept the Respondent's submission that the way in which the ground is formulated does not accurately reflect how the Employment Tribunal expressed itself in the relevant passages. Secondly, I accept that, when the Tribunal said that there was "no certainty" that the Claimant would have remained in employment, it was merely reflecting the fact that there was a chance that she would not have remained in employment in 2016 (as she herself accepted in cross-examination: see paragraph 54 of the Remedy Judgment).

147. In any event, as I have already indicated when citing the decision of the Court of Appeal in **Allied Maples**, the language used by the Employment Tribunal in the present case to some extent reflects the language used by the Court of Appeal in that case. Even if there were an infelicity of drafting, I accept the Respondent's submissions that it does not affect the substance of what the Employment Tribunal said in its reasoning.

Ground 9: error in approach to the Claimant's resignation

148. The Claimant submits that the Employment Tribunal did not direct itself that the question of how long the Claimant would stay with the Respondent had to be addressed on the assumption that the Respondent was acting in accordance with the implied term of trust and confidence. The Claimant further submits that the Tribunal clearly did not do this, because at paragraph 55 of the Remedy Judgment it regarded the Claimant's resignation in response to breach of that duty as being evidence of a relevant propensity to leave.

149. On behalf of the Respondent it was accepted that on the face of paragraph 55, the reference to the Claimant's resignation should have been put to one side. However, the Respondent submits that the Employment Tribunal correctly directed itself more than once that the exercise which it had to perform at the remedy stage was to consider what would have happened if the Claimant had not been constructively dismissed: see paragraph 2 of the Remedy Judgment. See also paragraphs 17 and 20, where the Tribunal directed itself that its determination had to focus on placing the Claimant in the position she would have been in had she not been constructively dismissed or subjected to discrimination.

150. I accept the Respondent's submissions in this regard. Although on the face of it there does appear in paragraph 55 to be reference to an irrelevant matter, namely the fact that the Claimant "resigned anyway in response to Mr O'Connell's conduct", I do not regard this as more than an infelicity of drafting in the context of the Remedy Judgment as a whole. When that Judgment is read as a whole, I am satisfied that the Employment Tribunal directed itself correctly as a matter of law. Even if that were incorrect in this regard, I accept the Respondent's submission that this was not material in any way, since the first and fundamental

issue of fact which the Employment Tribunal had to decide (whether the Respondent would be sold) was approached correctly as a matter of law.

151. I am reinforced in this view by the fact that, at the end of paragraph 56 of its judgment, the Tribunal expressly excluded the behaviour of Mr O'Connell when it stated:

> **"In short, at the time the Claimant resigned she was not wholly content in her role, excluding the behaviour of Mr O'Connell."**

Ground 10: error of approach in taking into account what the Claimant might have done

152. The Claimant submits that the Employment Tribunal erred in taking certain matters into account at paragraph 56 of the Remedy Judgment. In particular it is submitted that her desire to have children was irrelevant to the likelihood that she would remain in office until 2016, unless it was assumed impermissibly that, upon having children, her interest in achieving her targets at work would diminish. It is further submitted that the notion that one can infer from her having IVF treatment that she was not wholly content in her role is at best bizarre.

153. At the hearing before me this ground of appeal was not pursued on reflection, since it was accepted that it does not add to the other grounds.

154. In any event, in my judgment, it has no merit. In paragraph 56 of the Remedy Judgment the Tribunal stated:

> **"We accept her evidence that in her view if she had a child to support she would have remained in employment with the Respondent, but that is not a certainty."**

In the preceding sentence the Tribunal had said:

> **"We accept her evidence that at the present time she has no plans to have a family, but the situation might have been different had the conduct from Mr O'Connell not taken place, had she not resigned and had the IVF treatment been successful."**

As I understand it, evidence was given by the Claimant herself to that effect, including reference to IVF treatment. The Tribunal was not proceeding on any impermissible basis. It did not fall into error as a matter of law in this regard.

Ground 11: perversity in finding that the Claimant would not have remained in employment

155. The Claimant submits that the Employment Tribunal's apparent finding that there was no chance the Claimant would have remained in employment was perverse, for a number of reasons, which are set out at paragraph 82 of the amended skeleton argument filed on her behalf.

156. It is unnecessary to rehearse those submissions in detail, although I have taken them fully into account. This is because I accept the Respondent's submission that the formulation of this ground of appeal is not accurate. The Tribunal did not find that there was "no chance of her remaining in employment." On the contrary, it found that there was a chance that she might not have been. In my judgment, this ground of appeal amounts in substance to an attempt in various ways to appeal against a finding of fact, which was open to the Employment Tribunal, which had the benefit of the entirety of the evidence before it.

Conclusion on the Claimant's appeal against the Remedy Judgment

157. I do not accept the many and varied criticisms which have been made of the Employment Tribunal's Remedy Judgment by the Claimant. Her appeal against the Remedy Judgment is dismissed.

Result

158. For the reasons I have set out, the result of these three appeals is that:

(1) The Respondent's appeal against the Liability Judgment is dismissed on Grounds 1 and 2 but allowed on Ground 3. It is declared that the Claimant's constructive dismissal did not in itself constitute an act of harassment.

(2) The Respondent's appeal against the Remedy Judgment is allowed. The amount of damages to be awarded for injury to feelings is reduced to £10,000.

(3) The Claimant's appeal against the Remedy Judgment is dismissed.