Appeal No. UKEAT/0238/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 March 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

ACETRIP LIMITED — APPELLANT

MR A DOGRA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR OLIVER ISAACS (of Counsel) Instructed by: Surjj Legal Limited Devonshire House 582 Honeypot Lane Stanmore HA7 1JS
For the Respondent	MR OLIVER LAWRENCE (of Counsel) Free Representation Unit 5th Floor Kingsbourne House 229 High Holborn London WC1V 7DA

SUMMARY

UNFAIR DISMISSAL – Compensation

UNFAIR DISMISSAL – Mitigation of loss

UNFAIR DISMISSAL – Polkey deduction

The Claimant, an Indian national, was employed by the Respondent on a Tier 2 migrant Visa from 10 August 2015. In its liability decision the Tribunal had found that there were deductions from his wages, by repayments being extorted from him, and non-payment for overtime and of SSP, that from 31 December 2015 he went off sick with depression caused by the Respondent's treatment of him, and that he was unfairly dismissed on 20 February 2016 because he had made protected disclosures and asserted his wages rights on 31 December 2015.

At a Remedy Hearing the Tribunal made a compensatory award of £124,658.82. A number of grounds of appeal were upheld. The Tribunal had erred by (a) awarding full lost earnings in respect of the post-dismissal sickness period without making a finding as to whether, or to what extent, the dismissal exacerbated or prolonged the depression; (b) determining whether the Claimant might, had he not been dismissed, have returned to India at some point, by applying the balance of probabilities; (c) not considering the **Polkey** chance of his being lawfully dismissed in view of his sickness absence, although in so doing it would be entitled to have regard to the fact that the Respondent caused the sickness absence, and the likelihood of him being genuinely and lawfully dismissed on such grounds; (d) not explaining sufficiently its finding that, though no longer permitted to work in the UK, his wish to stay in the UK in connection with this litigation meant that it was not a failure of the duty to mitigate not to seek work in India; (e) not sufficiently addressing the contingency that he might return to India, when awarding loss for the whole of the unexpired 5-year visa period; (f) given that neither the schedule of loss nor the Claimant's witness statement claimed compensation for that period, not forewarning the Respondent that the

Tribunal was considering an award of that length; (g) making a notice money award and also covering the notice period in the compensatory award; (h) not taking account of the fact that the first £30,000 of the compensatory award would be tax free; and (i) not considering the absolute value of the ACAS uplift award before determining the percentage uplift.

HIS HONOUR JUDGE AUERBACH

1. I shall refer to the parties as they were in the Employment Tribunal ("the ET"), as Claimant and Respondent. The Respondent runs a small Travel Agency and Tour Operations business. The Claimant was employed by the Respondent from 10 August 2015 until his dismissal with effect on 20 February 2016.

2. Following a Hearing in November 2017, continuing in January 2018, and deliberations in chambers, in March 2018 the ET (Employment Judge Tobin, Mr G Tomey and Mr J Quinlan) promulgated a Reserved Judgment and Reasons. The Judgment found unanimously that the Claimant was unfairly dismissed for making a protected disclosure and for asserting a statutory right, in breach of sections 103A and 104 **Employment Rights Act 1996** ("ERA"). It was also found that the Respondent had in various respects made unlawful deductions from the Claimant's wages and sums were awarded in that respect.

3. With regard to remedy for unfair dismissal, it was directed that there should be a further Remedy Hearing. That Hearing took place on 11 May 2018 before the same three-person Tribunal and its reserved Decision was sent to the parties on 11 June 2018. The appeal I have heard today is from that remedy Decision. There were some 10 numbered grounds of appeal, although Mr Isaacs, who appeared for the Respondent, acknowledged that there was considerable overlap between them.

4. Mr Lawrence, who appeared as an FRU representative for the Claimant, as he did in the ET, submitted that in this case findings made in the liability Decision as well as in the remedy Decision provided important context. Mr Isaacs to some extent drew on both Decisions as well.

The facts found and conclusions reached in the liability Decision are indeed striking and unusual. I do need to draw out some points that emerge from that Decision before turning to the remedy Decision.

5. In its liability Decision the Tribunal found that the Claimant was employed as a PR Consultant and Sales Advisor. He is an Indian national who came to the UK to do this particular job on a Tier 2 visa and residency permit. He was employed on the minimum salary for the purposes of that visa sponsorship, of £23,000 per annum. He had no written contract, however; and the Tribunal found that, from when he received his second month's pay at the end of September 2015, he was threatened by the Managing Director, Mr Raj Kumar, that, if he did not pay Mr Kumar back half of his wages each month, his employment would be terminated. The Claimant complied with that, which the Tribunal described as extortion.

6. The Claimant, the Tribunal found, approached Mr Kumar on 30 December 2015. He protested that he was not being paid proper wages and could not live on what he was being paid. Mr Kumar said he would pay him an extra £50 per month if he worked on Sundays. The Claimant went to see Mr Kumar later that day again, but Mr Kumar exploded with rage and threatened to remove his visa. Fearful of losing his visa, the Claimant then went to see Mr Kumar again the next day, 31 December 2015, and attempted to placate him. However, Mr Kumar followed the Claimant back to his desk and started shouting at him and an altercation ensued. The Claimant then went home and was off sick from that point.

7. The Tribunal found that the Claimant sent in a succession of GP certificates in January and February, the last of which signed him off until 19 February 2016. He was not paid for January and asked to be put on SSP. He complained to the Home Office who referred him to the

police who referred him to Action Fraud. He was assessed with "anxiety and depression over his work situation." On 11 February 2016 he was recommended for a course of high intensity group cognitive behavioural therapy.

8. The Tribunal went on to find as follows, in paragraphs 65 and 66 of the liability Decision. On 20 February 2016, Mr Kapur (the Respondent's Accounts Manager) emailed the Claimant a copy of a letter dated 31 December 2015, which terminated the Claimant's employment with immediate effect. The stated reason for dismissal was "in view of the two previous warnings and the incident of serious misconduct on 31 December 2015." The letter asked that the Claimant contact Mr Kapur upon receipt to arrange an appointment for him to collect his salary and P45 and to return any company property or belongings. The Tribunal found that this letter was "contrived" to backdate the termination of employment to coincide with the Claimant's last day in the office. The Claimant's employment actually ended on 20 February 2016, as, the Tribunal reasoned, that was the date on which he received notification that his employment had ended. So that date was the effective date of termination.

9. The Tribunal went on to find that, the next day, the Respondent wrote to advise the Home Office that the Claimant's employment had been terminated. It recorded how, in subsequent correspondence, Mr Kumar maintained that the dismissal letter had been sent out on its given date, but to the wrong address. The Claimant was also sent copies of what purported to be disciplinary warnings from the previous October and December. However, the Tribunal found that these letters were manufactured for the purposes of justifying an unfair dismissal, and were an attempt to deceive the Claimant, initially, those who represented or assisted him, and latterly the ET.

10. The Tribunal went on to make further, more detailed, findings about the events of 30 and 31 December 2015. It found that the Claimant had both made a protected disclosure and asserted a statutory right in respect of his wages. The Claimant was found to have been dismissed on 20 February 2016 without any process, which the Tribunal found was a complete failure to comply with the **ACAS Code of Practice.**

11. The Tribunal went on in its liability Decision to say: "The Respondent was not able to produce one shred of corroborative evidence to support either the genuineness of any customer's complaint, nor the veracity of any process undertaken." This was with reference to the purported disciplinary letters. The Tribunal found that the sole reason the Claimant was dismissed was for making a protected disclosure, which also amounted to the assertion of a statutory right.

12. At paragraph 88 of the liability Decision of the Tribunal said this:

> **"As we find that the claimant was automatically unfairly dismissed, we consider whether an uplift for a failure to follow the ACAS Code of Practice is appropriate. As said above, the respondent's dismissed of the claimant and wholly disregarded all of the basic tenants of the ACAS Code of Practice. These are fundamental matters in respect of the fairness of any disciplinary or dismissal process. In any event this was a dismissal that was contrived and was wholly without merit. We award the full 25% increase available to us."**

13. The Tribunal went on to find that what it described as the extortion of repayment of wages amounted to an unlawful deduction, and made an award accordingly. After further detailed analysis of the relevant evidence, and fact finding, as to unpaid overtime hours that the Claimant had worked, it made a further wages award in that respect. The Tribunal also concluded that the Claimant was not entitled to contractual sick pay, but made a further wages award in the amount of unpaid statutory sick pay up to the effective date of termination. As I have said, it indicated that there would be a further Remedy Hearing with regard to unfair dismissal, which took place on 11 May 2018.

14. There were three schedules of loss produced at various points. The first, with a grand total of a little more than £32,000, including figures for the wages claims, appears to have been sent to the Respondent's representatives fairly early on in the litigation. A second schedule, with a total of a little more than £48,800, was produced prior to the opening of the Liability Hearing in November 2017. A third and final schedule, totalling £64,169.98, and giving a period from EDT to Hearing of 100 weeks, was produced prior to the resumed Liability Hearing in January 2018. No further schedule of loss was produced prior to the Remedy Hearing, and at that Hearing it was that third and last schedule which the Tribunal had before it. It also had a counter-schedule produced by the Respondent.

15. The Claimant gave live evidence at that Hearing, based on an updated witness statement of which I have had sight today, and the Tribunal also had an updated statement from Mr Raj Kumar. The Claimant, unsurprisingly, as the Tribunal remarked, did not seek reinstatement or reengagement.

16. As to its general approach to calculations the Tribunal said this:

> **"7. For the purposes of our determination, the parties had not presented figures, or the calculations, in respect of "grossing-up" of any possible award to take into account any tax or national insurance liability. Therefore, as with our previous determination respect of unlawful deduction of wages, we decided to award figures based on the gross amount to save any further application to gross-up our award.**
>
> **8. We accept the claimant's "key figures" in his schedule of loss because this is consistent with our calculations on pay in our previous determination. We note that the claimant commenced work with the respondent on 10 August 2015. His effective date of termination was 20 February 2016."**

17. The Tribunal went on to state that it was awarding the Claimant £442.31 gross in respect of his statutory minimum notice entitlement of one week. It recorded that, because of his length of service, he was not entitled to a basic award.

18. Turning to the compensatory award, the Tribunal reminded itself that in this case the statutory cap did not apply, and reminded itself of the wording of section 123(1) of the **ERA**, in particular that the amount of such an 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 consequence of the dismissal insofar as that loss is attributable to action taken by the employer."

19. As to mitigation, the Tribunal directed itself that it was for the Respondent to demonstrate that the Claimant had failed to mitigate his loss and adduce appropriate evidence in respect of this purported failure, citing **Ministry of Defence v Hunt & Others** [1996] ICR 554.

20. Having regard to the territory covered by the various grounds of appeal argued before me, I need to set out in full the Tribunal's reasoning in paragraphs 15 to 35 of the Remedy Decision.

> **"15. The claimant explained in evidence (which we accept) that it was his intention to work only for the respondent in the UK, indeed, that was a limitation on his Tier 2 Visa. The claimant explained that it was his intention to stay In the UK for five years (with the respondent) and then return to India to further his career.**
>
> **16. The claimant said in evidence that, following the incident of 31 December 2015, he had been ill and diagnosed with depression from his GP prior to be referred for cognitive behavioural therapy ("CBT"). Although we did not have a medical report. We did have sick notes from the claimant's GP, which were consistent and confirmed that the claimant's contentions that he was too ill to attend work in early 2016. The claimant was dismissed whilst he was on sick leave, his effective date of termination being 20 December 2016 (which we previously determined). The claimant did not submit further sicknotes following his dismissal because, he said, he knew that he was no longer employed by the respondent from that point. We accept the claimant evidence about the onset of his depressive illness and the fact that his depression continued following his dismissal. We reject the respondent's contention that an absence of sicknotes following dismissal means that the claimant was no longer suffering from depression and available to look for work. We previously found that Mr Kumar and Mr Kapur exploited a vulnerable migrant worker, extorting around half of his wages and compelled him to work long hours. This treatment made the claimant ill. The claimant's evidence of his ill-health is consistent with this exploitation and we have previously determined that he was a truthful witness. Nothing in his evidence at the remedy hearing undermined his integrity.**
>
> **17. Furthermore, we saw correspondence which confirmed the claimant's depression from Dr Helena Belgrave, Counselling Psychologist at the East London NHS Foundation Trust, who referred him for CBT for 12 sessions from February 2016. The claimant said that these sessions lasted until the end of April 2016 and that thereafter he participated in group therapy at his GP surgery. The claimant said that he was depressed and continued with therapy until October or November 2016. However, such was his illness that he was only able to look for alternative work from the end of May to early June 2016, at the, earliest. However, the day after his dismissal (i.e. 21 February 2016) the respondent wrote to the Home Office informing the immigration authorities that the claimant's employment had been terminated. This implemented Mr Kumar's threat to remove the claimant's ability to earn a living in the UK by orchestrating the cancellation of his Tier 2 Visa. The Home Office wrote to the claimant on 16 May-2016 advising him that a decision had been made to curtail his Leave to Remain in the UK (in this instance**

pursuant to his Tier 2 Visa) and that he was required to either leave the UK or submit a fresh application for Leave to Remain by 18 July 2016.

18. According to the Home Office decision then the claimant had up to around 8 weeks to find a sponsor before he had to leave the UK.

19. The claimant said in his witness statement:

> **I would have liked to earn a living here since my dismissal but my immigration status has prevented me from doing so. I have been taken advice from my Immigration solicitor... I have no right to work for anyone else unless I am granted another Visa permitted me to do so.**

There are four main reasons why I have not sought a sponsor for another Tier 2 Visa:

> **a. It would have cost around £4500 to get another Tear 2 Visa and neither I nor my father could afford that fee. Mr Kumar's extortion had left me with little or no money and my entire savings have been spent on my previous Visa application and the £6,800 "travel agent training" fee that Acetrip had required me to pay before working here.**
>
> **b. My Tier 2 Visa had been cancelled on the request of my former employer for reasons such as incompetence and aggressive behaviour. These were lies, of course, but no sponsor would have offered me a Tier 2 Visa sponsorship with such a reference.**
>
> **c. The Home Office caps the number of Tier 2 Visas every year. This makes it extremely difficult to successfully apply for one, even with a willing sponsor.**
>
> **d. My experience with Acetrip broke me mentally. I could not bring myself to consider applying for another Tier 2 sponsor during my consequent mental breakdown and depression. Even when I had recovered. I could not bear the thought of putting myself in the same position again.**
>
> **It is also been my understanding that one cannot apply for a Tier 2 Visa from inside the UK unless you are extending an existing Tier 2 Visa, or switching to a Tier 2 Visa from another Visa. Given that my previous Tier 2 Visa had been terminated, applying for another Tier 2 was not possible while I was in the UK. I accept that it would have been possible for me to leave the country and apply for another Tier 2 Visa from outside the UK, but as stated above, I want to see these proceedings through and had no Idea how long it would take.**

20. We scrutinised this response carefully. In respect of point (a), we accept the claimant's evidence that the Visa application fees to extend or switch his Tier 2 Visa in the UK were either £677.02 or £1,267 with the documentary verification service. The documentary verification service would speed up the application process by 2 to 4 months. The claimant would also need to pay a compulsory healthcare surcharge of approximately £600 per annum to cover NHS treatment. The claimant described the application process as extremely complicated requiring the submission of various documentation. If any aspect of the application process was not correct or if the documents submitted was not correct, then the application would be rejected, and any applicant would need to start the application process over again. Consequently, the vast bulk of applications were made through solicitors as they have the appropriate expertise in the application process and, if anything went wrong, then the claimant said the solicitors should pick up the tab for any reapplication. Indeed, the claimant said that he did not understand the original Visa application process, which is why he instructed solicitors for his original application. We accepted this evidence, and the appellant's estimate of £4,500 that he needed to find to obtain another Tier 2 Visa (which would include fees, surcharge, solicitor's charges and vat).

21. As for point (b) Mr Famutimi contended that the respondent (presumably Mr Kumar) would have provided a positive reference for the claimant so the claimant should have been able to obtain another sponsor within the short window of late-May to mid-July 2016 (and thereafter). We accept that the Tier 2 sponsorship application was long and costly. If an employer is found to abuse the system, then there were significant fines [up to £20,000 for illegal workers]. So finding a new sponsor did not directly equate to finding a new employer. It would have been considerably more difficult.

22. The claimant said he could not rely upon a fair reference from Mr Kumar because he was responsible for his extortion and also he fabricated previous disciplinary warnings and the

claimant's dismissal. We accept this contention. The respondent's position that the claimant could rely upon a positive reference was wholly untenable. The claimant said that he did not know anyone else who he could apply to as a new sponsor so, we accept, it would be essential in such circumstances that he had a positive reference or introduction and that could not be relied upon from Mr Kumar or anyone else respondent.

23. So far as point (c), if this was the only reason that the claimant relied upon then we would have approached this explanation with caution. However, given the claimant's predicament, this explanation adds weight to the more substantive points.

24. In respect point (d), the claimant explained that he was living on handouts from his father and barely surviving. He said that he could not ask friends to contribute and his experience in coming to the UK and being exploited by Mr Kumar and Mr Kapur led to a breakdown in his marriage, so it is entirely understandable that the claimant initially wanted to avoid putting himself in the same position.

25. The claimant applied for Further Leave to Remain on 17July 2016. It was a condition of his temporary immigration status that he was not permitted to work in the UK. The claimant's application for Further Leave to Remain was refused in August 2017 as the Home Office contended there were no exceptional circumstances to warrant the grant of such immigration status. The claimant appealed against this decision and his appeal is outstanding. It is a term of his on-going immigration status that he is not able to work in the UK. Once he had applied for Further Leave to Remain (in July 2016) he could not make an in-country application for a Tier 2 work Visa.

26. The claimant advised — and we accept — that it was a condition of his Further Leave to Remain that has not been permitted to work in the UK since 17 July 2016 (as he would need a work-related Visa). He accepted that he could apply for a further Tier 2 Visa but — as he is in the UK under a different immigration status (Further Leave to Remain) — he would need to leave the UK and apply out-of-country. The claimant said that the Home Office would take into account the circumstances of his original Visa and because, as a matter of fact, this was cancelled following his dismissal after working for a short period, he anticipated that, even if he were able to find a sponsor (which we accept is unlikely), the Home Office would be sceptical about his working intention. This is wholly the consequence of the respondent's actions in dismissing the claimant.

27. We accept Mr Lawrence contention that the claimant world have needed extraordinary fortitude to "get back into the saddle" and not only find other work but also find someone else willing and able to sponsor his immigration status the short window available between his dismissal and the Home Office's curtailment of his immigration status.

28. Following, the claimant's immigration application of 17 July 2016, he was then prevented from working unless he left the UK and applied to re-enter on a work-related Visa. We do not find that this was unreasonable that the claimant did not pursue this course.

29. The claimant was very clear that he originally applied for a Visa to last until August 2020 and, but for his dismissal, he would have remained in the UK until the expiry of his Tier 2 Visa (in August 2020). On the balance of probabilities, we find that the claimant would not have returned to India until the expiry of his Visa, i.e. after August 2020.

30. We accept that it was reasonable for the claimant to remain in the UK after July 2016. The claimant pursued his case diligently. We note there had been a number of delays and postponements during proceedings. The claimant attributed to delays in the employment tribunal process to the respondent and said that had this case concluded sooner, then he could have gone back to India much sooner. He said that he only stayed in the UK, without any income, in order to see through his case.

31. The respondent has not convinced us that the claimant has failed to mitigate his losses. Accordingly, we award the claimant his loss of earnings in full up to the date of this hearing. Ordinarily, we would make an award based on net figures. However, as stated above, our award may be subject to tax and national insurance and neither party has provided grossed-up figures, nor have they set out the appropriate calculation. We determine that it would not be just and equitable to award the claimant compensation without making a provision that, should HM Customs & Excise claim the appropriate deductions then the claimant should be put in the position that he would have been had the respondent made appropriate tax and national insurance deductions (which it should have had the claimant been paid in the normal way). If any party is dissatisfied with our calculations of the loss of earnings award based on gross

figures, then we will consider ordering a review hearing to enable the appropriate grossing-up calculations to be advanced and scrutinised.

32. In all of our considerations we have had consideration to the overarching objective of, so far as possible, putting the claimant into the position that we assess he would have been but for the respondent's- unfair dismissal.

33. Allowing for the claimant's notice period, for which we have made a separate award, we therefore calculate that the claimant has suffered a loss of earning of 116 weeks until the remedy hearing. Therefore, we award 116 x £442.31 = £51,307.96 (gross) in compensation for the claimant's loss of earnings until the date of the employment tribunal remedy hearing.

34. We accept the claimant's evidence that he would have remained in the UK until August 2020. However, following the termination of his employment, the claimant has remained in the UK in order to pursue his claim. That is entirely reasonable in the circumstances. We understand that the respondent has appealed our decision on liability (which it is entitled to do) but the claimant's evidence was that he needed to remain in the UK to participate in any appeal and also to undertake any possible enforcement proceedings for his compensation. This is also reasonable in the circumstances. It is clear that the claimant cannot work lawfully while he is in the UK and we regard it.as reasonable for him to remain in the UK.

35. So far as predicting the future, we do not know if the claimant will return to India before August 2020 and, although we are a UK industrial jury, we are not familiar with the labour market in India. Under the circumstances, we cannot speculate when the claimant may find other work in India. We have heard no credible evidence as to the circumstances that might give rise to the claimant looking for work in India before August 2020. We cannot foresee what work the claimant would undertake in India or what the relevant rate of pay might be. Any speculation would not do justice to this situation. So therefore, we rely on our factual determination that, but for the claimant's dismissal, he would have continued to work in the UK until August 2020. We have considered whether it would be proportionate to award the claimant his loss of earnings for a period of over two more years and we determine that rather than impose an arbitrary cut-off period without any factual basis whatsoever. It would be appropriate to award the claimant his losses in full for the entirety of his original Visa placement with the respondent."

21. The Tribunal went on to reiterate that its award might appear punitive, but that was not the intention. It awarded compensation for future loss of earnings for 117 weeks at £442.31 per week totalling £51,750.27 gross. The Tribunal awarded nothing for expenses, pension rights or loss of statutory rights.

22. The Tribunal went on to set out various requirements of the 2015 **ACAS Code of Practice 1** on disciplinary and grievance procedures and then said:

"42. The respondent did not adhere to any of the aforementioned responsibilities when they supposedly disciplined and subsequently dismissed the claimant. Mr Kumar and Mr Kapur made up previous disciplinary warnings and then manufactured the claimant's dismissal under false pretences. So far as the Code of Practice, the respondent's failures were manifest and profound. Under the circumstances, we can see little alternative but to award the claimant the full 25% uplift. Any figure short of this would not do justice to our previous determination.

43. The ACAS uplift should be based on net figures; therefore, we have worked out the uplift as follows: 234 weeks x £361.68 = £84,633.12 (net loss of earnings) @ 25% = £21,158.28."

Totalling up the award for notice money, loss of earnings to Hearing gross, future loss of earnings gross and ACAS uplift, it came to a grand total of £124,658.82, which was the compensatory award that it made.

23. The Respondent, as I have said, appeals from the Remedy Decision with 10 numbered grounds, albeit there is some overlap among them. Upon consideration of the Notice of Appeal on paper His Honour Judge Shanks allowed the whole contents to proceed for consideration at a Full Hearing, which has come before me today. The Respondent has been represented by Mr Isaacs of counsel and the Claimant by Mr Lawrence of counsel. I have had the benefit of their written skeleton arguments, as well as oral argument, and I was referred to various authorities.

24. I shall take the grounds of appeal somewhat out of order but will start with ground 1. Ground 1 argues that the Tribunal erred in awarding compensation for loss of earnings by reference to the full measure of the Claimant's ordinary weekly gross pay for the period from one week after 20 February 2016 (that first week having been covered by the notice award) up until mid-June 2016. This was challenged having regard to the Tribunal's findings in the liability Decision that the Claimant was, at the time of dismissal, off sick and not entitled to contractual sick pay, but only entitled to SSP, and that he was not well enough to work again in fact until around mid-June.

25. So, it is argued, had the Claimant not been dismissed when he was, he would have remained off sick until at least mid-June, which was when in fact he, according to the evidence presented to the Remedy Hearing, became well enough to work again. He would, during that period, have been entitled only to SSP. So that was the measure at its highest of what he had lost in terms of remuneration, in respect of that period, in consequence of the dismissal. Further, and

specifically, argued Mr Isaacs, while the ET found in its Decisions that the treatment of the Claimant *on* 31 December 2015, and/or *up to* that date, had made him ill, there was *no* finding either that the *dismissal* had made him ill, or that it had exacerbated or prolonged his pre-existing illness. As to authority for that approach, Mr Isaacs relied on **Dignity Funerals Limited v Bruce** [2005] IRLR 189 (CS), in particular at paragraphs 11 to 13.

26. Mr Lawrence submitted that the **Bruce** case could be distinguished, because in that case the employee's depression manifested some five years before the dismissal and was causally unrelated to it. Here, he argued in his skeleton, the Claimant suffered from depression as a result of events that were "causally interwoven" with the dismissal. The extortion, the oppression and the dismissal were all part of one causal chain. They led, he submitted, to the confrontation on 31 December 2015, that in turn led to the dismissal. It was, he submitted, enough that the dismissal kept the depression going. He also referred to the passage in the Claimant's witness statement cited by the Tribunal in paragraph 19 of the remedy Decision in support.

27. My conclusion on ground 1 is as follows. The starting point is indeed the wording of section 123, which confines the compensatory award to loss attributable to the action of the employer and which was also sustained *in consequence of the dismissal*. Accordingly, in a case such as the present, where a depressive illness exists before the dismissal and continues after, the Tribunal must in principle adopt the approach explained in **Bruce**. Specifically, its task is to determine to what extent the illness that continues after the dismissal is a consequence of, or has been exacerbated by, the dismissal. It is not enough that in its pre-dismissal origin it was attributable to pre-dismissal action also taken by the employer.

28. In a given case there may be various permutations. At one extreme, if the previous illness had run its course by the time of dismissal, then a further illness following dismissal might be found to be wholly attributable to it. At the other extreme a dismissal might have no additional impact on a previous indisposition or ill-health, which might simply continue before and after, exactly as it would have done regardless of the dismissal. That is easy to imagine, for example, in a case where the pre-dismissal absence is caused by a physical injury which merely continues post-dismissal.

29. In the middle there will be cases where the dismissal might be found to have exacerbated or prolonged a pre-existing illness. The task of the Tribunal in such a case is to assess as best it can what difference the dismissal has made, compared with how matters would have unfolded had there been no dismissal, and hence to identify the additional loss or impact attributable to the dismissal itself. I do not think it can make any difference in principle to the Tribunal's task, that the original illness was caused by the conduct of the employer, which later also carried out the dismissal. The question is whether they are part of the same indivisible act or are two separate and successive acts with distinct impacts.

30. In the present case, submits Mr Lawrence, what happened on 31 December 2015 and the dismissal *were* all part and parcel of the same conduct; but that is not in my judgement a sustainable analysis. True it is that there was a link of a certain kind between the two. It was the protected disclosure and assertion of the Claimant's rights at the end of December 2015, which was the reason, the Tribunal found, for his dismissal in February 2016. However, that does not mean that the conduct of the Respondent towards the Claimant in the encounters at the end of December, and then the conduct in dismissing the Claimant in February, were all part of a single piece of conduct.

31. Secondly, the Tribunal's own findings made that analysis unsustainable. It found in its liability Decision that the Claimant went off sick from the next working day after 31 December on which he was due to return to work. In his evidence he said he became ill on the very evening of 31 December. After seeing the GP, he was signed not fit to work for successive periods, and assessed with anxiety and depression over his work situation and recommended for CBT, all as of 11 February 2016.

32. In its remedy Decision at paragraph 16 the Tribunal identified the treatment in the period up to 31 December as having made the Claimant ill. The Tribunal accordingly found, in effect, that the depressive illness was triggered by the events up to and/or on 31 December 2015, and then continued following the dismissal. It rejected the contention that, following dismissal, the Claimant was *no longer* suffering from depression and went on to refer to the exploitation, extortion and long hours which it is said made him ill.

33. There might be room to debate whether the Tribunal thought, or made clear whether it was finding, that it was the treatment *on* 31 December that tipped the Claimant into depression, coming on top of the prior treatment, or whether things had simply reached a point by 31 December of having the cumulative effect of tipping him into depression at that point in any event. However, either way that does not assist the Claimant on this ground of appeal, because on any view of the findings, it was what had happened to him up to and/or including on 31 December that caused the onset of the depression *from that date*.

34. Nor is there any finding by the Tribunal, in paragraph 16 of the remedy Decision or elsewhere, as to whether the dismissal made any *contribution* to the depression, or its duration thereafter, as opposed to findings that it *had not stopped* by that date and *continued* beyond that

date. Nor does the reference in paragraph 19 of the remedy Decision to the Claimant's evidence that "my experience with Acetrip broke me mentally" take matters any further. Plainly, the Tribunal accepted that evidence, as a general proposition, but it throws no light on whether, or, if so, to what extent, it thought the dismissal exacerbated or prolonged the breakdown.

35. It has to be recognised of course that where there are successive discrete events, assessing how much, if anything, the second event has exacerbated or contributed to the ongoing inability to work is no easy task. However, in a case of this type it is a task that the Tribunal must carry out to the best of its ability, drawing on the evidence available. The inherent lack of certainty does not mean that it may not be attempted at all.

36. In this case, however, the Tribunal went on to use the measure of full underlying earnings as its benchmark for the whole of its lost remuneration award, without anywhere engaging with this question and making some finding about it, as best it could, on the evidence available. Mr Lawrence submitted that it could be *inferred* that the Tribunal thought that the dismissal had had some exacerbating effect and indeed that it would have been surprising, if not perverse, if the Tribunal had thought otherwise. However, I cannot identify the Tribunal anywhere specifically engaging with and coming to some conclusion about this. I agree with Mr Isaacs that it thereby erred in law.

37. Ground 1 therefore succeeds. On remission the Tribunal will need to consider and make a finding, doing the best that it can, about whether, and if so to what extent, the dismissal exacerbated or prolonged the Claimant's depressive illness.

38. Ground 2 postulates that the Tribunal erred in law by failing to consider and/or make a **Polkey** reduction to the compensatory award to take account of one or more of the following.

39. Firstly, it is said that issues had been raised regarding the Claimant's performance and commitment; and the possibility should have been considered that he might at some point have lost his job fairly, owing to poor performance. Secondly, having regard to the finding that the Claimant continued to be unfit for work until mid-June 2016, the Tribunal should have considered the possibility that, had he remained employed by the Respondent, but off sick for that length of time, he might have been fairly dismissed at a certain point for capability. The fact that he was in his probation period, submitted Mr Isaacs, was relevant to both these aspects.

40. In the Notice of Appeal another argument was that the Tribunal had failed to consider as a **Polkey** scenario, the impact of the Respondent losing its sponsor status. However, Mr Isaacs confirmed in oral submissions, that that was not pursued before me. However, a third scenario that was pursued, was consideration of the possibility that, had he remained employed by the Respondent, the Claimant might have left the job to return to India at some point prior to the end of his visa period. The Tribunal was said to have erred in law in deciding *on the balance of probabilities* that this would not have happened, which was not the appropriate test within the context of a **Polkey** exercise.

41. As to the first of these scenarios, Mr Lawrence relied on the Tribunal's findings that there was no evidence at all to support the proposition that there had been any genuine concerns with the Claimant's performance, nor any customer complaints, and that the purported copies of warning letters were in fact fabrications to provide a pretext for the dismissal. If anything, the evidence tended to go the other way. At paragraph 42 of the remedy Decision the Tribunal

reiterated that the Respondent had made up the previous disciplinary warnings. Mr Lawrence also referred in submissions to the fact that the Claimant had sought disclosure of records in the context specifically of his claims as to the number of extra hours that he had put in, but nothing had been forthcoming to contradict his case about how hard working he had been.

42. As to the second scenario, that he might have been lawfully dismissed on account of long-term sickness absence, Mr Lawrence submitted that this boiled down to the argument that the Tribunal should have reduced compensation on the assumption that the Respondent would have eventually dismissed the Claimant, because it would have continued to subject him to oppressive conditions making him continue to be ill.

43. As to the third **Polkey** scenario pursued on appeal, Mr Lawrence submitted that, given the extreme facts of this case, and the Claimant's dependence on a visa for his continued ability to work for the Respondent in Britain, the Tribunal was entitled to make a finding that, on the balance of probabilities, he would not have left the Respondent's employment, whether to return to India or otherwise, during the unexpired period of his visa.

44. My conclusions on this ground are as follows. Firstly, as to **Polkey** generally, the guiding principles are well-established by a number of authorities. In order to assess what an employee has actually lost through being unfairly dismissed, the Tribunal may need to consider what would, or might, have happened had they not been unfairly dismissed in the way that they were. The types of counterfactual scenario that might require consideration are not limited in any particular way, nor are they limited to cases where the unfairness is said to have been procedural.

45. The fact that the exercise involves an element of uncertainty or speculation does not of itself excuse the Tribunal from the need to engage with it. Sometimes things that have actually happened may help the Tribunal to consider the counterfactual, so long as it takes care in its reasoning. I was referred to the well-known discussion of these principles by the Court of Appeal in **Scope v Thornett** [2007] IRLR 155 at paragraphs 34 onwards. The threads were also very helpfully drawn together subsequently by the EAT, Elias P as he then was and members, in **Software 2000 Ltd v Andrews & Ors** [2007] ICR 825 starting at paragraph 53.

46. It is important also to remember that, if the counterfactual scenario would have involved a dismissal, then it must be a fair dismissal. See: **Johnson v Rollerworld** UKEAT/0237/10. I think it also must be implicit that, for the purposes of any **Polkey** scenario, the Tribunal should assume that the employer will generally act lawfully and not unlawfully towards the employee, in any respect that might impact on the continuation of his employment.

47. I turn to my conclusions as to the application of these principles in this case, and the particular scenarios that were raised before me. As to the first scenario – the possibility of a fair performance-based dismissal – on the Tribunal's findings the only suggestion of any issues at all about the Claimant's performance were fabricated by the Respondents. There was no evidence before the Tribunal, which it considered had any genuineness or credibility, of any such issues having arisen, whether from management, customers or other third parties.

48. That being so, I conclude that there was no evidence with which the Tribunal could or should have engaged in relation to this particular scenario. It could perhaps be said in some theoretical sense that it was possible that a performance issue could have arisen at some point in the future, that could have eventually led to the Claimant's lawful dismissal. However, the

Tribunal had no evidence to suggest to it that that might in any concrete way have been remotely on the cards. This was, at best for the Respondent, a wholly speculative scenario on which the Tribunal would have been unable to get any handle from the evidence before it. There was, I conclude, no error in the Tribunal failing to engage with that first scenario.

49. I turn to the second scenario: possible lawful dismissal for long-term sickness absence. Mr Lawrence's submission, that effectively to allow such a case to be considered would allow the Respondent, as it were, to profit from its own wrong, does not entirely dispose of the point. The authorities have in fact grappled with the question of what, if any, impact in law the employer's responsibility for the injury or ill-health that has caused the long-term absence may have, on the question of the fairness of such a dismissal. This question arises in this case, as it were, as an issue within an issue, within this **Polkey** context.

50. The leading case is **McAdie v the Royal Bank of Scotland** [2008] ICR 1087, where the Court of Appeal adopted the analysis in the EAT (Underhill J as he then was, and members). **McAdie** indicates that, if the employer has some culpability for the illness or injury that has led to the long-term sickness absence, that is not necessarily wholly irrelevant. It may mean, for example, that the employer should "go the extra mile" before dismissing. However, the EAT also said that the fact that the employer has caused the incapacity in question, however culpably, cannot thereby preclude it forever from effecting a fair dismissal, and that Tribunals must resist the temptation of being led by sympathy for the employee into granting, by way of compensation for unfair dismissal, what is in truth an award of compensation for injury. The Court of Appeal upheld that reasoning, and did not think it necessary to consider a scenario in which the employer had not merely been culpable, but had acted, as they put it, maliciously.

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51. Therefore, the authorities do not at present go so far as to say that there could never in law be a scenario in which it would be unfair to dismiss on account of a particular absence caused by *deliberate* ill-treatment by the employer. Ultimately, both counsel agreed before me that this is where the law stands after **McAdie**. Although there was also some discussion of the line of authorities of which the most recent example is **Awan v ICTS UK Ltd** UKEAT/0087/18, that considers a rather different scenario and set of legal problems. I do not ultimately think it can be usefully drawn on in this context. It does not take the **McAdie** position any further.

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52. Mr Isaacs simply rested his submission on the proposition that this was a scenario with which the Tribunal should at least have grappled. He does not say that the fact that it found that the employer culpably caused the ill-health absence would have been an irrelevant consideration; but the Tribunal should have grappled with it, and should have considered the possibility of whether there might at some point have been a fair dismissal, within the context of asking itself that **Polkey** question. Mr Lawrence submitted that, given the extreme facts of this case, there was really no need for the Tribunal to grapple with that scenario at all.

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53. However, given that it is not the law that, if the employer has caused the sickness absence, any dismissal by reason of that absence, at any point, would *necessarily* always be unfair, and given that the Claimant was, as a matter of fact, unwell for a significant period, I conclude that it was indeed an error of law for the Tribunal not at least to engage with that scenario, and it will need to do so upon remission. However, the Tribunal will be entitled, when it does so, in accordance with the **McAdie** guidance, to take account of the fact that the illness was caused by the employer, and to have regard to its particular findings about that.

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54. In addition, in considering the likelihood of this counter-factual scenario, the Tribunal should assume that it must be one in which the dismissal was not unlawful in any other respect. It will be a matter for the Tribunal's appreciation as to whether, or with what likelihood, it thinks that it is a realistic scenario to envisage the Claimant being genuinely dismissed for prolonged sickness absence in a manner that would be neither unfair nor otherwise unlawful.

55. I turn to the final **Polkey** scenario raised by this ground of appeal, which postulated that the Tribunal had erred in the approach it took to the possibility that, had he remained employed by the Respondent, the Claimant might have left its employment to return to India at some point before the end of the visa five-year period.

56. It is important to distinguish between three different legal contexts in which the possibility of a return to India might require some consideration. The first, with which we are presently concerned, is the counterfactual **Polkey** scenario which postulates that, had the Claimant remained in the Respondent's employment, he might at some point have decided to return to India before his visa ran out.

57. A different and second legal question concerns whether, in the aftermath of his actual dismissal *as it actually occurred*, and the consequent loss of his visa, the Claimant failed to comply with the duty to mitigate by deciding not to return to India. Yet a third and different legal question concerns whether the Tribunal should have taken account, regardless of the duty to mitigate, of the possibility that, in the real world, he might in any event decide at some point after the Remedy Hearing to return to India and to find work there.

58. I am at present concerned with the first of these three questions, but it was agreed that this appeal also put the second and third questions in play. I will deal with both of those when I come to ground 4. However, turning to the first question, the true **Polkey** question, the Tribunal's remedy findings at paragraphs 15, 29 and the first sentence of 34 address this, although the remainder of paragraph 34, it seems to me, is concerned with the second question.

59. Mr Lawrence submitted that the Tribunal had, in these passages, made proper findings that the Claimant did not, at the start of his employment, intend to return to India during the currency of his visa, and had addressed the possibility that he might nevertheless have changed his mind at some point, and decided to do so during the course of his employment with the Respondent, had it continued. However, said Mr Lawrence, it had properly found that this would not have happened.

60. However, the difficulty, says Mr Isaacs, is that the Tribunal had specifically made this finding on the balance of probability rather than adopting the correct approach within the **Polkey** context of looking at the percentage chance. See, in particular, **Chagger v Abbey National Plc & Anor** [2010] ICR 397 (CA). Mr Lawrence replies that, on the unusual facts of this case, and having made the finding that, at the *start* of the employment, the Claimant's intention was to see out the visa period, it was not an error for the Tribunal to take the approach that it did.

61. Unfortunately, however, I can see no getting away from the fact that the Tribunal has in terms made a finding by applying the test of balance of probabilities in the **Polkey** context; see paragraphs 29 and 34. That is simply the wrong test to apply in that context. This is, therefore, an error of law and the matter must be remitted, so that the Tribunal can give the question consideration on the proper legal basis of percentage chance.

62. It is convenient to take ground 4 next before turning back to ground 3. Ground 4 argues that the Tribunal erred in its approach to the duty to mitigate, and there is some overlap here with ground 5 and 9. The Respondent argued in particular that it was reasonable to expect the Claimant to mitigate his loss by returning to India to seek employment there and/or to seek a new UK sponsor from India. Other scenarios set out in Mr Isaacs' skeleton argument, in particular seeking immediate further sponsorship in the UK during the short window allowed before the revocation of his visa took effect, were not pursued in oral argument before me.

63. Mr Isaacs did argue, however, that the Tribunal gave no sufficient consideration to *why* it did not accept the Respondent's case that it was reasonable for the Claimant to have been expected, in accordance with his duty to mitigate, to return to India, where he would have the right to work. The Tribunal seems to have accepted that he was not reasonably obliged to do this, because he had decided to stay in the UK *to pursue this litigation*. However, said Mr Isaacs, the Tribunal had failed to explain why it thought that sufficiently excused what it ought otherwise to have found was a failure to take a reasonable step in mitigation, by returning to India where he had the right to work. At the very least, he said, this was not a **Meek** compliant part of its Decision.

64. I can conveniently bring in here the third context in which the "return to India" question arises, namely the Tribunal's approach to the general assessment of future loss. The Remedy Hearing was in May 2018. Had the Claimant remained in employment, the visa would have expired in August 2020. The Tribunal awarded the Claimant losses covering the whole period up to that expiry date: see paragraph 35. The Respondent said that was an excessive award to have made. Some discount should have been applied to such a long future period, for future uncertainties and contingencies generally. That included the possibility that the Claimant might

simply decide to return to India to get work at some point, given that he cannot work in the UK and, according to his evidence, was relying on handouts from his father as long as he is here.

65. It was also submitted by the Respondent that there was a contradiction here with the Claimant's own schedule of loss, which always, including in the version before the Tribunal at the Remedy Hearing, had claimed no more than 12-weeks' loss going forward from the date of the Liability Hearing. There was an overlap here with ground 6, to which I will return.

66. On the mitigation point Mr Lawrence argued that the Tribunal had made a clear finding in terms that the Claimant had acted reasonably in not returning to India to find work. That was a matter for the Tribunal. It was entitled to make that finding, particularly given also the practicalities of the Claimant continuing with this litigation with the very limited representation that he had through the Free Representation Unit. On the question of awarding more than two years of future loss, again Mr Lawrence said the Tribunal knew what it was doing. It had addressed this question very fully in paragraph 35. It had no evidence about the Claimant's prospects or ability to find work in India, and it concluded that there was no good reason to limit its award short of the end of the visa period, a finding that it was entitled to make.

67. My conclusions on these two aspects are as follows. On the mitigation issue, in paragraphs 18 and following of the Tribunal's Decision, it engaged with a number of arguments particularly put forward by the Claimant as to why he had not attempted to get a fresh Tier 2 visa with another employer. It did not accept all of them as equally strong, but concluded overall that he had put forward sufficiently cogent reasons for not going down that particular route. It was entitled so to find, as such.

68. However, that leaves the question of what was effectively in this case a binary decision for the Claimant to take: between going back to India where he had the right to work, and remaining in the UK on the basis of seeking further leave to remain, but which would mean as a matter of fact that he would have no right to work. As to that, his witness statement does not say anything about whether it would, or whether he believed it would, be difficult to find work in India, had he returned there. Rather, his witness statement says in terms that he decided to stay in the United Kingdom in order to pursue this litigation because, as he puts it, he wanted to see it through; and that he had not anticipated the litigation lasted as long as it had, which he attributed to the Respondent having dragged it out. The Tribunal clearly regarded that as *the* reason why he had decided not to return to find work in India, and did not think that an unreasonable decision.

69. Mr Isaacs referred to authorities to the effect that it is not an acceptable reason for not taking what would otherwise be a reasonable step to mitigate, that a claimant is relying on the expectation or prospect of compensation at the end of his Tribunal case. However, I agree with Mr Lawrence that that is not what the Tribunal found that this Claimant was doing in this case. However, I also agree with Mr Isaacs that it was incumbent on the Tribunal to say *something* to spell out why it thought that staying in the UK *solely* in order to continue with the conduct of this litigation meant that it was not reasonable to expect the Claimant to mitigate his loss by returning to a country where he would have the right to work. I do not think the fact that the Tribunal said it did not know about the jobs market in India was sufficient to explain that decision, in circumstances where it *did* know was that he was prohibited from earning a living in the UK.

70. Further, the Tribunal did not engage with the question of whether it would indeed have been impossible or impractical for the Claimant to continue with the conduct of the litigation, unless he remained living in the UK, particularly as to the position in the future, bearing in mind

that it was taking its decision at the remedy stage, so that in principle all that remained was the matter of enforcement and possibly dealing with any appeal. I think it was incumbent on the Tribunal to do more to explain its decision on the duty to mitigate in this respect.

71. I turn to the question of whether the Tribunal sufficiently considered the possibility of the Claimant returning to India and getting another job there in the future, in the context of awarding future loss of two years and three months on top of the losses awarded up to the date of the Remedy Hearing. There is some useful discussion in **Wardle v Credit Agricole Corporate & Investment Bank** [2011] ICR 1290 at paragraphs 50 and following, albeit there in a case where an award of whole career loss was sought. The main point is that an award of loss up to the point where the Tribunal, doing the best it can, judges that the claimant is likely to obtain an equivalent job, will ordinarily represent a fair assessment of loss. Here the Tribunal was not considering a claim for whole career loss. Nevertheless, it made an award for two years and three months of future loss, which is a significant period projected into the future on top of the period of loss it had already awarded, adding up to a total period of loss of considerably more than four years.

72. Mr Lawrence says that the Tribunal again was entirely alive to the significant length of its award. It had addressed the point fully in paragraph 35.

73. However, there are two difficulties with this. The first is, again, that the Tribunal did not have any particular evidence *either way* as to the Claimant's job prospects or ability to earn a living in India, but merely evidence that he had decided, at least up until the date of that Hearing, to stay in the UK to see through the litigation. Secondly, the Tribunal also defaulted back to its **Polkey** finding, as its answer to this question in the middle of paragraph 35: what it thought would probably have happened had he *not* been dismissed. However, what the Tribunal did not do at

this point is engage with the different question, of the possibility that the Claimant might, having in fact been dismissed, and following the Remedy Hearing, in fact return at some point to India, and take up work there at some point in the future, nor with other contingencies for the future.

74. I have therefore concluded that the Tribunal did err in this regard as well.

75. I turn to ground 3. This argues that the Tribunal failed to consider whether, by deciding to remain on in the UK, where he could not work, rather than by returning to India, where he had the right to work, the Claimant had taken a decision which broke the chain of causation of his losses from that date. In this particular case it seems to me that this is really an argument that directly overlaps with the mitigation argument in ground 4. Conceptually it is a different way to put the point: to argue that something has broken the chain of causation rather than that there has been a failure to take a reasonable step to mitigate the ongoing loss. However, in this case these two options both referred to the two sides of the very same coin: the binary decision as to whether to stay in the UK or to return to India.

76. The question of whether it has been shown that someone failed to do something which he reasonably ought to have done to mitigate his loss, is an objective question for the appreciation of the Tribunal. The question of whether a decision that he takes in the aftermath of losing his job breaks the chain of causation is also an objective question for the appreciation of the Tribunal. To neither of these questions can a simple formulaic answer be provided. See, on the latter issue **Dench v Flynn & Partners** [1998] IRLR 653 CA and related authorities. In this case, I do not think there could really have been any difference between the outcomes of asking these two questions, whichever way the Tribunal went, its answers to them would have to be consistent. Therefore, I do not think that ground 3 adds anything to ground 4.

77. Ground 5 was described as a perversity ground, but raised various points that effectively have been addressed already, or to which I will come, in relation to other grounds. So, I do not need to say anything more separately about it.

78. Ground 6 complained that the Tribunal had erred by making an award in excess of the amount claimed in the schedule of loss, being 12-weeks' future earnings. There is some overlap with the territory of ground 9, which also itself overlaps with ground 4.

79. The Respondent's point essentially here is that the Claimant had tabled his own schedule of loss claiming 12 weeks' future loss. Its case is that this shows that he himself believed he was capable of mitigating his loss during that sort of timescale; and/or that it was unfair to the Respondent for the Tribunal then to make an award covering the period of more than two years going into the future, as it did. In relation to that point reliance is placed on **Port of Tilbury (London) Ltd v Birch and Ors** [2005] IRLR 92 at paragraph 13. There the EAT said that it is not necessarily an error to award more than is claimed, but, at least where both parties have representation, then, if minded to do so, it is incumbent on the Tribunal to first give an opportunity for submissions on the matter. In short it was submitted to me that the Respondent in this case was not sufficiently on notice that the Tribunal might make an award of this length, given what was in the schedule of loss, and that, had it been fairly on notice, it might have brought further evidence of its own on that question, cross-examined the Claimant further on it, and/or made further submissions on it.

80. Mr Lawrence submits, firstly, that the Tribunal was not bound to restrict its award to the period claimed by the schedule of loss; and, particularly in a situation where the Claimant had limited and *pro bono* representation, it would not have been wrong for the Tribunal to indicate

that it considered that potentially wider losses might be merited, and that it was considering making a more extensive award. Further, said Mr Lawrence, the Claimant was cross-examined about his decision not to return to India, which was not an issue intrinsically limited to any particular time period. Therefore, he said, this matter was at large before the Tribunal.

81. My conclusions are these. Firstly, on the point with which it deals, the **Birch** case is the correct starting point. I do not agree with Mr Lawrence's written submission that there is any good or proper reason why I should depart from that earlier decision of the EAT. That said, I agree with Mr Lawrence that the schedule of loss as such is not *evidence*. I do not think it can necessarily automatically be inferred from it that the Claimant himself considered that he would be able to mitigate his losses fully within a 12-week period, as opposed to signalling that he was limiting his claim to that period. It would *potentially* have been open to the Tribunal to make a more expansive award, notwithstanding that this was what was sought in the schedule of loss, or for the Claimant, for example, to have produced a more up-to-date schedule for the Remedy Hearing, revising his position from that which he had adopted at an earlier stage.

82. However, the issue here is one of fairness to the Respondent. The schedule with which the Claimant in fact went into the Remedy Hearing only put it on notice that he was seeking potentially 12-weeks' future loss of earnings; and even this had been reckoned from somewhat before the date of the Remedy Hearing. There was no further schedule of loss indicating that the Claimant might be seeking a more ambitious future award. Nor was there anything in his witness statement for the Remedy Hearing, in terms, to put the Respondent on notice of that. Nor was it suggested to me that the Tribunal specifically indicated during the course of the Hearing that it was considering making an award of losses right up until the end of the visa period.

83. I do not think the Claimant being cross-examined on the decision that he had already taken, and was continuing to stick to, not to return to India pending the outcome of the litigation, was sufficient to place the Respondent on notice of that scenario. Nor, as is suggested in Mr Lawrence's written submission, do I think it is sufficient to rely on what the Tribunal considered to be, in Mr Lawrence's word, the unconscionability of the Respondent's conduct, nor its finding that Mr Kumar, by dismissing the Claimant and thereby robbing him of his visa, had made good on the threat that he made to the Claimant during the course of his employment. To go down that road would be to risk sanctioning the Tribunal wrongly punishing the Respondent for its conduct, by simply moving to a default position that compensation should cover the whole visa period, something which the Tribunal rightly in its Decision disavowed doing.

84. In all the circumstances, I do not think the Respondent was fairly and sufficiently on notice that the Tribunal might make a future award of this length. Thereby there was an unfairness in the Respondent not being able possibly to adduce further evidence or at least further to cross-examine the Claimant or make further submissions about that, before the Tribunal came to its decision. That does not of course in and of itself mean that it would not have been open to the Tribunal to make such an award, had the Respondent been fairly on notice of the possibility and had a fair opportunity to address it. However, in the circumstances, the handling of this was a further error of law by the Tribunal.

85. Ground 7 pleads that, having worked out that the Claimant should receive one week's full pay in respect of his notice period, the Tribunal then failed, when it performed the actual calculation, to adjust its unfair dismissal compensatory award by that one week, something that Mr Lawrence has conceded was an error of law, although I observe it is not clear to me whether

there was actually a freestanding notice money claim. However, it seems to me that, either way there was an error as there was some element of double counting, whichever way one looks at it.

86. Ground 8 concerns the Tribunal's approach to the impact of tax. It argues that the Tribunal should have worked out what the net loss of earnings was, and then grossed up its award to take account of the impact of tax on the award itself, applying the well-known principle in **Shove v Downs Surgical** [1984] IRLR 17. But what the Tribunal instead did, as described in paragraph 7 of its decision, was to calculate the lost earnings award by reference to gross pay, which, having started with gross figures, it then did not further gross up.

87. Ultimately, Mr Isaacs did not go so far as to say it was necessarily an error of law in every case, to take that approach. That was having regard in particular to **Chief Constable of Northumbria Police v Mr D Erichsen** [2015] UKEAT/0027/15/BA, which countenances that it may be open to the Tribunal in principle to take either approach, particularly where it is given no information by the parties to enable it to do the necessary calculation of grossing up a net award. However, the error here, argued Mr Isaacs, was specifically that the Tribunal failed to take into account that in *this* case the first £30,000 of its award would be tax-free. By working entirely on gross figures, it therefore, he said, over-compensated the Claimant.

88. Mr Lawrence submitted that, given that the Tribunal was offered no assistance in performing a grossing up calculation, it was not out of bounds in this case for it to have taken the broad-brush approach that it did, notwithstanding the point about the £30,000 allowance.

89. My conclusion, having regard to **Erichsen**, is that it is not necessarily an error as such, in a case where the Tribunal does not get any help from the parties, for it to start from gross figures

and then not to perform any further grossing up. However, the point about the £30,000 allowance did not arise in the **Erichsen** case and is in my view a discrete point. If it is clear, as here, that part of the ET's award will be tax-free up to the first £30,000, or at least that there is a real prospect of that being so, then this is not something the Tribunal can ignore if it goes for the approach of starting with gross figures, any more than it can ignore it if it starts with net figures and performs a grossing up calculation. To ignore this does indeed lead to the likely result that the recipient will be overcompensated. It is not a sufficient answer that the parties can apply for a reconsideration if they think that there has been some error in the calculation, particularly not where, as in this case, the need for some adjustment for the £30,000 tax-free bracket was highlighted, albeit in a footnote, in the Respondent's counter-schedule.

90. I add that it is, in my view, better, wherever possible, to start with net figures and perform a grossing up calculation, but particularly so where the first £30,000 will be tax-free, as the Tribunal may otherwise run into further difficulties if it attempts to mix and match, starting with gross figures, but still having to take on board the tax free element. Bearing in mind the **Erichsen** decision, I do not go so far as to say that the Tribunal is bound to take the net approach in every case; but it is, I believe, much the better approach, so as to avoid, or minimise, error, where possible, even where the grossing up calculation cannot be done with precise certainty. A Tribunal is also perfectly entitled, certainly where the parties have some representation, to expect them to proactively assist it, so far as they practically can, in accordance with the overriding objective, in performing the grossing up calculation as precisely as can reasonably and proportionately be achieved.

91. In all events, in this case I am bound to conclude the Tribunal did err in law in simply not taking any account of the fact that the first £30,000 of this award was liable to be tax-free.

92. Ground 10 argues specifically that the Tribunal erred in applying the maximum 25% uplift to its award, in respect of failure to comply with the **ACAS Code**, by not giving consideration to the absolute value of the uplift award that it would be making, if it applied that percentage rate.

93. Before considering that, I pause to note that it was not argued on appeal that the Tribunal erred in law in making an ACAS uplift *at all* having regard to what it found was the true reason for the Claimant's dismissal. That was not argued either in the grounds of appeal or before me today. I must therefore proceed to consider this ground of appeal on the assumption that the Tribunal did not err in making an ACAS uplift award, as such.

94. The specific question is whether the Tribunal erred in not considering the absolute value of that award when it made it, as opposed to merely determining what percentage it thought was appropriate. This question is discussed in **Wardle** (above) in particular at paragraphs 14 to 17. In that case, and in **Chagger** (above), to which it referred back, the court was concerned with the different regime that applied for a period of time under the **Employment Act 2002**. However, it was accepted by both counsel, and I agree, given the salient common features of the two regimes, that in principle the guidance in **Wardle** applies equally to the successor regime introduced in 2009, and which applied in this case. That is because, the relevant provisions (now found in section 207A **Trade Union and Labour Relations (Consolidation) Act 1992**) are engaged, where there is an unreasonable breach of an applicable **ACAS Code** provision, and empower the Tribunal, in such a case, to increase its award (under this regime by no more than 25%) if it considers it just and equitable to do so.

95. It is clear from those authorities, at least, that it is not an error of law, as such, positively to consider the absolute value of the award in deciding finally what adjustment to make in the

A 0% to 25% range. The issue that I have to decide is whether it also is, or may be, an error *not to* consider the absolute value of the award before settling on the final percentage uplift.

B 96. Mr Isaacs submitted that this Tribunal failed in fact to consider the absolute value of a 25% uplift, and that it did err in law in that respect. Mr Lawrence referred to paragraph 36 of the Decision where the Tribunal said it was mindful that its award might appear punitive, but said that it was not its intention to penalise, and that it had thought carefully about its figures.

C 97. However, the passage relied upon by Mr Lawrence comes before the passage in the Decision, that starts at paragraph 40, and is specifically concerned with the ACAS uplift; and

D there is also of course a precursor paragraph in the liability Decision about this.

98. In paragraph 42 of the remedy Decision, I can see no sign that the Tribunal has considered

E the absolute size of the award. In fact, it says that it can see "little alternative" but to award the Claimant the full 25% uplift, because the Respondent's failures were "manifest and profound", and that any figure short of this "would not do justice to our previous determination". Reading that paragraph as a whole, I do not think that, in using the word "figure", the Tribunal was

F referring to the absolute amount of the award as opposed to the percentage figure. It does not appear to me, therefore, to have considered the absolute amount, when deciding whether to award the full 25%; or, certainly, if it did, it has not explained how that featured in its reasoning.

G 99. It seems to me, on a careful reading of the guidance in **Wardle**, that the absolute value of a given percentage uplift is not simply something which it is *permissible* to take into account, but

H something which, in a case where the underlying award is of a significant amount, the Tribunal *needs* to take into account as a relevant consideration.

100. Under the 2002 regime, the starting point, in a case where the uplift provisions were engaged, was an uplift of 10%, but a Tribunal might award less if there were exceptional circumstances. In **Chagger** the Court considered that the absolute value of a large award might constitute such circumstances. The Court in that case (at paragraph 102) observed that Parliament could not have intended the sums awarded to be wholly disproportionate to the nature of the breach. In **Wardle**, the Court was concerned with the power, under that same regime, to make an award of up to 50%, if thought just and equitable. At paragraph 15 Elias LJ (Smith LJ and the Master of the Rolls concurring) said: "The principle of proportionality is equally applicable in those circumstances. The size of the award ought in an appropriate case to be a factor informing the tribunal's determination of what is just and equitable under that provision. No doubt in most cases where the compensation is modest it will not affect the tribunal's analysis. But in other cases, it can be a highly material consideration."

101. Elias LJ went on at paragraph 17 to say: "Mr Jeans submitted that if the Tribunal ought to have had regard to this factor and did not, then given the size of the award in this case, its decision was inevitably flawed and for this reason alone must be set aside. The EAT accepted that submission and so do I." At paragraph 27 he said that: "…the law set its face against sums which would not command the respect of the general public, and very large payments for purely procedural wrongdoings are at risk of doing just that."

102. I conclude that, in a case where the Tribunal is considering making an award of an ACAS adjustment of a certain percentage which, having regard to the size of the underlying award, would be of a significantly large amount in absolute terms, it is an error for the Tribunal not to consider the absolute financial value or impact, before settling on the final adjustment figure.

103. There is, inevitably it seems to me, a punitive element to an adjustment award under these provisions, because the Tribunal is not simply compensating a claimant for some additional readily identifiable or quantifiable loss that he has suffered. The adjustment is bound, to a degree, to be reflective of what the Tribunal considers to be the seriousness and degree of the failure to comply with the ACAS Code on the employer's part. However, the fact that it has a punitive aspect to it makes it, it seems to me, all the more incumbent on the Tribunal to consider the absolute value of its award, if that absolute value is likely to be significantly large, and bearing in mind that, in fixing on the amount which it considers just and equitable, the Tribunal must have regard to justice and equity to both parties.

104. In this case the absolute value of the uplift, at 25%, was in excess of £20,000. That is a figure which was certainly a significantly large amount. Therefore, in not considering the absolute value of this award *before* it determined upon the percentage level at which to set it, or, if it did consider it, certainly in not spelling out that it had considered it, and what view it took of it, the Tribunal erred in law on this point as well.

Outcome

105. In summary, there were therefore a number of errors in the Remedy Decision as follows. Firstly, awarding full loss of earnings for the post-dismissal sickness period without making a finding as to whether, or to what extent, the dismissal had exacerbated or prolonged the Claimant's depression. Secondly, in using the test of balance of probabilities, to determine the **Polkey** chance that the Claimant, had he remained employed, would or might have returned to India before his visa expired. Thirdly, in not giving any consideration to the **Polkey** chance of a long-term sickness lawful dismissal absence, although in considering this, the Tribunal will be entitled to take account of its findings as to the Respondent's deliberate conduct having caused

that sickness absence, and its assessment of the chances that the employment would, or might, have ended by a lawful sickness-related dismissal. Fourthly, not explaining why it concluded that the Claimant's wish to stay in the UK to see through the litigation meant that it was not a failure of the duty to mitigate not to return to India. Fifthly, in not considering the possibility that the Claimant might choose to return to India at some point before the date when his original visa would have expired. Sixthly, in not allowing the Respondent a fair opportunity to address the possibility that the Tribunal might award a future loss period beyond what was claimed in the schedule of loss. Seventhly, in double-counting the one-week notice period. Eighthly, in not taking account of the fact that the first £30,000 of its compensatory award would, or would very likely, be tax-free. Lastly, in not giving consideration to the absolute value of the proposed ACAS uplift award before settling on that uplift.

106. Having given my Decision on the substantive appeal, I heard further argument on two potentially related questions, namely whether this matter should be remitted to the same Tribunal as before or to a fresh Tribunal, and whether, and if so, to what extent, new evidence should be permitted to be adduced for the purpose of further consideration of the remedy. The guidance in **Sinclair Roche & Temperley & Ors v Heard & Anor** [2004] IRLR 763 (EAT) is well-known and I have borne it in mind, although of course the particular factors and how they interact in any given case are case sensitive and there are some unusual features of this case.

107. Mr Isaacs argued that I should direct that the matter be remitted to a fresh Tribunal; Mr Lawrence to the same Tribunal, if available. Mr Isaacs argued that there should be a completely fresh start on the question of remedy, with both sides being at liberty to adduce fresh evidence and indeed to run their arguments again without restriction at the reconvened Remedy Hearing. Mr Lawrence argued that that would be undesirable and unfair, in particular because it would

allow the Respondent to introduce lines of argument which it has not made the subject of its appeal against the existing remedy Decision.

108. I turn to the particular reasons why Mr Isaacs said this matter should not go back to the same Tribunal. Firstly, he said that there had been a significant delay; the implications being that this was not a case where the matter would still be fresh in the minds of the members of the Tribunal. However, it seems to me that that is at best a neutral consideration. Any new Tribunal will be dependent on reading the previous Tribunal's liability Decision and coming to the evidence afresh. I doubt that the existing Tribunal will entirely have forgotten this matter, and it will at least have the advantage over a fresh Tribunal of some background familiarity.

109. Secondly, said Mr Isaacs, it is desirable to remit to a fresh Tribunal given the number of errors that I have found. Although it is true that I have found a number of errors, a number of them are discrete and precise. The solution to them is also clear and specific. It should not be inferred from what I have said that therefore this Tribunal is incapable of getting this right or cannot be trusted to get it right on a second go. I do not think that is the case. I do not think it would be right to say that.

110. The most serious challenge perhaps to the proposition that this should go back to the same Tribunal, is the concern that, despite disavowing that it was punishing the Respondent, that is exactly what this Tribunal did. In particular Mr Isaacs points to paragraph 17 of the remedy Decision where the Tribunal says that, by writing to the Home Office the day after the dismissal, Mr Kumar implemented his threat to remove the Claimant's ability to earn a living in the UK, by orchestrating the cancellation of his Tier 2 visa.

111. It is of course correct to say as such that once the Claimant was no longer employed by it, the Respondent was bound to notify the Home Office of that fact, and that it led inevitably to the withdrawal of his visa. However, there is a wider context here, where this Tribunal has made findings that it was entitled to make, about this Claimant having been exploited as a vulnerable migrant worker, and specifically subjected to extortion of his wages by exploiting that vulnerability, and, in the course of that process, threatened that if he did not comply with it, his employment would be terminated and his visa thereby brought to an end.

112. In that context it seems to me that what the Tribunal said in paragraph 17 was a reflection of its findings in the liability Decision, and should not be salami-sliced by distinguishing between the question of termination of the employment, which was deliberate and unlawful, and the consequence of it, which surely Mr Kumar knew very well would follow. One can infer that the Tribunal thought that he knew it would lead to the loss of the Claimant's visa, as indeed it did.

113. I have not found at any point in my Decision that this Tribunal did do other than what it said it did, namely take care not to make a punitive award, which it knew it could and should not do, notwithstanding the strength of the findings it made, and was entitled to make, about the conduct of this employer. Indeed, it showed itself specifically aware of the danger that it might, subconsciously if not consciously, do that. Frankly that is a danger that would face any Tribunal tasked with awarding a remedy for this particular unfair dismissal, given the trenchant findings of fact made at the liability stage. Any Tribunal in a case like this would need to exercise some self-discipline to ensure that it does not subconsciously or consciously make a punitive award. I do not see any reason to think that the existing Tribunal cannot be trusted to do that.

114. So far as the question of evidence is concerned, I would not permit fresh evidence and fresh argument to be generally adduced, unless it was necessary to do so in order to give proper effect to putting right the errors of law. It is also not desirable, in the interests of either party, to have to rerun the entire hearing, which is liable to take much longer.

115. In addition, there is a danger of unfairness to the Claimant in allowing a completely fresh Remedy Hearing, in particular because of two points that were *not* run by way of challenge on this appeal. One arose from the fact that, I am told, the Respondent has, at some point, lost its Home Office licence. However, it has not made that the subject of a ground of appeal (nor did it seek a reconsideration from the Tribunal by reference to that). So, it would not be fair to the Claimant to allow the Respondent to now run a **Polkey** argument by reference to that, at a remitted Remedy Hearing. Nor, secondly, would it be fair to the Claimant to allow the Respondent to reopen the question of whether there should be any ACAS uplift *at all*, given that no such ground has featured in this appeal.

116. If I look at the different errors of law that I have identified, the error in relation to awarding full loss of earnings for the sickness period can be addressed by the Tribunal simply looking at the evidence that was before it and considering what, if any, finding it feels able to make, based on that evidence, as to what impact, if any, the dismissal had upon the Claimant's indisposition. The error of considering the **Polkey** chance of return to India on the balance of probabilities is addressed by looking at that question again on the existing evidence, applying the right test. The error of not considering the **Polkey** chance of a long-term sickness dismissal can be addressed, with the guidance I have given the Tribunal, by it engaging with the evidence it already has.

117. The Tribunal will be able to reengage with the mitigation point, and give reasons for its decision on that point, again without the need for fresh evidence. Double counting the notice money award is rectified by a recalculation, as is not taking account of the £30,000 tax-free. It will be a straightforward matter for the Tribunal to review its proposed ACAS uplift against the absolute value, again without the need for further evidence. What one is left with is the Respondent not having had a sufficient opportunity to make representations, possibly adduce evidence, and possibly cross-examine the Claimant, on the question of whether he may, in the future, return to India to work, at some point before the date on which his visa would have expired. It seems to me that that can be addressed by allowing both parties simply to adduce any further evidence that may be relevant to the prospect of the Claimant returning to India to work, or not, in the time that remains.

118. I have therefore concluded that this matter should be remitted to the same ET panel, if available, with directions being given for any further evidence to be adduced by either party on the question of the prospect of the Claimant returning to work in India in the period up to August 2020, and with permission for the Claimant, or any witness of the Respondent, if it adduces witness evidence on that question, to be cross-examined at the reconvened Remedy Hearing on that matter, and of course opportunity for further submissions on all the remitted grounds.