Appeal No. UKEAT/0016/19/RN
UKEAT/0159/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 February 2019
Judgment handed down on
8 March 2019

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

SITTING ALONE

MR Q QU APPELLANT

LANDIS & GYR LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS NABILLA Mallick (Of Counsel) Direct Public Access
For the Respondent	MR DAN NORTHALL (Of Counsel) Instructed by: Walker Morris LLP Kings Court, 12 King Street, Leeds West Yorkshire LS1 2HL

SUMMARY

DISABILITY DISCRIMINATION - Compensation

1. The two Notices of Appeal and Cross-Appeal together raised the following issues for determination in this case:

(i) Whether the Employment Tribunal erred in law by applying a balance of probabilities rather than a loss of a chance approach to the question of future loss and/or whether there was a perverse finding of fact that vitiates the assessment of future loss;

(ii) If so, whether the Employment Tribunal's approach to pension loss, bonus payments and other benefits was in error.

(iii) Is the Claimant entitled to argue that there was a separate error by the Employment Tribunal in relation to the calculation of pension loss because it adopted the employer's contribution method and/or that this aspect of the Remedy Judgment is inadequately reasoned; and if so, are these grounds made out?

(iv) Whether the Employment Tribunal erred in failing to address or award any compensation for a quantifiable holiday loss of two days per annum.

(v) Whether the Employment Tribunal erred in refusing to reconsider its earlier failure to award a **Simmons v Castle** and inflation uplift to the injury to feelings award.

(vi) Whether the Employment Tribunal erred on reconsideration by awarding an ACAS uplift having previously concluded that no such award should be made.

2. On the first two issues, the Employment Appeal Tribunal held detailed findings of fact about the Claimant's position on the job market at the date of the Remedy Hearing and about his performance, ability and career history in the context of the Respondent's employment were permissibly made. Having made those findings, the Employment Tribunal went on to conduct the difficult speculative exercise of assessing as best as it was able on all the evidence available, what is likely to have happened absent the discriminatory dismissal. It did so by reference to (i) the Claimant's likely ongoing career and career prospects at the Respondent had dismissal not occurred; and (ii) the point at which he was likely to obtain equivalent employment. On this basis full loss after giving credit for earnings received from temporary employment and from Cosworth was awarded for the period from dismissal to the Remedy Hearing; and a further period of three years' future loss (on a partial basis) was awarded from the date of the Remedy Hearing. There was no legal error (nor any perversity) in the Employment Tribunal's approach which was consistent with the approach set out in **Chagger** at paragraphs 57 and 67 above.

3. The Claimant was not entitled to challenge the Employment Tribunal's decision on pension loss having withdrawn that part of the ground of appeal. In any event, the Employment Tribunal made no error in dealing with pension loss as it did. Nor was there any error of law made out in relation to holiday loss or the injury to feelings award.

4. The Employment Tribunal did not err in refusing to reconsider its earlier failure to award a **Simmons v Castle** and inflation uplift to the injury to feelings award as this ground was not pleaded in the application for reconsideration. Nor was it an error in any event, for the

Employment Tribunal not to apply the **Presidential Guidance** upon reconsideration, as the remedy hearing pre-dated the **Presidential Guidance**.

5. So far as the ACAS uplift made at the Reconsideration Hearing is concerned, it was open to the Employment Tribunal, in the interests of justice to review its earlier decision, and its discretion was not arguably exercised in a **Wednesbury** unreasonable or irrational manner. The Tribunal realised that it made an error in concluding that the award for aggravated damages effectively extinguished any potential uplift award it might otherwise have made. That is because it realised that the aggravated damages award reflected the behaviour of one manager only but its liability decision criticised the procedures adopted by other managers responsible for the PIP, grievance and disciplinary process. In those circumstances the Tribunal was amply entitled to conclude that the interests of justice required reconsideration of that decision. Moreover, the Tribunal reached a conclusion that was again amply open to it in deciding to award a 10% uplift overall. There was no wholesale failure of process here; procedures were adopted but failed to comply with provisions of the relevant Codes. There was no error of law in the Tribunal's approach and conclusion and accordingly the Respondent's cross appeal failed and was dismissed.

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THE HONOURABLE MRS JUSTICE SIMLER DBE

1. These Appeals and the Cross-Appeal concern aspects of a judgment on remedy of the Cambridge Employment Tribunal (comprised of Employment Judge Sigsworth, Ms Carvell and Mr Briggs) promulgated on 6 June 2017 ("the Remedy Judgment") and a reconsideration decision given by Employment Judge Sigsworth on 12 April 2018 following an Oral Hearing.

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2. By the Remedy Judgment, the Employment Tribunal held, among other things, that the Claimant was not entitled to career long loss and his future earnings loss should be limited to a period of three years from the date of the Remedy Hearing (which concluded on 1 March 2017). The Claimant challenges this conclusion as in error of law, albeit no longer contending for career long loss; and argues that it affects a number of heads of loss, including bonus and pension, in addition to future loss of salary. There is also a free-standing argument about the Employment Tribunal's approach to pension loss (though the Respondent contends that this ground of appeal was withdrawn at a Preliminary Hearing before Soole J). The Claimant also challenges the Employment Tribunal's failure to address the holiday loss claim he made.

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3. Reconsideration was refused in all but a few respects. Neither side sought written reasons for the Reconsideration Decision and although I have two sets of short notes of what was said, made by counsel and solicitor for the Respondent, I do not have available any written reasons for that decision. By its Reconsideration Decision, the Employment Tribunal refused to reconsider its injury to feelings award. That is challenged by the Claimant on the basis that there was a failure to apply a **Simmons v Castle** uplift and uprating for inflation to the award for injury to feelings, and this should have been reconsidered. Secondly, the Employment Tribunal reversed its earlier holding by making an ACAS uplift to the award pursuant to s.207A of the **Trade Union and Labour Relations Consolidation Act 1992** assessed at 10%. This is challenged by the Respondent on three grounds.

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4. Of the twelve grounds of appeal against the Remedy Judgment originally pursued, a number were withdrawn (wholly or in part) and others dismissed at a Preliminary Hearing on 29 October 2018 by Soole J. He gave permission to proceed on a limited basis as follows:

> "This appeal be set down for a full hearing in relation to Grounds 3, 6, 7 (excluding paragraph 61), 8, 9 (in respect of holiday rights) and 11."

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There is considerable overlap in the points raised by these grounds and as Soole J observed in granting permission to proceed, the central challenge is to the Employment Tribunal's approach and conclusion as to the appropriate period for future loss of earnings and benefits, including pension, bonus and holiday benefits. Since that Order, there are additional grounds raised in relation to the Reconsideration Decision.

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5. Accordingly, it is common ground (having regard to the two Notices of Appeal and the Cross-Appeal) that the following issues arise for decision:

(i) Whether the Employment Tribunal erred in law by applying a balance of probabilities rather than a loss of a chance approach to the question of future loss and/or whether there was a perverse finding of fact that vitiates the assessment of future loss;

(ii) If so, whether the Employment Tribunal's approach to pension loss, bonus payments and other benefits was in error.

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(iii) Is the Claimant entitled to argue that there was a separate error by the Employment Tribunal in relation to the calculation of pension loss because it adopted

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the employer's contribution method and/or that this aspect of the Remedy Judgment is inadequately reasoned; and if so, are these grounds made out?

(iv) Whether the Employment Tribunal erred in failing to address or award any compensation for a quantifiable holiday loss of two days per annum.

(v) Whether the Employment Tribunal erred in refusing to reconsider its earlier failure to award a **Simmons v Castle** and inflation uplift to the injury to feelings award.

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(vi) Whether the Employment Tribunal erred on reconsideration by awarding an ACAS uplift having previously concluded that no such award should be made.

6. Representation is as it was below. For the Claimant, Ms Mallick of counsel appears. The Respondent is represented by Mr Northall of counsel. I am grateful to both of them for their assistance and the clarity of their submissions. As is clear, I shall refer to the parties as they were below for ease of reference.

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7. At the hearing I gave permission to the Claimant to rely on a Supplementary Bundle consisting of a number of documents that had been available at the Remedy Hearing and some provided only at the Reconsideration Hearing. I was also provided with copies of the third and fourth versions of the Claimant's Schedules of loss. Following the hearing, on 21 February 2019 at 2.18pm, the Claimant emailed the Employment Appeal Tribunal setting out a series of detailed points he invited consideration of and attaching a copy of the witness statement

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produced as the Remedy Hearing (a copy was in fact included in the Supplementary Bundle). It caused the Employment Appeal Tribunal to forward the email to the Respondent (which had not been included in the circulation list). Although I have read and considered the points made, the Claimant must understand that my function on appeal is limited to correcting errors of law. I cannot simply reconsider the merits of the various heads of loss and claims made.

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Background facts

8. Given that the issues raised are limited to the Employment Tribunal's approach to the assessment of loss, it is unnecessary to deal in detail with the history of the Claimant's employment by the Respondent or to set out the findings made in the Liability Judgment. It is sufficient at this stage to record the following.

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9. The Claimant was employed as a Senior Electronics Design Engineer from 16 May 2011 until his dismissal with effect from 25 November 2014 on grounds of performance capability. The Tribunal found that the Claimant was improving his performance at the point at which he was dismissed and had improved all the way through the process, notwithstanding that performance concerns remained. The Tribunal held that the Respondent's managers did not consider the improvements or give proper consideration to the possibility of redeployment, demotion or reassignment. The Tribunal concluded that dismissal in the circumstances was unfair and that the dismissing officer did not honestly believe the Claimant to be sufficiently

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incapable or incompetent to justify dismissal on this ground. There were other flaws in the process, including specific flaws in the disciplinary process leading to dismissal (to which I shall return below in the context of the ACAS uplift issue). The Tribunal dismissed the claims of unlawful direct race discrimination and harassment but concluded that the dismissal decision was an act of unlawful victimisation as was the decision not to award pay increases and to give reduced bonuses.

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10. By the Remedy Judgment, having heard evidence from the Claimant, Mrs Lisa Graves a Senior HR Adviser for the Respondent and considered a number of volumes of documents

including detailed and lengthy schedules and counter schedules of loss, the Employment Tribunal made the following relevant findings of fact.

11. Following his dismissal on 2 November 2014, the Claimant was signed off as unfit for work for several months and was on anti-depressant medication. Medical evidence available at the Remedy Hearing was conflicting as to whether the Claimant continued to experience depression and if so to what extent. The Claimant's own evidence at that hearing was that he thought he would be back to full health in three to four years.

12. The Claimant found temporary work between April and August 2015. After August 2015 he applied for nearly 150 jobs and registered with 39 Employment Agencies. The jobs were located in different parts of the UK and abroad. He attended eight face-to-face interviews and four telephone interviews.

13. In April 2016 (so about seven months later) the Claimant obtained a permanent position as Senior Electronics Engineer with Cosworth Electronics Ltd ("Cosworth") in Cambridge, with a salary of £45,000 per annum and pension based on a 1% contribution from his employer. Had he remained employed by the Respondent his salary would have increased to £51,300 with effect from 1 July 2016, so there was a continuing partial loss of salary. In addition, the Claimant had no bonus entitlement with Cosworth, whereas his contract with the Respondent included an annual bonus subject to performance and other criteria.

14. Although the Claimant's contract of employment with Cosworth provided for a five-day working week and had not been varied, at the time of the Remedy Hearing, the Claimant was working only four days a week. The Tribunal found this odd and said it was inadequately explained. It concluded that he would return to a five-day working week once the proceedings were behind him.

15. The Tribunal found the Claimant's performance with the Respondent was not such as would have led to his promotion. Although there were flaws in the PIP process which was motivated by unlawful considerations, the Tribunal held that there were genuine performance concerns in relation to the Claimant and that demotion was a possible alternative to dismissal. Moreover, the Tribunal held that the Respondent no longer had any Principal Engineer posts to which the Claimant could have been promoted.

16. The Tribunal referred to what it described as the Claimant's chequered employment history: he had five jobs in six years before commencing employment with the Respondent. No previous employment had lasted for longer than two years. The Tribunal accepted the evidence of Mrs Graves about turnover of staff and in particular that typically, Electronic Engineers move on from the Respondent after five years in order to further their careers. The Tribunal found that no Senior Electronic Engineers, including those in the Claimant's team, had been promoted during his employment, no doubt because there was no longer any promotion role for Senior Electronics Engineers at the Respondent.

17. The Tribunal found the Claimant would not have been promoted at the Respondent in any event. Moreover, since the Claimant started his employment with the Respondent in 2011, on the law of averages he would have been expected to move on in 2016, particularly if there was no prospect of promotion.

18. The factual evidence given by Lisa Graves was largely uncontested. The Claimant received a pay rise in January 2012 and there were pay increases more broadly in January 2013

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of 3.5% and January 2014 of 1.5% with a pay freeze from then until 1 October 2015 when a pay rise of 2.5% was awarded. On 1 July 2016 there was a further 2.5% pay rise. The Claimant did not get the benefit of these pay rises but this was because of unlawful victimisation. Taking all these pay rises into account, the Tribunal found that his salary as at 1 July 2016 would have been £51,300 per annum.

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19. In relation to pension, the Tribunal recorded the fact that the Respondent had a defined contribution scheme and contributed 9% per annum. The Tribunal accepted calculations provided by the Respondent in this regard. Since the scheme was a defined contribution scheme, the Employment Tribunal accepted that the Claimant's loss is the loss of the Respondent's contributions to his pension.

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20. In relation to bonus, at the Respondent this was calculated as a percentage of employee salary, usually 5% but exceptionally up to 8% and was based on company financial achievement and personal incentive achievement.

21. I shall deal with the approach of the Employment Tribunal to the assessment of compensation and set out its conclusions, when I come to address the relevant issue to which it relates.

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22. Against that background, I turn to address the issues I have identified as arising in these appeals and cross-appeal.

Issue one: the approach to the question of assessing future loss

23. In relation to future loss, at paragraph 18(1) and (2) the Employment Tribunal held as follows:

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> "18. Having regard to our findings of fact, applying the appropriate law, and taking into account the submissions and schedules of the parties, we have reached the following conclusions: -
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> > (1) The first point to note is that the Claimant has produced four schedules of loss over time. The first schedule was submitted on 5 May 2015, and claimed loss only to the end of 2015, with no suggestion of career loss nor even loss for an extended period. The second schedule of loss was submitted on 7 September 2015, when the Claimant had not obtained permanent employment.
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> > It contained the following statement: -
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> > "The Claimant believes it will take two years to obtain work of the same earning capacity as his previous employment, although he is willing to undertake casual work."
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> > However, by the time that the Claimant submitted his third schedule of loss, on 6 January 2017 he had of course won part of his case at the liability hearing. He now submitted a claim for a career loss until retirement at the age of 70, in the sum of £866,000. His total claims were in the region of £1.5 million. That schedule was updated in the fourth schedule of 2 February 2017. It seems to us that there has been a certain opportunistic ramping up of the Claimant's claims.

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> (2) We conclude that the Claimant is not entitled to compensation for career loss. This is not one of those rare cases referred to in **Wardle.** The Claimant now has a similar permanent job to the one that he had at Landis and Gyr, that of senior electronics engineer. His employment may or may not be as secure as it was at Landis and Gyr, but it is difficult to reach any conclusion on this. We do not know enough about the circumstances of the Claimant's current employer, Cosworth. However, we do take into account the Claimant's employment history, which was that he only had two years maximum in any job before he arrived at Landis & Gyr, and had five jobs in six years. We note Mrs Graves' evidence that electronics engineers tend to move on after five years at Landis & Gyr in order to further their careers. This is quite likely to have happened with the Claimant as he would not have been promoted at Landis & Gyr as there was no promotion opportunity for him there. Further, we note that the Claimant himself said that he would be back to full health within three to four years, and therefore could be expected to find commensurate employment with that at Landis & Gyr. We find that the Claimant's evidence as to why he was now only working four days per week unpersuasive, and not definitively linked to any health issues. We really cannot say why that is the position, and we believe that it unlikely to continue that way for long. We believe that, once proceedings are concluded, the Claimant will make a good and quick recovery and the medical evidence suggests that the prognosis is good. There are jobs out there, and the Claimant has not applied for any since getting his job with Cosworth. Although we do not necessarily blame him for this, the fact is that, as he had not tested the water, he cannot say that he cannot find better employment than he has at Cosworth. At one time the Claimant's own assessment was that he would fully mitigate his loss within two years of the effective date of termination. That concession is of evidential value. Doing the best we can, we conclude that the Claimant will be able to fully mitigate his loss in three years' time and should be compensated on that basis. We therefore award him three years loss of net earnings and benefits from the date of remedy hearing, as well of course as the uncontested past financial loss."

24. Ms Mallick contends that the Employment Tribunal wrongly took a balance of probabilities approach to the assessment of future loss and in doing so, placed undue weight on the fact that the Claimant had provided the Employment Tribunal with updated schedules of loss that moved from a position of claiming two years' future loss to a position of claiming long-term or career long loss. The Employment Tribunal regarded this as "opportunistic ramping up" of the Claimant's claims, but that was wrong and unfair and led the Employment Tribunal to close its mind to the proper analysis of future loss. In fact, the updated schedules merely reflected the change in the Claimant's circumstances over time: originally, he was optimistic about obtaining suitable alternative employment, but when that proved difficult, he became less optimistic and his loss expanded to reflect that. Ms Mallick relies on **MoD v Cannock** [1994] ICR 918 at 951 and **Abbey National v Chagger** [2010] ICR 397 at paragraphs 69 to 72, as reflecting the correct approach, namely to consider what the chance was of the Claimant obtaining suitable employment at a remuneration package equivalent at least to that offered by the Respondent and when that was likely to happen. She accepts this was a speculative exercise. She also accepts that it was open to the Employment Tribunal to conclude that salary loss might be extinguished at some point in the future, but contends that the Employment Tribunal should have found that pension loss would have continued for longer given the generosity of the Respondent's pension contribution rate. She relies on **Brentwood**

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Bros (Manchester) Ltd v Mrs Shepherd [2003] EWCA Civ 380 where she submits that approach was being adopted by a Tribunal and upheld by the Court of Appeal.

25. There is also a perversity challenge to this part of the Remedy Judgment (ground 11). It is said that the Employment Tribunal made an error of law, when it made a finding of fact about the Claimant not applying for other jobs having obtained permanent employment with Cosworth. Ms Mallick submits that there was evidence of 300 vacancies applied for by the Claimant who was working in a specialist field and had recently tested the waters and was in the best position to say that he could not find better employment than he had obtained with Cosworth. All of the evidence should have been considered in assessing future loss but the Employment Tribunal perversely failed to have regard to the best evidence available and accordingly it was perverse for the Employment Tribunal to conclude that the Claimant would obtain an equivalent job at an equivalent salary when there was no evidence to suggest bonus and/or pension contributions would ever be equivalent. Moreover, by finding that the Claimant would have changed jobs, the Employment Tribunal failed to consider the obstacles in his way in obtaining a job with equivalent salary and pension provision, ignoring the Claimant's evidence about this and the fact that other specialist Senior Engineers like himself had remained with the Respondent on a long-term basis.

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26. Those submissions are resisted by Mr Northall. In summary, Mr Northall submits the Tribunal made clear findings of fact and identified factors it considered relevant to the period of future loss, including questions of promotion, the Claimant's own career history and the availability of a promotion role at the Respondent. The three-year period for future loss was the product of the Tribunal balancing the various factors in the exercise of its discretion to produce a period which it considered provided fair compensation. He submits that there was nothing wrong with the Tribunal's approach. It did not adopt a balance of probabilities test and its approach is consistent both with **Chagger** and the approach identified by the Court of Appeal in **Wardle v Credit Agricole Corporate and Investment Bank** [2011] ICR 1290. Further, as to perversity, he submits that the Notice of Appeal pleads a narrow perversity ground only, identifying a single fact said to be perverse, when that fact was uncontroversial and obviously not perverse.

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27. I have concluded that the Employment Tribunal made no error of law in its approach to and assessment of future loss. My reasons follow.

28. The authorities show that it is a rare case where it is appropriate for a Tribunal to assess compensation over a Claimant's career lifetime, as the Claimant invited the Employment Tribunal to do. The usual approach is to assess loss up to a point where a Tribunal is satisfied, having regard to all the uncertainties and vagaries of life, that the individual is likely to get an equivalent job. The speculative nature of the exercise means that it is possible that the individual will in fact get an equivalent job sooner or might be unlucky and take longer to do so. Thus, the Tribunal's prediction will not necessarily be right, but those outcomes are inevitably factored into its assessment. Since the calculation of compensation for future loss is both speculative and predictive, there is no certainty about what will happen, but rather a range of possibilities and chances of different things occurring. The assessment is not a question of fact but a question of carrying out an assessment on the basis of the Tribunal's best estimate about the future.

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29. In **Abbey National v Chagger** by the time compensation came to be assessed, Mr Chagger had been out of a job for many years by the time of the remedy assessment. The

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evidence was that but for the unlawful discrimination against him, he would have remained at Abbey National. The Employment Tribunal found every effort had been made by him to obtain employment in his chosen field but the manner of his dismissal had led to stigma in the eyes of other employers. The Tribunal found that he took reasonable steps to mitigate his loss by going into a different field, teaching, and the evidence as a whole entitled the Tribunal to conclude that he had suffered permanent career loss for which he was entitled to be compensated. As Elias LJ explained.

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> "69. …… The task is to put the employee in the position he would have been in had there been no discrimination; that is not necessarily the same as asking what would have happened to the particular employment relationship had there been no discrimination. The reason is that the features of the labour market are not necessarily equivalent in the two cases. The fact that there has been a discriminatory dismissal means that the employee is on the labour market at a time and in circumstances which are not of his own choosing. It does not follow therefore that his prospects of obtaining a new job are the same as they would have been had he stayed at Abbey. For a start, it is generally easier to obtain employment from a current job than from the status of being unemployed. Further, it may be that the labour market is more difficult in one case compared with another. For example, jobs may be particularly difficult to obtain at the time of dismissal and yet by the time they become more plentiful, when in the usual course of events Mr Chagger might have been expected to have changed jobs had he remained with Abbey, he will have been out of a job and out of the industry for such a period that potential employers will be reluctant to employ him. In addition, he may have been stigmatised by taking proceedings, and that may have some effect on his chances of obtaining future employment.
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> 70. The result of these factors is that the discriminatory dismissal does not only shorten what would otherwise have been Mr Chagger's period of employment with Abbey; it also alters the subsequent career path that might otherwise have been pursued.
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> 71. It follows that in our judgment the period during which Mr Chagger would have remained in employment with Abbey had there been no discrimination is irrelevant given that this is a case where he would only leave for another job. The employment tribunal concluded that Mr Chagger would not have left Abbey unless and until he was able to move to a post at least as favourable as his Abbey job. In our view that is a wholly realistic assumption; few employees voluntarily leave employment for a worse paid job. We are not sure that Abbey were contending otherwise."

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30. The result on the facts of that case was that the proper assessment of loss was to be determined by asking when Mr Chagger might expect to obtain another job at an equivalent salary to his Abbey National salary and to fix his loss by reference to that period. The best evidence available to answer that question was provided by the efforts he had made to obtain alternative employment. The Court of Appeal also made clear, following well established principles, that when looking at future loss the assessment must be made by focusing on the degree of chance and not on a balance of probabilities approach; in other words, it would be

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wrong to conclude that something was more likely than not to have happened and then to deem it to have happened rather than considering the chance of it happening and applying a percentage factor to reflect that chance.

31. Elias LJ also recognised that in many cases the appropriate period for future loss would be fixed by reference to different considerations. At paragraphs 66 and 67 he held:

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> "66. ….. We would accept that, in many cases, the starting point in the case of a discriminatory dismissal will be the period for which the employee would have been employed by the discriminating employer. For example, if the employer can show that the dismissal would have occurred in any event after a specific period of time, for example because of redundancies or the closing down of the business, then this will normally set the limit to the compensation payable. If there is a chance as opposed to a certainty of this occurring, that should be assessed and factored into the calculation of future loss as the answer to the first question indicates. In such a case, the employee would have been on the labour market in any event once the employment had ceased, and the usual effect of the discriminatory dismissal would simply have been to put him on the labour market earlier than would otherwise have been the case.
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> 67. Similarly, there may be circumstances – although in practice they will be rare – where the evidence is that the employee would voluntarily have left in the near future in any event, whether or not he had another job to go to. This could occur, for example, if the employee is dismissed shortly before he was due to retire, or if he had already given notice of resignation when the discriminatory dismissal occurred. It would be wrong to award compensation beyond the point when he would have left because there would be no loss with respect to any subsequent period of employment."

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32. This case is factually quite different from **Abbey National v Chagger**. The findings here show:

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(i) Unlike Mr Chagger, although the Claimant had difficulty in obtaining suitable alternative employment for a period following his dismissal, in April 2016 he succeeded in obtaining a permanent position as Senior Electronics Engineer albeit with a lower remuneration package. That employment was ongoing at the date of the Remedy Hearing. There was insufficient evidence for the Employment Tribunal to conclude whether it was or was not as secure as his employment with the Respondent.

(ii) There is no finding that the Claimant suffered any sort of stigma damage such as was recognised in **Chagger**.

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(iii) Further, given the Respondent's genuine performance concerns in his case, the Employment Tribunal expressly found that demotion would have been possible as an alternative to the discriminatory dismissal.

(iv) In any event the Claimant's performance was found to be not such as would have meant he would have been promoted by the Respondent.

(v) Further, the post of Principal Engineer into which the Claimant might have been promoted, no longer existed at the Respondent.

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33. The Employment Tribunal made detailed findings of fact about the Claimant's position on the job market at the date of the Remedy Hearing and about his performance, ability and

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career history in the context of the Respondent's employment. Those findings of fact are supported by evidence and were undoubtedly open to the Employment Tribunal. Having made those findings, the Employment Tribunal went on to conduct the difficult speculative exercise of assessing as best as it was able on all the evidence available, what is likely to have happened absent the discriminatory dismissal. It did so by reference to (i) the Claimant's likely ongoing career and career prospects at the Respondent had dismissal not occurred; and (ii) the point at which he was likely to obtain equivalent employment. On this basis full loss after giving credit for earnings received from temporary employment and from Cosworth was awarded for the period from dismissal to the Remedy Hearing; and a further period of three years' future loss (on a partial basis) was awarded from the date of the Remedy Hearing. I can detect no legal error in the Employment Tribunal's approach which was consistent with the approach set out in **Chagger** at paragraphs 57 and 67 above. There is certainly nothing to suggest an erroneous balance of probabilities approach was adopted.

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34. So far as pension and bonus are concerned, there are two points to make. First, it was for the Claimant to prove his case on remedy; the onus was on him. The Employment Tribunal was plainly not satisfied on the evidence that bonus and pension entitlements offered by other employers are less generous than those offered by the Respondent so as to justify a longer ongoing future partial loss in either particular respect. While the Claimant produced job vacancy adverts that listed salary, there is nothing to indicate whether and if so at what level pension and/or bonus were available. There was, for example, no survey of employers in the Electronic Engineering sector and the provision made for pension and/or bonus. Secondly, and in any event, the Employment Tribunal concluded that the Claimant was likely to have left the Respondent irrespective of the dismissal, to further his career in the absence of promotion opportunities for him at the Respondent. There was therefore no further ongoing loss beyond that likely point. Having concluded that this was a case where it was likely that the Claimant's employment would come to an end for non-discriminatory reasons in any event, the Tribunal was entitled to factor that into its calculation of loss and apply it across the board to all heads of loss. It did so without error.

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35. Perversity is a high hurdle. Looking at the Tribunal's Remedy Judgment as a whole, I find nothing to suggest that the Tribunal made a perverse finding or ignored relevant evidence. Accepting the evidence of Lisa Graves does not entail that relevant evidence was ignored: it was for the Employment Tribunal to assess all the evidence and decide which evidence to accept. Furthermore, as indicated above the Employment Tribunal had material setting out many vacancies in the Senior Electronics Engineer sector. The material showed a range of salaries from £40,000 to £55,000 and in some cases £60,000 and £65,000 a year. The vacancies listed do not refer to pension (or bonus) at all. That does not mean pension was not available and tells one nothing about the pension provision actually available. Ms Mallick was unable to point to any document showing that a 9% employer pension contribution was unusual in the sector or that the Respondent's pension provision was particularly generous.

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36. This ground accordingly fails.

Issue 2: If the Claimant is correct about issue 1, whether the Employment Tribunal's approach to pension loss, bonus payments and other benefits was in error.

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37. Given my conclusions on the first issue, this issue falls away.

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Issue 3: Is the Claimant entitled to argue that there was a separate error by the Employment Tribunal in relation to the calculation of pension loss because it adopted the employer's contribution method and/or that this aspect of the Remedy Judgment is inadequately reasoned; and if so, are these grounds made out?

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38. In relation to pension loss, the Employment Tribunal assessed this on the basis of the employer contributions to the Respondent's defined contribution scheme. It said that it did not make any complex pension calculations and held that the Claimant would have to give credit for pension contributions received in his current employment. It is implicit that the Employment Tribunal allowed for continuing pension loss limited to three years from the date of the Remedy Hearing.

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39. In the Reconsideration Decision, the Employment Tribunal commented that the Claimant had not provided persuasive evidence that he could not have secured suitable alternative employment in future with a contribution level of 9% from a new employer. It said that the Claimant's own evidence hardly touched on this question and that he failed to provide any clear evidence regarding pension contributions in this sector. The Tribunal observed that it was for the Claimant to prove his loss.

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40. The Claimant contends (by ground seven, at paragraph 61 of the Notice of Appeal) that the Employment Tribunal made an error of law in stating "we do not make any complex pensions calculations". However, as Soole J's Order reflects, paragraph 61 was withdrawn, and leave to pursue only the remainder of ground seven was granted. Ms Mallick argues that the Order is in error. The Respondent resists that, submitting that the issue has been disposed of and cannot be reopened. It seems to me that I cannot go behind Soole J's Order. No application for review was made (as it could have been). The Order therefore stands. In any event, there would have been no merit in this ground and the Claimant is not therefore prejudiced. The Employment Tribunal eschewed making "complex pension calculations" because the Claimant's pension scheme was contributions based. It was not a defined benefit scheme. The Respondent's contributions were no doubt capable of straightforward calculation over a further three-year period, and that reflects the loss suffered by the Claimant. The reasons given by the Employment Tribunal were adequate in this context.

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41. As for the remaining arguments, Ms Mallick submits that the evidence demonstrated that the Respondent offered the most generous benefits in the market with a 9% pension contribution and that before rejecting the Claimant's case on this issue, close market analysis was required and careful reasons should have been provided. Neither was done. Instead the Employment Tribunal said it would not make any complex pension calculations. That is not **Meek** compliant.

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42. I have already dealt above with the essential complaint made by Ms Mallick in relation to this head of loss, namely that the Tribunal ought to have ordered pension loss for a period that extended beyond the three-year period fixed for future loss on the basis that the level of employer contribution was particularly generous and would be difficult to replace.

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43. I have struggled to identify an error of law in relation to her remaining points. Once it is accepted that the Employment Tribunal was entitled to assess future loss by reference to the three-year period, it seems to me that the Employment Tribunal was equally entitled to deal with pension loss on that basis. That is not to say that was the only approach open to the Employment Tribunal. In principle it was open to the Employment Tribunal to make a different

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award (even without it having been formally pleaded). However, in this case, in addition to the conclusion that the Claimant was likely to obtain fully equivalent employment within three years from the date of the Remedy Hearing, the Employment Tribunal also concluded that it was likely that the Claimant would leave the Respondent's employment in any event, and would therefore lose the benefit of the Respondent's pension provision.

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44. I am quite unable to say that in adopting the approach it did, the Employment Tribunal erred in law. Moreover, to the extent that perversity arguments are advanced in this context, the Claimant has not provided notes of the evidence against which the perversity arguments can be tested. There are various assertions in the skeleton argument about the evidence available but these are not accepted by the Respondent nor are they agreed. Indeed, the Claimant has not sought to comply with the **Employment Appeal Tribunal Rules** in relation to perversity appeals at all.

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Issue 4: whether the Employment Tribunal erred in failing to address or award compensation for a quantifiable holiday loss of two days per annum

45. This is a short point. The Claimant contends that upon completion of five years' service with the Respondent, he would have been entitled to two days' extra holiday each year. Ms Mallick submits that this loss ought to have been taken into account in calculating his future financial loss because it was a benefit that could be quantified financially and should reasonably have been treated as forming part of his compensatory award. Ms Mallick submits that the loss was quantified at £200 per day, and although not claimed in any of the schedules of loss, was expressly claimed on the penultimate page of an undated document she handed up at the end of the Remedy Hearing (C3). She relies on **Tradewinds Airways Ltd v Fletcher** [1981] IRLR 272 as authority for this head of loss. Mr Northall was not in a position to dispute that C3 was handed to the Employment Tribunal as Ms Mallick submits but resists this ground of appeal.

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46. The Employment Tribunal did not address this part of the claim in the Remedy Judgment. It should have done so but in my judgment its failure makes no material difference to the compensatory award for the following reasons.

47. In the Reconsideration Decision, the Respondent's notes record the Employment Tribunal's rejection of this claim on the basis that the Claimant was on an annual salary and there was no additional intrinsic value in this claim. It seems to me that is a view the Employment Tribunal was entitled to take and accordingly it was entitled to refuse to alter its original decision.

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48. **Tradewinds** is not authority for the proposition that a Claimant ought to be compensated for lost holiday independently of any salary loss as Ms Mallick sought to argue. The point was conceded in that case; and the Court of Appeal's observations are not encouraging of such claims.

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49. In any event, the difference between the Claimant's salary with the Respondent and his salary at Cosworth was being fully compensated for and includes holiday entitlement.

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50. To the extent that the Claimant might have had to work for two additional days to receive the same salary at Cosworth than he would have received from the Respondent from 2016 (when he would have accrued five years' service), the notional loss is significantly less than the figure of £200 per day claimed. No attempt to quantify this notional loss was made.

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Accordingly, in my judgment, the Employment Tribunal was entitled to refuse to alter this part of its decision, having taken the view that the claim for £200 per day was not made out.

Issue 5: whether the Employment Tribunal erred in refusing to reconsider its earlier failure to award a Simmons v Castle together with an inflation uplift to the injury to feelings award

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51. There is some uncertainty about the scope of this particular issue. The challenge to the Employment Tribunal's approach in the Remedy Judgment to the injury to feelings award was dismissed at the Preliminary Hearing as raising no arguable error of law (see paragraph 2 of the Order made by Soole J at the Preliminary Hearing). However, Ms Mallick submits that the issue is live in relation to the Reconsideration Decision and is based on the failure by the Employment Tribunal to reconsider this aspect of its decision. She submits that it was in the interests of justice for the Employment Tribunal to have done so.

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52. The Respondent's notes of the reasons given by the Employment Tribunal for refusing to reopen the injury to feelings award is that this issue formed no part of the written application for reconsideration. Ms Mallick accepts that is the case. She sought to amend the written application for reconsideration but that was refused. She submits that notwithstanding this procedural problem, this was a matter that should have been considered by the Employment Tribunal of its own motion.

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53. I disagree. Notwithstanding the informality of some aspects of Employment Tribunal proceedings, pleadings form a necessary part of ensuring that a proper limit is kept on proceedings and fairness to both sides in having notice of the other side's case is achieved. A written application for reconsideration was made. Grounds were identified by the Claimant. The Respondent responded to those grounds. The Employment Tribunal was undoubtedly entitled to limit the Reconsideration Hearing to those identified grounds and made no arguable error of law in doing so here.

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54. In any event, I consider, in agreement with Mr Northall, that the Employment Tribunal made no error of law and applied the law as it stood and as was required of it in March 2017. The Claimant's Schedules of Loss referred to the **Simmons v Castle** uplift but made no mention (unsurprisingly in the circumstances) of any requirement to uplift further for the effects of inflation. At paragraph 17 of the Remedy Judgment the Employment Tribunal said the following:

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> "the well-known Vento bands of compensation for injury to feelings were updated **in Da'bell v NSPCC [2010] IRLR 19. EAT** and further updated in **Simmons v Castle [2012] EWCA Civ 1039, CA**. The middle band is now between £6600 £19,800."

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In relation to personal injury the Employment Tribunal identified as the appropriate band, the range of £5500-£17,500, expressly stating that this included the **Simmons v Castle** 10% uplift. In relation to injury to feelings, the Employment Tribunal referred to the Claimant's evidence about "his seriously hurt feelings caused by the unlawful victimisation by Mr Lee in the PIP process over a quite lengthy period of time of at least 13 months." The Employment Tribunal concluded that there was high-handed treatment of the Claimant and that the conditions for an aggravated damages award were made out. It did not separate out the ordinary injured feelings award and the aggravated damages award but instead made an "all in award that is at the top of the middle **Vento** band or at the bottom of the top band – namely £21,000."

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55. The Claimant originally challenged this award on the basis that the Employment Tribunal erred in failing to apply the **Simmons v Castle** 10% uplift to injury to feelings part the of the award as required by **De Souza v Vinci Construction UK Ltd** [2017] EWCA Civ 879. Ms Mallick would have relied on the Court of Appeal's conclusion that the uplift applies to both personal or psychiatric injury and injury to feelings, and she would have submitted also, that there was no uprating for inflation in accordance with **Presidential Guidance** issued after that case.

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56. Following **De Souza** and applying the 10% uplift to the **Vento** bands (as adjusted for inflation in accordance with **Da'Bell**) results in a middle band with a range of £6600-£19,800 as the Employment Tribunal found. On that basis, the Employment Tribunal plainly had regard to the appropriate increase in making an award of £21,000, which included an element of aggravated damages.

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57. It is true, as Ms Mallick would have submitted that the adjusted band identified by the Employment Tribunal does not fully take account of inflation. As at 18 July 2017 the middle band, uprated to reflect inflation, is £8000-£25,000. However, I agree with Mr Northall that the Employment Tribunal did what the law required in March 2017. As he correctly points out, the Remedy Hearing predated the decision in **De Souza** and the publication of the **Presidential Guidance** which deals with periodic uprating for the effect of inflation. In the circumstances, I do not consider that the Employment Tribunal's failure to adopt that approach amounts to an error of law.

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Issue 6: whether the Employment Tribunal erred in its reconsideration by awarding an ACAS Code uplift to the compensatory award of 10%

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58. This issue concerns a challenge to an uplift award made pursuant to s.207A **TULRCA** which provides a power to increase any award made by a Tribunal to reflect relevant breaches of an applicable **ACAS Code of Practice**. It provides as follows:

> **207A Effect of failure to comply with Code: adjustment of awards**
>
> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

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> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –
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> > (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies;

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> > (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%
> > ………

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> (4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

59. Although in the Remedy Judgment the Employment Tribunal refused to adjust the award it made to reflect **ACAS Code** breaches, by its Reconsideration Decision the Employment Tribunal concluded that such an award should be made. I have already referred to the absence of written reasons requested or available following the Reconsideration Hearing for the Reconsideration Decision. All that is available are short-hand notes made by counsel and solicitor of what was said. I do not doubt the accuracy of the notes made but equally, I have no doubt that if written reasons had been requested (as should have happened for the purposes of an appeal), the Employment Tribunal would have amplified the points it made on an extempore basis at the end of the hearing. In these circumstances, to the extent that the Employment Tribunal's reasons are criticised, I am not prepared to accept those criticisms. If a reasons challenge is pursued, it must be on the basis of written reasons having (at the very least) been requested and refused.

60. Both sets of notes indicate that the Employment Tribunal did not accept what it described as the Respondent's argument that following a tick box process was sufficient to satisfy the **ACAS Code**. It referred to the need for it (the process) to be meaningful and in good faith. The Tribunal referred to the award of compensation it made in the Remedy Judgment by way of aggravated damages to reflect the high-handed treatment of Terry Lee (referring expressly to paragraph 6.12 of the Remedy Judgment) and according to the ATT notes, the Employment Tribunal said:

> "we did not take into account the other managers' actions – who failed to carry out investigations into the Claimant's grievance. We think we got that wrong therefore we are going to vary the decision. … It was not a wholesale breach because there was a process. We award a 10% uplift on overall compensatory award.…".

According to the other set of notes, having referred to the aggravated damages for the Terry Lee victimisation, the Employment Tribunal said:

> "We did not take into account in that award the other managers who as we found failed to carry out proper investigations into complaints of investigation and Mr Bennett adding new matters We think got wrong and vary decision
>
> Is appropriate to award uplift to reflect the breach of code by these managers
>
> Not a wholesale breach because there was a process, albeit flawed
>
> Concluded that taking into account already award agg damages
>
> To award 10% uplift overall compensatory award…"

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Whether implicit or explicit, these summary reasons (as summarily recorded by the Respondent's legal team) show that the Employment Tribunal realised that it had not taken into account in the aggravated damages award the behaviours of other managers who failed to conduct proper investigations and the actions of Mr Bennett in particular. Those failings were plainly regarded as **ACAS code** breaches. The Tribunal concluded, having realised its error that it was in the interests of justice to vary its decision and to reflect the **ACAS Code** breaches by other managers in an uplift award. It observed that there was not a wholesale breach because there was a process, but concluded that the process was flawed. Having regard to the aggravated damages award that already reflected part of those flaws, it concluded that an award of 10% uplift should be made.

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61. The Respondent challenges that conclusion on three grounds. First, Mr Northall contends that the **ACAS code** prescribes minimum procedural standards in a disciplinary and grievance context and is not concerned with an employer's decision-making process. To make an award in the circumstances of this case was impermissible because it reflected an assessment of the quality of the Respondent's decision-making rather than process flaws. Secondly, Mr Northall contends that the Tribunal failed to identify the breach or breaches of the **ACAS Code** on which it relied to make the uplift award. Nebulous concepts such as 'meaningful' and 'good faith' are not encompassed within the Code and do not warrant an uplift. Thirdly, Mr Northall contends that the Tribunal had already given a sufficiently well-reasoned judgment rejecting the claim for an uplift. The Claimant's application for reconsideration was simply a second bite of the cherry and should not have been permitted. It was not the appropriate forum for the arguments advanced by the Claimant.

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62. I do not accept Mr Northall's arguments for the following reasons.

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63. First, the suggestion that the award was made by reference to nebulous concepts like meaningfulness and good faith reflecting a value judgment on the employer's reasons rather than process failings, ignores express findings of fact made in the liability decision. In particular at paragraphs 3.14 and 6.7 the Tribunal made the following findings:

> "3.14. The claimant appealed against his dismissal. In the appeal notice, so far as updating and maintaining plans was concerned, the claimant said that what Mr Lee had found was not correct. He quoted meeting notes from 24 June where it was stated that he had updated the work plan and sent it out, albeit without the agreement of his managers. However, they were not always available to meet to agree it, as we have found. The second point; the claimant said that it was Mr Lee's subjective view as to whether actions were completed on time. Indeed, there is evidence set out by the claimant in his notice of appeal that in many instances the weekly improvement plans through August and September indicate that the plan items were on target, according to the new plan. It looks to us that if new plans were made and agreed when the claimant was late on the old plans, and the claimant was now on target, but then the respondent would go back to the old plans to say that he had been late on those. We have to question the point in having a performance improvement plan if improvement in performance is ignored by the management. The appeal was heard by Mr Bennett on 24 October 2014. Mr Bennett noted that the claimant was only working on one project at that time, the E450 project. His main role in that project was to deliver the electronics design and testing within the time scales agreed with Mr Radford.

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In his consideration of the claimant's performance, Mr Bennet (like Mr Lee before him) went back in time to March 2014 and looked at the earlier, pre-July tasks set for the claimant. The claimant was working to an updated plan at the date of dismissal, and we find that this is what should have been under consideration. Further, during the course of the appeal process Mr Bennett made reference to completely new matters – halt test failures and watchdog failures which had not been referred to before. Mr Bennett noted that the claimant was making complaints of discrimination against Mr Lee, but his investigation showed Mr Bennett that there had been a grievance which had been concluded and there had been mediation with Mr Lee. Mr Bennett's view was that the complaints about discrimination and victimisation against Mr Lee had been closed off nine months before the PIP stated. However, he did not consider whether the victimisation and detriment alleged could be ongoing or had restarted. On 29 October Ms Gould wrote to the claimant, saying that the appeal meeting would be reconvened on 13 November. On 8 November, the claimant wrote to Ms Wood saying that he could not attend the hearing and asked for it to be re-arranged or could he write to her without the meeting taking place. Ms Wood then wrote on the 10 November, saying that she could change the meeting date to 19 November. Otherwise, she asked the claimant to confirm if he preferred to be written to about the outcome instead. The claimant responded on 16 November, saying that it would be fine to write to him, and on 19 November Ms Wood confirmed that she would do so. We find there is some confusion as to the status of any reconvened appeal hearing. Was it to discuss Mr Bennett's findings in this investigation? Or was it simply for the purpose of Mr Bennett giving the outcome? The outcome of the appeal was sent to the claimant in writing on 24 November 2014. The decision to dismiss him was upheld.

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6.7. There was also no consideration of demotion or assignment, as an alternative to dismissal. So far as the redeployment period was concerned, then the claimant was only given the Northfields site vacancy list and not a vacancy list for anywhere else. In the appeal to Mr Bennett, it seems that two new allegations of late completion of work were added – those related to watchdog and HALT. Mr Bennett, as with the others, completely discounted potential discrimination and victimisation complaints. It is not clear to us why they were not considered relevant. Just because there had been a grievance process and mediation, does not mean that Mr Lee could not act against the claimant through the PIP process on the basis of those earlier complaints of discrimination. Mr Bennett made no independent investigation of the matter, but acted on what Mr Lee and Mr Radford told him. Also, the claimant was not given the opportunity to discuss Mr Bennett's findings after the first adjourned appeal hearing. Correspondence between Ms Wood and the claimant appears to indicate that the purpose of the reconvened hearing was for the outcome to be delivered to the claimant. Because that was what the claimant thought would happen, he did not attend that hearing. He was therefore not able to challenge Mr Bennett's further investigation. Mr Bennett also failed to consider the issue of redeployment".

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64. At paragraph 10 of the Remedy Judgment the Employment Tribunal held:

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> "The Claimant also pursues an uplift to his award for breaches of the ACAS code in relation to the grievance process. He says that the Respondent failed to arrange a formal meeting to hear his grievances about further victimisation by Mr Lee and the PIP process, or allow him to appeal against any finding that was made, or to stay the capability proceedings pending resolution of his grievances, or at least deal with them concurrently within the process. So far as Mr Bennett's conduct of the appeal is concerned, then we refer to paragraphs 3.14 and 6.7 of our original decision."

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65. The claim in this case was for unfair and unlawful dismissal arising out of the Respondent's handling of the PIP process conducted over a period of 13 months by Mr Lee and other managers, and to which the **ACAS Codes of Practice** on disciplinary and grievance investigations applied. In addition, the Employment Tribunal found that the Claimant had been unlawfully victimised in other respects about which he complained through various grievance processes. Again, the **ACAS Code** applied to those investigations. There are findings as set out above (and elsewhere in the Liability Judgment) that are directly relevant to minimum procedural standards specified in the **ACAS Code** dealing with disciplinary action and grievance investigations. For example, in relation to disciplinary matters the Code requires an employer to establish the fact of the case, inform the employee of the problem, hold a meeting with the employee at which the employee may be accompanied, decide on appropriate action, which should be communicated to the employee in writing, and give the employee an opportunity to appeal. In relation to grievance issues the Code provides for a formal meeting to be held without unreasonable delay after a grievance is lodged; for an opportunity by the employee to explain their grievance and how it ought to be resolved; for a proper investigation to establish the facts; and where the employee feels that the grievance has not been satisfactorily resolved, the opportunity to appeal. Read fairly, it seems to me that the Tribunal's findings in the Liability Judgment do sufficiently identify the provisions of the **ACAS Code** with which the Respondent failed to comply and do set out adequately the basis on which the Employment Tribunal concluded that the Respondent had failed to comply with those provisions. These are not findings based on any assessment of the quality of the Respondent's decision-making. They are findings about failings in the process that was adopted, and importantly include an implicit finding that the Claimant's grievances in relation to the PIP process leading to his dismissal were not considered in good faith. That latter finding is itself a finding of breach and not an assessment of the quality of the Respondent's decision-making (see if necessary, **De Souza** (above) at paragraph 54).

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66. The Employment Tribunal plainly had these matters in mind and regarded the Respondent's failures to comply with the relevant codes as unreasonable because at paragraph 18(12) of the Remedy Judgment the Employment Tribunal held:

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> "This is a case where an ACAS uplift might normally be appropriate in respect of the failure to investigate the claimant's grievances in the PIP process. However, we have already additionally compensated the claimant by way of aggravated damages for the injury to his feelings specifically related to the lack of investigation. To award an ACAS uplift in this respect would be over egging the pudding, and we do not think it is appropriate to do so...."

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That of course did not do justice to all the submissions made by the Claimant on this issue, which went wider than simply the actions of Mr Lee, as reflected at paragraph 10 of the Remedy Judgment.

67. The power to adjust compensation is engaged where the failure to comply with **ACAS Code** provisions is "unreasonable". True it is that the Tribunal's reasoning at the Reconsideration Hearing is brief and could have been better set out and explained. However, as I have explained above, summary reasons only were given and the Employment Tribunal had no opportunity to amplify them pursuant to a request for written reasons. In any event, the essential elements are sufficiently identified in the passages set out above and there can be little doubt as to why the Claimant was successful and the Respondent unsuccessful in relation to this issue.

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68. Nor do I accept that reconsideration was misused by permitting a "second bite" or ignoring the important principle of the need for finality in litigation. The discretion to act in the interests of justice is of course not open ended and the importance of finality does, as Mr Northall submits, militate against the discretion being exercised too readily: see **MOJ v Burton** [2016] ICR 1128.

69. In my judgment however, this is a case where it was open to the Employment Tribunal, in the interests of justice to review its earlier decision, and its discretion was not arguably exercised in a **Wednesbury** unreasonable or irrational manner. The Tribunal realised that it made an error in concluding that the award for aggravated damages effectively extinguished any potential uplift award it might otherwise have made. That is because it realised that the aggravated damages award reflected the behaviour of one manager only but its liability decision criticised the procedures adopted by other managers responsible for the PIP, grievance and disciplinary process. It seems to me in those circumstances that the Tribunal was amply entitled to conclude that the interests of justice required reconsideration of that decision. Moreover, the Tribunal reached a conclusion that was again amply open to it in deciding to award a 10% uplift overall. There was no wholesale failure of process here; procedures were adopted but failed to comply with provisions of the relevant codes. I can see no error of law in the Tribunal's approach and conclusion and accordingly the Respondent's cross appeal fails and is dismissed.

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