Appeal No. UKEAT/0398/11/JOJ
UKEAT/0039/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 July 2013
Judgment handed down on 13 August 2013

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

MR T HAYWOOD

MRS L S TINSLEY

---

(1) CUMBRIA COUNTY COUNCIL
(2) THE GOVERNING BODY OF DOWDALES SCHOOL APPELLANTS

MR S BATES RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR RAD KOHANZAD (of Counsel) Instructed by: Cumbria County Council (Legal Services) The Courts Carlisle CA3 8LZ
For the Respondent	MS LOUISE QUIGLEY (of Counsel) Instructed by: Messrs Shoosmiths LLP 3 Hardman Street Spinningfields Manchester M3 3HF

SUMMARY

UNFAIR DISMISSAL - Compensation

The Claimant was employed by the First Respondent as a teacher at Dowdales School. He was found to have been unfairly dismissed. Post dismissal he was convicted of common assault on a 16-year-old girl who was his former pupil and sentenced to six weeks' imprisonment. The issue was whether the Employment Tribunal should have had regard to evidence relating to that conviction when assessing the compensatory award, in particular his pension loss. The ET considered the decision in **Soros v Davison** [1994] ICR 590 prevented it from doing so. The EAT allowed the appeal, the ET having erred in its approach. The Claimant's conviction and sentence may have substantially reduced his pension loss and the ET determining the compensatory award would be entitled to take into account that evidence, and should have done so in the present case. The principles in **Scope v Thornett** [2007] IRLR 155 and **Software 2000 Ltd v Andrews** [2007] IRLR 568 applied.

THE HONOURABLE MR JUSTICE SUPPERSTONE

Introduction

1. Mr Bates was employed as a teacher at Dowdales School ("the school") from 1 September 1999 until he was dismissed for misconduct on 24 April 2009. His contract of employment was with Cumbria County Council, however the day to day running of the school is undertaken by the Governing Body of Dowdales School. We shall refer to Mr Bates as the Claimant, and Cumbria County Council and the Governing Body of Dowdales School together as the Respondents.

2. The Respondents appeal against the decision of an employment tribunal, chaired by Employment Judge Singleton, sitting at Newcastle-upon-Tyne on 17 September 2012 and sent to the parties on 4 October 2012 which held that the original judgment of the tribunal on remedy following a hearing on 21 February 2011 (and part of which was revoked following the hearing on 17 April 2012) be re-instated and that the Respondents are ordered to pay to the Claimant a total sum of £70,925 comprising a basic award of £4,725 and a compensatory award of £69,285.58 which is subject to the statutory cap of £66,200. The composition of the employment tribunal at all material hearings was the same.

Background

3. Following a hearing before the tribunal held on 7 and 9 September 2010 the Claimant was found to have been unfairly dismissed. The tribunal also concluded the Claimant had contributed to his dismissal, reducing his compensation by 15% to reflect his blameworthiness. Written reasons for the decision were sent to the parties on 13 December 2010.

4. A remedy hearing was set down for 21 February 2011. The Respondents applied at the outset of the hearing to adjourn the hearing on the basis that the Claimant was due to appear in the Preston Crown Court on 20 June 2011 to face three charges of sexually touching a 16-year-old former pupil of the school on 16 July 2010. The basis of the application was that although the acts occurred after the Claimant's dismissal the outcome of the criminal prosecution may be relevant to the question of remedy, potentially acting as a cut off for the Claimant's compensation for loss of earnings and reducing his pension claim. In refusing the application the tribunal referred to the case of **Soros v Davison** [1994] ICR 590 for the proposition that the tribunal should disregard events subsequent to the dismissal. Paragraph 2 of the tribunal's reasons sent to the parties on 5 April 2011 states:

> **"The Tribunal… held that it should have regard to the facts known to the Tribunal as at the date of this hearing having regard to the conduct of the Claimant during his employment and that it should not engage in speculation as to the outcome of any future criminal proceedings which are not directly relevant to these proceedings."**

5. By a judgment of 28 February 2011 the Claimant was awarded £70,925; comprising a basic award of £4,725 and a compensatory award of £69,285.58, which was subject to the statutory cap of £66,200 ("the first remedy judgment").

6. By a Notice of Appeal dated 16 May 2011 the Respondents appealed that decision.

7. On 26 June 2011 the Claimant was found not guilty of the three charges of sexual assault, but he was found guilty of a charge of common assault and he was sentenced to six weeks' imprisonment. Prior to his dismissal on 23 April 2009 the Claimant had been convicted of driving whilst under the influence of alcohol and disqualified from driving for 18 months. Although the Respondents had been aware of this conviction at the date of his dismissal this

was not a reason given by them for the dismissal. However shortly after his dismissal the Claimant was convicted of further motoring offences.

8. There was a hearing before this tribunal (His Honour Judge Serota QC presiding) at which Mr A Weiss of counsel appeared on behalf of the Respondents and Ms Quigley on behalf of the Claimant. The sealed order of this tribunal following the hearing states, in so far as is material:

> **"AND UPON the Employment Appeal Tribunal having indicated that, in the absence of a review it would be likely to remit the question of remedy to the Employment Tribunal, and expressed the hope that the Employment Tribunal would agree to review its decision**
>
> **IT IS ORDERED THAT:**
>
> 1. **This appeal be stayed to give opportunity to the Appellant to submit to the employment tribunal (and copy to the Employment Appeal Tribunal) an application for Review albeit out of time.**
>
> 2. **The Appellant is required to report to the Employment Appeal Tribunal the outcome of such an application together with an indication as to whether this appeal is to be pursued or treated as withdrawn."**

9. In his written submissions dated 30 January 2012, in support of the Respondents' application for a review, Mr Weiss informed the tribunal of the hearing before the Employment Appeal Tribunal and stated:

> **"16. At the outset of the appeal hearing the EAT expressed its provisional view on the appeal. This was that the tribunal had misunderstood its function. The EAT referred to paragraph 2 of the remedy judgment where the tribunal [said] that '*it should not engage in speculation as to the outcome of any future criminal proceedings*' The EAT referred the advocates to the Court of Appeal case of *Scope v Thornett* [2007] IRLR 155…, in which the Court of Appeal held that the EAT had been wrong to overturn the decision of the tribunal in that case because its findings as to how long the employment would have continued involved speculation. Rather, the Court of Appeal held that '*any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element*' [at paragraph 36].**
>
> **17. The EAT in the instant appeal also stated to the advocates by way of its provisional view, that the appropriate course of action for the tribunal to take would have been to adjourn the hearing pending the determination of the criminal charges.**
>
> **18. The EAT during the hearing became appraised of the fact of the Defendant's acquittal of the counts of sexual touching, and his conviction for common assault.**

> **19. The EAT expressed the view that this case seemed suitable for a review by the tribunal to consider whether the fact of the Claimant's conviction for common assault had an impact on his claim for future loss of pension. It was of potential relevance because the Claimant's loss of pension claim was made on the basis that the Claimant would have continued working. If he would not have continued working his loss of pension would be less as he would have accrued fewer pension contributions. If the conviction for common assault had an impact on the Claimant's ability to work, then it was of potential relevance and was a matter for the tribunal to take into account in considering the claim for loss of pension.**
>
> **20. The EAT stayed the claim pending an application for a review out of time, with liberty for either party to apply to restore the appeal hearing…"**

10. At a review hearing held on 17 April 2012 the tribunal revoked the first remedy judgment except for the basic award and the part of the compensatory award that related to the Claimant's loss of earnings up to the date of the hearing in the sum of £25,236.93 less 15% contributory fault, giving a net sum of £21,451.39. Mr Weiss informed the tribunal that the only remaining issue to be determined on a review was the element of the tribunal's decision relating to pension loss. That matter was adjourned to a further hearing to give the Claimant an opportunity to respond to a witness statement of Mr McGaw on behalf of the Respondent and other documents that had only been produced shortly before the hearing. Mr McGaw's witness statement dealt with the likelihood of the Claimant being dismissed because of his conviction for assault (see para 21 below).

11. A second remedy hearing took place on 17 September 2012. It is the decision of the tribunal following that hearing ("the second remedy judgment") that is the subject of the present appeal. The outcome of the hearing was that the tribunal reinstated the first remedy judgment.

12. On 1 October 2012 the Teaching Agency banned the Claimant from teaching for life.

The Decision of the tribunal

13. Having summarised the submissions of Mr Kohanzad on behalf of the Respondents and Ms Quigley on behalf of the Claimant the tribunal concluded, in so far as is material, as follows:

> **"15. Having considered all of the above the tribunal re-read the case of *Soros v Davison* [1994] ICR 591 EAT which held that under s.123(1) post-termination conduct is not relevant in determining the amount of compensatory award which is just and equitable in all of the circumstances. As the conviction for common assault related to matters occurring in July 2010 being some 14 months after the dismissal the tribunal concluded that it must follow the *Soros* case and conclude that the conviction for common assault was not relevant to what was just and equitable to award the Claimant by way of compensatory award. This is different to a case where the conduct occurred pre-termination but was discovered after the dismissal when it would be relevant to the just and equitable test *W. Devis and Sons Ltd v Atkins* (1977) ICR 662 HL…**
>
> **16. If the tribunal is wrong in this approach then it concluded, in any event, that the Claimant would not have been dismissed following the convictions for common assault and/or the driving convictions. The burden of showing that the Claimant's employment would have come to an end before his 65th birthday rested on the Respondents but they failed to adduce any evidence at all upon which to base their contention that it would have ended earlier. This is not a case where the evidence adduced by the Respondents is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made but it is a case where there was no witness evidence at all put before the tribunal upon which it could rely. Whilst the tribunal had regard to the very limited amount of written evidence produced by the Respondents in the bundle it concluded that this evidence did not assist the tribunal or support the submissions being put on the part of the Respondents. Conversely the tribunal were convinced by the evidence of the Claimant. The tribunal accepted that there were situations where teachers had been convicted of common assault and had not been dismissed, it accepted that the school would have to take into account the Claimant's long unblemished record and the other matters put forward by the Claimant and, in particular it noted that the Teaching Agency had not suspended the Claimant from teaching when it had the power to take action in this respect.**
>
> **17. In conclusion the tribunal had previously found that awarding compensation was the appropriate remedy in this case. As the Claimant had contributed towards his dismissal it would not be practical for an order for reinstatement or reengagement to be made and with regard to the assessment of the compensatory award the tribunal found that the dismissal was the direct cause of the Claimant's loss of earnings, the loss flowing from the dismissal, that loss being causally linked to the dismissal. Having concluded that this was the case the tribunal went on to determine what compensation would be just and equitable to award in all of the circumstances and held that compensating the Claimant for his pension loss up to the age of 65 was just and equitable in the particular circumstances of this case. Accordingly the original calculation of pension loss is reinstated…"**

The grounds of appeal

14. Mr Kohanzad advanced ten grounds of appeal:

i) The tribunal erred in applying the decision in **Soros v Davidson** to the present case.

ii) The tribunal erred in (1) refusing during the course of the hearing to look at the witness statement of Mr McGaw and to allow Mr Kohanzad to make submissions by reference to it, and (2) failed to have any, or any proper, regard to the material parts of Mr McGaw's witness statement.

iii) The tribunal failed to have any, or any proper, regard to the Claimant's evidence when finding that "there was no witness evidence at all put before the tribunal upon which it could rely" in support of the Respondent's contention that the Claimant would have been dismissed before his 65th birthday by reason of his conviction for common assault.

iv) The tribunal erred in its application of the burden of proof.

v) The tribunal failed to consider a percentage reduction in the Claimant's compensation from the date of his conviction to reflect the possibility of him being dismissed.

vi) The tribunal failed to give proper reasons explaining why it rejected the Respondent's case that the Claimant's conviction for assault and his driving convictions broke the chain of causation between his dismissal and his losses.

vii) If the tribunal made a finding that the Respondent's dismissal of the Claimant was the cause of his depression and alcoholism that in turn led to his convictions, the tribunal failed to have proper regard to public policy considerations in making this finding.

viii) The tribunal failed to have proper regard to the culpability of the Claimant when considering his failure to obtain post-dismissal employment and reduce his compensatory award accordingly.

ix) The tribunal displayed apparent bias when at the conclusion of the Claimant's evidence before hearing submissions from Mr Kohanzad Employment Judge

Singleton asked both counsel to calculate the Claimant's pension loss using the substantial loss approach because, she said, the tribunal "were minded to award the Claimant his pension losses on the substantial loss basis".

x) The tribunal failed to determine whether the value of the accelerated receipt of £37,000 by the Claimant should be deducted from the Claimant's pension loss.

Submissions of the parties and discussion

Ground 1: application of the decision in Soros v Davidson to the present case.

15. **Soros v Davidson** involved two employees who after they were dismissed and their complaints of unfair dismissal were upheld by an industrial tribunal, but before the assessment of compensation, disclosed allegedly confidential information about their former employers to a national newspaper in breach of their continuing obligation of confidentiality under their contract of employment. On behalf of the employers it was contended that the decision in **W. Devis & Sons Ltd v Atkins** supported the submission that the amount of the compensatory award should be reduced where the misconduct discovered occurred after the date of dismissal because an award must be made which is "just and equitable in all the circumstances". However in **Devis v Atkins** the misconduct had occurred before the employee was dismissed but the employers were unaware of it until after dismissal. In rejecting the employer's argument this tribunal (Tudor Evans J presiding) said at 594:

> **"We do not consider that the House of Lords [in *Devis v Atkins*] intended to lay down the far reaching proposition that any misconduct, even if committed after the employee had been dismissed, should be brought into the scales of assessment. In our view section 74(1) of the Act of 1978 [the predecessor to s.123(1) of Employment Rights Act 1996] is concerned with events which have existed during and not subsequent to the contract of employment."**

16. Mr Kohanzad submits the tribunal erred in applying **Soros v Davidson** to the present case because the Respondents were not arguing that a **Devis v Atkins**-type reduction should be made to the Claimant's compensation because of misconduct occurring after the dismissal. The argument of the Respondents is that the compensation award should be reduced to reflect the fact that the Claimant would have been dismissed at a later date: it is a **Polkey** reduction (**Polkey v A.E. Dayton Services Ltd** [1997] IRLR 503).

17. Ms Quigley accepts that the issue in **Soros v Davidson** is different from the Respondents' contention in the present case. At paragraph 25 of her skeleton argument Ms Quigley summarises her submissions as follows:

> **"The *Soros* principle as referred to by the tribunal is a correct statement of law. The fact that an employee commits an act of misconduct post-dismissal is not a valid basis to reduce compensatory awards on 'just and equitable grounds'. The *Andrews* [*Software 2000 Ltd v Andrews* [2007] IRLR 568] principles must be applied consistently with *Soros* and therefore, post-dismissal misconduct unrelated to employment must be excluded from the Tribunal's consideration of whether an employee would have been employed indefinitely or not."**

18. However the guidance provided by Elias J (President) in **Andrews** includes the following:

> **"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.**
>
> **…**
>
> **(6) The [ERA 1996] s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers some of the evidence or potential evidence be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.**
>
> **(7) Having considered the evidence, the tribunal may determine**
>
> **(c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case [*O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615]. …"**

19. In **Scope v Thornett** [2007] IRLR 155 Pill LJ said at paragraph 34:

> **"The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve a consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account."**

20. In our view, quite apart from any question of "just and equitable", the Claimant's conviction for assault and sentence of a term of imprisonment may have substantially reduced his pension loss and a tribunal determining the proper compensatory award in his case would plainly be entitled to take into account that evidence. The decision in **Soros v Davidson** does not forbid the tribunal from doing so.

Ground 2: the witness statement of Mr McGaw

21. The material parts of the witness statement of Mr McGaw include the following:

> **"1. I am the Chief Adviser for Children's Services in my role as Senior Manager – Learning Improvement within Cumbria County Council. As part of my role I manage a team of school advisers who work with schools to improve performance and I am accredited by OFSTED (the Office for Standards in Education, Children's Services and Skills who report directly to Parliament). I have held this position for eight years and worked for the Council as a school advisor and inspector for over twenty years. I have worked in education since 1976 and have undertaken a number of roles including teacher and deputy head teacher.**
>
> **10. Where an individual has been convicted of a criminal offence this is not an absolute bar to being employed as a teacher, unless the individual is on the Independent Safeguarding Agency barred list. There are a number of factors that would need to be taken into account to consider the individual circumstances and whether that individual is suitable to be employed as a teacher.**
>
> **12. In relation to the conviction(s), the nature of the conviction, the date, the sentence and the circumstances of the offence are likely to be relevant.**
>
> **16. In this case I understand that the Claimant was charged with three counts of sexual assault contrary to s.3 of the Sexual Offences Act 2003 and an offence of common assault. The offences were alleged to have occurred on 16 July 2010 and the Claimant was charged in December 2010.**
>
> **17. I understand that the Claimant was found not guilty of the three counts of sexual assault but was found guilty of common assault. The common assault related to a 16-year-old girl and in June 2011 the Claimant was sentenced to six weeks' imprisonment.**

18. During the course of these proceedings the Claimant has disclosed a copy of the witness statements taken by the Police and the record of the Claimant's interview. I was extremely concerned by the matters disclosed in the papers in particular relating to the identity of the individuals the Claimant invited to his house and the events disclosed by the Claimant. The Claimant does not dispute that two females aged 16 years old were at his house in July 2010. The two 16-year-old girls were former pupils of the Claimant and both had just completed their GSCEs in June 2010 at Dowdales School. The Claimant had taught both girls.

19. The Claimant does not dispute that he allowed both girls to drink alcohol at his house. In addition the Claimant does not dispute that he had sex with one of the 16-year-old former pupils (this is not the pupil who made the sexual assault allegation).

20. Given the nature of the offence and the short time since the offence, in my opinion it is unlikely that the Claimant would be employed as a Teacher in Cumbria and indeed it is likely for this to be the case elsewhere as the Council operates similar safeguarding policies to other Councils. If any Governing Body requested the Council appoint the Claimant I would almost certainly refuse to appoint any individual on the basis of this type of conviction.

21. In relation to the Claimant's conviction, had the Claimant been teaching at the time of his arrest I would have recommended that the Claimant be suspended and an investigation commenced. Although I am unable to say for definite, it is likely that the Claimant would then have been dismissed."

22. Paragraph 31 of the Notice of Appeal states:

"During the course of the second remedy hearing, counsel for the Respondents asked the tribunal to turn to the witness statement of Mr McGaw. The tribunal refused on the basis that the witness was not in attendance. The request was repeated and again, the tribunal refused on the basis that they would not look at the statement given that the witness was not in attendance. Counsel for the Respondents then suggested that the tribunal turn to the statement and give it the appropriate weight in the circumstances. Again the tribunal refused. Counsel was prevented from referring to the contents of the statement at all."

23. Ms Quigley does not recall whether or not Mr Kohanzad made repeated requests to the tribunal to turn to Mr McGaw's witness statement, but very helpfully she has produced a note (which she describes as being "not verbatim") of closing submissions which includes the following exchange between Mr Kohanzad and the Employment Judge:

"[Mr Kohanzad]: tries to refer to witness statement

[Employment Judge]: … don't want to hear from witness statement

[Mr Kohanzad]: so what! (v rude)

[Employment Judge]: in our discretion to look at witness statement and we are not being taken to it

[Mr Kohanzad] : usual proc(edure) is to hot out [?] attach appropr(iate) weight."

Mr Kohanzad recalls that what the Employment Judge said which led to his comment "so what" was the reason for not wanting to turn to the witness statement, namely that Mr McGaw was not in attendance. We think this is likely to be so because the only reason given by the tribunal in their decision for the approach they adopted to Mr McGaw's witness statement was his non-attendance and that therefore he was not available to be questioned (para 2.7).

24. The Respondents had made an application to adjourn the hearing because Mr McGaw was not able to attend. He was the only witness from whom the Respondents proposed to adduce evidence that it was likely that the Claimant would have been dismissed following his conviction for assault. In our view the Respondents were entitled to refer to Mr McGaw's witness statement. It was not contended for the Claimant that they should not look at it. It would then be a matter for the tribunal as to the weight that they should give to it. We consider that the tribunal unfairly refused to look at the witness statement and thereby unfairly prevented Mr Kohanzad from making any effective submissions on behalf of the Respondents in relation to it. There was no justification for the tribunal adopting such an approach.

25. Ms Quigley submits that looking at the decision of the tribunal as a whole, as one must, it appears that the tribunal did in fact take into account the witness statement when reaching its decision and considered that they should place little weight on it, as they were entitled to do. There are passages in the decision, in particular at paragraph 2.7 and within paragraph 16 where the tribunal indicates that they could place little or no weight on Mr McGaw's evidence from which it is to be inferred that the tribunal read his statement. However even if the tribunal did read it when deliberating that is no answer to Mr Kohanzad's criticism of the tribunal that they did not turn up the witness statement when requested to do so during the course of the hearing, as a result of which he was not able to make any effective submissions by reference to its

contents. Further if the tribunal did have second thoughts when reaching their decision the tribunal might have considered it prudent to state in their judgment that they had actually read the statement. Instead the tribunal made the following statements within paragraph 16 that in our view cannot be supported.

- "[The Respondents] failed to adduce any evidence at all upon which to base their contention that it [the Claimant's employment] would have ended earlier".
- "There was no witness evidence at all put before the tribunal upon which it could rely".
- "Whilst the tribunal had regard to the very limited amount of written evidence produced by the Respondents in the bundle it concluded that this evidence did not assist the tribunal or support the submissions being put on the part of the Respondents".

The witness statement of Mr McGaw was written evidence produced by the Respondents. It plainly provided "support" for the Respondents' submissions. We do not understand how it can be said that the Respondents "failed to adduce any evidence at all upon which to base their contention that [the Claimant's employment] would have ended earlier" than at his 65th birthday.

Ground 3: the Claimant's evidence

26. Even disregarding Mr McGaw's witness statement, the Respondents were entitled to rely upon the Claimant's own witness statement which states at paragraph 11:

> **"Regarding the effect of the common assault conviction upon my career, I have spoken to Mike McDonald at the NUT regional office who said 'You would not automatically have been dismissed but it would have been a distinct possibility for bringing the school into disrepute…'."**

27. Ms Quigley rightly observes that we do not have a note of all the evidence given by the Claimant. However the tribunal make no reference to the view of Mr McDonald at the NUT regional office, given through the evidence of the Claimant, in their decision when assessing the Respondents' contention that the Claimant's employment would have ended earlier. The tribunal decision suggests incorrectly that there was no evidence to support the Respondents' submissions in this regard. Yet at the same time the tribunal records that it was "convinced by the evidence of the Claimant".

Conclusion on Grounds 1-3

28. In our view the Respondents succeed on the first three grounds of appeal. In those circumstances we consider that we can express our conclusions with regard to the remaining grounds of appeal very shortly.

Ground 4: burden of proof

29. Mr Kohanzad accepted in his oral submissions that no criticism can be made of the tribunal's decision in this regard. At paragraph 16 the tribunal correctly stated that "the burden of showing that the Claimant's employment would have come to an end before his 65th birthday rested on the Respondents". Mr Kohanzad suggested, in the alternative, that the tribunal had failed to apply the correct standard of proof. We agree with Ms Quigley that this ground does not add anything to grounds 2 and 3.

Ground 5: failure to consider a percentage reduction

30. This ground stands or falls with grounds 1-3. If the tribunal decision was correct, then there was no need to consider a percentage reduction. However if, as we find, grounds 1-3 succeed the tribunal reconsidering the issue of pension loss will need to address this matter.

Ground 6: lack of reasons as to whether the Claimant's conviction for assault broke the chain of causation

31. At paragraph 17 of the decision the tribunal stated that they

> **"… found that the dismissal was the direct cause of the Claimant's loss of earnings, the loss flowing from the dismissal, that loss being causally linked to the dismissal."**

This ground adds little to grounds 2 and 3. The tribunal failed properly in our view to take into account the evidence of Mr McGaw and the Claimant and as a result did not grapple with the Respondents' case on causation.

Ground 7: public policy

32. Ms Quigley accepts that the tribunal made no express finding that the dismissal of the Claimant was the cause of his conviction for assault (or further motoring offences). In those circumstances the issue of public policy does not arise.

Ground 8: culpability

33. It does not appear that this issue was pursued at the second remedy hearing.

Ground 9: apparent bias

34. The Respondents' case is set out at paragraph 55 of the Notice of Appeal:

> **"The Claimant started to give evidence at about 11.30 a.m. on the morning of the second remedy hearing. At the conclusion of his evidence and immediately before sending the parties out for the lunch adjournment (at 1.45 p.m.), Employment Judge Singleton asked both counsel to calculate the Claimant's pension loss using the substantial loss approach over the lunch break because, she said, the tribunal 'were minded to award the Claimant his pension losses on the substantial loss basis'."**

35. Mr Kohanzad submits that the significance of what was said is that the tribunal must have formed a preliminary view as to whether the Claimant would have been dismissed or not as a result of his conviction for assault before he gave his evidence at this hearing because they had no opportunity to confer after his evidence and before the judge made the statement she did.

36. In relation to pension loss, the key factor in deciding which approach to take is to decide whether the tribunal is calculating career-long loss or not. If the tribunal found that the Claimant would have been dismissed upon or shortly after conviction, it would be inappropriate to use the substantial loss approach because that is only appropriate for career-long loss.

37. Mr Kohanzad had no contemporaneous notes of what was said by the Judge. Ms Quigley made a note (albeit not contemporaneously) that at 2.30 p.m., after the conclusion of the Claimant's evidence, the judge said she was "minded to look at percentage rather than subst[antial] approach". She made no notes of any comment that the tribunal was minded to award the substantial loss approach; rather her note is the tribunal indicated a willingness to consider a percentage. Very fairly she does not suggest that Mr Kohanzad is mistaken in his recollection; she merely states that neither she nor the Claimant can confirm the accuracy of his account.

38. The Respondents' case at its highest ("minded to accept") is that this was an expression of a preliminary view by the tribunal. Ms Quigley invites us to bear in mind that the Claimant had given evidence at earlier hearings and there were a number of previous occasions on which the tribunal had been made aware of the competing arguments of the parties on the loss of pension issue.

39. Having regard to the test for bias set out in **In Re Medicaments and Related Classes of Goods (No.2)** [2001] 1 WLR 700 at 726-727 and in **Porter v Magill** [2002] 2 AC 357 we have formed the view that the complaint of apparent bias is not made out. The statement by the Employment Judge ("minded to accept") does not, in our view, suggest an appearance of pre-determination irrespective of any closing submissions that may be made on behalf of the Respondents. In reaching this conclusion we have taken into account the observations of Peter Gibson LJ in **Jiminez v London Borough of Southwark** [2003] IRLR 477 at paragraph 38:

> **"I have some difficulty in understanding why a strongly expressed view cannot be a provisional view, leaving it open to the party criticised to persuade the tribunal as to why that view was wrong and why the party's conduct was justified. Of course the more trenchant the view, the more the attachment of the label 'preliminary' may need scrutiny to see whether the view was truly preliminary and not a concluded view."**

Ground 10: accelerated receipt of the cash sum

40. The parties are agreed that the tribunal, having identified this issue (see para 1.3(vi) of the Reasons), failed to deal with it. However Mr Kohanzad and Ms Quigley are agreed that, by reason of the calculations, this failure is of no consequence.

Conclusion

41. For the reasons we have given this appeal succeeds.

42. In those circumstances the issue of pension loss (and that issue alone) must be remitted to a tribunal to be determined in the light of the legal principles set out in this judgment.

43. We have considered whether the case should be remitted to the same tribunal for reconsideration. We have had regard to the guidance given in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. In the light of the unfortunate history of this case before the tribunal

and in particular the tribunal's approach to the evidence of Mr McGaw we are of the view that the case must be remitted to a newly constituted tribunal for consideration.