Neutral Citation Number: [2022] EAT 156

Case No: EA-2021-000557-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 September 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

HILCO CAPITAL LIMITED **Appellant**

- v -

DENISE HARRINGTON

Respondents

- -
- -

Sophie Garner and **Georgia Wood** (instructed by **Messrs Wright Hassall LLP**) for the **Appellant**
Simon Goldberg QC (**Direct Access**) for the **Respondent**

Hearing date: 1 September 2022

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The claimant succeeded in a complaint of unfair dismissal for whistleblowing. At the subsequent remedy hearing, it was averred and accepted by the claimant that, although there were jobs that she could have applied for, she had not looked, or applied, for any jobs at all since being dismissed. As to why not, her case was, in part, that any such application would have been pointless, because any prospective employer would have stigmatised her as a whistle-blower, and not given her a job.

The tribunal found that on that basis her failure to apply for any jobs did not amount to an unreasonable failure to mitigate her loss of remuneration, up to the date when the liability decision was promulgated. The tribunal erred in so deciding, in the absence of any evidence of any experience arising from any actual job application, or any other matter being found as a fact by the tribunal to have factually supported the claimant's assertion as to what would have happened in respect of any job application she might have made.

HIS HONOUR JUDGE AUERBACH:

1. Mrs Harrington was one of three former employees of Hilco Capital Limited who brought claims in the employment tribunal which were heard together. The tribunal referred to her as claimant one. I will refer to her as the claimant and to Hilco Capital Limited as the respondent.

2. Following a liability hearing, the claimant was successful in certain of her claims, including that she had been unfairly dismissed for the reason, or principal reason, that she had made a protected disclosure. There was subsequently a remedy hearing leading to an award. The respondent appealed against that award. The claimant defended the appeal and there was also a cross-appeal in relation to one aspect.

3. The three grounds of appeal in the original notice of appeal were considered to be arguable by HHJ Shanks and the cross-appeal was considered to be arguable by me and they have come before me for hearing today. Ms Garner appeared for the respondent and Mr Goldberg QC for the claimant, both of them having appeared for their respective clients at the hearing in the tribunal below.

4. It appears from his note of reasons for directing the appeal to proceed to a full hearing that Judge Shanks envisaged that the judge at that hearing should sit with lay members, but, possibly through error, this was omitted from the order sent to the parties, and members were not assigned for today. I raised this with both counsel and it was agreed by them both that I should hear and determine this appeal sitting alone. Whilst I appreciate that Judge Shanks thought the matter suitable for a judge and members, I am satisfied, bearing in mind that consent and the overriding objective, that I should.

5. There was a late application by the respondent, made only when its skeleton argument was tendered, to amend one of the grounds of appeal. That was opposed by the claimant and I heard argument on it at the start of the hearing, following which I gave a decision permitting the amendment to be made. Subsequent to this, during the course of the day, the issues considerably narrowed, as a result of which grounds 2 and 3 of the appeal, and the cross-appeal, can all now be disposed of by me

by consent.

6. In summary, I will direct that, in so far as the tribunal made an award in the remedy decision, of damages for breach of contract, that award is quashed, because that matter was compromised as part of the settlement of an equal pay claim that had also been brought by the claimant, and which was settled between the liability and remedy hearings.

7. In addition, again by consent, in so far as any part of the compensatory award was intended to compensate the claimant for loss of bonus that she might or would have earned had she not been dismissed, that element or elements of the compensatory award is also quashed. That is on the basis that the matter will be remitted to the tribunal to make an award, if not agreed, in an amount that reflects whatever is the final period of loss of remuneration covered by the compensatory award in light of the outcome of this appeal, at the agreed bonus rate per annum that has already been agreed by the parties, and pro-rated on a weekly basis.

8. Finally, as to such matters, it is agreed that the final compensatory award should include credit for the amount of the payment in lieu of notice that the claimant received upon her dismissal. Other points originally raised as part of ground 3 have been withdrawn.

9. All of that disposes of grounds 2 and 3 and the cross-appeal. What I have now to decide is ground 1. To set the context for that, I need now to say something more about the liability and remedy decisions and the background.

10. The respondent describes itself as a financial services company investing in underperforming businesses. The claimant was dismissed with effect on 13 October 2017 for the given reason of redundancy arising from a reorganisation. Thereafter, she and her two colleagues instituted their complaints to the employment tribunal. Those complaints, save for the claimant's equal pay claim, were heard together in the autumn of 2018 before Employment Judge A E Pitt, Mrs S Don and Mr Euers sitting at Teesside Justice Centre. The tribunal reserved its decision. On 19 February 2019 it

promulgated its written judgment and reasons. Subsequently, in August 2019, it issued a corrected version and the references I shall make are to that corrected version.

11. As I have already indicated, the tribunal upheld the claimant's claim that she had been unfairly dismissed by reason of having made a protected disclosure. This related to what she said were matters of serious financial irregularity. In the course of its decision, the tribunal considered the **Polkey v A E Dayton Services Ltd** [1987] UKHL 8 question, but decided that there was no basis on which to find that there should be any **Polkey** adjustment to the compensatory award. The respondent sought to appeal that decision to the EAT, but that appeal was dismissed at a rule 3(10) hearing. As I have said, the equal pay claim was initially extant but was ultimately settled.

12. After the dust had settled on all of those matters, the matter came back to a remedy hearing before the same panel on 24 November 2020. That led to a further reserved written judgment and reasons promulgated in February 2021. As with the liability decision, the tribunal later, in May 2021, issued a corrected version. Once again, the references that I will make are to the corrected version.

13. The remedy judgment contained three numbered paragraphs, one for each claimant. In relation to the claimant with whom I am concerned (the first claimant before the tribunal), the judgment said, "*The respondent shall pay to claimant one the sum of £244,328.45*." Originally, there was an issue on appeal as to whether, in calculating that figure, the tribunal had wrongly included an element of damages for breach of contract, notwithstanding that this had been compromised when the equal pay claim was settled, but that point has been resolved on the basis that I have explained. Whether or not that was included in the calculation, the rest of the award represents the compensatory award for unfair dismissal, which, because this was an automatically unfair dismissal, was not the subject of the statutory cap, and to which the tribunal also applied grossing up.

14. In the remedy decision, the tribunal identified that there were two particular issues that it had to decide. The first was whether it was now open to the respondent to argue a **Polkey** point for each

claimant (the tribunal concluded, in particular in light of the previous unsuccessful appeal and its earlier determination, that it was not, and that is not a live issue before me); and secondly whether the claimants had mitigated their losses.

15. In a section headed, "*The Facts*", the tribunal said the following in relation to the claimant with whom I am concerned:

> "7. The evidence of Claimant 1 was contradictory. In her witness statement, she states she has made significant efforts to find alternative employment (paragraph 2 of her witness statement). However, in her evidence, she told the Tribunal she had made no efforts to find employment. This was for two reasons; first, she thought that she would be prejudiced at an interview when the reason for her dismissal, i.e., the protected disclosure, became public. Therefore, she was waiting until it, i.e., the events leading to her dismissal were in the public domain before applying for any positions. When questioned, she said this would be when she decided to put it in the public domain at the conclusion of the proceedings. Her second reason was that she was working with two former colleagues who had set up a business similar to Hilco, and it was her intention to join them in the company. She gave evidence of some of the work she had carried out, including networking she had undertaken [on] behalf of the company. She was not paid for any of this work. As of October 23rd, 2020, the date of her witness statement, the claimant was 'in negotiations to come to terms, and I will come on board as a Director as soon as a deal is secured' (witness statement paragraph 6). In her evidence, she admitted she had not spoken to her colleagues since January 2020."

16. When coming to its conclusions on remedy in relation to the claimant, the tribunal said:

> "27. Having read the witness statements and heard the evidence of all the witnesses, the Tribunal concluded as follows;
>
> Claimant One
>
> The Tribunal bore in mind that it is for the respondent to prove that claimant 1 has acted unreasonably in failing to mitigate her loss. In principle, claimant 1 is entitled to look at and actively seek to set up her own business. The claimant's witness statement is lacking in detail in the setting up of the company. The facts are the company was established by the claimant's former colleagues. She has attended 'several recognised retail meetings which are essentially networking events' (paragraph 7 of her witness statement), but there are no dates. Claimant 1 and her colleagues attended a Retail Trust Ball in February 2018. The last date when she appears to have carried out any work of or participated in a networking event is 2018 (paragraph 9 of the witness statement). Claimant 1 told us she had not spoken to anyone in the company since January 2020.
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> 28. The Tribunal concluded that the fact that claimant 1 had not had contact with her colleagues in the company since January 2020 is incompatible with her assertion that she 'will come on board as soon as a deal is secured. The Tribunal, therefore, doubt that any effort is being made to establish a viable company. This, coupled with the lack of progress in obtaining contracts and the fact that the company now appears to be dormant, led the Tribunal to conclude that claimant 1 acted unreasonably in not searching out other opportunities, including seeking paid employment.
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> 29. Turning to the efforts by claimant 1 to find alternative employment. Her evidence,

> although contradictory, was clear; she had never applied for an employed position. Her reason for not wishing to explain why she had lost her last position had some merit during the proceedings. However, by the time the claim was before the Employment Tribunal for a merits hearing in September 2018, the fact that the claimant had made a Protected Disclosure was in the public domain. The Tribunal concluded that as the original Judgment and reasons were not signed until February 10th, 2019, it is unlikely they would be formally in the public domain until the date. That is not to say the claimant would be expected to obtain employment the day after. Instead, the Tribunal considered the claimant 1 should have started actively seeking work from February 2019, and her failure to do so was unreasonable. However, the Tribunal accepts she would not have obtained a position immediately following the hearing and allows a period of three months following from the date of the judgment. Therefore, the Tribunal concludes that claimant 1 acted unreasonably in not seeking a paid position from February 2019 but that her losses will end as of June 1st, 2019, as it is unlikely she would have obtained employment immediately.
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> 30. The Tribunal concluded she was entitled to 85 weeks loss of earnings and benefits"

17. After setting out its conclusions in relation to the other two claimants, there was then a section headed, "*The Award*", in which the tribunal set out its calculation for each claimant of the final award that it was making. In relation to the claimant with whom I am concerned, this identified that the loss of remuneration calculation was for a period of 85 weeks from the date of dismissal to 1 June 2019. That was consistent with what the tribunal said at the end of paragraph 29 and in paragraph 30.

18. The sole ground of appeal with which I am now concerned, is expressed in the following way:

> "In error of law, the Employment Tribunal failed to apply/misapplied the case of *Abbey National plc v Chagger* [2010] ICR 397 when calculating the compensatory award, and thereby awarded loss of earnings for a period that was significantly greater than was just and equitable in the circumstances of the case.
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> 1. The Claimant's weekly loss of salary was £1,451.28 plus bonus and benefits. The Claimant admitted in her statement and confirmed in cross examination (on 24 November 2020) that she had applied for no jobs since her dismissal on 13 October 2017. The Employment Tribunal found as a fact that the claimant's reasons for failing to seek alternative work were two-fold (para. 7 of judgment).
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> "*she thought she would be prejudiced in an interview when the reason for her dismissal i.e. the protected disclosure, became public"* i.e. stigma damages. The second was that she was working with two former colleagues to set up a business.
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> 2. The Employment Tribunal dismissed the second reason in para. 28 of its reasons. It "*doubt[ed] that any effort [was] being made to set up a viable business*" and found that she had "*acted unreasonably in not searching out other opportunities, including seeking paid employment*" (para. 28).
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> 3. In relation to the stigma damages, paragraph 29 the Employment Tribunal's reasons states "*her evidence, although contradictory, was clear; she had never applied for an employed position.*" However, in error of law it then went on to find that her assertion

> that she would be prejudiced by disclosing the reason for her dismissal was well founded, at least for the period prior to the liability hearing decision being published (whereupon it would come into the public domain). The claimant was awarded 85 weeks' loss, and the Employment Tribunal therefore calculated a total compensatory award (salary, bonus and other benefits) of £151,026 (before grossing up).
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> 4. The principles upon which stigma damages should be awarded are set out in *Chagger* (para.s 95-97), in which it is noted that they can be incorporated into remedy by being reflected in the period of loss.
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> 5. The Employment Tribunal erred in law by failing to take account of and apply the principle set out at para. 97 of *Chagger*:
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> *97. A tribunal should take a sensible and robust approach to the question of compensation, as the Court of Appeal emphasised in Essa v Laing Ltd [2004] ICR 746. Plainly it would be wrong for them to infer that the employee will in future suffer from widespread stigma simply from his assertion to that effect, or because he is suspicious that this might be the case. If he is unwilling to make good his suspicions by taking proceedings against the alleged wrongdoing employers- notwithstanding that it may be understandable why he is reluctant to do so- he cannot expect the tribunal to put much weight on what is little more than conjecture. This is particularly so given that it will in practice be impossible for the employer effectively to counter evidence.*
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> 6. The Employment Tribunal erred in law in the present case by inferring that the claimant would suffer stigma, reaching this conclusion from her simple "*assertion*" or suspicion that she would do so were she to apply for any alternative role.
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> 7. The Employment Tribunal noted that it would have taken around three months to find alternative employment (para. 29 of reasons). As the claimant had already received a redundancy payment and three months' notice pay, she should have received no further loss of income and benefits had the Tribunal correctly applied *Chagger*."

19. Ms Garner argues that the error asserted by this ground was an error in applying the ordinary principles by which a compensatory award falls to be calculated pursuant to section 123(1) **Employment Rights Act 1996** and in particular that it should 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 in so far as that loss is attributable to action taken by the employer*". That means that the tribunal may have to decide whether a particular loss claimed by the claimant should, in justice and equity, be treated as attributable to the action taken by the employer or whether it should not, on the basis that the chain of causation has been broken or that it is too remote. She referred to the well-established principles discussed in a number of authorities such as **Essa v Laing Ltd** [2004] IRLR 313 and **Simrad Ltd v Scott** [1997] IRLR 147. She said that the concept of the duty to mitigate is an example of this.

20. Whilst she accepted, as the tribunal itself noted – and it is well established – that the burden is on the employer to make good a contention that the claimant has unreasonably failed to take a step to mitigate her loss, where the tribunal does so find, that means that, in applying section 123(1), the loss claimed cannot be laid at the employer's door.

21. Ms Garner submitted that in this case there was never any dispute, and indeed the claimant herself averred and acknowledged, that she had not applied for any jobs with any potential or prospective new employer or even looked for any such jobs since the date of dismissal up to the date of the remedy hearing, which in the event took place some three years later. In those circumstances, it was a given that, by not applying or looking for any other jobs at all during that period, the claimant had unreasonably failed to mitigate, unless there was some good explanation which the tribunal properly regarded as meaning that this failure was not unreasonable.

22. The tribunal had identified in its decision, at paragraph 7, two particular explanations that the claimant put forward, in light of which it was her case that the tribunal should not regard her failure to look for or apply for jobs as unreasonable. The tribunal had set out its conclusions about these two explanations in paragraphs 27, 28 and 29. Ms Garner submitted that, on a natural reading, the tribunal had not accepted that the claimant's activity, such as it was, in relation to the company established by her two former colleagues, meant that her failure to apply for any other jobs was not unreasonable. However, the tribunal had found in paragraph 29 that she had not acted unreasonably in relying on the other matter that she put forward in paragraph 7, described in paragraph 29 as "her reason for not wishing to explain why she had lost her last position." The tribunal accepted that this meant that she had not acted unreasonably by not applying for other positions up until the date when the liability decision was promulgated in February 2019. However, it erred in law in so doing.

23. Ms Garner submitted that that was because there was no evidence to support the claimant's assertion that, if she had applied for a job or jobs, she would then have been stigmatised and rejected

for being a whistle-blower, which fact the claimant asserted would have come out in the process, even though, to her own understanding, it was not, prior to the tribunal's liability decision, in the public domain. That was merely an assertion on her part, but it was not supported by any evidence to justify that assertion or suspicion, so the tribunal was wrong to conclude without any such evidence that it constituted a good explanation for what would otherwise be an unreasonable failure to mitigate. In particular, there was no evidence of any actual experience the claimant had had, because she had not applied for any jobs at all, let alone been interviewed.

24. Ms Garner relied in support on the decision of the Court of Appeal in **Abbey National v Chagger** [2010] ICR 397 as well as that of the EAT in **Ur-Rehman v Ahmad** [2013] ICR 28.

25. In the former case Mr Chagger succeeded in a claim of race discrimination in respect of his dismissal. At the time of the remedy hearing, he gave evidence of his extensive efforts to find other employment in the financial services industry, including have made 111 job applications, but without success. He contended that one factor behind his lack of success was that he had been stigmatised for having sued Abbey National for discrimination. He claimed that this meant that he would not ever be able to work in the industry again, and claimed future whole career loss on that basis.

26. The loss of earnings that might arise from a potential employer refusing Mr Chagger's application on that basis was referred to as stigma loss. (It is not to be confused with a claim for losses arising from the stigma of being associated with the unlawful conduct of a former employer.) The Court of Appeal had to decide, first, as a matter of principle, whether losses of that type could be laid at the door of the former employer, or whether the conduct of the prospective employer (or the employee in litigating against the former employer) would break the chain of causation.

27. The Court of Appeal concluded that, as a matter of principle, whether or not Mr Chagger might also have a remedy, for example for victimisation, against the prospective employer, neither his decision to sue Abbey National nor the actions of the prospective employer should be seen as

breaking the chain of causation or as rendering the loss too remote, so that the stigma losses could not be laid at the door of the original employer, Abbey National.

28. There is then a passage in which the Court addresses the next issue, being what it called "determining the stigma loss":

> "95. Once it is accepted that stigma loss is in principle recoverable, in most cases it need not be considered as a separate head of loss at all. There will be evidence about the steps which have been taken by the employee to mitigate loss, and this will in practice guide the tribunal to reach a view on the likely period of unemployment. The stigma problem will simply be one of the features which impacts on the question how long it will be before a job can be found. Indeed, we suspect that in practice many tribunals fixing compensation will already have this in mind as one of the features of the job market when they determine how long it will be before alternative employment is secured.
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> 96. We understand the concern of Mr Jeans that allowing recovery for stigma damages will lead to unrealistically high awards by tribunals, but we think it is exaggerated. It is far from the common experience that those taking proceedings against their employer thereafter become virtually unemployable in their chosen field. Moreover, the fact that in a discrimination context it is unlawful to refuse employment for that reason ought further to reduce the likelihood of employees being adversely affected in this way. No doubt such discrimination will sometimes occur, which is why it was thought necessary to pass legislation in the first place. But its impact is likely to be small when compared to other factors, such as job opportunities generally in the labour market for jobs of that kind.
>
> 97. A tribunal should take a sensible and robust approach to the question of compensation, as the Court of Appeal emphasised in *Essa*. Plainly it would be wrong for them to infer that the employee will in future suffer from widespread stigma simply from his assertion to that effect, or because he is suspicious that this might be the case. If he is unwilling to make good his suspicions by taking proceedings against the alleged wrongdoing employers – notwithstanding that it may be understandable why he is reluctant to do so – he cannot expect the tribunal to put much weight on what is little more than conjecture. This is particularly so given that it will in practice be impossible for the employer effectively to counter that evidence.
>
> 98. However, where, as in this case, there is very extensive evidence of attempted mitigation failing to result in a job, a Tribunal is entitled to conclude that whatever the reason, the employee is unlikely to obtain future employment in the industry. That is essentially what the Tribunal did in this case, and that is why it was both undesirable and unnecessary for them to reach a concluded view on the particular contribution that the stigma factor may have played in the difficulties Mr Chagger faced in obtaining fresh employment.
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> 99. There is one exceptional case where it could be necessary for a tribunal to award compensation specifically by reference to the impact of stigma on future job prospects. This is where this is the only head of future loss. An example would be if in a case such as this a tribunal were to find that the claimant would definitely have been dismissed even had there been no discrimination. He would be on the labour market at exactly the same time and in the same circumstances as he would have been had he been dismissed lawfully. Accordingly, the damage to his employment prospects from the stigma of taking proceedings would be the only potentially recoverable head of future loss. Here,

> however, the employee would be asserting that this is a head of loss, and the onus would be on him to prove it. In practice this would be a difficult task. If he does establish such a loss, the Tribunal will then be faced with the almost impossible task of having to assess it. The tribunal would have to determine how far difficulties in obtaining employment result from general market considerations and how far from the stigma. In the unlikely event that the evidence of the stigma difficulties is sufficiently strong, it would be open to the tribunal to make an award of future loss for a specific period. But, in the more likely scenario that the evidence showed that stigma was only one of the claimant's difficulties, it may be that a modest lump sum would be appropriate to compensate him for the stigma element in his employment difficulties. This approach would be analogous to the lump sum awards sometimes made in personal injury cases to compensate an injured claimant for the risks of future disadvantage on the labour market: see *Smith v Manchester Corporation* [1974] 1 K.I.R. 1. Even then, however, this should not be an automatic payment; there should be some evidence from which the tribunal can infer that stigma is likely to be playing a part in the difficulties facing the employee who seeks fresh employment."

29. Ms Garner relied in particular on the proposition that it would be wrong to infer that the employee will in the future suffer from widespread stigma simply based on an assertion or a suspicion, and that they cannot expect the tribunal to put much weight on what is little more than conjecture. She submitted that those observations applied equally to the present case. The present tribunal had been asked to make an award based on nothing more than the claimant's suspicion and conjecture, without any supporting evidence, by contrast with Mr Chagger's case in which there had been what was described as very extensive evidence of his unsuccessful attempts hitherto to obtain another job.

30. She relied also on the following passage in the decision in **Ur-Rehman**:

> "20. There must be evidence to support a claim for loss consisting of difficulty in obtaining or keeping employment due to "stigma", particularly where the stigma consists not of taking unjustified proceedings, but successful ones against a former employer. The evidence likely to be critical is that which can answer the questions identified by the Court of Appeal in appeal from the decision of Lightman J in *Ali* which we have set out at paragraph 17 above. They require more than a suggestion or suspicion that stigma might be at work – though, as with discrimination, it cannot be expected that would-be employers would happily confess to have turned an applicant away because he had justifiably complained about a breach of his employment rights by another on an earlier occasion. Stigma may have to be inferred, just as was the case with discrimination, a matter recognised in King v Great Britain China Centre [1992] ICR 516 before statute passed the burden of proof to the employer in many cases of alleged discrimination, though this also requires a sound evidential foundation from which the inference may be drawn If, however, (taking the evidence as a whole) there is insufficient to conclude that stigma has been working its insidious worst, then a Tribunal can make no award."

31. She submitted that the present tribunal had therefore erred in law in making an award of 85

weeks' pay based purely on assertion and conjecture, without any supporting evidence.

32. In response, Mr Goldberg QC said, firstly, that it was a misreading of the tribunal's decision to say that it had rejected the claimant's reliance on her activities in relation to the company established by her former colleagues, entirely in relation to the whole period since she was dismissed. On a fair reading of paragraphs 27 and 28, the tribunal had focused in its conclusions on the period from January 2020 onwards, which, in the event, were not relevant, since it had confined its award to a period ending at the beginning of June 2019. In addition, the tribunal had not anywhere said that it was either reasonable or unreasonable for the claimant to have taken the decision to seek to pursue this opportunity, rather than applying for jobs elsewhere. Of course, what the respondent needed was a positive finding that she had acted unreasonably, which was not present in these paragraphs.

33. Secondly, he said it was not correct to say that there was no evidence at all put forward by the claimant in support of her position on the second aspect. Whilst she accepted that she had not looked for, or applied for, any other jobs, and so there was no evidence of any experience of any actual applications, there *was* still some evidence from her to support her suspicions and concerns. Though he accepted that I have not heard, and am not rehearing, the evidence, nevertheless he referred me to passages in her witness statement in which she expressed concerns that the truth of her situation was not necessarily being told by the respondent, whether to insiders or outsiders. She referred to what she understood to be the experience of former colleagues and to what she said was the surprising fact that there had been no interest or approaches in relation to the new venture set up by her two former colleagues, from former customers of the respondent. Mr Goldberg appreciated that it might be said that this evidence was hearsay or fairly limited, but nevertheless it was evidence put in front of the tribunal for it to evaluate, and it was not therefore true to say that there was no evidence at all.

34. Mr Goldberg set these particular submissions within the context of an overriding submission that the question of whether an employee has unreasonably failed to take a step in mitigation, such that it should impact upon their compensatory award, is quintessentially a question of fact and

evaluation for the tribunal as an industrial jury, with which the Employment Appeal Tribunal can only interfere on classic perversity grounds. He accepted that it did not involve the exercise of a pure discretion, because there must be a principled application of section 123(1) and the compensatory principle. Nevertheless, as was said in **Software 2000 Ltd v Andrews** [2007] IRLR 568; [2007] ICR 825, this is a matter for the common sense, experience and sense of justice of the tribunal; and so the EAT must allow a wide ambit to it to perform that task.

35. Mr Goldberg submitted that neither **Chagger** or **Ur-Rehman** indicated otherwise. What was said in **Chagger** must be set in the context of the fact that the principal issue for determination by the Court of Appeal was the issue as to whether, as a matter of law, so-called stigma loss can be laid at the door of the original employer at all. The passage on which Ms Garner relied related to the practical approach to be taken to the evaluation of evidence in support of such a claim on the particular facts of the case. He also submitted that, on analysis, it was also *obiter*. The scenario envisaged at a paragraph 97 of **Chagger** was also not factually like the present case. It was wrong, he submitted, to apply some different standard or special rule as to what evidence needed to be produced by a claimant to make good an argument about mitigation. **Chagger** did not do so and nor should I.

36. For completeness, I should note two points raised in the Answer which were not pursued by Mr Goldberg. One was the suggestion that this ground of appeal was an attempt to reopen the **Polkey** finding. Ms Garner said it was not. She did not seek to go behind that finding. Mr Goldberg accepted that. Secondly, it was originally suggested that the EAT should not entertain this ground of challenge at all since **Chagger** had not been cited to the employment tribunal. Again, Mr Goldberg confirmed that he no longer relied on that point. In any event, I would not have declined to entertain this ground for that reason, as it is clear that the point of substance was raised before the tribunal, including the claimant being cross-examined upon it and the matter being the subject of submissions.

37. I turn, then, to my conclusions. Firstly, I am not persuaded that Mr Goldberg's submissions about paragraphs 27 and 28 concerning the matter of the claimant’s activities in relation to her former

colleagues' company, assist his case. That is for the following reasons.

38. It was common ground, and is well-established by **Wilding v British Telecommunications Plc** [2002] EWCA Civ 349, and a number of other authorities, that the onus is on a respondent to raise and make good an assertion that a claimant has unreasonably failed to mitigate. Further, it must be found that the claimant has unreasonably failed to take some particular step. It is not sufficient that the tribunal considers that a step that she has not taken would have been a reasonable one to take.

39. But in this case it was an undisputed fact that the claimant had not looked or applied for any other jobs at all throughout the period from the date when she was dismissed up to the remedy hearing. The respondent was entitled to assert, and the tribunal to proceed, as it plainly did, on the basis, that that failure on her part amounted to a failure to mitigate her loss, because it was unreasonable for her not to look for, or apply for any jobs at all, *unless* the tribunal accepted that there was an explanation for that, of a kind that meant that it was, after all, not unreasonable. That is not a reversal of the burden of proof. Had it not been admitted, the respondent would have had to make good that there had been a failure to do something which was in principle unreasonable (in this case, the failure to apply for any jobs at all from the date of dismissal to the date of the remedy hearing); but it was able to make that good in this case, because it was not in dispute, and was admitted.

40. Further, in such a case, the practical reality is that the explanation for such a failure is likely to have to come from the claimant, who will know why she failed to take that step. To look at the matter another way, the fact of her failure to look or apply for any jobs at all meant that the respondent had discharged the burden initially on it. In substance, what the tribunal then had to decide was whether, in light of the explanations put forward by the claimant and whatever findings of fact it made about them, her failure to apply for jobs was an unreasonable failure to mitigate or not.

41. Secondly, it seems to me that, on a fair reading of [27] and [28], the tribunal was of the view that such activity as the claimant had engaged in, in relation to the company established by her former

colleagues, was so minimal that it did not assist her case that her decision to get involved in that activity meant that it was not unreasonable for her not to have applied for any other jobs at the same time. Of course, there will be cases where, following their dismissal, an employee sets up in business on their own, and where, notwithstanding that there may be uncertainty or a considerable period before it becomes clear whether it is going to be profitable, and so forth, the tribunal considers that they have not acted unreasonably by failing to look for other jobs at the same time. This is a fact-sensitive matter for evaluation by the tribunal. What I am concerned with here is, however, what the tribunal actually concluded in this case.

42. It seems to me that, on a fair reading of [7], [27] and [28], the tribunal was not confining its conclusions to the period after January 2020. It refers in those paragraphs to such activity as there was throughout the entire period from the date of dismissal, including the claimant's evidence about networking events, *as well as* the lack of any contact with her erstwhile colleagues following January 2020. I can see that, read in isolation, parts of [28] might give the impression that the tribunal was focusing only on that period, but I do not think that is a fair reading of [7], [27] and [28] as a whole. It is significant that the tribunal did not anywhere in [27] or [28] identify any particular date or phase in which it might have been said that the claimant's involvement, such as it was, in the activities of her colleagues, changed in a way relevant to its significance for the mitigation question.

43. The conclusion at [28] is also simply that she acted unreasonably in not searching out other opportunities, including seeking paid employment. Whilst I do not agree with Ms Garner's literal reading of that statement (on which, it is fair to say, she did not place much weight) as meaning that the tribunal had actually wholly determined the mitigation point at that stage, I conclude that the fair reading is that it concluded that this aspect of the claimant's explanation did not assist her at all in terms of her failure to seek paid employment *at any time*.

44. Finally, even had I thought otherwise about [27] and [28], or considered that they were not clear, that would not by itself be a reason not to allow the appeal if it otherwise should be allowed in

relation to the conclusions in [29] on the second aspect (the stigma point), although it might then have a bearing on what the consequences of allowing the appeal in respect of [29] alone would be.

45. I turn, then, to the question of whether the tribunal erred in paragraph 29 in accepting that the claimant's case on the stigma point meant that she had not acted unreasonably in not looking for any other work or applying for any jobs up until the date when the liability decision was published. In principle – and I think ultimately both counsel were agreed on this – what is at issue here is the application of section 123(1) in its particular application to an issue as to whether an employee has unreasonably failed to take a particular step to mitigate their loss.

46. In **Chagger** the Court of Appeal in fact considered three distinct points. The first concerned whether the loss that can be claimed from the former employer must necessarily always be confined by reference to the period during which the claimant would, or might, have remained in employment with the former employer, had they not been dismissed. The second was the question of whether stigma loss can potentially be laid at the door of the old employer. The answers are "no" and "yes". I drew counsel's attention to another example in which both of these points are discussed: **Small v Shrewsbury and Telford Hospitals NHS Trust** [2017] EWCA Civ 882.

47. The third question discussed in **Chagger** concerns the need for evidence to support a claim that the employee has suffered stigma losses flowing from dismissal. **Chagger** makes the point, as does **Ur-Rehman**, that stigma losses cannot just be awarded on the basis of assertion or supposition. There needs to be some evidence to support the claim that stigma has been, or is likely to be, at work.

48. The underlying thread in the foregoing cases was that the employee was contending that they had been, and/or would continue to be, hampered in their ability to secure comparable new employment because of prospective employers stigmatising them on account of their having litigated in respect of the dismissal. This may arise in various ways. In **Chagger** the stigma was said to attach to the employee having claimed race discrimination, in **Ur-Rehman**, unfair dismissal. In **Small**, the

employee claimed that the relationship had been abruptly terminated because he was a whistle-blower.

49. As I have noted, in some cases, such as **Malik v Bank of Credit and Commerce International SA** [1997] UKHL 23, there may be said to be a distinct type of stigma attaching merely to association with the former employer because of its reputed activities, but neither in the present case nor in **Chagger**, **Ur-Rehman**, or **Small**, were the tribunal or the higher courts concerned with a claim for a separate head of damages of that sort.

50. In the present case the claimant contended that she would have been stigmatised by any prospective employer for having blown the whistle against her former employer. It may be said that a point of factual distinction from **Chagger** is that the tribunal was not here concerned (or only concerned) with assessing future losses, but with the question of whether the claimant had unreasonably failed to take steps that she should have taken to seek to mitigate her past losses. However, it seems to me that the underlying point about the need for evidence to support a claim based on this type of stigma is equally applicable.

51. I recognise that evidence to support an employee's claim that stigma is a factor in her case could come from a variety of sources. As Elias LJ explains in **Chagger**, evidence that extensive job applications have been made but have consistently failed, may be found to support an inference that the problem will persist into the future. Save in the particular scenario discussed by him at [99], the tribunal will in fact not necessarily need to get to the bottom of why all efforts to mitigate thus far have failed. The very fact that they have done so, may support the inference as to the future, whatever the precise reason or reasons may be.

52. However, in a case where the employee has simply made no job applications at all, for reasons I have explained, the employer is entitled to assert, at least as a starting point, that, by failing to do so, she has acted unreasonably, subject to the tribunal being satisfied as to the explanation. Where

the employee, as here, relies on stigma, she needs to put forward some evidential basis in support of that case. I do not say that the fact that she has not made any job applications, and therefore cannot put forward the sort of evidence that Mr Chagger did, will necessarily be fatal to her case. There might, conceivably, be other evidence that is found to have supported her suspicions or concerns, that is sufficiently compelling to justify her not having tested the water with even a single application. But there does have to be some evidence of that sort, which is put before the tribunal, and which the tribunal evaluates and makes findings of fact about and concludes affects the question of whether the failure to look for any jobs or make any applications at all was reasonable.

53. Mr Goldberg is right to remind me that these are ultimately evaluative questions for the tribunal, and there is a limited basis on which an appellate court can intervene. Nevertheless, there does have to be some factual finding by the tribunal, which draws on some evidence presented to it, to support its conclusions. A tribunal cannot make findings of fact based merely on what amounts to a submission. To say that is not to fetter the tribunal in its evaluation of the evidence or the fact-finding process. It is simply to make the point, as **Chagger** and **Ur-Rehman** do, that findings and conclusions cannot be based simply on submission, assertion or pure speculation. In **Chagger** and **Small** there was a source of evidence relating to the experience of those claimants in making their job applications. But in **Ur-Rehman** the claim that stigma had been at work failed because it was found to have been unsupported by any evidence that would support such an inference.

54. I recognise too Mr Goldberg's point about the importance of the role of the tribunal as an industrial jury; he also submits that there are some matters on which it would not require specific evidence, and can draw on its industrial experience and common sense. One of these, no doubt, is the general proposition that whistle-blowers, unfortunately, sometimes are stigmatised and struggle to find fresh employment, as do other employees who gain an unfair reputation as trouble-makers because they have litigated with former employers, though their claims may be meritorious or legitimately pursued. But those are generalised propositions. I do not think that the tribunal, in

considering in this particular case whether the claimant acted unreasonably by not applying for any job in three years, could proceed on the basis as it were of judicial notice, that all such efforts would be bound to have been fruitless because she was claiming that she was a whistle-blower.

55. Mr Goldberg also highlights passages in the claimant's witness statement for the tribunal showing that she gave some evidence about why she feared that the respondent was, or might be, disposed to poison the well for her behind the scenes in the field in which she worked in particular. However, I do not think that is a sufficient answer to this ground of appeal for the following reasons.

56. Firstly, the proposition that someone may be refused a job because their employer is taking action behind the scenes against them, is not the same as the proposition that they will be refused a job because they are a whistle-blower, or have claimed to have been dismissed on that account, even if that alleged behind the scenes action is said to have been actuated by them having been a whistle-blower, or sued their former employer. In this case, the tribunal identified that what it was considering in paragraph 7 was the specific submission that if the claimant applied for a job, she would be prejudiced when, at an interview, it emerged that she had been dismissed for whistleblowing, and that she was waiting until that came into the public domain at the end of the proceedings. That is the case that it reached a conclusion about in paragraph 29, described there as "*her reason for not wishing to explain why she had lost her last position*" (that is to say, not wishing to explain at a job interview).

57. Ms Garner submitted that this was an inherently incoherent position to adopt, as such, as, logically, the claimant would be in more difficulty once the tribunal's decision was published and/or from when the matter came into the public domain at the time of the tribunal's hearing. I do not agree with that particular submission. It is not necessarily illogical to suppose that an employee might be more vulnerable at a stage when they can only claim that they have been dismissed for whistleblowing as opposed to a stage when an employment tribunal has, on the record, vindicated their claim. But, nevertheless, as I have said, I do not think that the tribunal could, as it were, take judicial notice of the fact that the claimant would be bound always to be subject to such stigmatisation, had she applied

for any jobs, without any particular evidence put before it to support that particular fear.

58. It may be that the tribunal is open to criticism for having not addressed in its decision a different, even if related, aspect of her case, being that she also had reason to fear that the respondent was poisoning the well against her behind the scenes; but that does not assist the claimant in resisting this appeal, because it has not been made the subject of a specific cross-appeal, nor do I know why the tribunal did not address that aspect of the evidence in her witness statement. There may or may not be a good reason for that. I do not know how matters stood at the end of the hearing, for example.

59. I have therefore concluded that the tribunal did err by finding that it was not unreasonable for the claimant to have looked or applied for any job at all in the period from the date of dismissal up until the date when the liability decision was promulgated, when there was no evidence put forward specifically to support her assertion that, if she applied for any job, the fact that she claimed to be a whistleblower would come out and she would then be unsuccessful. There are no findings of fact in the decision to support that conclusion. Whether that is viewed as error of law, perversity or lack of **Meek v City of Birmingham District Council** [1987] IRLR 250 compliance, there needed to be something more than the tribunal's description of the assertion by the claimant, and its acceptance that it provided a good reason for having applied for no jobs at all. I will therefore allow the appeal.

60. I consider that this matter has to be remitted to the tribunal for fresh assessment by it. I will hear submissions about the terms of remission.