Appeal Nos. UKEAT/0224/18/DA
UKEAT/0225/18/DA
UKEAT/0017/19/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 23 July 2019
Judgment handed down on
31 July 2019

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

PARK CHINOIS LIMITED	APPELLANT (First Respondent below)
MR ADNAN OZKARA	FIRST RESPONDENT (First Claimant below) (Appellant in UKEAT/0017/19/DA)
MR LEVENT CAKIR	SECOND RESPONDENT (Second Claimant below)
MR SIDDHARTH MEHTA	THIRD RESPONDENT (Second Respondent below)

JUDGMENT

APPEARANCES

For the Appellant and Third Respondent	MR ANDREW ALLEN and MS LINDA HUDSON (of Counsel) Instructed by: Direct Access
For the First and Second Respondents	MS ELAINE BANTON (of Counsel) Instructed by: Direct Access

SUMMARY

JURISDICTIONAL POINTS – Extension of time: just and equitable
UNFAIR DISMISSAL – Reinstatement /re-engagement
UNFAIR DISMISSAL – Compensation
CONTRACT OF EMPLOYMENT – Damages for breach of contract
PRACTICE AND PROCEDURE – Striking-out/dismissal

In three wide ranging appeals arising from three separate decisions dealing with two claims by former restaurant managers of wrongful dismissal, unfair dismissal, discrimination, harassment, deduction from earnings and other claims, it had not been shown that the tribunal had erred in any way. All three appeals failed on all grounds.

In the first appeal, the tribunal had been justified in extending time for presenting the claims alleging harassment on the ground of race and/or religion. It had not erred in applying the maximum 25 per cent uplift for unfair dismissal compensation and had set out sufficient reasons for selecting the maximum figure. It had not unfairly favoured the claimants by adjourning the contract claims to the remedies stage and then agreeing (under rule 52 of the **ET Rules of Procedure**) not to dismiss them on their withdrawal.

In the second appeal, the tribunal had been justified on the evidence then before it in finding that following the first claimant's unfair dismissal, it was practicable for the first respondent restaurant company to reinstate the first claimant; and in rejecting the employer's case that reinstatement was not economically viable and that trust and confidence in the first claimant had broken down. The tribunal had not erred in finding that the first claimant had not contributed to his dismissal by his conduct; nor in describing reinstatement as the "primary remedy" for unfair dismissal.

In the third appeal, the tribunal had been justified in receiving an affirmation from the second respondent contradicting the evidence given (in the second respondent's absence) at the previous remedies hearing and in revisiting and altering on the basis of that affirmation and further written submissions without a further oral hearing (no such further hearing having been sought by the first claimant after receiving the affirmation) its previous, provisional finding that reinstatement was practicable, deciding that it was not and that compensation only should be awarded instead.

THE HONOURABLE MR JUSTICE KERR

The Three Appeals

1. There are three appeals before the appeal tribunal against decisions on liability and remedies made in two tribunal claims brought in 2016 and 2017 and decided by a three member tribunal sitting at London Central Employment Tribunal in January, July and October 2018. The tribunal comprised Employment Judge Baty, sitting with Mr M Simon and Mr B Tyson. The claims were brought following the dismissal of the two claimants below by the respondent, which runs the Park Chinois restaurant in Mayfair, London.

2. I will call the claimants below and the second respondent below by their names, Mr Ozkara, Mr Cakir (together, the claimants) and Mr Mehta. I will refer to the first respondent below as Park Chinois. Mr Mehta is a board member of Park Chinois and its controlling shareholder.

3. In the first appeal, Park Chinois is the appellant. The decision appealed against followed a hearing from 22 January to 1 February 2018. The reserved decision (the liability judgment) was dated 17 April 2018 and sent to the parties on 18 April 2018.

4. In the second appeal, Park Chinois is again the appellant. The decision followed a hearing on 3 and 4 July 2018. The reserved decision (Remedies (1)) was dated 6 July 2018 and sent to the parties on 11 July 2018.

5. In the third appeal, the appellant is Mr Ozkara. It followed deliberations on the papers by the same tribunal in chambers, on 31 October 2018. There was no oral hearing. The resulting reserved judgment (Remedies (2)) was dated 31 October 2018 and sent to the parties on 1 November 2018.

The Facts

6. Mr Ozkara became restaurant director at Park Chinois, with guaranteed gross remuneration of £200,000 per annum. He worked under a contract terminable on three months' notice, with guaranteed pay of £200,000 a year. Mr Cakir became premier maître d'hotel at Park Chinois, reporting to Mr Ozkara, working under a fixed term contract with an expiry date in October 2017, with guaranteed gross remuneration of £160,000 per annum. Both were persuaded to join due to their contacts and experience in the trade. At the time, the restaurant was losing money and needed to cut costs.

7. During the period from September 2015 to January 2016 the then chief executive officer of the respondent, Mr Alan Yau, referred to the claimants, who are both Turkish and Muslim, as the "Turkish Mafia"; gave instructions that they should not employ black staff, "Eastern European bimbos", Muslim, Jewish or Indian staff; and that they should not tell restaurant guests with religious sensitivities that some of the dishes on the menu contained pork extracts.

8. Mr Yau was then removed from operational charge of the restaurant and Mr Ozkara took over. He reported to Mr Mehta. However, the restaurant continued to lose money. There was discontent about the way the restaurant was run and the system of "blocking" tables for wealthy customers. Eventually, on 6 September 2016, Mr Ozkara was abruptly dismissed,

without any due process, for certain alleged irregularities and failure to control labour costs. An appeal against his dismissal failed.

9. Mr Cakir was suspended from 7 September 2016. His conduct was investigated, he was called to a disciplinary hearing in October 2016 and by letter of 22 November 2016 he was summarily dismissed for gross misconduct, i.e. "selling" tables for personal gain in the form of cash and benefits. He too appealed unsuccessfully against his dismissal.

10. Mr Ozkara brought his claims on 12 December 2016; Mr Cakir, on 15 February 2017. The unfair dismissal and breach of contract claims were brought in time. The claims based purely on discrimination and harassment were not. Park Chinois and Mr Mehta were named as respondents to the claims. Mr Ozkara, but not Mr Cakir, ticked the box marked "reinstatement" as a remedy sought. He also ticked the "compensation only" box. In their defences, the respondents asserted that (so far as relevant to these appeals) the discrimination based claims were out of time.

The Decisions

11. At the liability hearing, both claimants and Mr Mehta were among the witnesses who made witness statements and were cross-examined. In the liability judgment, the tribunal upheld Mr Ozkara's unfair dismissal claim, adding a 25 per cent uplift to any award of compensation, because of failures to comply with the ACAS Code on Disciplinary and Grievance Procedures. Certain complaints by both claimants of harassment by reason of race and/or religion succeeded in part, as against Park Chinois only. Time was extended to enable these complaints to be entertained.

12. All allegations of discrimination brought against Mr Mehta personally failed. Other complaints against Park Chinois of harassment by reason of race or religion failed, as did claims for protected disclosure detriment and dismissal. A claim by Mr Ozkara for holiday pay succeeded. Mr Cakir's claim for unlawful deductions from wages was not entertained on the ground of lack of jurisdiction. The tribunal did not determine claims by both claimants for breaches of contract, saying these could, if pursued, be determined at a remedies hearing.

13. The tribunal required the claimants to indicate their position in relation to the breach of contract claims within 14 days of the liability hearing. The tribunal also asked for a list of issues for a remedies hearing to be produced. The parties did not produce a list of issues. The claimants did inform the tribunal and the respondents that they wished to withdraw the breach of contract claims. They asked the tribunal not to dismiss them, so that they could be pursued in another forum.

14. In the period leading up to the first remedies hearing, the semi-retired solicitor then representing the claimants, Ms Onwukwe, wrote that the claimants were unable to meet counsel's fees and would represent themselves at the next hearing. She reminded the tribunal and the other parties that Mr Ozkara was seeking reinstatement, to restore his reputation and generate an award of back pay instead of a compensatory award. She explained that although she would not be attending the hearing, she continued to represent the claimants.

15. The next day, Ms Hudson, then counsel for Park Chinois and Mr Mehta, wrote to the tribunal complaining of being taken by surprise on the issue of reinstatement and asking that the

remedies hearing be "stayed" (as per a request previously made) or "adjourned" with directions given for determination of the issue of reinstatement. In the letter, Ms Hudson pointed out that the direction given in April 2018 required the parties then, within 14 days, to identify the issues and reinstatement had not been advanced as an issue by Mr Ozkara in response to that requirement.

16. The tribunal wrote on 27 June 2018, refusing the application for a stay or adjournment and stating that the hearing fixed for 3 and 4 July 2018 would proceed. Reasons were given and an indication of the agenda for the forthcoming remedies hearing, together with certain other directions including that the issue of reinstatement would be considered at the hearing.

17. The hearing then did proceed on those dates, leading to the Remedies (1) judgment. Both sides were, in the event, represented by counsel, Ms Banton for the claimants and Mr Horan (on the first day) and Ms Hudson (on the second day) for the respondents. Mr Mehta had (though the tribunal did not discover this until later) clashing commitments. Unlike at the earlier liability hearing, he did not attend, make a witness statement or give evidence.

18. In the Remedies (1) judgment, the tribunal made an order for reinstatement of Mr Ozkara to his old job by 9 July 2018, ordering also that he treated as if not dismissed; and payment of £297,166.66 (subject to deductions of tax and national insurance) in back pay, less any remuneration received by him from other work during the back pay period. The tribunal stated that had it not ordered reinstatement, it would have awarded the maximum capped unfair dismissal award in the sum of £80,399 (a basic award of £1,437 and a compensatory award of £78,962).

19. The tribunal awarded £12,144 (including interest down to judgment) for injury to feelings in respect of Mr Ozkara's successful discrimination claims; and £16,060 (including interest to judgment) for injury to feelings in respect of Mr Cakir's successful discrimination claims. The tribunal decided, applying rule 52 of the Employment Tribunal Rules 2013 (the Rules), not to dismiss the breach of contract complaints, which had been withdrawn so that they could be pursued elsewhere without the jurisdictional financial limit of £25,000 per claim.

20. At paragraphs 27 and 28 of the Remedies (1) judgment, the tribunal commented adversely on the absence of any further evidence from Mr Mehta, who had not attended or provided a witness statement, stating that there was "no reason before us as to why he could not attend this hearing and why, if working with Mr Ozkara was problematic, he could not give evidence to that effect".

21. At paragraph 28, the tribunal accepted Mr Ozkara's evidence that he and Mr Mehta were "still in touch", had "exchanged baby photos" after the recent birth of Mr Mehta's new baby and "Mr Mehta said that Mr Ozkara should come and see the baby and Mr Ozkara said he would like to". They accepted other evidence from Mr Ozkara of continued contact and ability to work together despite the unsuccessful allegations of discrimination against Mr Mehta.

22. The tribunal stated at paragraph 32 of the Remedies (1) judgment that, if it had not made an order for the reinstatement of Mr Ozkara, it would have ordered Park Chinois to reengage him in "employment comparable to that which he had immediately before he was dismissed". It added that compliance with such an order would be practicable, "in particular as all the core elements of Mr Ozkara's previous job are still there for him to do".

23. After the Remedies (1) judgment, the parties corresponded further with each other and the tribunal. Park Chinois wished to continue to contest the practicability of reinstating Mr Ozkara and had indicated through counsel on 4 July that it would not comply with the reinstatement order. The tribunal wrote to the parties on 6 September 2018. In that letter the judge asked them to indicate whether a hearing should be held or whether "the matter should be determined on the papers already submitted".

24. The parties agreed that the outstanding issues should be dealt with on the papers, without a further hearing. The tribunal later recorded their agreement at paragraph 2 of the Remedies (2) judgment. However, the respondents made a request to rely on further written material. I have not seen that request and do not know if it referred to further written evidence, as distinct from submissions. The tribunal responded on 19 September 2018, giving the parties until 3 October "to submit any further written submissions they wish to make".

25. In a letter of 28 September 2018, the tribunal notified the parties that the deliberation on the papers would take place on 31 October. Just before 2pm on 3 October, the deadline date for making further submissions, Mr Ozkara emailed the tribunal (not copying the respondents) saying that Ms Onwukwe had "resigned" and "does not represent me anymore"; and that "[f]or now I represent my self and I will soon appoint a new solicitor".

26. He was, indeed, already in touch with Ms Samira Cakali of SCE Solicitors, who was not formally representing him but had been helping him with a written submission which he sent to the tribunal (omitting to copy the respondents) later the same day, 3 October 2018. It was focussed on asking the tribunal to preserve and uphold the findings made in the Remedies (1) judgment and on seeking an "additional award" of between 26 and 52 weeks' pay under section 117(3)(b) of the **Employment Rights Act 1996** (the 1996 Act).

27. Also on 3 October, Ms Hudson (counsel for the respondents) sent to the tribunal and Ms Onwukwe written submissions which included mention of written evidence "to follow" from Mr Mehta and then (at 5.34pm) an affirmation (inaccurately described as an affidavit) from Mr Mehta, with exhibits. Ms Onwukwe was by then no longer representing the claimants. She forwarded the written submissions to Mr Ozkara and then forwarded the affirmation and exhibits to him later that evening.

28. The respondents' written submissions were directed at persuading the tribunal that reinstatement of Mr Ozkara was not practicable and included clear contradiction of the oral evidence Mr Ozkara had given at the Remedies (1) hearing on matters relevant to the issue of continuing trust and confidence.

29. In the affirmation, Mr Mehta stated why he had been unable to attend the hearing on 3 and 4 July 2018 and the difficulties this had caused, citing business meetings in India and a family holiday in Mykonos making it impossible for him to attend or provide a statement. Mr Mehta also touched upon the issue of trust and confidence in Mr Ozkara, saying at length and in detail why he lacked trust and confidence in him, partly by reference to his earlier witness statement used at the liability hearing, on which he had been cross-examined and from which he quoted lengthy passages.

30. The affirmation also addressed the birth of his daughter and Mr Ozkara's evidence at the hearing on 3 and 4 July 2018. He challenged as untrue Mr Ozkara's evidence given at the Remedies (1) hearing. Mr Mehta said that his daughter had been born in December 2016, they had never exchanged "baby photos", he had never told Mr Ozkara he should come and see the baby, he had only inadvertently included Mr Ozkara in his group message announcing his daughter's birth in December 2016 and had not been in touch with Mr Ozkara since replying "same to you" to a new year greeting message from Mr Ozkara on 31 December 2016.

31. Mr Ozkara, unrepresented but with access or potential access to legal assistance, did not seek an oral hearing or ask to cross-examine Mr Mehta on his affirmation. Mr Ozkara had, at that time, the benefit of a reinstatement judgment in his favour, albeit one with which he understood Park Chinois did not intend to comply, coupled with a hefty financial award. Thus, unusually, the tribunal was faced with a belated challenge in written evidence (itself not cross-examined on) to earlier oral evidence at a hearing not attended by the challenger.

32. The affirmation was among the documents considered by the tribunal when it met at the end of October 2018 to deal with outstanding issues on the papers, leading to the Remedies (2) judgment, together with the written submissions of the parties. In the Remedies (2) judgment, the tribunal decided that Park Chinois had satisfied it that it was not practicable to comply with the order to reinstate Mr Ozkara.

33. The tribunal accepted the evidence in Mr Mehta's affirmation on the subject of contact between him and Mr Ozkara and on the subject of his reasons for having been unable to attend or give evidence at the Remedies (1) hearing in July 2018. The tribunal had available to it the exchange of WhatsApp messages in December 2016. They reached the conclusion that, contrary to what they had decided in their "provisional determination or assessment" (paragraph 19), there was (see paragraph 25) "no ongoing relationship between them".

34. The tribunal therefore decided that it would not make any additional award under section 117 of the **1996 Act** and substituted for its award totalling £297,166.66 the lesser award of £80,399, made up as already indicated in Remedies (1).

The First Appeal (Liability Judgment)

The Extension of Time Point

35. Mr Allen submits that the tribunal erred in law by agreeing to extend time to enable the successful discrimination claims to be entertained. He accepts that the tribunal's discretion to extend time is wide but emphasises that, as Auld LJ observed in *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434 at [25]:

> **"there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of the discretion is the exception rather than the rule".**

36. Mr Allen complains that the claimants did not present evidence or argument on extending time and that the tribunal decided it was just and equitable to do so only on the basis of oral submissions from the claimants and did not invite comment on its reasoning, which was (paragraph 253 of the liability judgment) that the allegations against Mr Yau were serious; that

it was understandable that the claimants would not bring them until after their employment was terminated; and that the extension needed was only eight to nine months, not a period of years.

37. Mr Allen contended that the tribunal had wrongly proceeded on the basis of assumptions in the claimants' favour, not based on evidence. He relied on HHJ Eady QC's decision in *British Transport Police v. Norman*, UKEAT/0348/14/MC, at [46]. HHJ Eady QC set aside an extension of time where a tribunal had extended it at a preliminary hearing, without hearing all the evidence, and had erred by making assumptions in the claimant's favour. She remitted the time point back to the tribunal so it could be considered at the main merits hearing.

38. In oral argument, Mr Allen added that Mr Ozkara and Mr Cakir had been bold enough to raise with Mr Mehta in late 2015 and early 2016 the matters of complaint against Mr Yau, as the tribunal noted at paragraphs 76-79; Mr Ozkara had produced a "grievance" document and sent an email and various WhatsApp messages to Mr Mehta on the subject, to which Mr Mehta had not responded.

39. Ms Banton defended the tribunal's reasoning. She reminded me that scope for an appeal is narrow and submitted that the high threshold of perversity would have to be reached. She relied on Sedley LJ's remarks in *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 at [31] and [32] that there is "no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised" and that whether to grant an extension "is not a question of either policy or law" but "of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it".

40. Ms Banton pointed out that the respondents' counsel had asked no questions of the claimants on the timing point, even though the respondents had raised the time point in their grounds of resistance and the issue was included in an agreed list of issues. The claimants had said in witness statements, unchallenged by Park Chinois on this point, that they had assumed their grievance had been dealt with by removal of Mr Yau from his operational role. Mr Ozkara had gone away on holiday after that and on his return had been summarily dismissed.

41. The tribunal, said Ms Banton, had made detailed findings to the effect that the conduct of Park Chinois, through Mr Yau, had been of the utmost seriousness and that was a factor of considerable relevance. She submitted that the tribunal could take judicial notice of the point that employees would be strongly inhibited from bringing claims of such seriousness while still employed. The relatively short duration of the extension needed was also a legitimate factor to take into account.

42. In my judgment, Park Chinois does not succeed in showing that the tribunal erred in law when deciding to extend time. The starting point was that the time issue was raised in the grounds of resistance and that was reflected in the list of issues. The claimants bore the burden of persuading the tribunal to extend time. Since the time point was not decided as a preliminary issue (unlike in *British Transport Police v. Norman*), the tribunal was able to decide the point on the basis of the detailed and extensive evidence before it.

43. The judge, during submissions "emphasised that the Tribunal … needed to make findings on any jurisdictional issues (specifically time limits) … and the parties were able to make submissions on those issues" (liability judgment, paragraph 10). Ms Banton did so,

including making the suggestion, rejected by the tribunal as unsupported by evidence, that the claimants would have been "too intimidated" to bring their claims earlier than they did.

44. The tribunal, therefore, was alive to the need to base its decision on evidence and not assumptions. The tribunal pointed out that neither claimant had expressly stated or been asked why they did not bring the discrimination claims (founded on Mr Yau's conduct) earlier. They referred back to the damning findings against Mr Yau, who was plainly aware of the proceedings but had not given evidence. He would escape being held to account unless time was extended.

45. The tribunal then said at paragraph 254 that they would extend time. The reasoning was:

> **"[g]iven the seriousness of the allegations, and given that we find it understandable that, however offensive they were to the Claimants, they would not bring them until the point where their employment was terminated … and … that these are allegations which are roughly 8/9 months out of time … it would be just and equitable to extend time … ."**

46. I do not think the tribunal was merely taking judicial notice of the point that employees such as these would not bring these claims until after the end of their employment. The tribunal avoided the error of accepting Ms Banton's suggestion that they must have been too intimidated to bring their claims while still employed. The tribunal was saying that it was "understandable" on the facts of this case that the employees did not bring their claims until their employment ended.

47. The tribunal's conclusion that this was "understandable" is not the same thing as an assumption, which would be unsupported by evidence, that they only plucked up courage to claim after being sacked. It is a finding that the claimants could and should reasonably be forgiven for not claiming earlier, given the seriousness of the conduct and the spectre of Mr Yau not being held to account for it. The facts informing the finding that the delay was "understandable" were detailed and extensive.

48. They included the history of Mr Yau's egregious conduct, his difficult personality, a description of him by the non-executive chairman of Park Chinois, Mr Sheridan, as "manipulative" and "abusive" (paragraph 70), the offence and affront to the claimant's dignity caused by his conduct and his removal from the scene after the grievance had been raised with Mr Mehta. Those were all legitimate matters for the tribunal to consider. I find no error of law in the decision to extend time and I dismiss this ground of appeal.

The ACAS Uplift Point

49. Mr Allen's next ground of appeal was that the decision of the tribunal in the liability judgment to increase Mr Ozkara's compensation for unfair dismissal by the maximum 25 per cent (applying section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992**) by reason of unreasonable failure to comply with paragraph 9 of the ACAS Code of Practice on Disciplinary and Grievance Procedures, was flawed by inadequate reasoning.

50. The tribunal, he argued, had failed to state why it opted for the maximum uplift of 25 per cent. He accepted, however, that the point was academic because the 25 per cent uplift was not actually applied to Mr Ozkara's award of compensation for unfair dismissal. That was because once the reinstatement order with back pay had been replaced with an award of

compensation for unfair dismissal, the award made (£80,399) was already capped at the statutory maximum, which cannot be exceeded by applying any uplift under section 207A.

51. Although that meant the point was academic, Mr Allen did not have instructions to withdraw it and I must therefore deal with it, albeit briefly. Mr Allen submitted that the tribunal had failed to answer two of the last three questions on the list of questions provided by Lady Smith in *Allma Construction Ltd. v. Laing*, UKEATS/0041/11/BI, at [29], namely why it is just and equitable to increase the award and why the increase should be of the amount chosen – here, the maximum 25 per cent.

52. Ms Banton submitted that it was obvious from the tribunal's findings elsewhere in the detailed liability judgment why it had chosen the maximum 25 per cent uplift: the conduct of Park Chinois had been about as unfair as it could have been; there was no warning of the dismissal and no opportunity given to Mr Ozkara to speak against it. The breaches of the Code were flagrant and of the utmost seriousness. She argued that those findings were sufficient to justify and explain the decision to select the maximum 25 per cent uplift.

53. I agree in substance with Ms Banton. It would have been good practice for the tribunal to state briefly its reasons for selecting the maximum uplift available, since a reader of the judgment should be able to see straight away from reading it what the reasons were for selecting the particular percentage uplift. But in the present case the only disadvantage to the reader was having to look elsewhere in it for the findings which obviously constituted those reasons. I therefore do not uphold this ground of appeal.

The Failure to Determine the Contract Claims Point

54. This ground of appeal amounts to an accusation that the tribunal wrongly descended into the arena of conflict and rendered assistance to the claimants at the expense of the respondents below. As such, it is perilously to an accusation of at least apparent bias, though not argued as such. Mr Allen submitted as follows.

55. First, he reminded me that the claimants had been legally represented throughout and had made what he said must have been a conscious tactical decision to bring breach of contract claims before the tribunal which, as the claims were clearly worth more than £25,000 each, brought into play the jurisdictional bar against awarding more than that amount, not increased since the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 which introduced both the jurisdiction over contract claims and the financial limit.

56. Mr Allen submitted that the claimants may be taken to have chosen, on advice, to litigate in a (normally) costs free jurisdiction, both as to costs recoverable and exposure to the opponent's costs. They told the Remedies (1) tribunal hearing that they had expected to win certain (in the event unsuccessful) discrimination claims where the dismissals had been cited as discriminatory acts. Had those succeeded, the £25,000 limit would in practice not have applied, since compensation for loss of earnings in discrimination claims is uncapped.

57. Next, Mr Allen submitted that the tribunal had in substance determined the claims for breach of contract, by determining in the liability judgment what the terms of their contracts were, which was a matter of dispute and evidence. Mr Allen then submitted that the tribunal unlawfully decided (liability judgment, paragraph 205) "not to determine [the] breach of

contract complaints in relation to notice periods for either Claimant at this point"; leaving the claimants to decide whether they wished to pursue them in the employment tribunal.

58. He contended that the tribunal had thereby overstepped the mark and fallen into the error of giving legal advice to the claimants to withdraw their breach of contract claims and pursue them elsewhere. This enabled the claimants then to withdraw those claims and invoke rule 52 of the Rules to preserve them for another forum, as they subsequently did successfully at the Remedies (1) hearing.

59. Mr Allen relied on *Fraser v. HLMAD* [2006] ICR 1395, decided after the 1994 Order but before the advent in 2013 of rule 52, which had no predecessor counterpart when *Fraser* was decided. Mr Fraser recovered £25,000 in an employment tribunal and sought to recover a amount in excess of that in the High Court, having in the tribunal proceedings reserved his right to do so. What Mr Fraser did not know was that, as the Court of Appeal subsequently explained, his success in the employment tribunal extinguished his cause of action for wrongful dismissal, which merged in the tribunal's judgment.

60. He was therefore not assisted by having reserved his right to claim in the High Court. The Court of Appeal warned that claimants should not bring breach of contract claims in the employment tribunal unless willing to confine them to £25,000. Mr Allen relied on Moore-Bick LJ's observations at [60] to the effect that there are advantages and disadvantages to bringing a claim in the employment tribunal and that a claimant may choose to bring the claim in one or other forum.

61. Ms Banton submitted that the tribunal had not erred; it had simply managed the case in a sensible and proportionate manner. She relied on the comment of the sift judge, Mr John Cavanagh QC sitting as a deputy High Court judge, that this ground of appeal might well have been found unarguable since the tribunal's course of action appeared to be a "sensible and pragmatic approach, well within the scope of the Employment Tribunal's discretion".

62. The tribunal had, Ms Banton said, deferred to the remedies stage the issue of the breach of contract claims which had at one stage appeared to overlap with, in Mr Cakir's case, a claim for deduction of remuneration due. It was legitimate, she submitted, for the tribunal to give the claimants a further 14 days to clarify its position and, when it did so, to operate rule 52 which was there to cater for "dual forum" issues including cases where there could be an overlap between (uncapped) deduction of wages claims and (capped) breach of contract claims. The *Fraser* case was not relevant because there was then no rule 52 and in the present case no award for breach of contract was ever made by the tribunal.

63. I come to my reasoning and conclusions on this ground of appeal. I agree with Mr Cavanagh and Ms Banton. In my judgment, the tribunal did not wrongly descend into the arena or proffer legal advice to the claimants, as Mr Allen contended. The tribunal sensibly managed the case in a manner that included giving the claimant, quite properly, sufficient time to consider and communicate its position. I note in particular the following features of the procedural history.

64. The starting point was the claims made. Mr Ozkara clearly claimed £50,000 as damages for wrongful dismissal, based on three months' notice with annual remuneration of £200,000.

In addition, he made a claim for unlawful deductions from pay which did not appear to overlap with his breach of contract claim.

65. He was therefore at peril of over-claiming for breach of contract an amount double the statutory maximum the tribunal could award. However, he also claimed unquantified damages for harassment on the ground of race or religion, and other causes of action, compensation for which would, if the claims succeeded, be uncapped and likely to overlap with and in practice include the amount of any wrongful dismissal damages above £25,000.

66. Mr Cakir's claim was less clearly formulated. He claimed for "breach of contract and discrimination". He claimed that he was "dismissed because he complained and refused to comply with unlawful and/or discriminatory instructions and treatment by [Park Chinois]". The allegations of "selling" tables were false and were "part of a pattern of discriminatory and/or unlawful treatment and/or punishment for the Claimant having complained about these matters", i.e. Mr Yau's "inappropriate and/or discriminatory comments during operational and other meetings".

67. His breach of contract claim was initially quantified at three months' gross pay amounting to £40,000 gross. He also claimed as "[u]nlawful deductions from pay" a sum to compensate him for loss of the unexpired portion of his fixed term contract, which would have run until October 2017. This was not, in truth, a claim for unlawful deduction from wages but for breach of contract damages. However, Mr Cakir's advisers appear not to have understood this at the time the claim was presented.

68. The agreed list of issues used at the liability hearing included in short form issues of breach of contract and unlawful deductions from pay affecting both claimants, without clearly disentangling them. This evidently caused the tribunal some irritation, to judge from its observations and directions in the liability judgment, encouraging a more lucid definition of the issues to be determined at the remedies stage.

69. Mr Allen rightly points out that the claimants chose to litigate in the tribunal and not the High Court or a county court. But they did so against the background that rule 52 of the Rules by then existed, unlike at the time the *Fraser* case was decided. Rule 52 is now a factor that must be added to the tribunal side of the balance when claimants' advisers are weighing the pros and cons before selecting their chosen forum.

70. The tribunal was unquestionably right to determine what the terms of the two service contracts were. It was a necessary part of the factual history against which to judge the process leading to the dismissals, the fairness of the dismissals, and the discrimination and whistleblowing claims. The discrimination and whistleblowing claims relied both on facts separate from the dismissals and on the dismissals themselves. They could not properly be determined without knowledge of the contract terms.

71. The tribunal dealt in the liability decision with the wrongful dismissal claims together with the claims for unlawful deductions from pay. It did so, plainly, because it regarded those different types of claim as having been run together in a manner that was not satisfactory; clearly, they needed to be disentangled and analysed separately. One was common law based, the other statute based.

72. When it heard closing submissions on behalf of the claimants, the judge noted that both claimants had included both breach of contract claims and deduction from earnings claims. He noted that the drafting was unclear and in particular described as "confusing" the claim for deduction from earnings by Mr Cakir based on the unexpired portion of his fixed term contract. It was therefore not surprising that he "sought to clarify with Ms Banton whether or not Mr Cakir was indeed bringing this as a breach of contract complaint or an unlawful deduction from wages complaint or both" (paragraph 203 of the liability decision).

73. He then reminded Ms Banton of the jurisdictional limit of £25,000 in the case of breach of contract claims. Mr Allen, rightly in my view, accepted in answer to a question during oral argument, that it was not wrong for the tribunal to give Ms Banton that reminder. Ms Banton took instructions and indicated that "both complaints were being brought". However, the tribunal remained unsatisfied that the case was clear. Eventually, he treated Mr Cakir's deduction from wages complaint as limited to "payments … in respect of his notice period".

74. The tribunal referred to "confusion" in relation to any claim by Mr Ozkara being brought as a deduction from earnings claim, so far as his notice period is concerned. As for Mr Cakir's deduction from earnings claim, the tribunal ruled that it lacked jurisdiction to hear it (paragraph 106). Ms Banton attempted in written submissions to persuade the tribunal that a notice period claim can be brought by way of a claim for deduction from earnings, a proposition the tribunal rejected, as explained at paragraph 207 in the liability judgment.

75. Against that background, the tribunal decided not to determine the breach of contract claims, but to give the claimants an opportunity to put their house in order and clarify their position within 14 days of the liability judgment being issued to the parties. I see nothing unfair about the tribunal taking that course. There was going to be a remedies hearing in any event, unless the claims should settle. There was a potential outstanding reinstatement issue in the case of Mr Ozkara.

76. The tribunal's decision to give the claimant that opportunity was not partial and was not unfair to Park Chinois merely because it gave the claimants the opportunity to recover fully any amounts properly due to them; nor because it enabled the claimants to have recourse to rule 52. I think it likely that rule 52 was enacted in the wake of cases such as *Fraser* which had drawn attention to the trap for the unwary represented by the 1994 Order and the restriction in it to £25,000 as breach of contract damages.

77. The 1994 Order was intended to create a new jurisdiction over small breach of contract claims. It was not intended to confer windfalls on fortunate respondents who could face breach of contract claims of more than £25,000. The fact that the elegant solution decided upon by the tribunal turned out to be favourable to the claimant does not mean it was unfair to the respondents. It was simply a piece of sensible case management. I find no error of law or lack of impartiality. I dismiss this ground of appeal and I dismiss the first appeal.

The Second Appeal (Practicability of Reinstatement; Remedies Judgment (1))

78. The second appeal is brought by Park Chinois to attack the finding in Remedies (1) that it was practicable for Park Chinois to reinstate Mr Ozkara to his old job. Mr Allen points out that if the third appeal fails the second appeal need not be considered, because in the third appeal Mr Ozkara attacks the tribunal's decision not to act on the reinstatement order and to

award compensation instead. However, I propose to deal with the second appeal anyway, and to do so in the order in which, logically and chronologically, the issues in it arise.

The Loss Making Business Point

79. Mr Allen's first ground is that he criticises the tribunal's finding that it was economically viable to reinstate Mr Ozkara. He sought to portray this ground, and his other two grounds of this second appeal, as instances of the tribunal making findings without regard to relevant evidence or failing to take account of material facts. But I think he is really advancing a perversity challenge to the tribunal's findings of fact.

80. The tribunal, said Mr Allen, should have rejected the proposition that it was economically viable to reinstate Mr Ozkara because of the following facts: that he was hired at twice the market rate (£200,000 per annum rather than £100,000); that he was required to reduce labour costs; that by the time of the Remedies (1) hearing, the restaurant had been radically restructured and staff dismissed; and that the business had lost £3.5 million in 2017.

81. I do not think there is any merit in this ground. The tribunal found that Mr Yau's wife, Ms Erentok, had lured Mr Ozkara away from another Mayfair restaurant owned within the same group of companies, Hakkasan, and persuaded him to move to Park Chinois with a promise of payment well above the market rate. The amount an employee is worth depends on how good he is. Ms Erentok evidently thought he was very good.

82. Even if Mr Ozkara did fail to cut labour costs, he could still be worth his high salary, for example, by generating sales. The tribunal did not yet have the benefit of Mr Mehta's evidence to contradict the proposition that it was not practicable to reinstate Mr Ozkara. It was entitled and obliged to proceed on the evidence before it. Park Chinois relied instead on evidence from a consultant, Mr Puri, who, the judge pointed out, was not an employee but worked under a consultancy agreement that could be terminated on 30 days' notice, without risk of liability.

83. In my judgment, Mr Allen's argument amounts to a disagreement with the tribunal's assessment of the factual evidence rather than a point of law.

The Employee / Consultant Comparison Point

84. In similar vein, Mr Allen submits that the tribunal "erred in diminishing the difference in role and salary between Mr Puri and Mr Ozkara". Having found that Mr Puri was not an employee but a consultant, the tribunal noted that he was being paid £180,000 per annum in consultancy fees, while doing certain additional tasks not done by Mr Ozkara, namely running the human resources and finance parts of the operation; compared to Mr Ozkara's higher salary of £200,000.

85. Mr Allen suggested that the £20,000 differential in pay as between Mr Ozkara, if reinstated, and Mr Puri, if Mr Ozkara were not reinstated, should have been given greater weight by the tribunal, in the context of a loss making business such as Park Chinois. He also criticised the tribunal for understating the differential: the true figure was not £20,000 but £50,000 if certain features (national insurance and pension contributions) later emphasised in the Remedies (2) process were taken into account.

86. I reject these criticisms. A tribunal considering the practicability of reinstatement is not bound to reject it just because reinstatement may require the employer to make some adjustments to the business to accommodate the returning employee. The tribunal pointed out that the business of Park Chinois was a single restaurant and it would always be necessary to have one person in charge of the operation, which could be Mr Ozkara. That was not a perverse finding on the evidence before the tribunal.

87. The evidence of a cost differential greater than £20,000 was not before the tribunal at the Remedies (1) stage. Nothing suggests Mr Puri made reference to it. It was first raised on 3 October 2018 at paragraph 3.18 of the written submissions of then counsel (Mr Benjimin Burgher) for Park Chinois, based on Mr Burgher's estimates of national insurance and pension contributions and (without figures) on paragraph 43 of Mr Mehta's affirmation (though Mr Ozkara did not have a workplace pension when dismissed; they became compulsory in 2017).

The Trust and Confidence Issues

88. Mr Allen criticises the tribunal, next, for its finding at the Remedies (1) stage that there was no absence of trust and confidence in Mr Ozkara on the part of Mr Mehta. He argues, first, that the tribunal should have found, even without hearing from Mr Mehta and having no explanation for his absence, a lack of trust and confidence that was necessary fatal to an order for reinstatement. He says, first, that the tribunal should have been swayed by evidence at the liability stage that Mr Mehta regarded Mr Ozkara as a "man of inaction" and indecisive.

89. I reject this. The tribunal was not then aware that Mr Mehta had good reason not to attend the hearing in July 2018. None was put before the tribunal. They were entitled to, and did, on the evidence and information before them, draw an adverse inference from Mr Mehta's absence. He was not there to deny Mr Ozkara's contrary evidence, which they accepted, that Mr Mehta was in touch with Mr Ozkara and could easily work with him again.

90. Mr Allen then advances a further ground of appeal. As I understood his argument, he says that hindsight ought to inform my assessment of the trust and confidence issue, even though that involves me looking at evidence the tribunal did not have until Remedies (2). In support of that proposition, he criticises the tribunal's decision not to accede to Park Chinois's request that the hearing should be adjourned so that Mr Mehta could at least give instructions.

91. He argues that because the tribunal refused to adjourn, the appeal tribunal should now admit as fresh evidence Mr Mehta's subsequent affirmation, which weighed so heavily with the tribunal once they saw it. I do not follow this at all. The decision to refuse an adjournment went unchallenged by Park Chinois. It has not been appealed. That is not surprising, since Park Chinois's then counsel was not even able to inform the tribunal at the hearing in July 2018 why Mr Mehta was not there to give evidence.

92. The evidence Mr Mehta gave in his subsequent affirmation does not come near to fulfilling the well known *Ladd v. Marshall* criteria for admitting fresh evidence on appeal. Mr Allen's real complaint is that the tribunal proceeded on 3 and 4 July without adjourning the matter as they had been asked to do. That unappealed decision cannot now be challenged by the back door, under the guise of an application to adduce fresh evidence.

The Contribution to Dismissal Point

93. Next, the tribunal is criticised by Park Chinois for concluding that Mr Ozkara did not contribute to his own dismissal. This is a statutory relevant consideration when a tribunal has to decide whether to order reinstatement (see section 116(1)(c) of the **1996 Act**). If the employee has "caused or contributed to some extent to the dismissal", the tribunal must take into account "whether it would be just to order his reinstatement".

94. The list of issues at the liability stage included (at issue 7(ii)) whether Mr Ozkara had contributed to his own dismissal. The tribunal decided that issue in favour of Mr Ozkara: see paragraphs 193 and 194 of the liability judgment. The tribunal reasoned that the conduct for which Mr Ozkara was dismissed was not proved; indeed, the investigation, if it could be called that, was so flawed that the genuine belief that Mr Ozkara had been privy to the selling of tables was not reasonable.

95. Mr Allen's first difficulty is that he did not appeal against that finding in the liability judgment. The exercise of determining contributory fault was no different at the Remedies (1) stage. It was logical for the tribunal's finding at that stage to be the same. The tribunal correctly directed itself (Remedies (1) judgment, paragraph 19) that it must consider this issue in the context of reinstatement, having set out the terms of section 116.

96. In the Remedies (1) judgment at paragraph 19, the tribunal pointed out that it had already decided not to make any finding of contributory conduct by Mr Ozkara. It made no new finding at the Remedies (1) stage. Mr Allen criticises the tribunal for having focussed on the conclusions reached at Mr Ozkara's internal appeal against dismissal, rather than at the initial dismissal hearing, at which he was more widely reproached with other matters including failure to cut costs.

97. Mr Allen's criticism derives from the liability judgment, not the Remedies (1) judgment. It is in any event misplaced. The finding that there was no contributory conduct was one for the tribunal to weigh in the light of all the evidence. I do not think it overlooked the width of the charges against Mr Ozkara and it was clearly aware of the first dismissal decision and the grounds for it, as well as the narrower basis of the decision on appeal to uphold the dismissal.

The Primary Remedy Point

98. Mr Allen continued his attack on the Remedies (1) decision with a submission that the tribunal misdirected itself by saying at paragraph 30:

> **"… an order for reinstatement is the primary remedy to look at in relation to the remedies available for successful unfair dismissal complaints. There are no reasons why we should not make such an order ….".**

99. He also criticised the passage in a letter of 27 June 2018 sent on behalf of the employment judge, stating:

> **"Mr Ozkara is entitled to make an application for reinstatement or re-engagement (which are the primary remedies for unfair dismissal), regardless of whether or not he notified the respondent of his intention to do so earlier than the last few days …."**

100. Mr Allen referred to *Oasis Community Learning v. Wolff*, UKEAT/0364/12/MC. There, the appeal tribunal dismissed an appeal against an order that an unfairly dismissed teacher be re-engaged at a different school in a different part of the country. Underhill J (P) emphasised at [44] that the appropriate remedy in each case is an issue of fact.

101. It is true, as Mr Allen points out, that Underhill J (P) (as he then was) at [33] took another tribunal to task for referring, in line with commentators and writers of texts, to the "primacy of the remedy of reinstatement and re-engagement", saying that was "not quite accurate". But he added that the tribunal had not been guilty of a "significant misdirection"; at worst, "the Tribunal's mood music was rather more favourable to re-engagement than is generally heard; but that cannot amount to an error of law".

102. The use of the phrase "primary remedy" to describe reinstatement and re-engagement probably has its origin in the early days of unfair dismissal, when it was envisaged that tribunals would regularly direct reinstatement or re-engagement of dismissed workers found by the industrial jury to deserve their jobs back. That idea may now seem naïve but is reflected in the procedural provision in section 112(2) of the **1996 Act**, requiring the tribunal *after* finding a dismissal unfair to explain those remedies to the complainant and only to proceed to compensation if the complainant does not want either of them.

103. That is why the judge was correct in the letter of 27 June 2018 to say that Mr Ozkara could ask for reinstatement or re-engagement whether or not he had only recently notified Park Chinois of his intention to ask for them; though in fact he had ticked the "reinstatement" box at the outset, as Park Chinois acknowledged.

104. It is not entirely a misuse of language to speak of reinstatement or re-engagement as "primary" remedies, since section 112 of the **1996 Act** requires the tribunal first to consider reinstatement or re-engagement and (per Underhill P in *Oasis Community Learning* at [10]) it "should only make a compensatory award when it has made a positive decision against reinstatement or re-engagement". Later in the same paragraph, he allowed that to call reinstatement or re-engagement the "primary" remedy is "in one sense true", but only in a temporal sense, because they must be considered first.

105. In my view there is, with respect, no substance in this ground of appeal. The tribunal did not misdirect itself here. They set out the applicable law accurately and did not adopt a presumption in favour of reinstatement or re-engagement purely on the basis that Mr Ozkara had asked for it. They correctly had regard to the three statutory relevant considerations in section 116(1)(a)-(c) of the **1996 Act**.

106. The focus was on the second of these: whether it was practicable for the employer to comply with an order for reinstatement. The tribunal properly considered and, on the evidence before it at the time, properly rejected Park Chinois's case that it was not practicable to comply. Their conclusion was not infected with any notion of "primacy" wrongly given to the remedy of reinstatement (or re-engagement).

Non-dismissal of the Contract Claims

107. A separate ground of appeal was that the tribunal ought not to have dismissed the breach of contract claims. As Mr Allen accepted, that ground of appeal stands or falls with the

argument in the first appeal, which I have dismissed, to the effect that the tribunal rescued the claimant by not determining the contract claims, enabling them to be withdrawn but not dismissed. As I have rejected that argument, this ground of appeal falls in the second appeal as did its counterpart in the first appeal. The second appeal is therefore dismissed.

The Third Appeal (Practicability of Reinstatement; Remedies Judgment (2))

108. The tables are turned in this third appeal, where the appellant is Mr Ozkara. He challenges the decision of the tribunal in the Remedies (2) judgment in relation to the unfair dismissal claim, declining to act on the reinstatement order, refusing an additional award and awarding only compensation, capped at the statutory maximum.

109. Ms Banton submits that the appeal tribunal should give guidance to tribunals on how to approach cases such as this where the tribunal effectively changed its mind about the practicability of reinstatement. I agree with Mr Allen that no guidance is needed; it is in the cases that guided this tribunal: *Timex Corporation v. Thomson* [1981] IRLR 522, EAT, per Browne-Wilkinson J at 523-524 and *Port of London Authority v. Payne* [1994] ICR 555, CA, per Neill LJ at 569A-H.

110. Three grounds are raised by Ms Banton in the appeal: that the tribunal failed to require Park Chinois to demonstrate a rational basis for losing trust and confidence in Mr Ozkara; that the tribunal wrongly relied on the evidence in Mr Mehta's affirmation, which had not been tested in cross-examination; and that the tribunal should have gone on to consider re-engagement once it had rejected reinstatement, but failed to do so. I propose to deal first with the second of these grounds.

The Affirmation of Mr Mehta

111. Ms Banton complains, first, that the tribunal did not permit witness evidence to be adduced for the purposes of the Remedies (2) paper exercise. Next, she says the written evidence in Mr Mehta's affirmation was untested in cross-examination and Mr Ozkara had no opportunity to challenge it or comment on it. Third, Mr Mehta's additional evidence was "unsafe"; it could and should have been given at the Remedies (1) stage. Fourthly, she challenged the substance of the affirmation.

112. She submitted that it overplayed, at least, Mr Ozkara's responsibility for the ills of the business. Mr Mehta was trying to "have his cake and eat it"; he attributed operational responsibility to Mr Puri for the purpose of playing up the latter's "non-replaceability"; yet, inconsistently, he blamed Mr Ozkara, not Mr Puri, for the poor performance and high staff costs of the business. She supported her challenges with points of detail including disputes about operational cost figures.

113. Her points could well have made a strong impact if they had been put in cross-examination to Mr Mehta at an oral hearing. The first question is whether it was procedurally fair to Mr Ozkara that they were not. I am unable to conclude that it was unfair. Mr Ozkara had been represented professionally through all or nearly all the proceedings. Even when Ms Onwukwe withdrew, Mr Ozkara was helped by Ms Cakali and informed the tribunal he would appoint another solicitor. He was never without means of access to legal help. He is also an educated man who, I am told, holds two master's degrees.

114. Next, as Mr Allen points out, Mr Ozkara has not asserted that the affirmation is factually incorrect; in particular on the issue of recent contact between him and Mr Mehta. There is no traverse of Mr Mehta's evidence that he was not once in touch with Mr Ozkara after the end of 2016; yet Mr Ozkara's evidence of continuing contact between the two had strongly influenced the tribunal's provisional view of the practicability of reinstatement, as set out in the Remedies (1) judgment.

115. One would expect even an unrepresented party to protest if confronted with untrue evidence from Mr Mehta on that important subject. The tribunal had sight of the WhatsApp messages in December 2016 and Mr Ozkara would surely have contradicted Mr Mehta's account of them if, contrary to Mr Mehta's affirmed evidence, the messages or other contact had continued into 2017.

116. In the light of that, the tribunal was in my view justified in stating, at paragraph 9 of the Remedies (2) judgment:

> **"Whilst clearly neither party was present to be cross-examined, it was by the agreement of the parties that the matter should be considered on the papers only; there was, therefore, no suggestion that should give any less weight to the evidence and submissions submitted to the tribunal by either party on the grounds that they were not present to be cross-examined."**

117. I therefore reject Ms Banton's second ground of appeal and I uphold the decision of the tribunal to proceed to consider Mr Mehta's affirmation, and to do so on the basis that it was uncontradicted by any other subsequent evidence.

The Trust and Confidence Isssues

118. The rejection of the challenge to the tribunal receiving Mr Mehta's affirmation also cuts the ground from under Ms Banton's first ground of appeal: that the tribunal was unjustified in finding a rational basis for Mr Mehta's professed lack of trust and confidence in Mr Ozkara. Once the tribunal had accepted Mr Mehta's account and, no doubt, regretted its acceptance of Mr Ozkara's inconsistent account at the Remedies (1) stage, the tribunal was fully justified in drawing the conclusion that Mr Mehta and Park Chinois lacked trust and confidence in Mr Ozkara. It was plainly a rational position for Park Chinois. This ground of appeal also fails.

The Re-engagement Point

119. The final ground of the third appeal is that the tribunal failed to go on to consider re-engagement, once it had rejected reinstatement, which Mr Ozkara did not ask for in his ET1 but which the tribunal is required, when complying with section 112, to consider if the employee expresses a wish for it. Ms Onwukwe did say in her letter of 25 June 2018 that Mr Ozkara was "seeking an order of re-employment/reinstatement".

120. The tribunal stated in its Remedies (1) judgment (paragraph 32) that it would have ordered re-engagement had it not ordered reinstatement. At that stage, it envisaged that Mr Ozkara could, if not reinstated, be re-engaged in "comparable" employment "to that which he had immediately before he was dismissed". This was viable as "all the core elements of Mr Ozkara's previous job are still there for him to do".

121. By the time of the Remedies (2) exercise, however, the tribunal's view was very different, on the updated evidence. At paragraph 32 of the Remedies (2) judgment, they found that it would not be practicable to reinstate Mr Ozkara to his original role; it "does not … exist". In the next paragraph, they stated that for the reasons already given, "it would not be practicable to re-engage him as managing director in place of Mr Puri. That conclusion is unimpeachable. This final ground of appeal therefore fails and the third appeal is dismissed.

Conclusion

122. For the reasons given above, all three appeals are dismissed on all grounds. I conclude by expressing my admiration for the way in which the tribunal managed and decided these claims and for the high quality of its three written decisions. Not one of the arrows aimed at it hit the target. We criticise the tribunals when they get it wrong and so must not forget to show our appreciation when they get it right.