Appeal No. UKEATS/0021/14/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 28 November 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

DR SUKHOMOY DAS — CLAIMANT

AYRSHIRE & ARRAN HEALTH BOARD — RESPONDENT

JUDGMENT

© Copyright 2015

APPEARANCES

For the Claimant	Mr M McLaughlin (Solicitor) DWF LLP Dalmore House 310 St. Vincent Street Glasgow G2 5QR
For the Respondent	Mr A Hardman (Advocate): Instructed by: NHS Scotland Central Legal Office Anderson House Breadalbane Street Bonnington Road Edinburgh EH6 5JR

SUMMARY

Equality Act 2010 section 27B. Victimisation. The claimant applied for a vacancy advertised by the respondent. He was qualified for the post and was the only applicant. The respondent shortlisted him but prior to interview decided to withdraw the vacancy. The HR department of the respondent thought that there was a high risk of the claimant complaining of discrimination if he was not offered the post, due to his history when previously employed by the respondent. The ET found that was the reason he was not interviewed. There were also discussions within the respondent about the need to fill the vacancy for reasons connected to reorganisation. It may have decided not to fill it in any event. The ET found that the claimant had been subject to victimisation and awarded compensation in respect of loss of a chance. It found that the claimant had a 10% chance of being appointed and reduced compensation accordingly. The claimant appealed against the reduction in compensation. The respondent cross appealed on the amount of compensation. Held: appeal and cross appeal refused. The ET was entitled to decide that the claimant had lost a slender chance of appointment and to reduce compensation accordingly. The ET had given clear reasons for its decision on the sums awarded under injury to feelings and for future loss. There was no error in law. The figure for injury to feelings was high, but not so high as to permit reconsideration by the EAT.

THE HONOURABLE LADY STACEY

1. This is an appeal by Dr Das and a cross appeal by Ayrshire & Arran Health Board against a decision made by an employment tribunal (ET) comprising Employment Judge Paul Cape, Ms Kathleen Jones and Mr John Hughes. They heard the case over several days in February and May 2014; their decision was advised to parties on 27 June 2014. The decision is to the effect that the claimant's complaint under section 47B of the Employment Rights Act 1996 (ERA) fails and is dismissed; his complaint of unlawful victimisation contrary to the Equality Act 2010 section 27B succeeds and for the reasons set out the claimant is awarded compensation (together with interest) totalling £8600.08. The ET reduced compensation by 90%. The claimant appeals against that reduction. The cross appeal is against the amount of the award.

2. I shall refer to the parties as claimant and respondent as they were in the ET. Mr M McLaughlin, solicitor, and Mr A Hardman, advocate appeared for claimant and respondent respectively in both ET and before me. The claimant is a doctor, and the respondent a health board which employed him at one time, and refused to interview him for a vacancy after he had left their employment.

3. The appeal and cross appeal concern the compensation awarded. No appeal is taken against the decision that the claimant was not discriminated against due to his having made a protected disclosure. The cross appeal is only on the amount of compensation, not on the finding that the claimant was subject to victimisation. In order to understand the appeal it is necessary to summarise the facts found by the ET.

4. The claimant began his employment with the respondent in 2000 in the care of the

elderly directorate as a locum staff grade doctor. His post became permanent. He worked at Crosshouse Hospital. During 2005 and 2006 the claimant developed concerns over what he saw as misdiagnosis of patients by a consultant. He approached those in authority at the hospital at which he worked in February 2006. In March 2006 he stated that he would not be able to see patients on behalf of locum clinics, effectively giving three weeks' notice of his intention to change his working arrangements, known as his job plan.

5. The medical director arranged for investigation of matters. The outcome was that there was no evidence found to support the allegations made by the claimant. There was recognition of tension in the relationship between him and the doctor about whom he complained. The claimant was told that breaking the terms of his job plan was a serious matter. A breach of confidentiality arose in the course of the investigation, in that the doctor about whom the claimant complained was shown a letter written by the claimant. The respondent apologised for that to the claimant. In June 2006 the claimant instructed solicitors who wrote to the respondent stating that he did not regard all matters arising out of his raising concerns about clinical performance as being at an end and intimating that he was considering whether to raise a grievance. He raised a formal grievance in June 2006 which was determined by September 2006. The claimant was not satisfied with the outcome but he did not appeal.

6. In 2007 there was a difficulty about accommodation in that there were fewer rooms than there were doctors. The claimant was asked to move rooms and share with someone else and indicated in a letter that he would treat that as "racism/discrimination". This matter was finally resolved following a meeting attended by the claimant's trade union official in November 2007.

7. There was also an issue in 2007 concerning the claimant's application for promotion to associate specialist. The claimant complained that he had made an application but it had not

been progressed. The respondent's position was that it had no immediate plans to appoint such a specialist.

8. In October 2008 an advertisement was published by the respondent seeking candidates for appointment to a speciality doctor post in stroke medicine. The claimant felt that he was asked to move out of stroke medicine and eventually agreed that he would do so if he was supported in an application for progression to associate specialist. He maintained that such an agreement was reached, but the doctor said by him to have agreed gave contrary evidence. Ultimately the claimant came to describe the process as "a shambles".

9. In October 2008 the claimant made a complaint about a racist comment made by a hand hygiene coordinator. He raised a complaint in October 2008 and the grievance procedure was completed in April 2009.

10. During 2008 changes were made nationally to medical staff grades in which promotion to associate specialist was closed off save for what was termed "a window of opportunity" that allowed existing staff grade or speciality doctors a final opportunity to seek promotion to associate specialist. The claimant applied during that window of opportunity and was supported by the consultants and his department. His application failed at the level above, that of associate medical director. The reasons given by the associate medical director were a lack of clearly identified need in relation to service provision, the fact that the claimant had shown competence at the staff grade level but had not shown clinical excellence beyond that level, and the fact that there were issues around participation in continuing professional development over recent years.

11. The claimant decided to train to work as a GP. He was accepted for the GP training

programme. He remained an employee of the respondent. He submitted what purported to be a letter of resignation dated 30 June 2009. While it was not strictly a letter of resignation because he was continuing in the service of the respondent as a GP trainee, he was bringing to an end his employment in the post of speciality doctor.

12. The letter made reference to the protected disclosure and also to "bullying, harassment, discrimination, exploitation and victimisation". The letter stated the following: –

> **"…I would like to assure you as my previous appraiser, that I shall still raise concerns appropriately wherever I work as a doctor if I believed patients interests are compromised, no matter what my personal damage and my families (sic) hardship had been for doing so once before in this job."**

The claimant worked out his period of notice but there was no attempt by the respondent to contact him to explore the issues raised in his letter.

13. The claimant started his GP training in August 2009 and withdrew from it in October 2009. He explained to the ET that the reason for withdrawal was that he was not content with the training modules to which he had been assigned, as they related to areas with which he was familiar but did not include training on other areas.

14. Ms Bulloch of the HR Department of the respondent became aware of the resignation from the GP training programme and asked the associate medical director to meet the claimant to explore the concerns raised in the earlier letter. The associate medical director wrote to the claimant but the claimant did not take up his offer of a meeting.

15. When the claimant resigned from the respondent, he had no job to go to. He took a temporary post in Glasgow Royal Infirmary, and in or around February 2010 he was appointed to a post as specialty doctor in the department of medicine for the elderly at Edinburgh Royal

Infirmary. He worked there for a period, living at home at the weekends only. The claimant then worked for some time in a hospital in Paisley and by November 2012 he had left that hospital and taken up a permanent position in Hairmyres Hospital, East Kilbride.

16. When working in Edinburgh, the claimant lived away from his family home during the week. At about the same time his parents moved from India to live with the claimant and his wife and daughter in Ayrshire. He assumed financial responsibility for his parents. The claimant's position was that he wanted to be employed at a hospital, such as Crosshouse, which was close to his home. Hairmyres Hospital, East Kilbride, was further away, but within daily travelling distance.

17. On 26 April 2010 the respondent published an advertisement for a specialty doctor post in geriatric medicine. The successful applicant would be based in Kirklandside Hospital Kilmarnock, and Crosshouse. Applicants were required to have four years full-time postgraduate clinical experience with two years in geriatric medicine. This was the second advertisement to fill the post; the claimant did not respond to the first advertisement, but made an application following the second advertisement. He had substantially greater experience than the minimum required. The applications were considered by a panel of three doctors within the respondent. One decided not to shortlist the claimant because he knew that he had been unhappy in the department when he had worked there before, had decided to become a GP but had left that training and soon settled in Edinburgh. He thought the job was not appropriate for the claimant, because the job was too junior and the claimant would not find job satisfaction in carrying out the work. One of the others on the shortlisting panel decided not to shortlist because the claimant had held a number of posts in quick succession and that raised a question about his commitment to geriatric medicine. The third member of the shortlisting panel would have shortlisted him. In June 2010 the claimant was told that he had not been shortlisted for the

post.

18. As a matter of routine, a file on recruitment is passed by those in the respondent's HR team dealing with it to the medical staffing officer in order that she may review the file prior to interviews. That officer recognised the claimant's name and from her knowledge of the claimant's time working with the respondent was able to identify that he had the necessary experience to meet the essential criteria. She raised the issue with Ms Bulloch of the HR department, who agreed with her that the claimant should be shortlisted. Ms Bulloch took the matter up with the associate medical director and it was agreed that the claimant would be offered an interview. Another candidate was interviewed a few days before the claimant. Both candidates were asked the same questions and were given scores reflecting the interviewers' assessment on a rating form.

19. The claimant was assessed as having performed poorly during the interview. He was rated C against a number of essential criteria. He was also thought to have become defensive and agitated when he was asked a question about dealing with underperforming doctors. That question was described as a "hot topic" in medical circles. A good candidate was expected to be able to explain how he would apply General Medical Council guidelines to assist a colleague in overcoming difficulties. The claimant thought he was being asked a question directed towards his dealings with the doctor about whom he had raised concerns in 2006.

20. The claimant was also marked as unsatisfactory in respect of appraisal and continuing professional development. He had not been appraised for several years and he had done little by way of training. One of the panel of three was badly affected by the claimant's behaviour in the interview, describing herself as being put in fear by it.

21. The other candidate was offered the post. The claimant took up the question of why he had not been initially shortlisted and also asked for feedback on why he had been unsuccessful in his application for the job. The feedback was that he had been regarded as excellent in relation to general clinical experience and leadership skills but was considered not to be appointable to the post because of other failings at interview. The claimant instructed solicitors to pursue the nature of the error that resulted in the initial exclusion from the shortlist and to seek to identify the culprit. He lodged an employment tribunal application form against the respondent in September 2010. He alleged that the respondent's decision not to offer him the 2010 vacancy was not for the reasons given but rather was due to the fact that he had made a protected disclosure in 2006 and a race discrimination grievance in October 2008. The claim was settled at judicial mediation.

22. In May 2012 the respondent advertised a clinical teaching and research fellow post in stroke medicine. Such a post is a low-level post which would not normally appeal to an experienced specialty doctor. The claimant emailed seeking further details of the post. He got no reply. This was due to two doctors thinking the other was replying.

23. In November 2012 the respondent published a job advertisement for specialty doctor for the care of the elderly to be based predominantly in Crosshouse Hospital. A minimum of four years post graduate experience was required with at least two years in geriatric medicine, general medicine or any of the associated sub specialties. The claimant and one other doctor indicated an interest. The other doctor obtained further details by email and did not go ahead with his application. The claimant applied.

24. The claimant therefore was the only applicant for the vacancy. The respondent considered that there was a mismatch between the level of experience they were looking for and

the level of experience of the claimant. The doctor in charge of the recruitment process, Doctor Shah, spoke to his colleagues about the claimant and discovered that various doctors working for the respondent had differing views about the claimant.

25. It was brought to the attention of Ms Bulloch that the claimant was the only applicant for the vacancy. She was surprised that the claimant would want to return to the same working environment that he had complained about when he left in 2009. She was aware that the claimant met the essential specification for the position. She checked whether there had been anything in the judicial mediation precluding the claimant from applying for a further position and found there was not. She and other HR colleagues decided that he should be shortlisted. Ms Bulloch and her colleague Ms Todd were concerned that no matter how the respondent proceeded with the claimant's application, and whatever the outcome, if the claimant was not appointed, there would be further challenges from him against the respondent.

26. Following discussions between HR colleagues and the associate medical director, it was decided to convene an interview panel that would have little or no knowledge of the claimant's previous history so that the panel could be seen to be objective and unbiased. It was decided that Ms Todd would write to the claimant regarding the make-up of the interview panel, explaining what had been decided. That was not normally the procedure but it was decided to do so in this case.

27. The claimant responded to Ms Todd's letter in January 2013. He said that he had reservations about the proposed composition of the interview panel as it highlighted that the circumstances of the candidate were unusual, but he was content with the proposal. He stated in the letter the following: –

> **"…the fact that I am content with your proposal is not an acceptance that the panel members have**

> **no knowledge of my previous disclosures and claim. Nor is it an acceptance that any such knowledge will not be factored into the panel's decision. The panel members' knowledge is currently unknown to me."**

Ms Todd was extremely shocked and surprised by the content of the claimant's letter; she thought it sounded as though it had been drafted by a lawyer. She had concerns about the respondent employing the claimant. She discussed it with the associate medical director and other doctors who had been involved with the claimant when he had worked for the respondent. A meeting was arranged and the file on the claimant was produced. Ms Bulloch expressed the opinion that the tone of the letter did not instil confidence.

28. Entirely separately from the matters concerning the claimant, the respondent was considering reorganisation of its service provision. During 2012 the respondent was considering introducing a service in the department for the care of the elderly, namely thrombolysis. This was not available locally and patients had to be taken to Glasgow. There were also plans to introduce a new system known as the "front door initiative" which involved patients being assessed by a consultant before being admitted to Crosshouse Hospital, or discharged home or to another facility. The initiative depended upon a number of consultants being available and premises being created and equipped.

29. At a meeting on 31 January 2013 at which Ms Todd, Ms Bulloch, Dr McGuffie and Dr Ghosh attended there was discussion about the move towards providing the service. The job that had been advertised was also discussed. Doctor Ghosh told the meeting that members of his team had expressed concerns regarding the claimant being too experienced for the role. Dr McGuffie and Dr Ghosh said that they would abide by the advice of the HR colleagues. If they were advised that the interview of the claimant should go ahead then they would accept that. By the end of the meeting the consensus was that recruitment to the vacancy should be stopped pending discussion due to take place at an "away day" that was due to take place on

21 February 2013.

30. The claimant had not heard any more from the respondent and sent a reminder by email on 9 February 2013. Ms Todd replied stating that a review of the service delivery was under way and the decision was not to fill the vacancy "at this stage" but to make a locum appointment in the meanwhile.

31. Thus the claimant did not get an interview for the job that he had applied for despite the fact that he was the only applicant.

32. The claimant's case before the ET was that the vacancy which had arisen at the end of 2012 was withdrawn because the respondent did not want to interview him or appoint to the post because he had made a protected disclosure in the past. Thus the claimant had been victimised.

33. The respondent's case before the ET was that the withdrawal of the post was not done because of any protected act nor was it victimisation. The respondent contended that consideration of how to deal with the claimant's application for the post came about because of a generalised concern in the mind of the HR Department about the claimant. The reason for the post being withdrawn was that it was concluded that the funding taken up by the post could be put to better use in pursuance of its reorganisation of service provision.

34. The ET directed itself on the applicable law on victimisation from paragraph 287 to paragraph 303. It found that the decision was taken to convene the 31 January 2013 meeting because Ms Todd and Ms Bulloch believed that the claimant may bring proceedings in the employment tribunal if the recruitment process was allowed to proceed in the ordinary way.

The ET accepted that while there may have been a management decision to divert funds from the budget for a specialty doctor to the budget for a consultant, that decision was not contemplated before the recruitment process was set in train and only came under consideration at the meeting because Ms Todd and Ms Bulloch were of the belief that the claimant may bring proceedings. The ET therefore concluded that the decision was an act of victimisation because the belief that the claimant may bring proceedings in the ET was a substantial influence in the decision to depart from the ordinary recruitment process which resulted in the detriment to the claimant in that he lost the opportunity to be considered for appointment on merit.

35. The ET took the view that the loss to the claimant was the loss of the chance of being appointed. It found that an interview stood between the claimant and the appointment. It found that the claimant was plainly capable of giving a satisfactory interview as he had secured four appointments in the time between leaving the respondent service and applying to the respondent in 2012. It also found that the claimant was capable of giving a poor interview as had happened in 2010. It found that the respondent practice was not simply to appoint the best of the candidates available; it was prepared to turn away all unsatisfactory candidates even if that resulted in no appointment being made.

36. The ET found that the claimant had only a slender chance of being appointed even though he was the only candidate. It decided that his recent employment history was bound to provoke questions from any interview panel who would want to know why the claimant had left the respondent's hospital to train as a GP and then then abandoned that after a short period of time. The panel would want to hear a very good explanation why over a period of three years the claimant passed through three hospitals before finally leaving an established post in Paisley for a locum post in East Kilbride. It found that the move from Edinburgh to Paisley was explicable by reference to the practical impossibility of travelling daily from rural Ayrshire to

Edinburgh and the undesirability of having to live apart from the family during the week. It was less obvious what the explanation would be for leaving an established post in Paisley for a locum post in East Kilbride giving a reduction of 20 minutes each way in travelling time. The ET came to the view that the reason the claimant left the respondent's hospital in the first place would have to be explained, as it was close to his home and that was a matter of importance to him. The ET thought that that would inevitably be the subject of close scrutiny.

37. The ET found that the claimant would answer such questions truthfully and would have given the explanation set out in his letter of 29 June 2009, which was to the effect that he would raise concerns appropriately wherever he worked if he thought that patient's interests were compromised no matter what personal damage and hardship for his family would ensue. In evidence before the ET the claimant expanded upon matters set out in the letter. He said that he thought the respondent took advantage of him because he was not being paid properly for the work he was doing. He was exploited by consultants and was asked to supervise a consultant. He said he was bullied and harassed and he summarised the letter's contents by saying that he resigned because he was taken advantage of.

38. The tribunal thought that the interview panel would have asked a question about the topic of "doctors in difficulty". The claimant had given a poor answer to that question in 2010 and the ET thought that there was a substantial risk that he would do so again.

39. The ET came to the final conclusion about the chance that the claimant lost at paragraph 356. They note that of course no interview panel was ever constituted and so the tribunal could not hear evidence from those who would have been on it. They state that they are unwilling to conclude that there was no chance of the claimant being appointed, but they do find that very few interviewers would have been prepared to appoint the claimant. They

thought that the claimant's explanation for his resignation, given in the letter and on their finding, likely to be repeated and expanded at interview, would have "dealt a hammer blow to his chances of appointment."

40. Further while the ET found that the vacancy was withdrawn prior to the "away day" at which the future of the service was to be discussed, and that while that was an act of victimisation, it also found that had the discussion taken place it was highly likely that the same decision would have been taken.

41. The ET found that the claimant had only a 10% chance of being appointed and therefore reduced his compensation by 90%.

42. The solicitor for the claimant argued that the ET had erred in law in making the deduction. He argued that the decision that the loss to the claimant was properly categorised as a 10% chance that he would have got the job was perverse. He submitted that the claimant was the only applicant for a job for which he satisfied the personal requirements. He accepted that in 2010 the claimant had attended an interview which did not go well, in which he was marked down on appraisal and continuing professional development. By 2012 he had had several appraisals and had conducted and undergone training and therefore had a better chance than he had had previously. The major point was that the ET had indulged in impermissible speculation. It is speculated about what a panel, which was never appointed and whose identity was therefore unknown, would have asked by way of questions; what answers it would have got; and what decision it would have made.

43. He argued that the decision of the respondent was to fix a panel which had as little as possible knowledge of the claimant's history. Therefore it was illogical and perverse of the ET

to decide that the panel would have asked about his history.

44. Counsel for the respondent argued that the ET was entitled to draw the inferences which it did from the facts which it found. He argued that the respondent intended to set up a panel which had as little knowledge as possible of the past events but it was an impermissible gloss to say that the respondent had decided to have a panel which had no knowledge at all. In any event, the panel, whoever was on it, was entitled to ask appropriate questions of the claimant just as it would of any person it was interviewing. Therefore it would ask the claimant about the reasons for his having held several posts in recent years. It would ask why the claimant had left the hospital to which he was now applying. The ET was entitled to hold that the claimant would be truthful and therefore that the claimant's view that he had been the subject of discrimination and that he had been taken advantage of would be put before the panel. It was, counsel argued, entirely within the function of the ET to come to the view on the facts that the claimant was quite likely to answer the question about "doctors in difficulty" as he had in 2010; if he did then he would be marked down on that. The ET was entitled to find that the respondent might have decided to withdraw the vacancy pending reorganisation. Counsel argued therefore that there was plenty of material before the ET from which it could draw the inference that the claimant only had a 10% chance of appointment. He argued that the decision of the ET was not perverse.

45. I agree with counsel for the respondent. The test of perversity is, as the solicitor for the claimant appreciated, a high test to be met. In my opinion it is legitimate to decide that any interviewing panel would be very likely to enquire about the claimant's employment history; similarly it is legitimate to find that the claimant would be truthful and in stating his opinion would expand on his view that the respondent had previously taken advantage of him.

46. I appreciate that it may seem paradoxical to the claimant that the respondent decided to set up a panel which had as little as possible knowledge of the history, but then to argue that whatever panel was set up would ask about history. The respondent was entitled to set up a panel which did not have actual knowledge, in order to be fair to the claimant. As was found by the ET, different doctors within the respondent's employment had different views of the claimant, and it is always possible that persons have inaccurate memories and are of the view that they know what happened in the past without actually doing so. Therefore, to appoint a panel of doctors who had been involved to varying degrees in the past would not have been fair to the claimant. Nevertheless, any interviewing panel would be entitled if not bound to ask about the claimant's work history as could be seen from his CV. That being so, the claimant would give the information that he had previously given about his views. The ET was entitled to find that any such panel was very unlikely to have made an appointment in the circumstances.

47. The ET remarked that the pecuniary loss was unusual. The claimant's earnings in his post at East Kilbride are the same as he would have had with the respondent and that is likely to remain so in future. Therefore loss arises from the increased cost of travelling to work at Hairmyres Hospital as opposed to Crosshouse Hospital, which is nearer to his home.

48. Parties were able to agree the cost of journeys but two issues were left for determination by the ET. The first was the relevant journey, which the respondent argued was the direct route from the claimant's home to his place of work at East Kilbride, with credit given for the journey the claimant would have had to have made to Crosshouse if appointed to a post there. The claimant in contrast argued that the journey actually made each morning was from his home to Crosshouse where he dropped off his wife at her workplace and then onwards to East Kilbride and in reverse at the end of the working day. The ET found that it was not unreasonable for the

claimant to take his wife to work and that his approach to the journey to be brought into account was correct.

49. The second issue was the multiplier to be used to calculate future loss. The claimant had submitted that he should be compensated on the basis of his employment continuing to his normal retirement age, and applying Ogden tables on that basis. The tribunal did not accept that approach. It decided that various factors indicated that the claimant would not have continued working in Crosshouse until retirement. It found that the claimant was studying for a degree in law and had in mind taking up work for an organisation such as the Medical Defence Union. It found that the claimant's elderly parents lived with him and there were health issues which might lead to him working part-time, perhaps three days per week, to provide necessary care to his parents. The ET found that the reduction in travel if the claimant worked part time would apply whether the claimant worked in East Kilbride or at Crosshouse. The ET found that the claimant's wife is an advanced nurse practitioner and it did not accept that she would continue working in Crosshouse for the rest of the claimant's career. They did not accept the claimant's evidence that no attractive employment opportunity would ever arise for her in East Kilbride or elsewhere, which might cause the family to consider the strength of their attachment to the current home. It decided to factor in the possibility that Mrs Das might move to another hospital, which might be at East Kilbride. It also noted that the claimant's daughter had reached the age of 18 and might leave home. The ET also took into account that the claimant had applied for a job that was far below his capabilities. It found that sooner or later the tension between a lack of professional satisfaction and the desire to work at the location which was convenient for his home would become so great that the claimant would have chosen to accept travelling a distance similar to or greater than that from his home to East Kilbride. It therefore found that the pecuniary loss which the claimant sought compensation would not endure until he reached retirement age. It decided to make an award for five years. Given the claimant's

age, he could have expected to work for a further 10 years.

50. I have decided that the ET was entitled to choose the multiplier of 5 for future loss. The ET was entitled to look at matters in the round. The weight that it put on various factors was a matter for it. It could for example have put more weight on the claimant's evidence that he wished to continue to live in rural Ayrshire, especially after his elderly parents had come to live in family with him. The ET could have put less weight on their expectation that the claimant's daughter might leave home, and that the claimant's wife might seek work elsewhere. But they had the advantage of hearing the evidence, which I did not. There was no perversity in the view the ET reached. There is no error of law in the ET deciding that five is a reasonable multiplier in all of the circumstances.

51. The ET considered an award in respect of injury to feelings. It stated at paragraph 375 that it found some assistance in the case of **O'Donoghue v Redcar and Cleveland Borough Council 2001 IRLR 615**. In that case it was found that the claimant had been dismissed as an act of victimisation, but that she would have been lawfully dismissed six months later than the actual date of dismissal. The ET restricted the award for injury to feelings on that basis. In the Court of Appeal it was held that that was an error. The lawful dismissal was an event properly to be taken into account as a cut-off point in respect of any claim based on future loss of earnings, but could not be similarly regarded in respect of the claim for injury to feelings. The claim for injury to feelings was based on, and should be quantified as damages for, the sense of anger and upset and humiliation arising from loss of the job because of sex discrimination in the form of victimisation for bringing an earlier claim. The solicitor for the claimant argued that the ET erred in not regarding the current case as the same. The submission was that the ET had erred in law by taking into account what was described in the **O'Donoghue** case as a notional event.

52. I do not agree with that submission. The claimant in **O'Donoghue** was dismissed as an act of victimisation. She was in a job which she was dismissed from unlawfully. She was entitled to compensation for injury to feelings with no deduction. Her future wage loss was reduced because the ET found that she would have been lawfully dismissed six months later. In contrast, the claimant lost the chance of securing an appointment which he had but a slender chance of securing on the merits. I agree that there is a distinction to be made on that basis. What the claimant lost was a chance of getting a job, which he was unlikely to get for reasons unconnected to victimisation. He did not lose his job; he lost a slim chance of being appointed. That is what the ET had to value. The value of the loss to him must be less than if he lost the chance of getting a job which he was very likely to have got had a fair procedure been used, and even such a loss would be less than a dismissal from a post he was already in.

53. Further, the ET considered that in **O'Donoghue** part of the damages was in respect of the sense of anger, upset and humiliation arising from the claimant being dismissed. In the current case the claimant did not get a job he applied for which was not the same as being dismissed from a post he was already in. It will generally be more humiliating to be dismissed from a job than to be unsuccessful in an application. The ET did take into account, correctly, that the claimant's position was that he wished to work close to his home, and so, given his profession, was restricted to the respondent as his employer. It was therefore particularly upsetting to him to be victimised by the respondent. The ET also thought that the claimant coming to know that he had only a slender chance of securing the appointment might go some way towards ameliorating the effect of knowing that it was an act of unlawful victimisation which had resulted in the loss of the chance of appointment. They were entitled to take these matters into account and did not err in law in so doing.

54. The respondent withdrew the first ground of appeal, which concerned the correct test to be applied in finding a contravention of section 27 of the Equality Act 2010. Counsel argued the second ground, that the award of £5000 was too high. The ET had taken account of an irrelevant consideration, as it had included something in respect of the time and trouble in travelling to East Kilbride. He argued that did not amount to an injury to feelings. In any event, the sum awarded was too high; it should have been a nominal award only, of £750. In discussion, counsel submitted that the test to be applied by me when considering if an award was excessive was that of perversity. He submitted that the award was so high as to be an award that no ET properly directing itself could have made. He referred to the case of **Vento v Chief Constable of Yorkshire Police [2003] IRLR 102** and the updating of awards in the case of **Da'bell v NSPCC [2010] IRLR 19**.

55. I do not agree with counsel for the respondent. The ET was entitled to regard the injury to feelings as meriting more than a nominal award. The act of victimisation was a single occurrence, not a course of conduct. It did however have a serious effect on the claimant, especially when the respondent is the only employer of doctors in his area. The inclusion of an unspecified amount in respect of inconvenience does not seem to me to be material. While I accept that the award is on the high side, I do not find that the amount awarded to be so excessive as to enable me to reconsider it.

56. Thus the appeal and the cross appeal are both refused.