Appeal No. UKEATS/0043/12/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 21 November 2012

Before

THE HONOURABLE LADY SMITH

MR J M KEENAN MCIPD

MR M SMITH OBE JP

WEST LOTHIAN COUNCIL — APPELLANT

MR KAMRAN AZIZ — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MS A JONES (Solicitor) Maclay Murray & Spens LLP Quartermile One 15 Lauriston Place Edinburgh EH3 9EP
For the Respondent	MR G BOOTH (Consultant) 19 Etive Court Condorrat Cumbernauld North Lanarkshire G67 4JA

SUMMARY

UNFAIR DISMISSAL – Compensation

Trainee solicitor. Dismissal procedurally unfair. Compensation for unfair dismissal. Tribunal had no basis in the evidence for proceeding on basis that it was likely that the Claimant – whose performance in the employment of the Respondent was completely inadequate and such as to lead them to conclude that he could never be a 'fit and proper person' to be admitted as a solicitor – would in fact have qualified and been permanently employed as a solicitor. Tribunal appeared to have been unduly swayed by sympathy for the Claimant. No opposition offered, at the appeal, to Appellant's submissions. Appeal upheld and award comprising basic award only (£402) substituted for Tribunal's award of £30,597.62.

THE HONOURABLE LADY SMITH

Introduction

1. The Claimant was employed by West Lothian Council as a trainee solicitor from 20 October 2008 to 25 August 2010, when he was dismissed. His training contract was a fixed term contract which would, in any event, have been due to terminate after two years, on 20 October 2010.

2. This is West Lothian Council's appeal from the judgment of an Employment Tribunal sitting at Glasgow, Employment Judge C S Watt, registered on 15 May 2012, finding that the Claimant was unfairly dismissed, that he was not discriminated against on grounds of disability and awarding him £30,597.62. Of that sum, £402 was the basic award and £2,407.36 was in respect of the period between dismissal and 20 October 2010; the Respondents had, however, paid the Claimant his salary during that two month period and it was conceded that the latter sum was, accordingly, not in fact due.

3. We will continue referring to parties as Claimant and Respondent.

4. The Respondents were represented by Ms A Jones, solicitor, before the Tribunal and before us. The Claimant was represented by Mr G Booth, consultant, before the Tribunal and before us.

5. At the outset, we should record that, at the end of the submissions which were presented for the Respondent by Ms Jones, Mr Booth advised us that, having heard them, he had no contrary submissions to make. He said that he found Ms Jones' submissions difficult to resist and offered no opposition. He did not, however, have any instructions to concede the appeal. He, accordingly, made no submissions.

6. We retired at that point to allow Ms Jones an opportunity to consider her position. The adjournment provided us with the opportunity for deliberation in the light of the only submissions that we were going to hear. When we returned to court, Ms Jones invited us to state the outcome of the appeal and provide reasons later. Her submission was, naturally, that we should indicate that we would allow the appeal.

7. We were and are satisfied that this appeal was manifestly well founded and have no hesitation in upholding it. We so indicated at the end of the hearing. Our disposal will be as indicated at the end of this judgment.

Background

Training to be a solicitor

8. The Claimant had a law degree and had completed a Diploma in legal practice. Under the regulations then in force (**Admission as a Solicitor (Scotland) Regulations 2001**), to train and qualify as a solicitor, he required to serve under a training contract with a training solicitor (reg 7(1)). The period of training comprised two years (reg 7(2)).

9. The training solicitor did not, under the regulations, have any discretion to vary the period of training.

10. Training contracts required to be registered with the Law Society of Scotland (reg 14). There was no provision in the 2001 regulations whereby the Law Society of Scotland ("LSS") became party to any contract with the trainee. There was, in particular, contrary to what the Tribunal stated to be its understanding, no tripartite contract amongst the trainee, the solicitor and LSS.

11. The role of LSS was and is one of oversight and in certain circumstances, it could, under the 2001 Regulations, intervene. LSS acts and acted through its **Council (Solicitors (Scotland) Act 1980** s.3). Reg 16 of the 2001 Regulations, insofar as material, provided:

> **"Intervention in training contracts**
>
> **16.(1) The Council may make enquiries concerning any aspect of a training contract and the conduct of the parties to that contract and the Council shall be entitled to require the evidence of the employer, the trainee, any solicitor and any intrant and to call for and recover such evidence and documents from any such person as the Council thinks proper.**
>
> **(2) If the Council, after enquiry and after affording the parties to the training contract the opportunity to make representations, is of the opinion that a party to a training contract is not, as a result of the acts or omissions of the other party to the training contract, receiving the benefits it should receive from that training contract, the Council may require that other party to take such steps as the Council may request to ensure that those benefits are so received.**
>
> **(3) Without prejudice to the generality of regulation 16(2) of these Regulations, if: -**
>
> **(a) ……**
>
> **(b) the Council, after enquiry and after affording the parties to the training contract the opportunity to make representations, is of the opinion that a training contract ought to be terminated, assigned or extended; or**
>
> **(c) there is a dispute between the parties to a training contract**
>
> **the Council may by notice in writing to the parties to the training contract require the termination of the training contract with effect from such date as may be specified in the notice or may require an assignation of the training contract or an extension to it, as the case may be, or may take such other action as it thinks fit. ……."**

12. Accordingly, LSS could but did not require to intervene if there was cause to consider that termination, assignation or extension of the training contract was appropriate. Whilst the main focus of the provisions may be thought to have been to make provision for situations where the training solicitor failed in his obligations to the trainee they were also apt to cover circumstances where there were concerns about the trainee. The training solicitor could also, as the trainee's employer, take such disciplinary steps (including dismissal) as were open to him under the contract of employment, without recourse to LSS and without their approval or consent. At the end of the training period, the training solicitor provided the trainee with a written statement declaring whether or not he considered him to be a fit and proper person to be admitted to be a solicitor in Scotland.

13. As above noted, the training period was one of two years (reg 7(2)). LSS had, however, a discretion that enabled it to extend that period in certain circumstances. Reg 41(2) provided that the Council " may…where the circumstances of a particular intrant are exceptional, waive any provision" of the regulations, subject, if it thought fit, to conditions; that would plainly have encompassed the power to waive the reg 7(2) requirement that the training period be limited to two years.

14. We also note that the objects of LSS are stated, by section 1(2) of the 1980 Act, to include the promotion of the interests of the profession and of the public in relation to that profession. Solicitors have an interest in trainees being properly trained and demonstrating that they have achieved a level of competence which fits them to be members of their profession. The public has an interest in trainees being properly trained so as to be able to serve their interests competently once they are qualified. That is the context in which the 2001 Regulations were devised. We do not read into them that LSS owed any paternalistic duty towards trainees.

The Claimant's Training and Progress

15. The Respondent developed serious concerns regarding the Claimant's competence. Evidence was given to the Tribunal by their Chief Solicitor, Julie Whitelaw, and by a senior solicitor in charge of litigation, Carol Johnston, both of whom acquired direct knowledge of the Claimant's work. Both had expressed their concerns in detail, in writing, at the time - the former in a very detailed letter to LSS dated 21 July 2010. Their evidence was, in essence, that the Claimant's performance was completely inadequate and demonstrated that he could never be a fit and proper person to be a solicitor. Those witnesses appear to have been accepted as credible and reliable by the Tribunal; that is, the genuineness of their belief as to the inadequacy

of his level of competence was accepted. We have considered the terms of Ms Johnston's report and Ms Whitelaw's letter. Both contain careful, professional, and detailed consideration of the Claimant's progress and both provide ample evidence to support the conclusion which they reached both as regards his competence and as regards the question of whether he would ever attain the requisite professional standard.

16. The Claimant spent his first year in property, planning and strategy and his second year in litigation. He had quarterly performance reviews. Each review was scored on a form provided by LSS. The form did not call for a detailed assessment. The trainee was marked as "competent", "not yet competent" or "no opportunity to demonstrate competence" in respect of nine matters and the reviewer was asked to rate, on a scale of 1 to 9, the trainee's overall performance.

17. According to LSS guidance, a score of 5 indicated that the trainee was performing at the level which could reasonably have been expected at that stage of training. The Claimant scored 4/9 in his first two quarterly performance reviews. He scored 5/9 in his third review. The Respondent's chief solicitor, Julie Whitelaw, carried out the fourth review as the principal solicitor in the team with which the Claimant had been working was on maternity leave and gave him a score of 7/9; Ms Whitelaw gave evidence to the Tribunal – which was not rejected - that she had marked him too highly. The scoring ought to have been 5/9.

18. In his second year, the Claimant received scores of 4/9 in each of the two reviews that were carried out in February and May 2010 despite the fact that he was having weekly reviews of his work with Carol Johnston and she was going over with him every case that he was dealing with.

19. The respondent checked with the Claimant whether his poor performance was related to his dyslexia but he assured them that that was not the problem.

20. In March 2010, Ms Whitelaw contacted LSS to discuss her concerns about the Claimant. Following that discussion, Ms Meanly of LSS wrote to the Claimant by letter dated 17 March 2010, advising him that she had reviewed his quarterly trainee performance reviews including that, in his most recent review, he had scored 4. She stated:

> **"As you will appreciate I would normally expect to see improvement in your quarterly review rating over your traineeship and this is not the case for your ratings."**

21. On 18 March 2010, the Claimant met with Ms Whitelaw and his two mentors. He was given four weeks to improve his performance. That did not happen.

22. On 6 July 2010, the Claimant met with Ms Whitelaw and Ms Johnston and Ms Whitelaw summed up matters, at the end of the meeting, by stating that, based on what the Claimant was doing and the basic level of his work, his traineeship - which was due to finish in October 2010 - would not be signed off.

23. On 7 July 2010 there was a meeting at the offices of LSS attended by Ms Meanly of LSS, her line manager, Ms Whitelaw, Ms Johnston, the Claimant and Mr Booth, the consultant who represented him at the Tribunal and at this appeal. The Tribunal found that LSS indicated that a number of options were to be considered including an extension of the Claimant's training period. At paragraph 55, the Tribunal found:

> **"The first option was that the claimant's traineeship could be extended for a minimum period of three months and this would require to be approved by the Law Society Admissions Committee. The Law Society Admissions Committee might actually recommend that the claimant complete the whole of the second year again."**

24. As above noted, the power to extend the training period lay only with the Council of LSS and its discretion to do so only arose if they were satisfied that the circumstances of the trainee in question were "exceptional". The Tribunal did not have regard to those matters at all. Indeed, elsewhere in their judgment, they refer to the option to extend the training period as having been "proposed" by LSS but it had not – it would not have been within the power of Ms Meanly or her line manager to make such a proposal. There was no proposal which was open to the Respondent to accept or reject yet, when it came to assessing compensation, that is how the Tribunal approached matters; at paragraph 181, they state:

> **"181. The Tribunal consider that any reasonable employer……...would have agreed to an extension to the training contract proposed by the Law Society."**

Dismissal

25. The Respondent decided to terminate the Claimant's training contract because of their concerns about his competence and because they concluded that he would not reach the level of performance and ability which was required for them to be able to certify him as fit to practise as a solicitor. The Tribunal found that they did not, when doing so, follow a fair procedure and that aspect of the Tribunal's conclusions was not challenged on appeal.

Financial Pressures on Respondent/ Circumstances as at October 2010

26. In common with many local authorities as at 2010, the Respondents were under pressure financially as a result of which, jobs were being cut. At paragraphs 71 and 76, the Tribunal found:

> **"71……Julie Whitelaw said that with budget constraints and staff redundancies it would be very difficult to keep Mr Aziz employed until the end of his employment contract……**
>
> **76. The Tribunal is satisfied that if Mr Aziz had qualified as a solicitor with West Lothian Council, he would not have been taken on by them in a solicitor's role. They had no vacancies for newly qualified solicitors and were having to make financial cut-backs."**

27. Those observations by Julie Whitelaw were made on 25 August 2010.

Other jobs

28. The Tribunal found that the Claimant tried but failed to secure an assignation of his training contract, despite writing to a large number of law firms and law centres. Having signed on at the Job Centre in August 2010, he was not able to find work until 23 November 2010, in a call centre. He subsequently worked for Royal Mail and as a local authority Housing Officer.

29. The picture presented by such evidence as was led was of a downturn of business in the legal profession at that time, as would have been within the judicial knowledge of the Tribunal, it being widely reported at that time as being the case. The Tribunal do seem at least to have accepted that finding a job would not be altogether straightforward since they concluded, at paragraph 77, that it might have taken Mr Aziz some time to find employment as a solicitor.

30. The Tribunal found that if Mr Aziz had begun to work as a newly qualified solicitor after training he would have earned about £25,000.

Discrimination

31. Mr Booth withdrew the Claimant's claim for direct discrimination, at the hearing before the Tribunal, but sought to insist on a claim of failure to make reasonable adjustments. That claim was rejected by the Tribunal.

The Tribunal's Reasons

Sympathy for the Claimant

32. We begin by observing that the Tribunal's written reasons show considerable sympathy for the Claimant who they refer to as a "young trainee" despite the fact that, at age 29 years, he was some years older than many, if not most, trainees.

33. At paragraph 78, they state that "it is extremely unlikely that he will ever obtain another job in law and qualify as a solicitor" (the tenor being that he was, sadly, deprived of his chosen career) despite the fact that they heard no evidence to that effect or on that issue at all and that it did not have any obvious bearing on the assessment of compensation; section 123 of the **Employment Rights Act 1996** does not entitle a Claimant to an award for injury to feelings.

34. At paragraphs 198 to 210, the Tribunal are highly critical of the part played by LSS in relation to "the future career of a young man" (paragraph 209). In particular, they are critical of LSS having done "little to protect a young trainee who was not even given an opportunity by his employers to make representations on their 'extension option'" (paragraph 210) yet, as we explain above, LSS were not in a contractual relationship with the Claimant, had no duty to play a paternalistic role in relation to him and had not made an offer of any option which was open for acceptance, the matter not, at the stage of the meeting with the Claimant, having been put to or considered by the Admissions Committee or the Council of LSS. The criticisms seem, in part, to flow from the Tribunal's own assessment of the nature and extent of the Claimant's competence, namely, that they thought that his quarterly reviews tended to indicate that it was not the case that he would be incapable of becoming a solicitor, irrespective of the clear evidence to the contrary from Ms Whitelaw and Ms Johnston which evidence was not, as we have noted, rejected.

35. Further, the Tribunal's criticisms of LSS were made in circumstances where LSS were not a party and were not represented. LSS were not 'on trial' and had had no notice of any allegation of failure of duty on their part. The Tribunal had heard no submissions from LSS on the issue of whether or not they had acted as they ought to have done. It is difficult to resist the inference that the Tribunal's degree of sympathy for the Claimant led them to overlook the fact that, had they been given the opportunity of presenting a defence of the position they adopted, LSS may well have had something of some substance to say for themselves.

36. The Tribunal also demonstrate sympathy for the Claimant in that part of their reasons which deal with his discrimination claim. Although they find that there was no evidence that the provision, criterion or practice relied on[1] put the Claimant at a substantial disadvantage given the lack of evidence that the criticisms of his performance arose from his dyslexia, they deal with what would have been their approach if they had done. In particular, they express surprise that the submission advanced for the Claimant by Mr Booth was that any award should be at the lower end of the **Vento** scale and indicate that their award would, instead, contrary to any submission made to them, have been in the top band. There would appear to be no purpose in that part of their reasons other than to underline the sympathy they felt for the position in which the Claimant found himself after having, as they put it "set his heart on becoming a qualified lawyer" (paragraph 239).

37. We were advised of two other matters which do also seem to be indicative of the Tribunal being sympathetic to the Claimant's case. The first is that the Tribunal themselves ordered the production of the Respondent's written disciplinary procedure during the hearing – which they then founded on in their reasons for finding that there was procedural unfairness. They did so

[1] Mr Booth sought to argue that the relevant PCP was the requirement to complete the traineeship within 2 years but that was *not* a PCP imposed by the Respondent; as explained above, it was a requirement of the 2001 Regulations. The Tribunal treated the PCP, however, as being a requirement imposed by the Respondent.

notwithstanding that Mr Booth did not make any motion for its recovery and they do not refer to the matter in their written reasons. We are somewhat surprised at their adopting and not explaining this course of action in circumstances where the Claimant was represented. Secondly, we are advised that the Tribunal themselves produced graphs analysing the Claimant's scores and seeking to indicate what might have happened to them had he been allowed an extension of his training contract. The Respondent's submission was that the degree and extent of the Tribunal's active interest in the pursuit of the case was such as to suggest that they did not maintain an open mind and it is difficult not to agree with it as, in the end of the day, Mr Booth did, on the Claimant's behalf.

Credibility of the Claimant

38. The Tribunal appear to have accepted the Claimant's evidence as being credible and reliable. They make no mention of the substantial attack on his credibility which was made in cross examination. We deal with this in the "Appeal" section below.

The Award of Compensation

39. The Tribunal began by awarding the Claimant loss of earnings in respect of the period between 25 August 2010, when his contract was terminated, and 20 October 2010, the date when his traineeship would, in normal course, have terminated. However, as was conceded, the Claimant had been paid his salary by the Respondent during that period.

40. The Tribunal next awarded the Claimant compensation for loss of earnings during the period 20 October 2010 to 20 April 2011. That was on the basis that if there had been a fair procedure, "a reasonable employer would have agreed to the Law Society's option of extending the traineeship" (paragraph 191) and they took six months as the relevant period, that being what they state a reasonable employer would have considered was appropriate. We observe,

again, that that would have been a matter for LSS to determine, not the training solicitor. Further, they heard no evidence that supported the six month period – the evidence that LSS would have insisted on the Claimant training for a further 18 months if his training contract had been assigned was to the contrary.

41. The Tribunal then awarded the Claimant compensation for past loss of earnings from 20 August 2011 to April 2012 on the basis that he would have qualified as a solicitor in April 2011 and would then have taken four months to find a job – accepting that it would have been difficult to find a job as a newly qualified assistant. They base their calculations on an annual gross salary of £25,000.

42. The Tribunal also awarded the Claimant compensation for 2 years future loss of earnings. They based their award on hypothetical earnings as a solicitor of £25,000 for the first year and increased that sum by £2,000 for the second year.

43. The Tribunal also made an award in respect of loss of statutory rights despite the fact that the Claimant was on a fixed term contract with the Respondent which, they accepted, would have terminated at the end of his traineeship.

Polkey

44. The Tribunal made only a 10% **Polkey** reduction on the basis that they were 90% certain that if the Claimant had been granted an extension to his traineeship then he would have successfully completed it and been signed off as a fit and proper person to be admitted as a solicitor. Their basis for so concluding, as stated in paragraph 183, was that the Claimant had

two law degrees[2], he had been given a marking of 7/9 at the end of his first year[3], that he had been signed off as adequately fulfilling the obligations of the first year of his training contract and that although his first two scores in litigation were poor (4/9), that was how he had started in year one. They do not explain how they felt able to conclude that, despite the detailed analysis and assessment of his year 2 performance by Ms Whitelaw and Ms Johnston, despite the fact that he was in a different department and despite the fact that there was no evidence as to which 'seat' he would have been placed in had he been given an extension, he would have improved sufficiently to alter his employers' view of his level of competence, bearing in mind that it was the Respondent's assessment of him which would determine whether or not he would be signed off.

The Appeal

45. We mean no disrespect to Ms Jones' clear and detailed submission by summarising it but briefly – an approach which, given the absence of any opposing submissions, we consider to be sufficient:

- The appeal was restricted to a challenge to the award of compensation;
- The Tribunal adopted a substitution mindset and determined the issue according to *their* conclusions as to how they would have assessed the Claimant's competence;
- The Tribunal was unduly sympathetic to the Claimant's case and that coloured their approach to his claim for compensation;
- The Tribunal made no reference to the extended and substantial attack on the Claimant's credibility that was mounted in the course of cross examination:

[2] The claimant did *not* have two law degrees; his first degree, from the University of Paisley, was that of Bachelor of Arts and Law.

[3] That mark was, however, not for the whole year – it was a quarterly assessment – and was a mark from which Ms Whitelaw had departed subsequently with her final position being that it ought to have been 5/7, as above noted.

- The Claimant had submitted a job application to 'Impact Arts' dated 22 July 2010 in which he had represented that since April 2007, he had been a volunteer assisting Women's Aid with legal advice and had had contact with service users, giving an address in Irvine as the relevant Women's Aid address whereas the truth was that that was his girlfriend's home address and he had provided her with ad hoc advice without himself having any direct involvement with Women's Aid;
- In the 'Impact Arts' application, the Claimant had stated that he was employed by Abbey National between 2004 and 2007 whereas in another job application - to Cube Housing Association – he had stated he was employed by them between 2002 and 2004;
- In the Impact Arts application, the Claimant stated that his first degree was at level 2:1 whereas in the Cube Housing Association application, he stated that it was at level 2:2.
- In the Cube Housing Association application, the Claimant stated as his reason for seeking employment the end of a fixed term contract whereas the true reason was that he had, by the date of that application, been dismissed;
- In the Cube Housing Association application, he had represented that he was still employed by the Respondent yet, by the date of his application, he had been dismissed;
- He had, in one application, named a particular individual employed by the Respondent as a referee, indicating that he was the Claimant's line manager whereas that person was not his line manager and he had not asked if he would be prepared to give a reference nor whether they were agreeable to disclosure of his address, which he also stated, in full, in the application form.

- The above attack on the credibility of the Claimant was not challenged and, of itself, demonstrated that the Claimant was not a fit and proper person to become a solicitor;
- The Tribunal had no proper basis in the evidence for concluding that the Claimant would have qualified as a solicitor, or for their assessment of the date at which that would have happened or for their conclusion that he would have found employment as a solicitor at the date on which they hypothesised that he would have done so – she recognised the relevance of the dicta Elias P in **Software 2000 Ltd v Andrews and others** [2007] ICR 825, which had been relied on by the Tribunal but it did not mean that it was open to a Tribunal to speculate where there was no basis in the evidence on which it could properly do so;
- The decision as to whether or not to sign off the Claimant as a fit and proper person to be a solicitor would have been for Ms Whitelaw, the Respondent's Chief Solicitor, and it was clear that it was highly unlikely, given her views as to the Claimant's competence (it never having been suggested that her views were other than genuinely held, in implement of her own professional duties) that she would ever have done so – the Tribunal had simply substituted its own view and decided whether or not they would have signed him off;
- The ultimate decision as to whether or not to admit a person as a solicitor is for LSS and the Tribunal had given no consideration to the question of whether or not they would, in the circumstances, have admitted the Claimant as a solicitor;
- Regarding loss as from April 2011, the Tribunal had heard no evidence about the job market for newly qualified solicitors at that time, a market which was known to be a difficult one for legal employment given the impact of the recession. The Tribunal had heard evidence that the Claimant had not even been able to get unpaid work in the legal field for a substantial period; and

- The claimant had applied to LSS for consent to his traineeship being assigned to another firm on the basis that he would be credited with 18 months training as already having been completed but LSS had refused his application; their decision was that if his traineeship was assigned, he would, because of the performance issues that had come to light during his first traineeship, require to complete a further eighteen months of training.

Relevant Law

46. Section 123 of the **Employment Rights Act 1996**, directs tribunals as to how any compensatory award should be calculated:

> **"(1) ……the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in so far as that loss is attributable to action taken by the employer."**

47. Accordingly, tribunals require to consider what would have happened if the employee had not been dismissed at the time that the dismissal occurred. That task often involves an exercise in prediction. Further, if the tribunal is asked to make a **Polkey**[4] reduction, it requires to consider what were the chances of the claimant remaining in the respondent's employment in any event and that will also involve such an exercise.

48. In the course of his discussion in the case of **Software 2000 Ltd v Andrews and others** [2007] ICR 825, Elias J, as he then was, strove to make it clear that the fact that a tribunal required to speculate when arriving at its compensatory award did not mean that it should not do so. However, he stressed, under reference to the judgments of the Court of Appeal in **Thornett v Scope** [2007] ICR 236, and **Gover v Propertycare Ltd** [2006] ICR 1073, that

[4] **Polkey v AE Dayton Services Ltd** [1988] ICR 142: the compensatory award may be reduced to allow for any chance that the claimant would have been dismissed had a fair procedure been followed.

there must be a body of material and reliable evidence on which such prediction is based – in **Thornett**, the court had specifically noted that there was a body of evidence capable of justifying the predictions that had been made by the employment tribunal in that case. In **Gover**, Buxton LJ approved HHJ McMullen QC's statement, when the case was at EAT stage, to the effect that the tribunal's task was "to construct, from evidence, not from speculation, a framework which is a working hypothesis about what would have occurred had the [employer] behaved differently and fairly."

49. The short point for the purposes of the present appeal is that whilst a tribunal must not, as a general rule, shy away from making predictions when considering whether to make a compensatory award and if so in what sum, they are only entitled, for that purpose, to make such predictions as have a proper and identifiable basis in material, credible and reliable evidence. If there is no proper basis for the prediction in the evidence, then it is not open to the tribunal to make it.

Decision

50. We are satisfied that Ms Jones' submissions were well founded and that, for the reasons advanced by her, this appeal should be upheld.

51. By way of preliminary, we would observe that on any reading of the Tribunal's judgment, we find it impossible to resist the conclusion that their starting point was one of having considerable sympathy for the Claimant. We accept Ms Jones' submission that that sympathy does appear to have coloured their deliberations and decision. It should, however, not have played any part in their reasoning and conclusions.

52. We would add the following.

53. At the heart of the Tribunal's reasoning in support of the compensatory award they made was their prediction that it was highly likely (to the extent of a 90% chance) that, had the Claimant not been dismissed, he would (a) have been afforded a six month extension to the traineeship contract between him and the Respondent; and (b) that by the end of that period, the Claimant would have qualified as a solicitor.

54. We are, however, satisfied that there was no evidential basis on which it was open to the Tribunal to make that prediction for the reasons to which we have already alluded. Principal amongst them are that the Tribunal assumed not only that the Respondent would have been prepared to allow such an extension to their fixed term contract with the Claimant but that LSS would also have been agreeable to it and that the outcome would have been his being admitted as a solicitor, without there being evidence to any such effect. The Tribunal appear, rather, to have misunderstood the role and powers of LSS - there is, for instance, no indication of them having had regard to the relevant provisions of the 2001 Regulations (to which we refer above). They also failed to have regard to the evidence of countervailing factors relied on by the Respondent such as (i) that the attack on the Claimant's credibility raised a real question as to whether he was a person who would ever be able to show that he was a fit and proper person to be a solicitor – we accept that the issues focussed on were highly relevant given the fundamental professional requirement that a solicitor must be honest and trustworthy at all times, (ii) that the views of his employers (who would require to sign him off as fit to be admitted as a solicitor) as to his competence, as explained by Ms Whitelaw and Ms Johnston – both of whom had direct knowledge of his work- were that they could not envisage him ever reaching the required level, and (iii) that the decision on whether or not to admit the Claimant as a solicitor was one for LSS, not the Respondent, and their concerns about his first year performance were such that when he applied to them to be credited with already having

completed 18 months training, in the event of his contract being assigned, they refused, telling him that he would have to complete a further 18 months of training.

55. All that the Tribunal appear to have taken into account is that the Claimant improved during his first year. They extrapolate from that - and only that - to take them to their conclusion, at paragraph 183, that they were "ninety per cent certain that if Mr Aziz had been granted an extension to his period of traineeship, he would have successfully completed it, would have been "signed off" as a fit and proper person to be a solicitor and would have qualified as a solicitor at the end of the agreed extension to his training contract." We cannot, however, accept that they had any proper evidential basis for that conclusion. To the contrary, there was evidence that LSS would normally expect to see improvement in the quarterly review ratings but, rather than show improvement, the Claimant's ratings in the two second year reviews that were carried out were worse than his rating at the end of his first year. Further, it cannot, we consider, simply be a matter of looking at numbers. The Tribunal had heard evidence, which was not rejected, from Ms Whitelaw and Ms Johnston, about the very poor quality of his performance throughout their dealings with him during year two. Under references to various examples of his failures, they explained that they held out no hope for improvement and we find it impossible to fathom how, in all the circumstances, the Tribunal concluded that there was. That, of course, is all before account is taken of the other aspects of the countervailing factors to which we have already referred.

56. We are, accordingly, satisfied that the compensatory award made to the Claimant requires to be set aside in its entirety.

Disposal

57. We will issue an order upholding the appeal, setting aside paragraph 1 of the judgment of the Tribunal and substituting for it the following:

> **"That the claimant was unfairly dismissed by the respondent and the respondent shall pay to the claimant a basic award of £402."**