Appeal No. UKEAT/0590/12/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 May 2013

Before

MR RECORDER LUBA QC

MRS M V McARTHUR FCIPD

PROFESSOR K C MOHANTY JP

MR W SMITH — APPELLANT

IDEAL SHOPPING DIRECT LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BENJAMIN UDUJE (of Counsel) Direct Public Access Scheme
For the Respondent	MR CARL FENDER (of Counsel) Direct Public Access Scheme

SUMMARY

SEXUAL ORIENTATION DISCRIMINATION/TRANSEXUALISM

Claimant (C) succeeded at the Employment Tribunal (ET) on a claim that he had been victimised (by his dismissal) for raising concerns about homophobic treatment at the workplace. However, the ET additionally decided that (1) he would have been dismissed 4 days later in any event and (2) his claims in respect of harassment by remarks directed to his sexual orientation (a gay man) were not made out.

Claimant's appeal on both aspects allowed:

(1) The ET had failed to explain why it had decided that it was inevitable that C would have been dismissed 4 days later. That was the scheduled date of a disciplinary hearing. The notice for that hearing warned that it could lead to dismissal. There had been no earlier written warnings. The history of earlier responses to concerns about C's employment had been to move him to other posts at higher salaries. The ET failed to explain, in the light of that history, why dismissal was inevitable as opposed to being a possibility.

(2) The ET failed to grasp and address the actual evidence on two harassment complaints and its Judgment muddled the facts as to them. It also failed to apply the correct approach required by the regulations.

MR RECORDER LUBA QC

Introduction

1. This is a Claimant's appeal from the Judgment of an Employment Tribunal sitting at Leicester (Employment Judge James and members). By their Judgment, the Employment Tribunal upheld a complaint made by the Claimant that he had been subject to unlawful victimisation, in that he had been summarily dismissed shortly after having stated that he would be filing a grievance with his employers alleging harassment on grounds of sexual orientation. Notwithstanding that success, this appeal is brought by the Claimant because by its Judgment the Tribunal went on to determine that the only detriment he had suffered was that he had been dismissed four days earlier than he would otherwise have been. The Claimant also appeals from the rejection by the Employment Tribunal of his further complaints of discrimination by way of harassment on the grounds of his sexual orientation.

The relevant facts

2. The Claimant is a gay man. For several years he has worked in the television home shopping industry. In late 2009 he was employed by the Respondent, a home shopping television channel. Initially this employment was on a fixed-term six-month contract, but over time his role and salary changed such that by May 2010 his position was as TV operations project manager. He was dismissed by the Respondent in mid-July 2010. The Employment Tribunal's Judgment charts in considerable detail the relatively short history of the Claimant's employment up to the point in time at which he was dismissed. We need not deal in this Judgment with that history. We can focus on the matters directly relevant to the dismissal itself.

3. On 8 July 2010 there was an altercation between the Claimant and another staff member, a Ms Pearce. This exchange between them came to the attention of Mr Hancox, the

Respondent's most senior employee, and he discussed it with the Claimant who was cautioned that Ms Pearce might raise a formal complaint. The Claimant responded that if she did that, he in turn would lodge a complaint about the Respondent's response to matters relating to his sexuality. Later that day Ms Pearce did give a description of what had occurred to Mr Hancox, and he decided that the matter should be addressed formally. A disciplinary investigation was put in hand and, at a meeting on 13 July 2010, the Claimant's own account of what had occurred between himself and Ms Pearce was recorded. Mr Hancox then decided to put formal disciplinary processes underway and on 14 July the Claimant was sent a letter setting out the grounds on which the disciplinary process was founded. The letter invited him to a disciplinary hearing the following afternoon. At the Claimant's request, the meeting was delayed to 19 July. The terms in which the Claimant had sought the postponement also indicated that he would be raising a grievance about his having been bullied and having been subject to homophobic behaviour by other staff in the workplace.

4. On 15 July 2010 the Claimant was summarily dismissed i.e. four days prior to the disciplinary hearing. The dismissal letter confirmed that the reasons were those reasons that had led to the disciplinary process being initiated. Notwithstanding his dismissal, the Claimant did pursue his grievance but his complaints were not upheld. An appeal by him to the Respondent was rejected. The Claimant then brought his claims of discrimination, harassment and victimisation to the Employment Tribunal Service. The victimisation alleged was the dismissal itself. The discrimination alleged was in relation to harassment and bullying, which turned in large part on complaints as to the language that had been used to or about the Claimant by other employees in the course of his employment.

The Tribunal's Judgment

5. The Employment Tribunal read and heard the evidence of the Claimant and that of a number of employees of the Respondent over several hearing days. The Employment Tribunal's reserved Judgment issued to the parties in August 2011 sets out in turn the nature of the claims made, the relevant statutory provisions and the issues in the case. Its findings of fact deal at length with the chronology of events in the Claimant's employment with the Respondent, culminating in his dismissal and the rejection of his grievance. At page 16 of its Judgment the Employment Tribunal opens a section 6 headed "Decision". In the paragraphs and pages which follow it addresses in turn each of the specific claims made by the Claimant in respect of harassment, bullying and ultimately dismissal.

6. In relation to the harassment, the Employment Tribunal find as a fact that in the workplace other staff had referred to the Claimant in language about which he had complained. In particular, they find that the term "Val's bitch" was used, that being a reference in part to the Claimant's line manager, one Val Kaye. Other language included references to "Big Gay Wayne" and to "Will". The latter is a reference to a gay male character in a TV comedy show who was considered by the Claimant to be playing the role of what might be described as a drama queen. Further, the Employment Tribunal found that comments such as "You are so gay" had been made by other staff and that other remarks referable to sexual orientation, such as that of the Claimant, had been made.

7. The Employment Tribunal was satisfied that, taken in the abstract, these words had a homophobic connotation, but they decided that in the context of this case and in the workplace environment they were "not homophobic". The Employment Tribunal had expressly found that the Claimant had made his sexuality prominent to his colleagues and that he had used terms such as "Big Gay Wayne" and "Will" in referring to himself. The Employment Tribunal found

that any adverse comments made were not made as a result of the Claimant's sexual orientation or with the intent of causing injury to his feelings but were rather used as the manifestation of the fact that he was disliked by many colleagues because of his management style and his lack of interpersonal skills.

8. In relation to the complaint of dismissal by way of victimisation, the Employment Tribunal was satisfied, in the absence of any satisfactory explanation by the Respondent as to why the Claimant had been dismissed four days prior to a disciplinary hearing, that the act of dismissal was one of victimisation in relation to two protected acts: firstly, that the Claimant had alleged discriminatory treatment; and secondly, that he had stated that he would raise a grievance about his homophobic treatment by others. However, as already explained, the Employment Tribunal, although upholding the complaint of dismissal by way of victimisation, went on to find, for reasons that it set out, that a dismissal on 19 July 2010 was in any event inevitable.

The appeal

9. The grounds of appeal are nine in number and are directed separately to the two issues of harassment and dismissal. We shall deal with them in that order; firstly, harassment. The prohibition on harassment in relation to sexual orientation is set out in the **Employment Equality (Sexual Orientation) Regulations 2003**. By Regulation 6(3):

> **"It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to subject to harassment a person whom he employs or who has applied to him for employment."**

10. The definition of harassment for the purposes of applying Regulation 6(3) is given in Regulation 5(1) in the following terms:

> **"For the purposes of these Regulations, a person ("A") subjects another person ("B") to harassment where, on grounds of sexual orientation, A engages in unwanted conduct which has the purpose or effect of—**
>
> **(a) violating B's dignity; or**
>
> **(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."**

11. Regulation 5(2) provides:

> **"Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect."**

12. The grounds of appeal relating to harassment complain that the Employment Tribunal fell into error in its approach to the law, in its application of the law, and in its treatment of the facts. We shall deal with each of the grounds of appeal in turn. The first ground of appeal asserts that the Employment Tribunal's Judgment evidences a fundamental misapprehension by it of the evidence relating to two of the complaints made by the Claimant. In order to understand this ground of appeal it is necessary to identify those two complaints and the way in which they were dealt with, in the evidence and by the Tribunal. The complaints themselves are identified in the Claimant's claim to the Employment Tribunal as the first two matters mentioned in paragraph 5.2 of his claim form ET1.

13. The first complaint asserts that a Ms Alison Pearce, a creative manager at the Respondent, would say to the Claimant that it was "okay for me to work weekends because I did not have a family". It is clear from the way in which that allegation is put that the Claimant was complaining of what was said directly to him rather than to others. This particular complaint echoed a complaint to the same effect that the Claimant had made as part of the grievance procedure. On the third page of his grievance procedure letter he had written this in relation to that matter:

> **"Alison Pearce would say to me, 'It's okay for you, you're gay with no kids so you can work weekends'."**

14. As to that complaint, the Tribunal record in their findings of fact, at paragraph 5.39, as follows:

> **"The Claimant also asserts that when he suggested that more managers should work at weekends, including Ms Pearce, she stated that it 'was okay for you, you're gay with no kids so you can work at weekends'."**

15. That, then, was the first of the two material complaints. It was a complaint as to what Ms Pearce had said directly to the Claimant, and the assertion was that the words quoted were used. The second complaint made relevantly by the Claimant related to what was said by a different member of staff, that member of staff being a Joanne Puttrich, who was a presenter employed by the Respondent. The complaint, as set out in the ET1, was:

> **"Joanne claimed that I was giving other openly gay members of the team preferential treatment. This comment was told to Shaun Ryan (presenter) and Nigel May (presenter)."**

16. This, then, was not a complaint about what had been said directly to the Claimant but about what had been said to two others in relation to him. One of those two was Mr Nigel May. Mr May made a statement as a part of the employer's investigation of the grievance. Mr May's evidence, collected as part of the investigation of that grievance, is contained in a note dated 3 August 2010. As to that matter, Mr May's account was as follows:

> **"Yes, it was said by Joanne Puttrich but it was an off-the-cuff comment though. It was to Jo, Shaun and I on a Sunday morning. Jo said in a conversation as far as I can recall, 'It's okay for you gay boys, you're the favoured ones'. Shaun and I were both upset by the comment. Jo realised what she said was wrong and immediately apologised."**

17. As to that matter, the Tribunal, in their findings of fact, record as follows in paragraph 5.38:

> **"[…] he heard that Ms Puttrich had said to Shaun Ryan and Nigel May, whom the Claimant states are also openly gay men, that it was, 'OK for you gay boys, you're the favoured ones'. The comment was confirmed by Ms Puttrich albeit in slightly different terms."**

18. This, then, the second relevant allegation, was one as to what had been said by Ms Puttrich to others and one that had, unlike the complaint in relation to Ms Pearce, led to an immediate apology. It is quite clear that these were two different complaints; different in nature, different in circumstance and involving different members of staff. Ground 1 of the grounds of appeal complains as to the way in which they were dealt with by the Tribunal. Firstly, at paragraph 6.1.2 of its reserved Judgment, the Tribunal say this:

> **"The Tribunal is also satisfied that Ms Pearce said the words that it was 'OK for you, you're gay with no kids so you can work at weekends' to two gay colleagues. The Tribunal has noted that Ms Pearce offered her apologies for that comment immediately afterwards."**

19. There is a clear confusion there. The attributed words are the words alleged in relation to Ms Pearce, but they were not made to two gay colleagues; they were made to the Claimant. Moreover, the reference to an apology immediately afterwards is not so much a reference to Pearce as to the apology given by Puttrich. That confusion is deepened further by a consideration of what the Tribunal say at paragraph 6.2.5 of their Judgment, which reads as follows:

> **"Ms Puttrich commented to two gay colleagues, Nigel May and Shaun Ryan, that it 'was OK for you, you're gay with no kids so you can work at weekends'. This comment was not made to the Claimant. He was made aware that such a comment had been made through office gossip. Either before the Claimant heard about it or very shortly afterwards Ms Pearce accepted that what she had said was wrong and had apologised to both the affected colleagues. The Tribunal does not believe that the comment is homophobic. The comment might easily have been made in reference to unmarried colleagues with no children. For fear of having caused offence, Ms Pearce apologised and that apology was accepted by the two affected employees. The Claimant has asserted that the comment demonstrates a homophobic atmosphere within the Respondent's workforce. The Tribunal disagrees."**

20. As is evident from the language there used, the Tribunal has wholly conflated and muddled the two different complaints, the circumstances of them and the individual staff members involved. Mr Uduje accordingly submitted that ground 1 had been clearly established

and that the Tribunal had made a fundamental misapprehension of important parts of the evidence before it. For his part, Mr Carl Fender, appearing for the Respondent, struggled nobly to deal with that proposition. His first response was to suggest that paragraph 6.2.5 could be understood if one simply transposed the words used by reading "Puttrich" throughout instead of "Pearce". That approach cannot save the paragraph or unpick the muddle. In our judgment it is not a sustainable approach to understanding the paragraph. Mr Fender was, in truth, unable to offer any further elucidation or exposition from which one might be able to sustain or otherwise justify what had been said by the Tribunal in paragraph 6.2.5, given the very different factual strands of the two complaints.

21. We are entirely satisfied that the Employment Tribunal confused themselves as to the evidence and circumstances of these two different complaints with their differences in time, personnel involved and content. It follows that ground 1 of the grounds of appeal is made out. Insofar as the same paragraph, that is to say 6.2.5, deals correctly with Ms Pearce's comment in relation to, "It is okay for you, you're gay with no kids so you can work at weekends", Mr Uduje submits that the Tribunal then goes on to import a comparator, being an unmarried colleague with no children, and no 'excuses', if that is the right term – the phrase in fact used – on that basis. Mr Uduje reminds us that Regulation 5 does not envisage any question of comparators and points out that in any event the comment was not simply a comment about staff who do not have family responsibilities; it included the term, "You're gay". Taken on its own, the whole comment was a clear and prima facie derogatory reference to the Claimant and his sexuality. It might well be taken as meaning that all gay people, male or female, do not have family responsibilities.

22. Had it been necessary to do so, we would have upheld Mr Uduje's submissions to that effect under this ground also. However, it is only necessary for us to say that ground 1 is made

out on the basis of the fundamental misapprehension of the evidence. Ground 2 of the grounds of appeal asserts that the Tribunal misdirected itself in law because it attached significance to the fact that one or more of the derogatory comments made had been made not directly to the Claimant but to other members of staff. It was submitted by Mr Uduje that this was a clear failure by the Employment Tribunal to have regard to the authority of the Court of Appeal in **Garry v London Borough of Ealing** [2001] IRLR 681. To make good his submission he took us to various passages in the Judgment but most keenly focused on paragraph 6.2.5 and its reference to the fact that the Claimant was only "made aware that such a comment had been made". We are unable to extract from that terminology, or from any other part of the Judgment, the proposition that the Tribunal misdirected itself in law in this important respect. Put shortly, ground 2 of the grounds of appeal is simply not made out.

23. We move, then, to ground 5 and will return in due course to grounds 3 and 4. Ground 5 asserts that the Tribunal misdirected itself in relation to the harassment questions in two senses. First, it is asserted that throughout their treatment of the harassment complaint the Tribunal confined themselves to only one part of the relevant statutory definition of harassment; that is to say, they focused on unwanted conduct which has "the purpose" of violating the target's dignity. Thus it is that their Judgment repeatedly refers to purpose or intent. The first limb of ground 5 of the grounds of appeal asserts that the Tribunal failed to have regard to the alternative words "or effect" which appear in Regulation 5(1). This misdirection was said to be contrary to the authority of **Grant v HM Land Registry** [2011] IRLR 748, in particular the passages at paragraphs 11 to 13.

24. The second alleged misdirection in ground 5 is that the Tribunal appear to have treated the fact that the Claimant was openly gay and promoted his sexuality as meaning that it was either unlikely or, *in extremis*, impossible for any remark made relating to this sexual

orientation to constitute harassment of him for the purposes of the provision. Mr Uduje took us to numerous passages in the Judgment to sustain those propositions. We are satisfied that both propositions raised in ground 5 are made out. We need not set out in this Judgment at length the various references and extracts which sustain that conclusion. That is because there is a plain instance of both which emerges from a consideration of grounds 3 and 4 of the grounds of appeal which both relate to the use of the term "Val's bitch". The Tribunal find that the relevant background to the use of this term was that it was the Claimant's habit when dealing with other members of staff to deploy the name of his superior, Val Kaye, in support of whatever suggestion, recommendation or decision he was himself promoting.

25. The Tribunal clearly find that the term "Val's bitch" was used in the workplace by more than one member of staff. Clear findings to that effect are made by the Tribunal at paragraph 5.37 of their Judgment and again in their findings and decision at paragraph 6.1.1 and 6.2.3. The Tribunal find that the sentiment behind the use of this term by members of staff would seem to be an attempt to refer to the Claimant in the way in which one might alternatively have used such language as "Val's lackey" or – Mr Uduje's suggestion – "Val's gopher". But the use of the term "bitch", in our judgment, carried, at least prima facie, the inference that attention was being given to the sexual orientation of the Claimant. The Employment Tribunal's explanation as to why the use of that term in respect of the Claimant did not amount to harassment is put in this way at paragraph 6.2.3:

> **"References to being Val's bitch are clearly less acceptable but the Tribunal is satisfied that such references were intended to demonstrate dislike for the Claimant seeking to enforce his authority by referring to Ms Kaye rather than demonstrating homophobia."**

26. In our judgment, that is a curious way of dealing with the matter, and it appears to have led directly to the finding in paragraph 6.3.1 that the Tribunal was satisfied:

> **"[…] that any adverse comment or action against the Claimant from or by colleagues was not as a result of his sexual orientation."**

27. Mr Uduje submits that this conclusion is a clear manifestation that the Claimant was not applying the right approach in both of the senses identified in ground 5. As to the first of those, the failure to recognise the alternative dimension of harassment, i.e. the effect on the recipient, Mr Fender was good enough to acknowledge that the Tribunal do not expressly address anywhere the 'effect' limb and in particular do not address it in relation to the use of "Val's bitch". Notwithstanding the absence of any express reference, Mr Fender tried valiantly to explain to us that it could be imputed that the Tribunal had taken the correct approach.

28. We prefer the submissions of Mr Uduje. It seems to us, from this example and others in the Tribunal's Judgment, that it was only having regard to that part of the statutory test which refers to the purpose or intention of the person uttering the comment rather than to that part of the test which, in the alternative, refers to the effect. That is a plain error of law. Secondly, in our judgment, it is clear from the language used by the Employment Tribunal in paragraph 6.2.3, and elsewhere in their Judgment, that it was treating the matter of language, although to varying degrees of acceptability, as being within some sort of tolerable range because of the Claimant's own demonstrable assertion of his sexuality. We quite accept that a person who parades their particular characteristic loudly and vocally might expect to receive from colleagues responses or comments which make reference to that sexuality. But that is quite distinct from the "abusive" use of references to sexual orientation or any other protected characteristic.

29. In this case, the Tribunal appear to have included within their understanding of what was tolerable that which on any reasonable view would not fit within such a range. In short, we are

satisfied that grounds 3 and 4 relating to "Val's bitch" are made out for the reasons given in ground 5, namely that the Tribunal misdirected themselves in the two senses we have identified.

Dismissal

30. As we have already indicated, the Employment Tribunal found that the dismissal in this case was the result of unlawful victimisation. But it went on to determine what followed from that wrongful act. It is common ground that the Tribunal was entitled to investigate the question of what loss followed from the wrongful act, not least by considering what might have happened on the facts had the unlawful act not taken place. The relevant law is set out in the decision of the Court of Appeal in **Chagger v Abbey National Plc & Anor** [2010] IRLR 47. In that case, at paragraph 55 and 56, the Court set out firstly, the contention that a successful claimant must recover all damages flowing from an unlawful act and then why that submission is rejected. They say this at paragraph 57:

> **"We are satisfied that the analysis of the EAT, reproduced in paragraph 43 above, was entirely correct on this point. It is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss."**

31. That being the law, we turn to the Tribunal's reserved Judgment and paragraph 6.4.6, at which they deal with this matter. They say as follows:

> **"However it is necessary to add that the Tribunal is satisfied that it was inevitable that the Claimant would have been dismissed following the disciplinary hearing on 19 July 2010. The nature and extent of the issues he had caused throughout his short period of employment would have inevitably led to his dismissal and that dismissal would not have been on the grounds of sexual orientation. In reaching this decision the Tribunal noted that the problems caused by the Claimant had been ongoing for a considerable time and it was possibly surprising that it had taken so long for the Respondent to consider dismissing the Claimant and, on one occasion allowing him to withdraw a resignation. It is clear that the Claimant must have attributes of value to the home shopping industry but on this occasion his lack of management skills prevented him from successfully demonstrating them."**

32. We turn then to the grounds of appeal in relation to this 'consequence of dismissal' aspect. In the course of developing his submissions on grounds 6 to 9, Mr Uduje indicated that

he would apply for permission to amend the grounds of appeal to add a wholly new ground. He outlined to us that this new ground would be to the effect that the Tribunal had dealt with this matter in breach of natural justice. In outline, he told us that this had been a liability only hearing and that he was not intending or expecting to address the Tribunal on the consequences or loss flowing from the dismissal. Moreover, he told us that: no evidence had been led, directed to this question; that the Employment Tribunal had not put the parties on notice that they would deal with this point; and that what had in effect happened was that the Tribunal had dealt with this in their reserved Judgment by way of afterthought prejudicially to the parties because they had no opportunity to address it. During the short adjournment, Mr Uduje then put in the text of this proposed new ground.

33. The application to amend was opposed by Mr Fender for the Respondent. He made, but did not need to develop, the obvious point that the application to amend was made very late. He did take the point that as a result he had had no chance to deal with it. His clients had been deprived of the opportunity of obtaining, as they would have done had the matter been raised earlier, the Employment Judge's own note or explanation as to what had happened. Mr Fender acknowledged that such a note would only be necessary if the parties were in disagreement as to what had in fact occurred before the Tribunal. Mr Fender made it clear that he did not agree with Mr Uduje's account. He, Mr Fender, recalled addressing the Tribunal on the matter in his oral submissions to the Tribunal, and his notes in preparation for that oral submission bore that out, he submitted. We did not need to resolve that dispute. It was sufficient to simply identify that there was a dispute.

34. On the application to amend, we took the approach required of us by the authorities and by the relevant procedural rules, of weighing the prejudice as between the parties. The prejudice that would be potentially suffered by the Claimant if the application to amend were

not allowed, and the potential prejudice to the Respondent if it were to be allowed. For the Claimant it was submitted that this was a clear point which, if made good, established a clear error of law. Mr Uduje urged upon us that in keeping with the requirement to 'do justice as between the parties' we should allow the amendment. We are clear that the application should be and is refused. If, as Mr Uduje submits, this was such a crisp and clear point of law, it makes it all the more extraordinary that it was not formulated in the grounds of appeal, either originally or between the submission of the notice and this hearing. Moreover, this is not a point which can be resolved by submissions. As we have heard from Mr Fender, the parties' representatives are not agreed as to what occurred. In the absence of such agreement, fresh evidence would be a prerequisite, probably in the form of a note from the Employment Judge. In those circumstances, and in the absence of that note, it would be unfairly prejudicial to the Respondent to allow in this new ground of appeal. For all those reasons, the application was refused.

35. We then turn to grounds 6 to 9 themselves. Grounds 6 and 9 appear to contain contentions that, as a matter of law, it was not open to the Employment Tribunal, having found a discriminatory dismissal, to curtail the effect of detriment by analysing what might have happened absent the unlawful discrimination and by applying concepts of fairness and reasonableness. We are satisfied that both grounds 6 and 9 are misdirected. As became clear in oral submissions before us, the parties are at one as to the relevant legal principles. The real complaint by the Claimant is as to their application. That is dealt with in the Claimant's grounds of appeal 7 and 8. They assert respectively that it was impossible for the Tribunal in this case to fairly find that there must have been a dismissal expected on 19 July 2010, firstly, because there was what is described in ground 7 as a break in the chain of causation – that is to say, the uncertain outcome of a prospective disciplinary hearing – and, as it is put in ground 8,

on the basis that the facts found by the Tribunal cannot sustain a conclusion that it is inevitable that the Claimant would have been dismissed.

36. Those grounds were brought together in Mr Uduje's helpful submissions. He put his case in this way; on the facts, as found by the Tribunal, no Employment Tribunal could be 100 per cent sure that the Claimant would have been, in any event, dismissed on 19 July 2010. First, Mr Uduje pointed to the fact that what was anticipated was a disciplinary hearing on that date. As the letter inviting Mr Smith to the disciplinary hearing indicates, it "could result in your dismissal". Even the employer was recognising this only as a possibility. Second, this was a case in which there would be a range of outcomes available to the persons holding the disciplinary hearing. They would range, at one end, to dismissal but at the other to lesser sanctions such as warnings. This was a case in which there had been no prior written warning.

37. Further and thirdly, Mr Uduje referred to the history as found by the Tribunal which indicated, somewhat surprisingly, that on each previous occasion in which difficulties had been aired between the Claimant and his superior, far from being dismissed or disciplined, the Claimant had been moved to alternative functions on different salary terms. Mr Uduje pithily submitted that the best guide to the likely future in this case was what had happened in the past. We balanced those submissions with the submissions helpfully made by Mr Fender. He submitted that although it was unusual for a Tribunal to be so clearly satisfied that the prospect of a dismissal was 100 per cent; nevertheless, that was a permissible finding on a spectrum that ranged from zero to 100 per cent. He submitted that it was open to a reasonable Tribunal, properly directing itself, to reach a conclusion of 100 per cent certainty in this case and that their finding was not perverse.

38. In short, we accept Mr Uduje's submissions. If, given the background in this case, this Employment Tribunal really were saying that the only possible outcome of the proposed disciplinary hearing to take place four days later was that the Claimant would inevitably be summarily dismissed, they needed to explain in very clear terms why that was so. Given that the sanction of dismissal was only one of a range of alternatives open to the disciplinary panel, and given the history of past dealings between the Respondent and the Claimant in this case, in our judgment the requisite explanation is not given by paragraph 6.4.6 of the Tribunal's Judgment. In the absence of such satisfactory explanation, their conclusion simply cannot stand. That is not to say that there could not have been a reduction or lessening of the projected loss based on the prospects of dismissal, but we are certainly not satisfied that the reasoning offered by this Tribunal can sustain their assurance that a dismissal was 100 per cent likely. It follows that we allow the appeal in relation to the dismissal point on what are essentially grounds 7 and 8 of the grounds of appeal.

Outcome

39. What follows from our Judgment is that the findings both in relation to harassment and the consequences of dismissal must be set aside. We were invited by Mr Uduje to exercise our power under the procedural rules to make the requisite decisions for ourselves. We are satisfied that we cannot do that. The very first ground of appeal demonstrates that. It would be dangerous in this case for anyone other than a Tribunal fully seized of the requisite facts to start to make decisions based on a determination of those facts. It is inevitable, in our judgment, that this task must be dealt with by a first-tier Tribunal rather than by this Appeal Tribunal. The next question is: which Employment Tribunal? Should the matter be remitted to the Employment Tribunal of the same constitution or to a different Tribunal? We are satisfied that this case is in a class in which it cannot be fairly remitted to the same Tribunal. The Tribunal has expressed itself in trenchant terms on both of the matters in respect of which we have found

it to have erred in law. In those circumstances, with a heavy heart, we must remit this matter to a differently constituted Tribunal.

40. Of course, the Claimant has already succeeded on the question of victimisation and the unlawful discrimination by reason of dismissal that that represents. That matter is not remitted and will bind the Tribunal which hears the other complaints. We would, notwithstanding the formal step of remitting to a fresh Tribunal certain of the claims made by the Claimant, urge both of the parties to take a step back, having considered the terms of our Judgment, and consider whether it is really necessary for a further hearing to be conducted before the Employment Tribunal. For all of those reasons this appeal will be allowed and the questions of (1) harassment and (2) the loss flowing from the dismissal will be remitted to a differently constituted Tribunal.