Appeal No. UKEAT/0037/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 October 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

LOOK AHEAD HOUSING AND CARE LTD — APPELLANT

(1) MISS D CHETTY
(2) MRS B EDUAH — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ELAINE BANTON (of Counsel) Instructed by: Messrs Levenes Solicitors 150 Minories London EC3N 1LS
For the First Respondent	MR JACK FEENY (of Counsel) Instructed by: Pattinson & Brewer Solicitors 4th Floor 11 Pilgrim Street London EC4V 6RN
For the Second Respondent	MR NICK SCOTT (Appearing through the Free Representation Unit)

SUMMARY

RACE DISCRIMINATION - Injury to feelings

RACE DISCRIMINATION - Other losses

UNFAIR DISMISSAL - Compensation

UNFAIR DISMISSAL - Mitigation of loss

UNFAIR DISMISSAL - Contributory fault

UNFAIR DISMISSAL - Polkey deduction

PRACTICE AND PROCEDURE - Costs

Appeal in respect of remedy (in a case in which the Employment Tribunal had found both Claimants were unfairly dismissed and that dismissal was an act of race discrimination against them) on the basis that Employment Tribunal failed to deal with "**Polkey**", took a punitive rather than compensatory approach, did not find that the First Claimant had failed to mitigate her loss, and said insufficient by way of Reasons was rejected; against a second Claimant, it was said that the Employment Tribunal should have awarded more than 35% by way of deduction for contributory conduct, and had awarded too much for injury to feelings, and also said insufficient. This too was rejected.

Appeals having been allowed by consent against the Employment Tribunal's failure to deduct earnings actually received from the losses of salary caused by the dismissals, the Appellant applied for an order that the First Claimant should pay half the fees paid in appealing. This too was rejected with some observations about the power and its exercise at appellate level.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This appeal concerns questions of remedy. It arises out of two hearings at an Employment Tribunal in East London before Employment Judge Jones, Miss Jansen and Mr Ross. Although the parties are as described in the title of these proceedings, anyone reading this Judgment should understand that the Respondent was not responsible for the events which occurred except as a matter of liability consequent upon a transfer of undertaking. Accordingly, if any opprobrium should attach by reason of what happened, it does not attach to that organisation. The parties are agreed that I should make this clear at the outset.

2. By a Decision dated 21 March 2013 the Tribunal upheld complaints made by two members of staff that they had been discriminated against on the grounds of race and had been unfairly dismissed. The first was Ms Chetty, who had had ten years of service, rising to the post of Deputy Manager, at the Marsh Hill project run by the Respondent's predecessor. She was dismissed on 23 April 2010. The second was Ms Eduah, who had been a Care Assistant since 2004, a bank worker at the same project, who was dismissed in respect of the same incident.

3. The Tribunal proceeded, in a separate hearing, to deal with the issues of remedy which arose from its conclusions as to liability. The Respondent employer appealed both Decisions. That in respect of liability was rejected by this Tribunal before HHJ Eady on 23 May 2014, and the appeal and then cross-appeal on remedy ordered to be relisted.

The Background Circumstances

4. I need say only little about the circumstances which underlay the Liability Hearing and only insofar as relevant to the issues which arise on the remedy appeal. A resident, whom I shall call G to preserve identity, was diabetic. She was self-medicating, in the sense of administering drugs to herself, and habitually took an appropriate dose of insulin in the morning, though she was resistant to taking another dose thought clinically necessary in the evening. She was free to leave the project and often did.

5. The drug regime operated by the employer involved three principal documents. The two relevant to present circumstances were a document known as M9, which was a signed sheet from the GP setting out the current drugs to be taken. The second was a chart which showed that the relevant drug or drugs had been administered, when and by whom, so that there was a record that they had been given and taken.

6. On the morning of 1 March 2010 Ms Eduah came to see to G taking her drugs. There was no signed M9 form available. A drug should not have been administered unless there was such a sheet. Knowing that G had been in need of insulin, that the amount had not changed, that there was a bubble pack of drugs which was current and showed that the drug was available to be taken, and aware that if not administered G would simply leave the premises, which she was entitled to do, and would then be at risk of the consequences of not having the insulin in her system, which can be severe. Accordingly, and without reference to any senior manager at the time, she gave insulin from the bubble pack to G. At the time Ms Chetty was the Deputy Manager. She did not know that this had happened. She was told of it by the Manager, who was white, and who was just nearing the end of a three-month induction period. The Manager

had had the incident reported to her. She asked Ms Chetty to see to the obtaining of an M9, and to make sure the forms were in order. Ms Chetty immediately put steps in train to do so.

7. On the Tribunal's findings she was also asked, on 2 March, to sign an administration sheet to indicate that G had had the appropriate drug. This was a breach of procedure since only the person administering the drug should have filled in this sheet, for obvious reasons. The Manager who had asked for this to be done, who was in overall responsibility and to whom the report had been made in the first place of Ms Eduah's giving of the drug on the 1st, suffered no discipline at all. By contrast, both Ms Chetty and Ms Eduah were disciplined. Both were dismissed.

8. Ms Chetty had in her history since 2008 been subject on three occasions to warnings, two of which were final written warnings, one of which was a written warning. The Tribunal which made careful findings in respect of discrimination was unhappy about two of those warnings but did not say anything critical of the third.

9. The Tribunal, in its Liability Decision, reached different conclusions about the two Claimants. So far as Ms Chetty was concerned, it was satisfied that the disciplinary charge which had been brought against her had simply not been made out. There could be no reasonable belief in her guilt. There had been no reasonable investigation of what she was said to have done. The Tribunal plainly had difficulty in discovering what she had done wrong: it thought that she would and should not have been dismissed after any reasonable investigation.

10. So far as Ms Eduah was concerned, it was satisfied that what she did was capable of being misconduct - indeed, gross misconduct - but considered that, although the employer held

a genuine belief in her culpability based on reasonable grounds, the employer in determining that she should be dismissed had not taken into account any of the substantial mitigation which there was in her case. In particular she had been placed in a difficult position in which there was conflict between her obligation as a care assistant to ensure the safety of the resident, which in G's case was secured by ensuring that she had insulin rather than not having insulin, on the one hand, set against the need to ensure formal compliance, albeit for very good reasons, by completing the required paperwork on the other.

11. I have set out the background facts only in summary form. They are fully set out in the Liability Decision.

The Remedy Decision

12. The Remedy Decision, in respect of which the appeal arises, was sent to the parties on 25 November 2013. In respect of Ms Chetty the employer was ordered to pay a basic award, together with a compensatory award, which was capped at £65,300, leaving a total payable of £69,100 subject to the recoupment regulations. It awarded her £10,000 in respect of the injury to her feelings. In respect of Ms Eduah it awarded her a sum of £20,870, from which it deducted 35% by way of contributory fault. Coupling that with the reduced basic award, to which the same percentage deduction applied, it came subject to recoupment regulations to a total of £14,800.66. Different issues arise in respect of each of the two Claimants, and I shall take them separately.

Ms Chetty

13. The Claimant asked that she be reinstated or re-engaged. By the time of the hearing, which was on 28 June 2013, with further consideration by the Tribunal in chambers on 30

September 2013, she had not secured employment at a status commensurate with that which she had enjoyed with the employer. The tribunal considered this request between paragraphs 7 and 14 and rejected it. It did so for a mixture of reasons. Amongst them, at paragraph 11, was:

> **"We heard no evidence this morning that the Respondent had taken any steps to correct the conduct or to impose sanctions or even investigate those about whom we were critical during the hearing. We were also not told about any steps taken to address any of the wider institutional matters found by this Tribunal."**

The Tribunal had earlier adopted the phrase "institutionally racist" to describe what it had discovered in determining the liability issues.

14. Having rejected the application to be reinstated or re-engaged, it then considered, between paragraphs 15 and 25, whether, in the light of what had happened, Ms Chetty would have been fairly dismissed because of the incident. It did not ask in terms what the chances were of that occurring. Rather, it addressed the matter in terms of probabilities. But it did say (at paragraph 17) that the Claimant would not have been dismissed for what she had done, even if she had been disciplined. That is because what she was dismissed for, on the Tribunal's findings of fact, she had simply not done at all. Therefore there would be no possibility, logically, of her having been fairly dismissed for that. What she might have been subject to discipline for (paragraph 21) was her signing a medication chart in respect of medication which she had been told had been administered by others, but which she had not herself given to the resident. Yet this was something which she did on the instruction of her senior manager, Ms Morton, who suffered no discipline whatsoever for having told her to do that.

15. At paragraph 25, in the last sentence, the Tribunal concluded that there was "nothing here" to lead them to a finding that she would have been fairly dismissed. It is thus plain to me

that the Tribunal addressed the possibility that the Claimant would or might have been fairly dismissed within the period of time for which it went on to order compensation.

16. It did not deal with compensation until paragraph 33, following through to paragraph 44. It took account of the Claimant's loss and recognised matters which it should have set against it in terms of the work which she had been doing since her dismissal. The key paragraph for this appeal is 34, which reads:

> **"The Claimant has worked since her dismissal. We find that she has mitigated her loss. Firstly, she worked for 8.5 months employment at £200.00 less per week than she earned at Living Space [that was the name of the employer which was responsible at the time]. She then worked at the rate of £250.00 per week less at George Mason Lodge for 4.5 months. She worked at NTEC from 8 August 2010 until 21 December 2011 and then at 2XL as a temporary agency Residential Care Worker to the date of the Remedy Hearing. The Claimant is no longer a manager and it will take her some time to achieve that status again with another employer."**

It was on that basis that it calculated her loss of wages. It omitted, in the course of that calculation, to take account of the earnings which the Claimant had had in her alternative employment, and would continue to have, on its findings. Taking those into account, as should have happened, the parties are agreed before me that the figure of £32,414.62 should be substituted for the loss of wages originally assessed in the sum of £60,134.

17. It then dealt with injury to feelings, as to which no appeal point arises.

Ms Eduah

18. The Tribunal began by asking whether it should make a **Polkey** deduction in relation to her remedy and decided it was not appropriate. No appeal point is taken in respect of that finding. It then considered (paragraphs 55, 56, 57) as follows:

> **"55. However, it is our judgment that some disciplinary action against Ms Eduah was warranted. She gave the resident the medication which was important for maintaining her health and possibly her life – given the real danger of an insulin crisis if the resident had gone out for the day without her medication. However, she had not followed the Respondent's procedures. Even if the M9 form was not in the file, she failed to note anywhere that she had**

given the medication. During the disciplinary process and in the Tribunal Hearing she did not agree that she would do things differently if faced with the same situation again.

56. We weighed that with the mitigating factors set out in paragraph 166 of the Reasons, some of which were mentioned in the disciplinary decision and appeal letters from the Respondent. However, it is our judgment that the Respondent failed to demonstrate that they had considered all the Claimant's points in mitigation and so we are not persuaded that if they had done so they are likely to have dismissed her for gross misconduct. We find, given the way in which the Respondent dealt with Ms Morton and Ms Duncan that it is more likely than not that she would have been given written or final written warning [sic].

57. We also find that Ms Eduah has contributed to her dismissal by her conduct. We determine that she contributed 35% towards her dismissal."

19. It then went on to deal with the question of mitigation of loss and financial award, as to which no issue arises in her case, then at paragraph 77 to the award in respect of injury to feelings appropriate to her. That reads:

"It is our judgment that the Claimant suffered hurt feelings from the race discrimination we judged had occurred during and at the termination of her employment. She also suffered stress and was prescribed anti-depressants. In part, this was one of the reasons for setting up her own business as an insurance against this ever happening to her again. The Claimant considered that becoming self-employed would protect her from ever having to be treated the same way again. She gave live evidence and it is our judgment that her self-esteem and self-confidence were affected and that she found it difficult to trust prospective employers, as she would need to do in order to be an effective employee.

78. It also influenced her decision to start the course as she gave evidence that she wanted to be more senior should she ever seek employment again.

79. Even though she was not employed by the Respondent for as long as Ms Chetty it our judgment that it affected her just as much. [sic]

80. We find that the Claimant was affected by her treatment and suffered stress and anxiety. We did not have medical evidence but considered and accepted the Claimant's evidence of the effect of the discriminatory treatment on her.

81. We find that Ms Eduah was dismissed at a time when her husband had recently arrived in the country and so she found in particularly difficult financially."

Grounds of Appeal

20. The grounds of appeal are in part general to both the case of Ms Chetty and Ms Eduah. Underlying many of them, and as a first ground in respect of Ms Chetty, Ms Banton, who appeared below and who appears for the Appellants before me, argued that the Tribunal had made an award which was unusually high. Her theme was that it was affected by the sense of outrage or disappointment which the Tribunal had, concerning the way in which it thought the Claimants had been treated by their employer. This general approach affected the whole of the

Decision. Specifically, in the case of Ms Chetty, Ms Banton argued that this was evident in what was said in paragraph 11 quoted above. To take account of any finding of institutional racism in determining remedy was irrational. If that had been what the Tribunal was doing in respect of matters other than reinstatement or re-engagement, I can see the force of it, but I am satisfied that it was not adopted in that way. It had relevance to the question of whether reinstatement was practicable. Such an order would have put the Claimant back amongst work colleagues who had not been taken to task for the impermissible way in which they had previously behaved towards her. Given her illness and reaction to what had already occurred, the Tribunal thought that was simply not appropriate.

21. I have looked carefully through the rest of the Judgment to see if there is a sense of that approach being replicated in determining the precise findings that followed. Apart from the very general issues of the number of years for which loss was awarded and the level at which the award for injury to feelings was placed, which in themselves do not substantiate the ground, there is no further reference. Yet, as Mr Feeny pointed out, the Tribunal has shown itself perfectly capable of referring back to earlier findings if and when it had those in mind. One example is its reference back to paragraph 166 in the quotation I have given. Accordingly I reject that point.

22. The second ground was that the Tribunal in paragraphs 38 to 40 had not come to a finding, as it should have done, that the Claimant had failed to mitigate her loss. Ms Banton complained that, in her written Skeleton Argument in closing she had said (paragraph 19) that Ms Chetty could and should have fully mitigated her loss after one year. These submissions, she maintained, had been disregarded when the Tribunal came to make its award. The evidence, taking the Claimant's employment position beyond 2011, had not been addressed.

23. Underlying these submissions was the concept that it is for the Claimant to satisfy a Tribunal that the Claimant has discharged her duty to mitigate. If there were truly such an underlying concept, then I need to say clearly that it would be in error. The burden of proof, in asserting a failure to mitigate, does not rest upon a Claimant to show that what she did was or was not reasonable. It rests upon the Respondent, the employer, to show that a Claimant has acted unreasonably in failing to mitigate. That point has been clearly made by the Court of Appeal (see the case of **Wilding v British Telecommunications plc** [2002] EWCA Civ 349). It has been repeated more than once by this Tribunal. And it probably deserves repetition again. It is of course the case that a Claimant who comes to a Tribunal and, in answer to a question from the employer's representative says "Of course I have mitigated. You prove the opposite" is likely to receive scant sympathy from the Tribunal. Questions can properly be asked in cross-examination of such a witness as to what she has done and, if asked, have to be answered. But without there being evidence (whether by way of direct testimony, or by inadequate answers given by a Claimant in cross-examination) adduced by the employer upon which a Tribunal can be satisfied, on the balance of probabilities, that the Claimant has acted unreasonably in failing to mitigate, a claim of failure to mitigate will simply not succeed.

24. I have no material to show that there was anything perverse in this Tribunal's Decision, which is a matter of fact if addressed properly, that the Claimant had fulfilled her duty to mitigate. The substance of what it said about her regular employment ever since she had been dismissed gives a solid basis for supposing that she had. It does not seem unreasonable on the face of it that the Tribunal should conclude that she was unable to obtain a managerial position after her dismissal. There is no material evidentially put before me to suggest the Tribunal should have reached any other conclusion.

25. I should add that any sense that there must be a period of time after which an employee will necessarily occupy a job with the same level of earnings as the Claimant had when dismissed, such that the duty to mitigate requires an award for future loss of earnings to be limited in that way, is entirely artificial. There is no such time period. A Tribunal should - and will inevitably - scrutinise with great care any claim for loss of earnings which continues into the distant future. But there is neither law nor principle which provides that, in an appropriate case on appropriate material, it may not make such an award. The circumstances in which an award will be made for loss stretching many years into the future are likely to be vanishingly small because of the nature of the jobs market as a whole, but there is no principle that must be a cut-off point. All depends upon the evidence, and Tribunals must be trusted to take a reasonable approach as to when that will be in light of the Tribunal's own knowledge of the local labour situation. It is that approach, a proper approach, which I see reflected in this Tribunal's Judgment on this issue.

26. The appeal in respect of the **Polkey** issue, also comprehended within the first ground at paragraph 4 of the Notice of Appeal, took a slightly unusual turn in the course of submissions. The ground is that the issue of **Polkey** was not considered. It had been raised in submissions using the word "**Polkey**", but the Tribunal failed, it is said, to deal with it at all.

27. In the course of her submissions Ms Banton submitted that she was seeking a reduction from damages since the Tribunal should have made a reduction to accommodate the chance that the Claimant might fairly have been dismissed. The language which the Tribunal adopted (witness the paragraphs I have cited) spoke of what "would have" happened, thus speaking in terms of probability, rather than asking what might have happened in terms of chance.

28. I have, as it seems to me, to deal with the Notice of Appeal as it stands. That avers that **Polkey** was not dealt with at all. I reject that ground. There is no magic in the word "**Polkey**" even though it is often used as shorthand: what is relevant is what it means as a matter of principle. What it means is that a Tribunal may, in an appropriate case, and provided there is some evidence to work on, conclude that there is a real risk that the Claimant might, had the employment continued, have been fairly dismissed from it by the employer. Such a submission will usually find favour if the only basis for supposing a dismissal to be unfair is a procedural failing by the employer which might, were matters to be revisited, easily be corrected. Here, between paragraphs 15 and 25, the Tribunal did indeed look at the question whether, in its view, this employer, acting fairly, might have dismissed the Claimant. It did not use the word "**Polkey**". In my view it did not have to. It dealt with the substance of that which "**Polkey**" would have meant had it used the shorthand. That is sufficient to dispose of the ground of appeal, which is that the Tribunal failed to deal with it. The answer is it did.

29. However, I am far from suggesting that, had the appeal been made upon the basis that the Tribunal here had wrongly addressed the matter as one of probability rather than of chance, I would have found the ground upheld. It seems to me there is considerable force, which on balance would have persuaded me, in the submissions by Mr Feeny that in paragraph 17, in the final sentence, the Tribunal was in effect saying that the chances of dismissal were nil. That would seem entirely in line with a case in which the Tribunal had struggled to find any fault at all in what the Claimant had actually done.

30. There are two aspects to making a **Polkey** award. One is assessing the chance. The other is having evidence to do it. It was a lack of evidence to which the Tribunal referred at paragraph 25. That is the meaning of there being "nothing here to lead us to a finding".

Accordingly, on either or both of those bases, had the matter been a live issue, I would have been inclined to hold against the Appellant's submissions.

31. I turn then to the third matter. It is said that the Tribunal wrongly took into account the warnings which the Claimant had had. At paragraph 8 it said.

> **"It is not a proper matter of remedy as to whether the Claimant will be dismissed regarding the warnings on her record. No submissions regarding warnings or regarding the likelihood of dismissal were made at the Remedy Hearing by either party. Ms Chetty's warnings were only raised regarding contributory conduct at the Remedy Hearing."**

32. Three matters arise. First, on my reading of the Judgment, the Tribunal did not take into account its view in respect of warnings in any respect other than determining its view of what was the likelihood of a fair dismissal, with which I have already dealt. Secondly, Ms Banton explained that there was no true inconsistency between the second sentence of paragraph 8 as quoted and the argument in respect of **Polkey**. She was referring to arguments in respect of the question of contributory conduct. As to contributory conduct, thirdly, it seems to me that the presence or absence of a warning has nothing to say whatsoever in this context as to whether the Claimant did or did not contribute by her own misconduct to the dismissal which actually occurred. On the particular facts of the relevant incident here, the only misconduct for which she might have been taken to task was that for which she was never disciplined. The dismissal was based upon something she had not done. The Tribunal found that as a matter of fact. In those circumstances I do not see how any contribution could be made by her conduct to that dismissal. Whatever she may have done in the past, relevant to the warnings she received, could not amount to blameworthy conduct contributing to her dismissal.

33. Those matters were raised also in the context of the question whether the Tribunal had made an award which was punitive rather than compensatory. I have dealt already with the

rather general nature of that allegation. Such an allegation may be well founded in an appropriate case, which in my view this is not, but if it is to be raised it requires to be set out specifically by reference to facts which would allow an Appeal Tribunal to deal with the allegation with a close focus, rather than made by making vague and generalised accusations. Such complaints simply do not suffice for a successful appeal.

34. Accordingly, in my view, and subject only to the compensatory error which I have dealt with already, the appeal in respect of Ms Chetty should be dismissed.

35. I turn then to Ms Eduah. As to her, it is said that the Tribunal erred in law or found perversely on the facts in making only a 35% reduction for contributory conduct. There is an argument that in this respect the Decision is not **Meek**-compliant.

36. In answer to this point, with which I confess I have some sympathy given the stark wording of paragraph 57, unexplained as it is and without any cross-reference within it, Mr Scott reminds me of what was said by the Court of Appeal in **Hollier v Plysu** [1983] IRLR 260 per Stephenson LJ at paragraph 19. That related to an assessment of reduction for contributory conduct. He said:

> **"In a question which is so obviously a matter of impression, opinion and discretion as is this kind of apportionment of responsibility, there must be either a plain error of law, or something like perversity, to entitle an appellate tribunal to interfere with the decision of the tribunal which is entrusted by Parliament with the difficult task of making the decision."**

37. Here, Ms Banton's first argument is that because Ms Eduah was guilty in the Respondent's eyes, and not unreasonably so in the view of the Tribunal, of conduct which was gross misconduct, the degree of contribution should be set at least 50%. In my view, I do not consider that a Tribunal would be regarded as perverse in concluding that it was 35% any more

than it would have been perverse to conclude it might have been something a little over 50%. That is because matters such as the precise percentage at which contributory fault is to be assessed are not easily susceptible of detailed reasoning. They are figures in assessing which impression, familiarity with the evidence and the witnesses, an intimate knowledge of the facts and an assessment of the industrial realities, are all-important. There are many cases, as Ms Banton was first to concede in argument, in which there may be something which can be classed as gross misconduct in which contribution would plainly be considerably less than 50% just as I have no doubt that there are many in which it would be perverse to fall below say 75%.

38. This is a case in which, on all the facts, as I have indicated I could not say that there was a plain error of law or something like perversity, as Stephenson LJ would have required. But Stephenson LJ did not deal with the second question which arises, which is whether the Tribunal said enough. It is inherent in both Rule 30(6) of the **Employment Tribunal Rules** as were, and in the case of **Meek**, that the parties should know why they have lost. That applies to central arguments in a case as it applies to the case as a whole. In an assessment such as that of contributory fault, it is not possible often to say much, but it will almost always be possible to say something to indicate the particular factors which have led a Tribunal to make a conclusion as it has. A Tribunal should always strive to do so even if all it can do is indicate the main considerations pulling in each direction. It is Mr Scott's submission that that is actually what the Tribunal did, just as it is Ms Banton's submission that paragraph 57 in effect stands on its own. I therefore have to resolve what I understand the Tribunal to have been saying in paragraphs 55-57.

39. Though not without some hesitation, I have concluded that the word "also" in paragraph 57 was not introducing a separate issue, to which the Tribunal then turned, but was, as Mr Scott

submitted, creating a linguistic link between that paragraph and the two which had immediately preceded it. I reach that conclusion, contrary to my initial instinct, for these Reasons. First, I accept that the word may be used in that sense. Second, a Tribunal's Decision has to be viewed as a whole, holistically. Third, at the end of paragraph 54, the Tribunal had dealt with the question of the application of **Polkey** in Ms Eduah's case. It concluded that that application should be dismissed. Therefore paragraphs 55 and 56 were not in any sensible way linked to the question of **Polkey**. There was no obvious force which they could have, within the Judgment taken as a whole, unless it were intended that they should lead to the conclusion which is set out at paragraph 57. What is said there is indeed to draw the balance (see the opening words of paragraph 56) between those matters which showed that Ms Eduah had been at fault and those matters which suggested that she would not necessarily have been dismissed for it because the fault was not that great. I consider, therefore, that what the Tribunal was doing in those two paragraphs, though it could have done so more clearly, was to set out the factors upon which it relied when reaching the conclusion it did. Since the conclusion was not perverse, and the factors were not manifestly inappropriate, I have therefore concluded, albeit with the hesitations that I have expressed, that this ground of appeal also fails.

40. The next ground of appeal was that the award of £6,000 in injury to feelings was too high. There had been no medical evidence to support Ms Eduah's contentions of stress and anxiety as referred to in paragraph 80 of the Judgment. Given that she admitted and knew of the breach of procedure, it was said the injury to feelings was too high. Ms Banton contended that it should have been £5,000 rather than £6,000.

41. The general principle to be adopted was, as Mr Scott submits, set out in the case of **Land Registry v McGlue** UKEAT 0435/11, a Decision of 6 February 2013, at paragraphs 25 and 26:

> **"As a matter of principle awards made by a Tribunal in respect of injury to feelings are not susceptible of close calculation. That is why they will not be interfered with unless they are manifestly excessive or wrong in principle. The making of an award at all was plainly not wrong in principle given the Tribunal's conclusion at paragraph 74..."**

The Judgment in **McGlue** then descends to the particular facts of the case, before going on to say that a tribunal has an opportunity which the appellate court does not have, on review, to see and hear the Claimant.

> **"In any case involving injury to feelings, the Tribunal using its experience must assess the effect upon the individual. That involves understanding and evaluating what truly is the subjective effect of what objectively is discrimination. It means that a considerable margin must be recognised around any award which is made.**

I adopt those principles. I cannot see that an award of £6,000 could be said manifestly excessive where one of £5,000 is regarded as not inappropriate. There is no error of principle in its assessment. In cases of serious medical injury, it might be expected that there would be medical evidence, but there are very good reasons in a case such as this why there may not be such evidence, not least the disproportionate cost of obtaining it. The reasons for supporting the award of £6,000 were amply set out. There is nothing perverse about the conclusion. I dismiss the claim in this respect.

42. Finally, ground 6 complains generally about **Meek** compliance. I think that, although I have dealt here purely with Ms Eduah's appeal, the complaint pertains to both. In my view, the Tribunal has set out sufficiently what it found for parties to understand the basis of its calculation. It did not do so in respect of the precise calculation for loss of wages. I have already referred to the agreed order in that respect and since it is a matter which I have given some consideration, inevitably, I think that would merit a separate Judgment, short I hope,

which can then be promulgated as such. So, so far as the main case is concerned, the matter will be remitted to the same Tribunal, assuming that remains convenient, on the question whether the total award to the First Claimant, after the substitution of a figure for loss of earnings contained in the Judgment has been done, should be adjusted for grossing up and, if so, by how much. Secondly, I note that the parties recognise that the recoupment regulations will still apply in respect of both Claimants. Thirdly, it is agreed that in respect of Ms Eduah, the total monetary award is £16,231.25. The total prescribed element for the purposes of recoupment is £13,840.37 and the prescribed period is 22 April 2010 to 18 February 2012.

The Costs Appeal

43. I am asked, as it happens (somewhat surprisingly, for the first time in an appeal which I have heard) to make an order under Rule 34A(2A) of the **Employment Appeal Tribunal Rules 1993**. That rule provides:

> **"If the Appeal Tribunal allows an appeal, in full or in part, it may make a costs order against the respondent specifying the respondent pay to the Appellant an amount no greater than any fee paid by the Appellant under a notice issued by the Lord Chancellor."**

44. It is common ground, in the appeal which I have just heard and determined, that a fee totalling £1,600 has been paid by the Appellant in order to bring this appeal. It will have been paid in two tranches: first £400 in order to lodge the appeal, pending a Decision on the sift that the appeal showed reasonable prospects of success sufficient for it to proceed to a Full Hearing, and a further £1,200 once that Decision was made, such that the case was then to be a Full Hearing of the appeal.

45. In this appeal the Appellant has lost on every point which was argued orally before me. It has taken almost a full day of argument including time for the Judgment to be delivered. However, part of the grounds of appeal did succeed. They succeeded ultimately by agreement.

The Tribunal, in stating what losses it would award each of the two Claimants concerned, failed in each case to take into account, as against the losses caused by their dismissals, the sums which they had received in alternative employment about which the Tribunal had full information and made a record in its Decision.

46. The Appellant's position, therefore, is that it did succeed in part on the appeal. It was necessary to appeal if it were to secure that monetary advantage. Matters were made more difficult by the fact that, at the time it appealed, the Claimant was unrepresented or thought to be, and therefore it might have been anticipated that she would have said that she did not agree that there had been a miscalculation by the Tribunal.

47. The application is resisted by Mr Feeny on behalf of the First Claimant, against whom it is now made. The claim is not pursued against the Second Claimant, who at a slightly earlier stage, after the service of the Notice of Appeal, agreed that there had been a miscalculation in her case. Ms Banton therefore asks for half the total fee paid £800 against the First Claimant. In answer, Mr Feeny takes one point of fact and three points of principle.

48. The point of fact is that there was never any suggestion that the Claimant objected to the ground of appeal as being unfounded or wrong. The dates which are relevant are that the appeal was lodged on 3 January 2014, two days before the expiry of the 42-day period. On 31 January, it appears, a copy of the notice of appeal was sent to the Claimant. The case was sifted to a full appeal on 21 January 2014.

49. The points of policy and principle which Mr Feeny took were that the Appellant has lost on the substantive elements of the appeal, which were argued today. That was where the appeal

was centrally focussed. Secondly, the Employment Tribunal clearly got the calculations wrong so there could never have been any real issue about that. Thirdly, to award costs against the Claimant would be to work an injustice. It would have been open to the Appellant to seek reconsideration by the Tribunal, to whom, if the matter had been pointed out, the mistake should have been obvious. Further, it occurred to me, and Mr Feeny I think would adopt this, that there had been no request made by the Respondent prior to the issuing of the Notice of Appeal to ask the Claimant to recognise that the Tribunal plainly had made a mistake, and thus take the opportunity between the parties to resolve the issue by agreement without either incurring a fee.

50. Underlying those principles is the fact that the fees are paid whatever the result. They are not refundable. Except perhaps in the most exceptional of circumstances, which very rarely if ever exist, the court never pays them back. Accordingly, what has to be achieved by application of Rule 34A(2A) is justice between the parties as to which should effectively incur the payment of fees which, viewed as between them, is a common expense which was incurred simply because there was an appeal.

Observations

51. It is tempting to adopt the same approach as would be taken in the civil courts where costs order are made. In a costs shifting regime the costs of bringing or defending a claim are generally awarded to the party who substantially succeeds by the party who fails. Those costs, however, are very different from the costs which are envisaged by Rule 34(2A). That Rule does not deal with the costs which the parties have themselves incurred. The **Employment Tribunal Rules** do not create a costs shifting regime. This Rule looks simply at the question of repayment of fees which it was necessary to pay in order to bring an appeal. Here, it might be

said that the Appellant had to make the appeal if the Appellant were to obtain an order rectifying a very costly order against the Appellant. Given the strict approach to time limits which the Appeal Tribunal adopts, not to put a Notice of Appeal in within 42 days of the sending out of the Decision would almost certainly mean that the order would have stood, erroneous in calculation though it might have been,.

Consideration

52. It seems to me that in a case such as this, where there has been an obvious error by a Tribunal, the focus of the parties ought in the context of this rule be assessed as to whether it was necessary for the Appellant to bring the appeal. There were two ways here in which the expense and trouble and the necessary expenditure on fees, in particular, could have been avoided at the outset. The first was inviting the Tribunal to reconsider the question. Ms Banton says that was not done because the Tribunal had already issued a notice of correction. I have a strong sense from what she said that the employer had lost confidence that the Tribunal would necessarily right the wrong it had done. The employer could not know this would be the case without asking. The second was to approach the Claimant. As to Ms Banton's response that the Claimant might very well have rebuffed that approach, I observe that that is a difficult stance to take when she was never given the opportunity. If she had been and had rebuffed it, then it seems to me there would have been a case that some of the costs by way of payment of fees would have been recoverable by the Appellant, albeit that would have to be balanced, as it seems to me, against the fact that during the bulk of the hearing the focus has been on matters on which the Appellants have entirely lost. I have concluded that there could have been and should have been action taken prior to the issue of the Notice of Appeal, of a kind which would not have imposed the payment of fees or an equivalent sum upon either party, and which should

have been capable of remedying the injustice. In the light of that, I have concluded that in this case I should make no order as to costs: that is no order as to the repayment of fees.

53. For the benefit of other cases which may follow, it seems to me that in a case in which an appeal is brought which is entirely rejected, there is no basis for any payment by the successful party to the Appellant. Where there is an appeal which is partly successful, all will depend upon the particular facts. The Rule does not permit the payment of the actual costs of litigation, apart from fees, from one party to another. What the court centrally has to assess is whether it was necessary to incur the expense in order to bring the appeal – this includes asking whether the appeal, as in the present case, could have been avoided by the Appellant taking reasonable steps, or was made more likely to proceed by the behaviour of the Respondent to it; it should then recognise the fact, if it be the case, that an appeal has largely failed or for that matter largely succeed in deciding, in its discretion, exercised reasonably, whether it should award the full extent of the payment made by way of fees, or whether it should moderate that amount to a reasonable extent. A reasonable extent includes making no award at all, though in circumstances in which an appeal has been partly successful this would have to be carefully justified and is likely to be rare.

54. As I have indicated, those observations are for other cases and not for this where, for the reasons I have given, I do not allow the application.