Appeal No. UKEAT/0514/12/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 April 2013
Judgment handed down on 8 May 2013

Before

THE HONOURABLE MR JUSTICE KEITH

MR B BEYNON

MRS A GALLICO

MR S LUND — APPELLANT

ST EDMUND'S SCHOOL, CANTERBURY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ZEESHAN DHAR (of Counsel) Bar Direct Access Scheme
For the Respondent	MS LYDIA BANERJEE (of Counsel) Instructed by: Cripps Harries Hall LLP Wallside House 12 Mount Ephraim Road Tunbridge Wells Kent TN1 1EG

SUMMARY

STATUTORY DISCIPLINE AND GRIEVANCE PROCEDURES: whether applicable.

The fact that the employee was dismissed, not for a reason relating to his conduct, but for some other substantial reason of such a kind as to justify his dismissal, did not mean that the employee's claim did not concern a matter to which the ACAS Code of Practice on Disciplinary and Grievance Procedures related within the meaning of section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**. His claim concerned the conduct on his part which led his employers to consider whether he should be dismissed, even if it was not his conduct, but the effect of his conduct on others, which was the ultimate reason for his dismissal.

UNFAIR DISMISSAL: compensation.

The tribunal's award relating to the employee's pension loss was flawed because it did not consider whether such alternative employment as the employee might find came with a pension. That fact was a critical component in determining what methodology should be used to assess the employee's pension loss.

THE HONOURABLE MR JUSTICE KEITH

Introduction

1. The claimant, Stephen Lund, was employed by the respondent, St Edmund's School, Canterbury ("the School"), as a teacher in graphics and design from 1 September 1991 until his dismissal without notice on 19 October 2010. Following his dismissal, he brought claims for compensation for unfair dismissal, damages for wrongful dismissal and a redundancy payment. The School admitted his claim for damages for wrongful dismissal in that he had not been given the notice of his dismissal to which he had been entitled, and for his part Mr Lund did not pursue his claim for a redundancy payment. That left his claim for compensation for unfair dismissal. Following a 2 day hearing at the employment tribunal in Ashford, the employment tribunal (with Employment Judge Sutton presiding) decided that Mr Lund had been unfairly dismissed by the School. In addition to the damages of £19,413.00 which it awarded Mr Lund for his wrongful dismissal, he was awarded compensation of £18,329.05 for his unfair dismissal. Mr Lund now appeals to the Employment Appeal Tribunal against the level of his compensation.

The reason for Mr Lund's dismissal

2. It is necessary to say something about what the tribunal said had been the reason for Mr Lund's dismissal because that affected one element of his compensation. Mr Lund's case was that he had not been happy with the computer equipment which he had used in his teaching. Even though the previous equipment had been replaced, he thought that the new system was unsatisfactory as well. The School's case was that the problem partly related to Mr Lund's lack of understanding of the system. Either way, there came a time when Mr Lund dismantled the system, and refused to allow the consultant who had been engaged to report on his teaching

to observe his class. Shortly after that, Mr Lund did not go in to work for a few days because of stress. On his return to work on 18 June 2010, he was suspended on full pay.

3. In due course, an appointment was made for Mr Lund to see a consultant psychiatrist. The report from the psychiatrist concluded that Mr Lund's stress was the consequence of his frustration with the computer system, but he did not have a classifiable psychiatric disorder and was fit to return to work. However, his suspension was not lifted. Instead, he was asked to attend a meeting at the school. At that meeting, which was on 19 October 2010, he was given a letter notifying him of his dismissal there and then. The relevant parts of the letter read:

> **"There were a number of issues with your behaviour which led to your suspension from your duties. The suspension was to enable us to deal with the serious concerns we had about the health and safety of yourself, colleagues and students. We are pleased that the outcome of the medical assessment showed that you do not have any health issues that could have contributed to your behaviour. However the school remains very concerned about how you deal with the challenges that arise from your job, and notes that your behaviour under such challenges has been erratic and sometimes irresponsible.**
>
> **Perhaps most tellingly we have lost confidence in your commitment to the school. This has been reflected in your attitude towards colleagues, which has been reported as difficult and unhelpful, and which has alienated you from many of your colleagues who no longer want to work with you. This has affected morale in those who work closely with you and is not conducive to an effective working environment. The school concludes that there has been an irreparable breakdown in the employment relationship.**
>
> **After careful consideration the school has regrettably come to the decision that your employment should be terminated with immediate effect. The reason for doing so is that the trust and confidence essential to an employment relationship has broken down."**

The tribunal adopted much of that language when it came to decide what had been the reason for Mr Lund's dismissal. It said in para. 52 of its judgment that the School "had lost confidence in [Mr Lund's] commitment to the school, that he had become alienated from colleagues which had affected morale. This was not conducive to an effective working relationship …" The tribunal described that reason as "some other substantial reason" for Mr Lund's dismissal, which was shorthand for saying that the reason for Mr Lund's dismissal had not related to his capability for performing his work or his conduct, but that it had been some

other substantial reason of a kind such as to justify the dismissal of someone holding Mr Lund's position.

4. The tribunal decided that Mr Lund's dismissal for that reason had been both substantively and procedurally unfair. It had been *procedurally* unfair because he had had no warning of the purpose of the meeting on 19 October 2010. He had thought that what was to be discussed was his return to work. He had had no opportunity to prepare for the meeting or to put his case. Nor was he given the opportunity to appeal against his dismissal. His dismissal had been *substantively* unfair because no-one had attempted to deal with Mr Lund's concerns about the computer system before, as the tribunal put it, "attitudes hardened on both sides". However, the tribunal decided that Mr Lund had by his own behaviour contributed substantially to his dismissal, and it reduced the basic and compensatory awards which it would otherwise have made by 65%.

The uplift under section 207A

5. The first ground of appeal relates to the tribunal's power to increase an award of compensation for unfair dismissal under section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("the 1992 Act"). Section 207A provides:

> **"If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –**
>
> **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
>
> **(b) the employer has failed to comply with that Code in relation to that matter, and**
>
> **(c) that failure was unreasonable,**
>
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."**

A claim for unfair dismissal is a claim to which section 207A applies, and the only Code of Practice which could have been relevant to Mr Lund's case was the Code of Practice issued by ACAS in 2009 on disciplinary and grievance procedures.

6. The sole reference which the tribunal made to this Code of Practice was in para. 47 of its judgment when it said that the Code of Practice was "silent as to whether it applies to dismissals for 'some other substantial reason'". The tribunal made that reference in the part of its judgment in which it set out the legal principles it had to apply when considering whether Mr Lund had been unfairly dismissed, and whether his compensation should be reduced to take into account any conduct of his which caused or contributed to his dismissal. The Code of Practice was not referred to at all in the part of its judgment in which it addressed the compensation which Mr Lund should be awarded.

7. The absence of any other reference to the Code of Practice in the tribunal's judgment led Mr Lund to think that the tribunal may not have addressed the question of any increase in his award under section 207A at all. That was one of the reasons why he asked the tribunal to review its decision. In para. 16 of its judgment refusing the application for a review, the tribunal said:

> **"As regards the failure to apply an uplift because the procedure for the dismissal was in breach of the ACAS Code, it is clear from the Tribunal's notes that we addressed this fully in our discussion when considering the Judgment, it is explained in paragraph 47 that we did not need to apply the uplift. [Mr Lund] did not understand that we had considered the question. In the Tribunal's letter of 12 October, the Employment Judge did mistakenly say that the uplift had not been considered, as he did not see it in the calculation at the end of the Judgment. However, once the Tribunal had reconvened and gone through their notes it was clear that the point had, in fact, been fully considered, and that after discussion we felt that it was not appropriate to apply the uplift where [Mr Lund] had contributed so substantially to his dismissal and whether the dismissal was for 'some other substantial reason'."**

8. This passage is not entirely satisfactory for two reasons. First, para. 47 of its original judgment did *not* say that the uplift did not need to be applied. It simply said, as we have said,

that the Code of Practice was "silent as to whether it applies to dismissals for 'some other substantial reason'". Since employment tribunals are required by section 207(3) of the 1992 Act to take into account any relevant code of practice, anyone reading the tribunal's judgment would have understood the tribunal only to be saying that there was nothing in this Code of Practice which assisted the tribunal in determining whether Mr Lund had been unfairly dismissed or whether his compensation should be reduced to take into account such conduct of his as had caused or contributed to his dismissal. Indeed, that is what the employment judge himself appears to have thought when he re-read the judgment following Mr Lund's application for a review, because the tribunal's letter to Mr Lund of 12 October 2011 informing him that a hearing would take place for the tribunal to consider whether it would review its decision said that Employment Judge Sutton accepted that there had been no consideration of the appropriate uplift for the School's "failure to follow the ACAS guidelines", and that that was an oversight for which Employment Judge Sutton apologised. However, since the tribunal went on to say that it *had* addressed the question of an uplift, we proceed on the basis, of course, that it had done so.

9. Secondly, the tribunal made it plain why it did not apply the uplift: Mr Lund had "contributed so substantially to his own dismissal", and his dismissal had been for "some other substantial reason". But what is not entirely clear is how the tribunal linked those two reasons to the language of section 207A. Presumably the fact that Mr Lund had contributed so substantially to his dismissal made it not "just and equitable" to increase Mr Lund's award. And the fact that his dismissal had been for "some other substantial reason" presumably meant that section 207A had not been engaged because, in the tribunal's view, the Code of Practice did not apply to such dismissals.

10. We do not think that it was open to the tribunal to deny Mr Lund an uplift on his award on the basis that he had contributed substantially to his dismissal. We do not see why a provision which is supposed to penalise employers for failing to comply with a code of practice should be disapplied in a case in which the employee has not contributed to that non-compliance. Mr Lund may have contributed – and contributed substantially – to his dismissal, but he had done nothing to contribute to the School's failure to act in accordance with the Code of Practice. Moreover, the fact that Mr Lund had contributed substantially to his dismissal had resulted in both his basic and compensatory awards being reduced by 65%. To deny him an uplift on what remained of his compensatory award on that account amounted to him being penalised twice over, and was an example, we think, of impermissible double accounting.

11. We turn to the other reason which the tribunal gave for denying Mr Lund an uplift on his award, namely that his dismissal was for "some other substantial reason". The tribunal's reasoning, in view of what it had said in para. 47 of its original judgment, must have been that because the Code of Practice did not apply to a dismissal for "some other substantial reason", Mr Lund's claim could not have concerned a matter to which the Code of Practice applied as required by section 207A(2)(a) for the tribunal's power to increase Mr Lund's award to be triggered.

12. It is necessary here to say something about the Code of Practice. Para. 1 of the Code explains what the Code is all about:

> **"This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.**
>
> - **Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should be followed, albeit that they may need to be adapted.**
>
> - **Grievances are concerns, problems or complaints that employees raise with their employers.**

The Code does not apply to redundancy dismissals or the non renewal of fixed term contracts on their expiry."

So although there are particular situations to which the Code does not apply – dismissals for redundancy and the non-renewal of fixed-term contracts on their expiry – it is intended to apply to those occasions when an employee faces a complaint which may lead to disciplinary action or where an employee raises a grievance. If the employee faces a complaint which may lead to disciplinary action (whether because of his misconduct or his poor performance), the Code applies to the disciplinary procedure under which the complaint is to be investigated and adjudicated upon. Of course, the outcome of the disciplinary procedure may not result in the employee's dismissal at all. Or it may result in his dismissal which on analysis turns out not to be a dismissal for his misconduct or poor performance but a dismissal for something else. The important thing is that it is not the ultimate outcome of the process which determines whether the Code applies. It is the initiation of the process which matters. The Code applies where disciplinary proceedings are, or ought to be, invoked against an employee.

13. This is where the tribunal fell into error. It focused on the outcome of the disciplinary process, and not whether it had, or should have been, invoked. The School itself acknowledged – at least that is how the tribunal understood it – that it had invoked its disciplinary procedure to deal with Mr Lund. As the tribunal said in that part of its judgment in which it summarised the School's case (paras. 7-11), the School's case was that Mr Lund had been suspended on 18 June 2010 "prior to the disciplinary process" (para. 9), and following the report from the consultant psychiatrist that Mr Lund had not been suffering from mental illness, "[a] disciplinary procedure was put into effect because [Mr Lund's] colleagues would not work with him due to his history of erratic behaviour" (para. 11). It is true, of course, that by finding that the reason for Mr Lund's dismissal had been "some other substantial reason", the tribunal was saying that Mr Lund had been dismissed for a non-disciplinary reason. But that was to

look at what happened through the wrong end of the telescope. That did not mean that the Code had not applied to the process which resulted in that outcome. On the tribunal's understanding of what the School's case was, the Code applied to the process which resulted in Mr Lund's dismissal because the disciplinary procedure was the mechanism which the School had used to decide whether Mr Lund should continue to be employed by the School.

14. The answer to that which Ms Lydia Banerjee for the School advanced is not without force. It is that the tribunal misunderstood the School's case. The School's case had never been that the disciplinary procedure had been invoked. Although the tribunal had been right to find, in para. 29 of its judgment, that the Acting Head of the School had "considered disciplinary procedures", that was not the whole picture. The School's case, as set out in its ET3, had been as follows:

> **"In these circumstances the [School] took the view that the School's disciplinary procedure should be put into effect as it appeared that [Mr Lund's] protracted, unreasonable behaviour and the lack of co-operation was entirely within his control and as such he was accountable for his actions. However before the [School] commenced the disciplinary process it became clear that if [Mr Lund] returned to work his colleagues were not prepared to work with him given his history of erratic and difficult behaviour. It was indicated that if he came back to work then at least one of them would consider whether they should resign their position. In these circumstances the [School] concluded that there was an irreparable breach of trust and confidence between itself and [Mr Lund] and that his employment would have to be terminated."**

And the fact that Mr Lund had been suspended for medical, rather than disciplinary, reasons was said to have been reflected in the tribunal's finding, in para. 30 of its judgment, that the "decision was taken to suspend [Mr Lund] until his fitness for work had been assessed by a medical practitioner".

15. We do not agree that the tribunal found that Mr Lund's suspension had been for medical reasons. The School itself said in the letter to Mr Lund of 19 October 2010 that what had led to his suspension were the issues with his behaviour. His suspension therefore may have given

the School the opportunity to have him medically assessed, but what had caused him to be suspended had been the School's concern about his conduct. And the tribunal's finding in para. 30 of its judgment is not what Ms Banerjee says it was. It was not a finding that Mr Lund had been suspended *so that* he could be medically assessed. He was suspended *until* he could be medically assessed. The tribunal was only finding how long it was proposed he should be suspended for. It was not a finding about what the reason for his suspension had been. What the reason for his suspension had been was plain from his letter of dismissal.

16. Whether the disciplinary procedure was actually invoked by the School is a moot point. But if the tribunal had misunderstood the School's case, and if it should have found that the School had not got round to invoking the disciplinary procedure, the question would then have been whether the disciplinary procedure ought to have been invoked. There is only one possible answer to that question. However you look at it, Mr Lund's conduct had been called into question – whether that conduct related to his dissatisfaction with the computer system or to the aspects of his behaviour which his colleagues found difficult and unhelpful. It should have been apparent to the School that once his conduct had been called into question, *and* crucially that it was thought that his conduct might lead to his dismissal, the disciplinary procedure should have been invoked, even if the School ultimately decided that Mr Lund was to be dismissed for what the tribunal found to be a non-disciplinary reason. That is what distinguishes the present case from **Ezsias v North Glamorgan NHS Trust** [2011] IRLR 550. In **Ezsias**, the Trust never contemplated dismissing Mr Ezsias for the conduct on his part which had caused the breakdown in the working relationships between him and his colleagues. In the present case, that was clearly in the contemplation of the School, even if it ultimately decided to dismiss him for a reason which the tribunal found did not relate to his conduct.

17. That is why, in our view, the tribunal was wrong to conclude that Mr Lund's claim did not concern a matter to which the Code of Practice related. His claim concerned the conduct on his part which led the School to consider whether he should be dismissed, even if it was not his conduct but the effect of his conduct (whether on his relationships with his colleagues or the School's belief about his commitment to the School) which was the ultimate reason for his dismissal.

18. We should add that we are not sure that what the tribunal said had been the reason for Mr Lund's dismissal could properly be characterised as a dismissal for some other substantial reason justifying his dismissal rather than a dismissal relating to his conduct. That is because we are not sure precisely what the tribunal found to have been the factual reason for Mr Lund's dismissal. Was it because his colleagues were no longer willing to work with him, which would have been a dismissal for some other substantial reason? Or was it because his conduct in alienating them had caused them not to want to work with him, which would have been a dismissal for a reason relating to his conduct? That was the crucial distinction identified in **Ezsias**. We are inclined to think that the tribunal found the latter because the tribunal seems to have accepted that the reason for Mr Lund's dismissal was what the School had said in its letter to Mr Lund of 19 October 2010 which gave as the reason for Mr Lund's dismissal the School's loss of confidence in his commitment to the School. What did the letter say was the reason for that loss of confidence? It said that the loss of confidence had arisen because of Mr Lund's attitude towards his colleagues. If that had been the reason for Mr Lund's dismissal, that would have been a dismissal relating to his conduct. But it is unnecessary for us to resolve the issue about what the tribunal found to have been the reason for his dismissal (and therefore whether it applied the correct legal label to that reason) in view of our opinion that the very fact that the School had, or ought to have, invoked the disciplinary procedure in the first place meant that the Code applied.

The calculation of Mr Lund's pension loss

19. The second ground of appeal relates to the calculation of Mr Lund's pension loss. The tribunal calculated his pension loss by reference only to the contributions which the School would have continued to make towards his pension, and limited the loss of those contributions to one year from the date on which the tribunal's assessment of his loss took place, i.e. until 9 August 2012. Mr Lund's case is that in view of his age, and because the pension scheme of which he was a member was a final salary scheme, calculating his pension loss on the basis of the School's contributions was substantially less favourable to him than either of the methods recommended in the latest edition of the booklet "Guidelines for Compensation for Loss of Pension Rights" issued to provide assistance to employment tribunals, and that even if it had been appropriate for the tribunal to calculate his pension loss on the basis of the School's contributions, the tribunal should have assessed his loss by reference to the School's contributions until he would otherwise have been likely to retire, because he would never have found employment which gave him pension benefits at all. In order to evaluate this ground of appeal, it is necessary to set out the history of this aspect of Mr Lund's claim.

20. Prior to the hearing of his claim, Mr Lund provided the tribunal with a schedule of his losses. He calculated his loss of pension rights on the basis of the contributions which the School would have continued to make towards his pension but for his dismissal. He calculated the School's contributions as amounting to 14.1% of his salary, and he claimed the loss of those contributions for the period up to 9 months after the hearing was due to begin. After reserving its judgment, the tribunal "requested" Mr Lund to provide the tribunal and the School "with a valuation of his pension loss on an annual basis from October 2010, when he was dismissed, to his likely retirement age of 62", i.e. until December 2016. It added that this should include "notional employer and employee contributions" but exclude "employee contributions". This

"request" was contained in a document headed "Order" which was sent to the parties on 7 July 2011.

21. As we read that order, the tribunal was telling Mr Lund that in order to assess his pension loss by reference to the contributions which the School would have made to his pension had he not been dismissed, the tribunal needed to know what those contributions would have been in each year until his retirement in case the tribunal decided that he would never get a job with a pension. Although the tribunal knew from Mr Lund's previous schedule that he was saying that the School's contributions represented 14.1% of his salary, the tribunal did not know by how much his salary would increase each year until his retirement. That was the information which, as we read it, the tribunal wanted Mr Lund to provide. Mr Lund responded to that request on 23 July 2011. He gave the tribunal and the School the data which the tribunal had requested about the contributions towards his pension. He confirmed that the School's contributions amounted to 14.1% of his salary, and that he had contributed 6.4% of his salary towards his pension. And to help the tribunal decide by how much his salary would have been likely to increase over the years, he added that he estimated that his salary was increasing by £669.00 a year.

22. Having said that, it looks to us as if Mr Lund thought that the tribunal had been asking him for more than that. He thought, we think, that he was being asked to provide the tribunal with the figures for (a) what his deferred pension when he retired would be as a result of his dismissal in October 2010, and (b) what it would have been for each additional year during which he would have remained in the School's employment but for his dismissal. What he told the tribunal was that the body responsible for administering teachers' pensions had not been willing or able to provide him with the information which he had sought from them, but he provided the tribunal with copies of his estimated deferred pension based on his pensionable

years' service up to 31 March 2008 and 31 March 2010. What he could not provide the tribunal with was what his estimated deferred pension would be if it was to be based on pensionable years' service beyond the year in which he had been dismissed. That is not information which pension providers provide. If it is necessary for an employment tribunal to know what an employee's deferred pension would have been, it has the means to work it out for itself from what it estimates the number of pensionable years' service and the employee's final salary would be likely to have been but for the employee's dismissal.

23. That was the extent of the material before the tribunal when it came to value Mr Lund's pension loss. It said in para. 60 of its judgment:

> **"As regards pension loss, [Mr Lund] having been unable to provide the figures requested to value his pension loss in the order dated 7 July 2011, the Tribunal has dealt with this head of claim on the basis of the loss of the employer's contributions at 14.1% as suggested by [Mr Lund] in his letter of 23 July 2011."**

It looks as if the tribunal did not consider any alternative way of calculating Mr Lund's pension loss: since he had suggested that it should be calculated by reference to the School's contributions to his pension, that was the methodology which the tribunal was going to adopt.

24. In a schedule to its judgment, the tribunal set out how Mr Lund's basic and compensatory awards were calculated, and the schedule showed that it assessed his loss of pension rights at 14.1% of his salary, which came to £9,340.00. We have not been able to work out how the tribunal arrived at that figure. It would have been helpful had it said so. But since the tribunal, as we shall see, sought to compensate Mr Lund for the period from his summary dismissal on 19 October 2010 to 9 August 2012 (about 22 months), the sum of £9,340.00 presumably represents 14.1% of the gross salary which Mr Lund would have been paid in that

time, though that was subsequently discounted by 65% to reflect the extent to which the tribunal found that he had contributed to his dismissal.

25. Mr Lund queried the tribunal's approach in its judgment to his pension loss. He did not do so on the basis that the tribunal had valued his pension loss by reference only to the School's contributions to his pension. At that stage, he was not aware of any other methodology for calculating his pension loss. He queried the tribunal's approach on the basis that the figure of £9,340.00 represented "just one year's loss", whereas at the hearing the tribunal had "seemed prepared to accept losses up to [his] retirement" and the tribunal's order of 7 July 2011 had asked for information about his pension loss to "his likely retirement date of 62". The tribunal's response was that that order had been made "before the Tribunal had decided how far forward it should have to calculate pension loss, and was not an indication that it would project the loss forward to any particular date".

26. At the same time as the tribunal gave Mr Lund that response, the tribunal notified Mr Lund that there would be a hearing to consider whether its judgment should be reviewed since at that time the employment judge thought that the question of whether Mr Lund's award should be increased under section 207A had been overlooked. The tribunal went back on that later, but we have already dealt with that. The important thing for present purposes is that in para. 15.1 of its judgment refusing the application for a review, the tribunal said:

> **"On the pension issue … [Mr Lund] did not answer the order of 7 July in the way that was intended. He did send evidence of his pension loss which we had before us when we considered the Judgment, and which was used in the Judgment. There is no evidence which has now been produced which might persuade us that we should review the pension figures …"**

27. We make two comments about that passage. First, we do not understand what it was that Mr Lund had failed to do. We have set out what we think the tribunal was asking for in its

order. If it was asking Mr Lund for the information which we think it was asking him for, he gave it to the tribunal. If he was being asked for the information which we think Mr Lund may have thought he was being asked for, he was being asked, in part at least, for information which the tribunal should have realised he would not have been in a position to give. Secondly, the tribunal appears to have assumed (as it had done at the time of its original judgment) that because Mr Lund had been asking for his loss to be calculated by reference to the School's contributions towards his pension, no alternative methodology of calculating it needed to be considered.

28. Following the issue of Mr Lund's Notice of Appeal, a hearing took place before Underhill J (as he then was) to consider whether Mr Lund's appeal should proceed to a full hearing. It was only at that hearing that Mr Lund discovered for the first time that there were methods of calculating pension loss which were potentially far more advantageous for someone of his age who had been with the same employer for almost 20 years in a final salary pension scheme than simply taking account of what the employer's contributions to the employee's pension would have been. That is the context in which it is now being said that the tribunal erred in law in (a) failing to consider whether Mr Lund's pension loss should be calculated using a methodology other than the contributions which the School would have made to his pension, and (b) limiting the pension loss to the period up to one year following the date of the tribunal's assessment of his loss.

29. In our view, the critical issue which the tribunal had to decide was whether Mr Lund was likely to find alternative employment which gave him a pension. Mr Lund was 56 years and 8 months old at the time the tribunal was assessing his loss, and the tribunal was working on the assumption that his likely retirement age had he remained with the School would have been 62. How likely was it that he would find employment in the remaining 5 years and 4 months with a

pension? The tribunal's finding on the topic was in para. 59 of its judgment. It said that "it will be very difficult for [Mr Lund] to obtain other employment at or near his former salary of £36,977 per annum plus pension benefits", though that does not sit easily with what the tribunal went on to say in the next breath, which was that "in the circumstances it is reasonable to project his loss for one year from the date of the assessment on 10 August 2011, bringing the future loss up to 9 August 2012". The tribunal's finding that Mr Lund was unlikely to find a job with a package of salary and pension benefits at or even near to the package he was getting from the School meant, of course, that there would be a continuing loss for Mr Lund until he would have retired at the age of 62. But what the tribunal did not make any express finding about was whether, whatever his salary might be in any alternative employment he found, that alternative employment would come with a pension. If it would not, his pension loss had to be calculated up to the date of when he would have retired but for his dismissal.

30. In our view, this was a finding which the tribunal had to make. Para. 4.7 of the booklet issued for the assistance of employment tribunals says:

> **"The key choice to be made by a tribunal is whether to look at the whole career loss to retirement which can then be discounted to allow for the eventuality that the applicant would not have remained in the employment throughout, or to look only to the next few years and assume that by that time he will have obtained comparable employment either with a similar pension scheme or a higher salary to compensate."**

That choice was key because the answer to it was a critical component in determining what methodology should be used to assess Mr Lund's pension loss. The booklet identified two approaches, which it called the simplified approach and the substantial loss approach. At paras. 4.13 and 4.14, the booklet identified when one approach rather than the other should be used:

> **"4.13 Experience suggests that *the simplified approach* will be appropriate in most cases. Tribunals have been reluctant to embark on assessment of whole career loss because of the uncertainties of employment in modern economic conditions. In general terms *the substantial loss approach* may be chosen in cases where the person dismissed has been in the respondent's employment for a considerable time, where the employment was of a stable nature and unlikely to be affected by the economic cycle and where the person dismissed has reached an**

age where he is less likely to be looking for new pastures. The decision will, however, always depend on the particular facts of the case.

4.14 More particularly, we suggest that *the substantial loss approach* is appropriate in the following circumstances:

(a) when the applicant has found permanent new employment by the time of the hearing and assuming no specific uncertainties about the continuation of the lost job such as a supervening redundancy a few months after dismissal; further, the tribunal has found that the applicant is not likely to move on to better paid employment in due course;

(b) when the applicant has not found permanent new employment and the tribunal is satisfied on the balance of probabilities that he or she will not find new employment before State Pension age (usually confined to cases of significant disability where the applicant will find considerable difficulty in the job market);

(c) when the applicant has not found new employment but the tribunal is satisfied that the applicant will find alternative employment (which it values, for example, with the help of employment consultants) and is required then to value all losses to retirement and beyond before reducing the total loss by the percentage chance that the applicant would not have continued to retirement in the lost career."

The circumstances set out in paras. 4.13 and 4.14(b) suggest that this may very well have been a case for Mr Lund's pension to have been assessed using the substantial loss approach. We have not overlooked that the booklet said at para. 7.1 that the simplified approach "may be used where the period of loss of future earnings is not likely to be more than two years", but we are not concerned here with Mr Lund's chances of finding employment which paid him a salary equivalent to that which he got at the School, but what the chances were of any such employment providing him with a pension.

31. In the circumstances, we think that the tribunal's approach to the assessment of Mr Lund's pension loss was flawed in three respects. First, the tribunal did not make any finding about the chances of any employment which Mr Lund might get in the future being pensionable. That finding needed to be made for the tribunal to decide by what method his pension loss needed to be calculated. Secondly, the tribunal did not consider whether his pension loss should be calculated using a methodology other than the simplistic method of awarding him the contributions which the School would have made towards his pension. It wrongly proceeded on the assumption that assessing his pension loss by reference to the School's contributions to his pension was appropriate simply because that was what Mr Lund

had asked for. And thirdly, even if it had been appropriate to assess his pension loss on the basis of the School's contributions to his pension, the tribunal did not explain why it limited Mr Lund's loss of those contributions to one year from the date of the assessment of his loss.

The outcome of the appeal

32. For these reasons, this appeal must be allowed. We set aside the tribunal's finding that it was not appropriate for the tribunal to award an uplift on Mr Lund's compensation under section 207A. We remit the case to the same tribunal for it to decide whether the School's failure to comply with the Code was unreasonable, whether it is just and equitable for an uplift to be awarded, and if so by what percentage. These are the only issues which the tribunal needs to address because by this judgment we have decided that Mr Lund's claim concerned a matter to which the Code of Practice relates, and Ms Banerjee acknowledged that this was not a case in which it could be argued that the School had complied with the Code. When considering whether the School's failure to comply with the Code was reasonable, the tribunal should be wary about concluding that that failure was not unreasonable on the basis that the School thought that the Code did not apply, when we have found that it should have been apparent to the School that the Code did apply. When the tribunal comes to consider whether it is just and equitable to make an uplift, the tribunal may not take into account the fact that Mr Lund contributed to his dismissal. And when it comes to deciding what the percentage uplift should be, the tribunal should remember that the factor which primarily governs the level of the percentage is the extent to which the School failed to comply with the Code. The greater the degree of non-compliance, the higher the percentage should be.

33. We also set aside that part of the tribunal's award which relates to Mr Lund's pension loss. Again, we remit the case to the same tribunal for it to reconsider that part of the award in the light of this judgment. The tribunal will have to decide, of course, what Mr Lund's chances

are of finding alternative employment which is pensionable, and if it concludes that those chances are good, it will have to explain why it reached that conclusion in the light of its finding in the first part of para. 59 of its original judgment. If the tribunal finds that Mr Lund's chances of obtaining alternative employment which is pensionable are good, that will not mean, of course, that assessing his loss by reference to the School's contributions would be appropriate, or that his pension loss should be limited to one year only from the date of the original assessment, since the deferred pension he will receive at the age of 62 may be nothing like as valuable as the deferred pension he would have received at 62 if he had not been dismissed. On these issues, it will be open to both Mr Lund and the School to file such documents and give such evidence as they wish, especially such evidence as the tribunal will need if it decides that either the simplified approach or the substantial loss approach is appropriate.