# NOTES FOR THE EMPLOYMENT LAWYERS ASSOCIATION

# "REMEDIES MASTERCLASS" – 17TH OCTOBER 2012


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## Introduction

1. This paper looks at some of the key legal and tactical considerations when dealing with the remedies process in employment tribunal litigation. These are considered under the following broad headings:

    a. Case Management;

    b. Assessment of Compensation; and

    c. Other Remedies.

## Case Management

2. Whether you are acting for a claimant or a respondent, at an early stage of the litigation process it is tempting to put issues of remedy to one side and not to dedicate too many resources to the issue until the CMD stage (or later). However, early and effective planning on issues of remedy / quantum can be valuable. It should help to ensure that interlocutory issues are determined in your client's interests and that their case is as powerful as it can be when the time comes. It will also help to strengthen your client's bargaining position in any WP discussions.

Schedules of Loss

3. In our experience it is common for schedules of loss / counter-schedules to be drafted and disclosed only after the initial CMD stage. Typically, the agreed List of Issues does not deal with remedy in any detail either.

4. Producing a schedule at an earlier stage of the proceedings, even if it is a provisional schedule, has a number of potential benefits, including:

   a. Applying an analytical approach to the potential value of the claim;

   b. Identifying the issues in respect of which disclosure will be required;

   c. Highlighting evidential issues which may require further investigation;

   d. Focussing the parties' minds on the best / worst case scenarios; and

   e. Building credibility with the Tribunal.

5. When representing claimants, it is perfectly proper to pitch the client's case as optimistically as possible. However, it is important to remember that unrealistically inflating a draft schedule of loss has a number of potential drawbacks, including:

   a. Creating an unnecessary and avoidable impasse / deadlock in any negotiations;

   b. Damaging the client's credibility in the negotiation process (e.g. a respondent may take the view that a claimant who is prepared to settle for 50% of his/her pleaded schedule of loss has little confidence in the claim and would therefore be prepared to accept a much lesser figure);

   c. Damaging the client's credibility at the tribunal hearing (e.g. written openings and cross-examination on issues of liability will almost inevitably contain remarks about the 'greedy' or 'fanciful' nature of the compensation claim); and

   d. Unreasonably extending the evidential scope of the remedy enquiry (e.g. by relying on comparators who are not genuinely comparable).

6. Conversely, of course, pitching the value of the claim too low may adversely affect the ultimate level of settlement.

7. Note that there may be down sides for the claimant in having to plead a schedule of loss. For example, the claimant who alleges psychiatric damage puts his/her mental health in issue and therefore potentially damages her career. S/he also embarks on a process which may involve consideration of sensitive personal information about her mental health. It therefore behoves the respondent to require the claimant's case to be set out fully at the outset, including particulars of mitigation, injury to feelings and any claim for psychiatric injury.

8. In many cases (particularly those where a number of different acts are complained of; and/or a lengthy period of loss of earnings is being claimed; and/or which contain discretionary elements of remuneration) it will be appropriate and helpful to produce a range of hypothetical scenarios. It is important, however, that the factual basis for these potential outcomes is clearly set out (e.g. which losses flow from which act; on what date it is alleged that the claimant would have achieved a promotion / been awarded a discretionary bonus; and the anticipated financial consequences of such hypothetical events).

9. Schedules of loss which fail (adequately or at all) to set out the claimant's pleaded case on remedy are unhelpful to the Tribunal and respondents should be ready and willing to challenge them – and seek appropriate directions from the Tribunal – at the CMD stage. It may well be useful to put in a counter schedule and to seek a direction that the List of Issues sets out the quantum issues in detail.

10. The claimants may also wish to put the respondent "on the spot" on remedy. If so, it may be worthwhile to ask for a direction that a counter schedule be served and to specify what it must address.

Full / Split Hearing?

11. In many cases it is likely to be unnecessary and disproportionate to seek a split hearing on liability / remedy. However, this may be an important tactical issue for one or both parties.

12. A compelling case for a liability hearing may be made where, for example:

    a. A number of different acts are complained of and the outcome will therefore have a material impact on the approach to remedy. Thus, a claimant might allege acts of workplace harassment, a discriminatory failure to promote and a discriminatory dismissal. Success or failure on each will affect the approach to remedy. Rather than argue and prove different permutations on a hypothetical basis, it may be better to await the actual outcome;

    b. Expert evidence is required, or may be required depending on the outcome on liability – e.g. psychiatric injury cases or cases where there are issues as to the employee's ability to find alternative work and/or future earnings capacity / prospects;

    c. The remedy question is complex in any event and/or involves substantial evidence and preparation.

13. Potential advantages of a split hearing include:

    a. Listing a trial on liability more quickly – e.g. finding a slot for a 7 day trial to deal with liability and remedy is likely to be more problematic than listing a 5 day trial on liability only;

    b. Reducing the complexity of the liability hearing;

c. Saving costs – if the claim (or part of the claim) *is* ultimately unsuccessful, it is obviously undesirable for both parties to have incurred substantial costs in collating / marshalling evidential material relating to that issue(s);

d. Promoting settlement – in the event that the claimant succeeds at trial, a split hearing provides the parties with a period of grace to discuss settlement. It may be that the claimant succeeds on some but not other elements of his/her claim, which allows the parties to narrow the issues on remedy and avoid the need for a further Tribunal hearing.

14. The tactical considerations are important. There may be reasons why one or other party wants to put the value of the claim "in the shop window" or merely to focus on liability – e.g. for settlement purposes or because of concerns about publicity. Much may depend on where the perceived strength of the respective parties' positions lies – e.g.:

a. A claimant with a strong case on liability but a claim which is not worth much for one reason or another may wish to focus on liability and then drive a hard bargain when this has been decided; the respondent in such a case may take the opposite view;

b. A respondent to a substantial claim, where a win is not guaranteed and there is a risk of adverse publicity, may prefer to avoid the "record award" type headline by having a split hearing and then quietly settling the case.

15. Where the line is drawn for the purposes of the split is also important. Typically, the respondent may be taking points to the effect that any breach did not cause loss or, at least, the losses alleged. It may be that it is being argued that a given breach would not have made any difference to the outcome. There may also be allegations of contributory fault. The parties need to be clear whether these sorts of issues, and if so which, are for the "liability" hearing. Typically, they will want to ensure that there is a clear list of the issues for determination at this hearing and that, as far as possible, the

determination of these issues will put them in a position to settle the case once they have been determined.

16. The question whether there should be disclosure going to the whole of the issues in the case or whether disclosure should initially be limited to the "liability" issues is also important. The default position, even if there is a split hearing, is likely to be that there should be disclosure in respect of all issues and it is therefore important for this question to be addressed if a different course is to be taken. Again, this is an important tactical consideration – for example:

    a. It may be that disclosure involves confidential contractual and/or pay data in relation to comparators, for example, such that the claimant is keen to press on and the respondent reluctant to do so;

    b. It may be that claim is inflated and the respondent wishes to demonstrate that this is the case and/or to see the claimant's attempts to mitigate.

17. If either party does consider that a split hearing would be the best approach, this should be raised with the other side and the Tribunal at an early stage of the process. The approach to the split should then be agreed, or determined by the Tribunal as the case may be.

<u>Disclosure</u>

18. As stated above, it is important that a claimant properly pleads his/her case on remedy; the claimant's factual assertions regarding 'what would have happened' but for the unlawful conduct in question will inevitably influence the remedy disclosure process. For example, particular allegations may be made about prospects of promotion within the company, or levels of discretionary bonus payments. Once such allegations are formally 'in issue', there will be an obligation to disclose on the standard basis.

19. One issue which regularly gives respondents cause for concern is the disclosure of sensitive contractual and/or remuneration data relating to colleagues of the claimant. This may be an issue where, say, the Tribunal will need to determine what bonuses might have been awarded to the claimant but for the acts or acts complained of; and/or what the claimant's terms would have been had they been promoted to a given position.

20. The first point to note is the distinction between the disclosure stage and the presentation of the evidence at the hearing. There is less scope for limiting disclosure than there is for protecting confidentiality at the hearing.

21. Although, in principle, the confidentiality of material which is disclosed in the litigation process is protected by the **Home Office v Harman [1983] 1 AC 280** undertaking (ie to use the documents for the purposes of the litigation only), in practice clients do not take much comfort from this. Moreover, as is well known, confidentiality alone is not a justification for refusing to disclose information: **Science Research Council v Nasse [1979] IRLR 465**. On the other hand, relevance alone is not a basis for ordering disclosure. The question is whether disclosure is necessary for the fair disposal of the matter. In considering whether or not to exercise its discretion to order disclosure of certain documents / categories of documents, the Tribunal is entitled to have regard to (*inter alia*):

    a. the fact that ordering disclosure of certain information would involve a breach of confidence;

    b. the sensitivity of particular types of confidential information;

    c. the extent to which the interests of third parties may be affected by disclosure;

    d. the interest which both employees and employers may have in preserving the confidentiality of personal data;

e. any wider interest which may be seen to exist in preserving the confidentiality of systems of personal assessment / pay or other personal data; and

f. whether the necessary information has been or can be obtained by other means, not involving a breach of confidence.

22. Redactions are commonly used in order to balance the competing interests of comprehensive disclosure and the preservation of confidentiality. However the extent to which pay data may properly be provided on an anonymised basis will depend on how the claimant advances his/her case and what is in dispute. For example:

    a. If the claimant seeks general disclosure about the broad / average level of earnings within his/her department (of former department in dismissal cases), it is likely that a list of earnings figures without the employees' names being visible will suffice – provided that relevant information such as job titles is included.

    b. However, in circumstances where the claimant cites a limited number of individuals as specific comparators, or categories of individuals as comparators, and there is an issue as to whether the comparators are truly comparable, the Tribunal may well be prepared to order that the claimant be provided both with the pay data *and* the name of the individual to whom those figures relate.

23. These points serve to emphasise the importance of making sure that the issues in relation to remedy are clarified at an early stage. It is for the claimant to justify his/her case as to the scope of disclosure and this will be based on the pleaded issues. Absent a clearly pleaded case, a Tribunal ought to be reluctant to order wide ranging disclosure of sensitive confidential data.

24. Even if there is an order for un redacted sensitive personal data, it remains possible (and desirable) to request that appropriate redactions / codifications are made to:

    a. documents in the hearing bundle;

    b. witness statements; and

    c. the judgment itself.

25. Note that arrangements will have to be made to ensure that the Tribunal and any witnesses are able to follow the evidence easily. If the position is that the identities of individuals are relevant and need to be known to the Tribunal and the witnesses, a clear code will need to be agreed, with a key provided so that references to (e.g.) "Mr A" are readily understood.

26. As to the need for redactions and/or the power of the Tribunal to order or permit them, unless express provision is otherwise made (as to which, see the section on private hearings below), Tribunal hearings on liability and remedy are public hearings. Now that Tribunals are generally adopting the practice of taking witness statements 'as read' and moving straight to cross-examination (rather than requiring the witness to read the statement out first), a direction should in principle be given that copies of the witness statements be left at the back of the Tribunal room for members of the public and/or press to read.

27. Representatives should be ready and willing to query a direction from the Tribunal that all of the witness statements be made available to observers at the outset of the hearing; as a general principle, a witness's written evidence should only be disclosed to the public and/or press at the point in time when that evidence falls to be considered by the Tribunal (which in may cases will not be on the first morning of the hearing). This being so, where there is sensitive material consideration can be given to dealing with remedy in separate remedy statements on the basis that they will not be

read, and therefore not come into the public domain, unless the case reaches that stage.

28. Witness statements will frequently refer to documents contained in the trial bundle. There is no general rule that these documents be made available to observers; in fact, quite the reverse. In **Gio Personal Investment Services Ltd v Liverpool and London Steamship Protection & Indemnity Association Ltd [1999] 1 WLR 984**, a case determined prior to the coming into force of the CPR, the CA held as follows:

> "…So far as concerns documents which form part of the evidence or court bundles, there has historically been no right, and there is currently no provision, which enables a member of the public present in court to see, examine or copy a document simply on the basis that it has been referred to in court or read by the judge…"

29. CPR, r. 32.13 provides as follows:

> "*Availability of witness statements for inspection*
>
> (1) A witness statement which stands as evidence in chief is open to inspection during the course of the trial unless the court otherwise directs.
>
> (2) Any person may ask for a direction that a witness statement is not open to inspection.
>
> (3) The court will not make a direction under paragraph (2) unless it is satisfied that a witness statement should not be open to inspection because of –
>
> (a) the interests of justice;
>
> (b) the public interest;
>
> (c) the nature of any expert medical evidence in the statement;
>
> (d) the nature of any confidential information (including information relating to personal financial matters) in the statement; or
>
> (e) the need to protect the interests of any child or protected party.

(4) The court may exclude from inspection words or passages in the statement."

30. So, the CPR retains the presumption that witness statements ought to be accessible to members of the public present at the trial, but does *not* make specific provision for a right to inspect documents referenced therein. Whilst **Gio Personal** was not Tribunal litigation, it is submitted that Tribunals should follow the approach laid down by the CA in that case (and indeed in the authors' experience this does seem to be the generally accepted practice).

31. This being said, in order to avoid the *de facto* disclosure of document(s) contained in the trial bundle (to third party observers), representatives should avoid cutting and pasting sensitive extracts from documents into witness statements; skeleton arguments and/or written submissions.

Private Hearings

32. In a limited set of circumstances a Tribunal may, pursuant to Schedule 1, Rule16 (1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2004 (SI 2004/ 1861) ("**the 2004 Rules**"), conduct the whole or part of a hearing in private. This may be done in order to hear evidence or representations which in the Tribunal's opinion is likely to consist of information:

    a. which could only be disclosed by contravening a prohibition imposed by or by virtue of any enactment;

    b. which has been communicated to a witness in confidence, or which he has otherwise obtained in consequence of the confidence placed in him by another person; or

    c. the disclosure of which would cause substantial injury to any undertaking of the witness or any undertaking in which he works, for reasons other than its effect on negotiations with respect to any of the matters mentioned in

section 178 (2) TULR(C)A 1992 (i.e. matters falling within the meaning of a "trade dispute").

33. Where the Tribunal concludes that a private hearing is appropriate, the employment judge must give reasons for that decision. The more practical course may, however be, to redact and codify the relevant information and to hold the hearing in public.

Evidence

34. It is important to consider, at an early stage of the proceedings, what evidential enquiries will need to be undertaken in order to maximise your client's case on remedy at any Tribunal hearing. Relevant considerations are likely to include:

a. Expert evidence. See, generally **De Keyser Ltd v Wilson [2001] IRLR 324 EAT** and CPR Part 35 for guidance on the use of experts. Expert evidence may be on a range of topics, including:

i. Evidence on the current state of the job market in the particular industry / sector under consideration (e.g. City headhunters / recruitment consultants);

ii. Evidence on how the job market is likely to develop in the future / current trends (e.g. decreasing bonus pots / diminishing job security);

iii. Evidence on the likely earnings trajectory of an employee working in a particular sector where, for example, the level of remuneration is discretionary and/or evidence as to the value of benefits in kind such as shares or share options;

iv. Actuarial / accounting evidence – this will be particularly important in 'career loss' (or similar) discrimination claims. For example, the Lord Chancellor's discount rate (currently set at 2.5%) need not be slavishly followed, if

there is evidence that doing so would risk under-compensating the claimant for their loss: **Simon v Helmot** [**2012] UKPC 5**. Furthermore, this sort of evidence is likely to be particularly helpful in cases involving a large claim for pension loss. The EAT has confirmed that Tribunals are not compelled to follow the methodology set out in the 'Purple Book'[1], provided it gives cogent and credible reasons for adopting a different approach: **Chief Constable of West Midlands Police v Gardner [2011] (UKEAT/0174/11/DA**);

v. Medical evidence – this will be necessary in cases involving a claim for personal injury (e.g. compensation for psychiatric damage arising out of discrimination). The medical evidence should address not only the medical issues (e.g. clinical diagnosis and prognosis), but also the practical effect which this has had (and will continue to have) on the claimant's daily life. The question of causation must not be overlooked – it is important that the medical expert identifies precisely what, in their opinion, is a consequence of the unlawful conduct (and what, if anything, is or may be attributable to other factors);

vi. Care / assistance evidence – this is closely related to (iv) above. Cases involving a serious breakdown in the claimant's medical condition may give rise to a substantial claim in respect of care / assistance (whether that has been, or will be in the future, provided on a gratuitous or commercial basis): as to the legal approach to be adopted, see **Giambrone v JMC Holidays (formerly Sunworld Holidays Ltd (No 2) [2004] EWCA Civ 158**; **Housecroft v Burnett [1986] 1 All ER 332**; and **Evans v Pontipridd Roofing Limited [2001] EWCA Civ 1657**.

[1] Compensation for Loss of Pension Rights in the Employment Tribunal, 3rd edition (2003): http://www.justice.gov.uk/downloads/tribunals/employment/claims/guidance-booklets/LossOfPensionRights.pdf

b. Mitigation evidence – the burden of proof is on the respondent to substantiate any assertion that the claimant has failed to take reasonable steps to mitigate her losses. Respondents can be lulled into a false sense of security on the mitigation front, in circumstances where claimants fail, in advance of trial, to disclose much in the way of mitigation evidence. However, it is always important to remember: (i) the burden of proof; and (ii) the fact that Tribunals will almost inevitably allow claimants an opportunity to explain in oral evidence what steps they have taken to find alternative work since their dismissal. Accordingly, respondents would be well-advised to keep a watchful eye on the job market and identify any vacancies (particularly those which are well publicised) for which the claimant would be suitably qualified and experienced. They should then prove their case by evidence at the hearing.

c. Similarly, in order to make their own case on mitigation as watertight as possible (and to assist with settlement negotiations), claimants would be well-advised to retain comprehensive records of:

   i. How they have undertaken searches for work (e.g. via newspapers, internet, networking, verbal enquiries);

   ii. Applications for jobs (including evidence of submission / acknowledgment of receipt – usually in the form of an automated email response);

   iii. Registrations with recruitment agencies / temporary work agencies;

   iv. Discussions with potential employers;

   v. Dates of interviews;

   vi. Rejection letters / emails;

   vii. Any training undertaken (and the cost of doing so); and

   viii. Costs directly incurred as a result of searching for alternative work (e.g. travelling to interviews).

This information will also be critical if the claimant is seeking advance a positive claim for 'stigma damages', in light of the evidential burden inherent in such claims: see for example **Chagger v Abbey National Plc [2010] IRLR 47**; **Malik v BCCI SA [1998] AC 20**; and **BCCI v Ali (No.3) [2002] IRLR 460**.

35. A general point for claimants: make sure you cover the evidential bases given that the burden is on you to establish loss. An example of a common failing is not to spell out injury to feelings arising out of the acts complained of. Since compensation is for the injury which the claimant has suffered, it is not enough simply to rely on (for example) the Tribunal's findings as to the acts of discrimination. There must be evidence of impact.

36. A similar point for respondents: you have the burden of proof on issues like mitigation, arguments to the effect that the breach made no difference to the outcome and arguments about the risk of redundancy or early termination of employment for other reasons. Do not rely on assertion. There has to be evidence to support these arguments.

## Assessment of Compensation

37. In this section we cover particular points, rather than attempt to give a comprehensive account of how compensation should be calculated.

### Career-long loss?

38. In the vast majority of cases the Tribunal will not be dealing with a claim for loss of earnings for the remainder of the claimant's career; and will instead be faced with the task of identifying when the claimant will be likely to obtain an "equivalent job" (i.e. return to employment at a comparable level of earnings). As Elias LJ said (at paras 51-53) in **Wardle v Credit Agricole Corporate Investment Bank [2011] ICR 1290 CA**:

> "…the usual approach, assessing the loss up to the point where the employee would be likely to obtain an equivalent job, does fairly assess the loss in cases – and they are likely to be the vast majority – where it is at least possible to conclude that the employee will in time find such a job"
>
> "In the normal case if a tribunal assesses that the employee is likely to get an equivalent job by a specific date, that will encompass the possibility that he might be lucky and secure the job earlier, in which case he will receive more in compensation than his actual loss, or he might be unlucky and find the job later than predicted, in which case he will receive less than his actual loss. The tribunal's best estimate ought in principle to provide the appropriate compensation. The various outcomes are factored into the conclusion."
>
> "Exceptionally, a tribunal will be entitled to take the view on the evidence before it that there is no real prospect of the employee ever obtaining an equivalent job. In such a case, the tribunal necessarily has to assess the loss on the basis that it will continue for the course of the claimant's working life".

The Ogden Tables

39. In this "exceptional" category of career-long loss cases, it is likely that Tribunals will derive assistance from the Ogden Tables[2], which provide an actuarial basis for assessing future losses extending up to retirement age.

40. However, a word of warning was sounded by the EAT in **Abbey National plc v Chagger [2009] ICR 624 EAT** at para. 17:

> "…We do not wish by these observations to discourage tribunals from using the Ogden Tables in cases where sophisticated calculations of long-term future loss are required. But if they are used they must be used with care and with a proper understanding of their limitations…"

41. The EAT went on to state at para. 114 that:

[2] Ogden Tables, 7th Edition (2011)
http://www.gad.gov.uk/Documents/Other%20Services/Ogden%20Tables/Ogden_Tables_7th_edition.pdf

> "…Even in a case where it is appropriate to use the Ogden Tables, it will never be right to use the multiplier taken from the main tables without considering the contingencies which those tables do not reflect. For a claimant to be compensated in full (subject to accelerated receipt) for his assumed annual loss for every year and month of the rest of his career involves treating as a certainty the assumption that he would have continued for the rest of his career to receive his pre-dismissal earnings. But that cannot be a certainty. On the contrary, it is subject to a number of contingencies: he might have died or become too ill to work, or his employer might have gone out of business, or he might have been dismissed for some other good cause or have left voluntarily for any one of a number of reasons. The only one of those contingencies taken into account in the main Ogden tables is the possibility of death (and even that may be inadequately represented if there is reason to believe that the claimant's risks are substantially worse than those of the general population from which the Ogden figures derive). Those other contingencies must be properly reflected in the ultimate multiplier used. There may be cases where a tribunal believes the contingencies in question are balanced by "upside" contingencies not reflected in the multiplicand (e.g. promotion); but otherwise the multiplier will fall to be reduced…."

42. Section B of the Ogden Tables (in particular, Tables A – D) suggests ways in which the multiplier for loss of earnings may be further discounted, in order properly to account for risks / contingencies other than mortality. However, there is still scope for claimants and respondents to argue for an adjustment to *these* discount rates, if (for example) the claimant was employed in a particularly secure role prior to the unlawful conduct in question (or the reverse is true)[3].

The law on mitigation

43. The evidential issues relating to mitigation have been discussed above. As regards the law, a dismissed employee is under a duty to take reasonable steps to mitigate his/her loss, although the burden of proving a failure to comply with duty falls upon the respondent. The test is one of reasonableness; the employee is *not* compelled to take "all reasonably practicable steps", for example. The Court of Appeal has stated that the standard of what is reasonably required of a dismissed employee should not be

[3] See for example **Conner v Bradman & Co Ltd [2007] EWHC 2789**, a civil claim for personal injury damages.

set too high. In **Fyfe v Scientific Furnishing Ltd [1989] IRLR 331**, the EAT (at para. 3) summarised the position thus:

> "…To state the basic rule broadly it is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed through unreasonable action or inaction to avoid. It is important to emphasise that the duty is only to act reasonably and the standard of reasonableness is not high in view of the fact that the defendant is a wrongdoer".

44. Tribunals will generally afford claimants a period of grace within which they will not be criticised for focussing their efforts on obtaining alternative employment at the same / similar level to their pre-dismissal role. Dismissed employees are, however, expected to be realistic in their searches for replacement income; and will be expected to lower their sights if it is apparent that little progress is being made with 'Plan A'.

45. Mitigation disputes can arise in circumstances where a claimant elects to undergo a process of training / re-training, or to set up a new business venture. Whether or not such conduct will comply with the duty to mitigate will be a question of fact for the Tribunal, having regard to all the relevant circumstances (which may include the state of the labour market in the particular sector in which the claimant was previously employed; and whether this decision is taken only after significant – but unsuccessful – efforts have been made to obtain alternative employment).

46. Where a claimant has set up (or is in the process of setting up) their own business, it will often be said that no salary has been drawn from the business owing to the substantial start-up costs. In such circumstances, respondents would be well-advised to review the publicly accessible information relating to the new business (e.g. Companies house, news / magazine articles, website and other promotional material); and press for substantial disclosure relating to (e.g.):

    a. Company accounts;

b. Business plans / projections (both internal and those which are pitched to prospective clients);

c. Client lists;

d. Marketing material; and

e. Charge-out rates.

47. Disputes about 'double recovery' often arise in circumstances where a summarily dismissed employee, perhaps with a contractual notice period of several months, promptly obtains alternative employment within the period of what would have been his notice period. The basic legal position is as follows:

a. Where the claim is for wrongful dismissal / breach of contract, credit should ordinarily be given for earnings obtained during the notice period (unless, for example, the contract is for a fixed term and contains a valid 'liquidated damages' clause in the event of unlawful termination: see for example **Murray v Leisureplay [2005] EWCA Civ 963**; and **Kevin Keegan v Newcastle United Football Club Ltd [2010] IRLR 94**);

b. Where the claim is for 'express' unfair dismissal, compensation for unfair summary dismissal should include full pay for the notice period, without any requirement for the claimant to give credit for alternative income obtained during that period: **Norton Tool Co Ltd v Tewson [1972] ICR 501**; and **Burlo v Langley [2007] IRLR 145**;

c. Where the claim is for constructive unfair dismissal, in assessing the compensatory award credit *should* be given for alternative income obtained during the notice period to which the claimant was lawfully entitled: **Stuart Peters Ltd v Bell [2009] IRLR 941**.

48. An employee's unreasonable refusal to accept an offer of reemployment will be in breach of the duty to take reasonable steps to mitigate his/her financial losses: **Gbaja-Biamila v DHL International (UK) Ltd [2000] ICR 730; Wilding v BT plc [2002] IRLR 524**; **Ministry of Defence v DeBique [2010] IRLR 471;** and **F & G Cleaners Ltd v Saddington [2012] (UKEAT/0140/11/JOJ)**. Whether or not a refusal is unreasonable is a question of fact for the Tribunal. In **DeBique**, the claimant, a serving female soldier, succeeded in a claim for indirect sex and race discrimination against the MoD, and was awarded £15,000 by way of compensation for injury to feelings. During her notice period the respondent offered her a posting which would, in the opinion of the Tribunal, have provided stability and adequately addressed her childcare difficulties. Accordingly, the claimant's refusal to accept this offer was deemed to be unreasonable, and she was therefore not entitled to be compensated for loss of earnings. The EAT noted, however, that Tribunals should not be too ready to criticise claimants for refusing offers of reemployment, stating (*per* Underhill P):

> "…if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice; it is where and only where the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed…"

49. In the event of a defeat on liability where the claimant's losses are substantial, a respondent would be wise to give careful consideration to this possibility and the means by which it might be made more realistic to expect the claimant to return.

Pension loss

50. The law on pensions can be quite complex and, as stated above, in some cases it may be necessary and proportionate to instruct an actuarial expert to give an opinion as to the likely financial loss under this head.

51. It is obviously important to differentiate between final salary / defined benefit pension schemes on the one hand; and money purchase schemes on the other. As to the latter, the claimant's loss flowing from his/her dismissal will generally be the prospective value of their former employer's pension contributions (up to and until the point in time when claimant is able to obtain comparable pension benefits from a new employer[4]) – which can be relatively straightforward to calculate. As to the former, the position is often more complicated, mainly because the hypothetical value of the claimant's pension (including, in most final salary schemes, a significant lump sum payment upon retirement) will vary significantly, depending on (*inter alia*):

    a. For what period the Tribunal considers that the claimant would, but for the unlawful termination, have remained in the respondent's employ; and

    b. How the Tribunal considers the claimant would, but for the unlawful termination (and taking into account (a) above), have progressed within the respondent organisation over time (e.g. promotion prospects, salary increases).

52. It is common for Tribunals to determine these sorts of speculative issues on a percentage chance basis.

53. The provisions of the 'Purple Book' are generally the starting point for Tribunals in their assessment of pension loss. The two main approaches suggested and explained by these Guidelines are: (i) the simplified approach; and (ii) the substantial loss approach.

54. For most cases the simplified approach will be appropriate. Para. 4.11 of the Purple Book states that this essentially involves three stages of assessment:

[4] Assuming that the accrued rights are transferable – although there may still be ongoing loss in such circumstances.

a. in the case of a final salary scheme, the loss of the enhancement to the pension already accrued because of the increase of salary which would have occurred had the applicant not been dismissed;

b. in all cases, the loss of rights accruing up to the hearing; and

c. the loss of future pension rights.

55. The substantial loss approach is summarised at para. 4.12 of the Purple Book; in essence, it "uses actuarial tables comparable to the Ogden Tables to assess the current capitalised value of the pension rights which would have accrued up to retirement". The actuarial tables (in Appendices 4 – 7) take into account the following factors:

a. Age at dismissal;

b. Retirement age;

c. Gender; and

d. Whether the pension was a final salary or money purchase scheme.

56. Adopting the substantial loss approach may be appropriate in cases where:

a. the claimant is considered likely to suffer career long loss;

b. the claimant was employed by the respondent for a substantial period of time;

c. the employment was of a particularly stable nature; and/or

d. the claimant is of an age where s/he is less likely obtain new employment.

57. For further guidance on this potentially thorny issue, see in particular paras. 4.7 – 4.14 of the Purple Book; and the observations of HHJ McMullen QC in **Sibbit v The Governors of St Cuthbert's Catholic Primary School [2010] UKEAT 0070/10/ZT**.

The law on injury to feelings / psychiatric injury

58. It is trite law, but worth remembering, that compensation for injury to feelings ("**ITF**") is compensatory in nature and not punitive. In cases of blatant and egregious discrimination, it is tempting for representatives to focus their evidence and submissions on the seriousness / gravity of the employer's conduct. Doing so at the remedy stage is appropriate but the focus of the evidential enquiry and submissions to the Tribunal should be on the personal, practical and/or medical effects that the unlawful conduct has had on the particular complainant. A robust claimant may shrug off egregious discrimination whereas a less robust one may be far more hurt by less serious misconduct: **Essa v Laing [2004] ICR 746 CA**.

59. The Tribunal's assessment of compensation for ITF should not be influenced by the extent of its disapproval of the respondent's unlawful conduct. In **Ministry of Defence v Cannock [1994] IRLR 509**, the EAT held (at para. 144) that:

> "It is wrong for Industrial Tribunals to make an award on the basis that it has or must have within it some kind of deterrent element, either *pour encourager* the MoD or *les autres*..... We should make it clear that an award of damages for injury to feelings is solely based on principles of compensation…"

60. In **HM Prison Service v Salmon [2001] IRLR 425** the EAT (at para. 29) highlighted the need for Tribunals to avoid double recovery, in circumstances where separate heads of loss are being claimed for (i) injury to feelings; and (ii) psychiatric damage. The EAT held that in such cases it may well appropriate to make one award:

> "In a given case it may be impossible to say with any certainty or precision when the distress and humiliation that may be inflicted on the victim of discrimination becomes a recognised psychiatric illness such as depression. 'Injury to feelings' can cover a very wide range. At the lower end are

comparatively minor instances of upset or distress, typically caused by one-off acts or episodes of discrimination....But at the upper end the victim is likely to be suffering from serious and prolonged feelings of humiliation, low self-esteem and depression; and in these cases it may be fairly arbitrary whether the symptoms are put before the tribunal as a psychiatric illness, supported by a formal diagnosis and/or expert evidence. It appears from an article to which we were helpfully referred in *Equal Opportunities Review* for September/October 2000, in which recent compensation awards in discrimination cases are reviewed, that tribunals in such cases do sometimes treat 'stress and depression' as part of the injury to be compensated for under the heading 'injury to feelings'; and we can see nothing wrong in principle in a tribunal taking that course, provided it clearly identifies the main elements in the victim's condition which the award is intended to reflect (including any psychiatric injury) and the findings in relation to them. But where separate awards are made, tribunals must be alert to the risk that what is essentially the same suffering may be being compensated twice under different heads".

61. It is also imperative that the Tribunal keeps a sense of proportion. Thus, *per* the EAT (at p.283B-D) in **HM Prison Service v Johnson [1997] ICR 275**:

"(i) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

(ii) Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham M.R., be seen as the way to "untaxed riches."

(iii) Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.

(iv) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

(v) Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made".

62. As to the ranges of awards for ITF, these were updated by the EAT in **Da'Bell v NSPCC [2010] IRLR 19** as follows:

a. Upper band: **£18,000 – £30,000**. The most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in the most exceptional case should an award of compensation for ITF exceed £30,000;

b. Middle band: **£6,000 – £18,000**. The middle band should be used for serious cases which do not merit an award in the highest band; and

c. Lower band: **Up to £6,000**. Less serious cases, such as where the act of discrimination is an isolated or one off occurrence. It is generally considered that £500 is roughly the 'baseline' level of award, as anything lower risks being regarded as so low as not to be a proper recognition for ITF.

63. More 'case specific' guidance can be obtained from Harvey's discrimination quantum reports. It is important, however, to:

a. check the date on which the comparable award(s) were made;

b. check whether the award has been 'uprated' to take into account inflation; and, if not,

c. use an 'inflation calculator' (available on e.g. Lawtel) to calculate the approximate value of the award in 'today's money'.

64. As to guidelines for awards for psychiatric damage, the JSB Guidelines for the Assessment of General Damages in Personal Injury Cases[5] are instructive, as are quantum reports from Kemp & Kemp.

[5] The latest version is the 11th edition, published in September 2012.

Aggravated / Exemplary Damages

65. These heads of damage are frequently cited on discrimination pleadings and/or schedules of loss; and are often 'lumped together'. They are, however, distinct legal concepts – as outlined below.

*Aggravated Damages*

66. In order to justify an award of aggravated damages, the Tribunal must be satisfied that there was "high handed, malicious or insulting behaviour" on the part of the respondent(s): **Alexander v Home Office [1988] ICR 685**. However, in circumstances where such conduct is made out, it does not follow that the claimant is thereby entitled to a 'punitive' award of damages.

67. The true position is that where the threshold for aggravated damages is satisfied, the claimant is entitled to be compensated for the greater injury suffered by reason of the egregious conduct of the respondent. Even in aggravated damages cases the award is made to reflect the fact that the injury has been aggravated by the conduct of the employer, rather than to punish such conduct *per se*. The end result should be that the claimant receives compensation for the injury which s/he suffers, but no more than this. In **HM Prison Service v Salmon [2001] IRLR 425**, the EAT stated at para 23:

> "…it is also clear that aggravated damages are awarded only on the basis, and to the extent, that the aggravating features have increased the impact of the discriminatory act or conduct on the applicant and thus the injury to his or her feelings: in other words, they form part of the compensatory award and do not constitute a separate, punitive, award…"

68. More recently in **Commissioner of the Metropolitan Police v Shaw [2012] ICR 464 EAT**, the EAT reiterated that aggravated damages:

a. are compensatory and not punitive; and

b. represent an aspect of injury to feelings rather than a wholly separate head of damages.

69. The EAT observed that although it is common sense for a Tribunal to look at the nature of the employer's conduct when assessing aggravated damages, the ultimate question is: what additional distress was caused to this particular employee by the aggravating feature(s) in question? In order to reduce the risk of a Tribunal awarding a punitive element within an aggravated damages award, the EAT suggested that Tribunals use the following wording in their judgments:

> "*Injury to feelings in the sum of £X, incorporating aggravated damages in the sum of £Y*"

*Exemplary Damages*

70. This head of damage is punitive; and is available in a narrow category of cases. In **Rookes v Barnard [1964] AC 1129** the House of Lords identified two categories of cases in which awards of exemplary damages may be permissible:

a. Arbitrary or unconstitutional action by the servants of the government ("…for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service ..."); and

b. Where the defendant's conduct "…has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff..."

71. As regards the first category of cases, in **Cassell & Co v Broome [1972] 1 All ER 801**, Lord Reed stated that:

> *"…*The contrast is between 'the government' and private individuals. Local government is as much government as national government, and the police and many other persons are exercising governmental functions. It was unnecessary in *Rookes v Barnard* to define the exact limits of the

category. I should certainly read it as extending to all those who by common law or statute are exercising functions of a governmental character…"

72. In **Bradford City Metropolitan Council v Arora [1990] ICR 226**, the claimant failed in a job application by reason of unlawful discrimination. The Court of Appeal concluded that the interviewing of the applicant for a senior position in a college for which the Council had authority was properly to be regarded as an exercise of a public function by a public authority of attracting an award of exemplary damages for its abuse. By contrast, in **Virgo Fidelis Senior School v Boyle [2004] IRLR 268**, the EAT held that the management of a voluntary aided-school were not agents or servants of the Government, in the sense required for an award of exemplary damages to be permissible.

73. In **Michalak v Mid Yorkshire Hospitals NHS Trust & Others [2011] (ET 1810815/2008)**, a Tribunal made an award of exemplary damages in recognition of the discriminatory manner in which the respondent had handled the suspension of the claimant (a consultant doctor), in particular by:

a. Failing to carry out proper reviews;

b. Failing to allow the claimant to return to work when, as a matter of fact, the suspension had lapsed;

c. Not telling the truth to the National Clinical Advisory Service in order to obtain their endorsement of the claimant's continuing suspension;

d. Unlawfully continuing the claimant's extension beyond six months, despite the fact that no criminal activity was suspected; and

e. When the claimant sought to challenge her suspension in the High Court, the respondent opposed the application and relied upon "wholly untruthful" witness evidence of a HR representative.

74. The Tribunal concluded that those circumstances "properly amount to oppressive, arbitrary or unconstitutional action by the servants of the Government".

75. Further detailed guidance on aggravated damages was provided by the EAT in **Ministry of Defence v Fletcher [2010] IRLR 25**, at paras. 96 – 118.

76. Even if a claimant does successfully demonstrate that the criteria for an award of exemplary damages are satisfied, the quantum of such awards tends to be low. For example, in **Arora** the CA reinstated the Tribunal's award of £1,000 (circa. £2,200 RPI); and in **Michalak** the award was £4,000. In **Ministry of Defence v Fletcher** a total of £7,500 was awarded.

Interest

77. Pursuant to the Employment Tribunals (Interest) Order 1990 (SI 1990/479), where the whole or any part of a sum of money (other than costs or expenses) that has been required to be paid to a party under an award or other determination of an employment tribunal (known as a "relevant decision") remains unpaid, it shall:

    a. automatically carry interest at a stipulated rate as from the end of a period of 42 days beginning with the date when the document recording the award was sent to the parties (such date being known as the "relevant decision day");

    b. In practical terms, therefore, interest only starts to accrue on the expiry of the 6 week time limit for appealing the Tribunal's decision to the EAT;

    c. The applicable interest rate is that specified by section 17 of the Judgments Act 1838 on the relevant decision day – currently 8% per annum.

78. With regard to compensation for unlawful discrimination, the Tribunal's jurisdiction to award interest is not limited only to interest in respect of late payment (on the basis set out above), but there exists an additional discretionary power to award interest on the value of the award itself. This power derives from the Employment Tribunals

(Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803[6]; and the position is as follows:

a. The Tribunal must consider whether to make an award, even in the absence of a formal application;

b. There is no obligation to make an award of interest, but a Tribunal which decides not to do so must give reasons for that decision;

c. The discretion relates to the decision whether or not to award interest at all; if the Tribunal decides to make an award, there is no discretion as to the manner in which it is to be calculated, nor (save in exceptional circumstances – see below) the period for which it shall be awarded;

d. Where interest is awarded, it will be calculated as simple interest accruing from day to day. In England and Wales, the rate is that from time to time prescribed for the Special Investment Account ("**SIA**") under Rule 27 (1) of the Court Fund Rules 1987 – currently 0.5%;

e. Note that for discrimination cases involving a course of conduct extending over a lengthy period, the SIA rate used to be far more generous; the SIA rate has diminished over time as follows:

    i. 6% from 1st February 2002 to 31st January 2009;

    ii. 3% from 1st February 2009 to 31st May 2009;

    iii. 1.5% from 1st June 2009 to 30th June 2009;

    iv. From 1 July 2009, 0.5%.

[6] Section 139 (1) of the EqA 2010 provides for regulations to be made enabling Tribunals to include interest on an amount awarded in proceedings under the Act. At present, the 1996 Order remains applicable: see the Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocations) Order 2010 (SI 2010 / 2317), Sch. 7, Art. 21 (1).

f. Where the SIA has varied over the relevant period, a Tribunal may apply a median or average of the applicable rates;

g. Interest on ITF awards should be calculated according to the whole of the relevant period (i.e. from the date of discrimination to the date on which the interest calculation is made);

h. For all other types of discrimination award, interest will be payable only for half the relevant period. In practical terms, the Tribunal will identify a 'mid-point date' which is the halfway point between the date on which the act of discrimination complained of occurred and that date on which the interest is being calculated;

i. Where interest is awarded, there is a very limited power for Tribunals calculate the amount by reference to a different period of time; it may do so only if there are "exceptional circumstances" (either relating to the whole award or a particular sum) and "serious injustice" would be caused by awarding interest for the specified periods;

j. The Tribunal must set out in its written statement of reasons a statement of the total amount of interest awarded, together with a breakdown of its calculation;

k. As regards interest in respect of late payment of discrimination awards, instead of interest accruing from the 42nd day after the relevant decision day, it will begin to accrue on the day *immediately following* the relevant decision day. However, no interest for late payment will be payable if payment of the full amount of the award is made by the respondent within 14 days after the relevant decision day.

Apportionment / Contribution

79. In **London Borough of Hackney v Sivanandan & Others [2011] ICR 1374**, the EAT (Underhill P) provided the following guidance on the rules of apportionment in Tribunal discrimination claims:

a. Where the same "indivisible damage" is caused by more than one party, each is liable for the whole of the damage. This situation may arise where:

i. there are concurrent tortfeasors – i.e. joint tortfeasors liable for the same unlawful act (for example where an employer is held vicariously liable for the discriminatory act(s) of its employee); or

ii. there are multiple tortfeasors who separately contribute to the same damage.

b. Where the damage is "divisible", i.e. where it is possible to distinguish between the damage caused by different tortfeasors, each tortfeasor is liable to compensate the claimant only for that part of the damage attributable to it.

80. In the situation described at (a) above, one tortfeasor who is liable to the claimant for all the damage may, under the Civil Liability (Contribution) Act 1978, claim a contribution from other tortfeasor(s) who have contributed to the damage in question. However, the Tribunal has no jurisdiction to determine such a claim, and it must be pursued in the civil courts: **Brennan & Others v Sunderland City Council [2012] (UKEAT/0286/11/SM)**, at paras. 9 – 21**.**

**Other Remedies**

Interim Relief

81. This is a potentially potent remedy and operates as follows:

a. It applies to specific categories of automatic unfair dismissal only eg whistleblowing, trade union membership and activities[7], raising health and safety issues and other protected activities;

b. The employee has 7 days from the effective date of termination to apply to the Tribunal (s128(2) ERA);

c. The Tribunal is then obliged to hear the application "as soon as practicable after receiving the application" (s128(3) ERA);

d. If, on hearing the application, "it appears to the tribunal that it is *likely* that on determining the complaint" (s129(1) ERA) the employer will be found to have breached s103A ERA it may make an order for interim relief pending the determination of the complaint at a full hearing;

e. The orders which the Tribunal may make under s129 ERA, pending the determination of the complaint are:

i. To reinstate the employee (if the employer consents); or, if not,

ii. To reengage the employee in another job but on equivalent terms and conditions (subject to the consent of the employer and the employee, the consent of the employee not to be unreasonably withheld); or, if not,

[7] See ss161-167 Trade Union and Labour Relations (Consolidation) Act 1992 for parallel provisions in relation to trade union victimisation.

iii. To continue the employee's contract of employment.

f. Under s. 130 ERA an order for the continuation of the contract of employment requires that in relation to pay and benefits the employee be treated as if he had not been dismissed.

82. However, note **Ministry of Justice v Sarfraz [2011] IRLR 562, EAT:**

a. "In this context 'likely' does not mean simply 'more likely than not' – that is at least 51% – but connotes a significantly higher degree of likelihood. .....'likely' connotes something nearer to certainty than mere probability". There have to better prospects than "a reasonable prospect of success"... "The tribunal should ask itself whether the claimant has established that he has a "pretty good" chance of succeeding in the final application to the tribunal". See, also, **Dandpat v The University of Bath and Anor [2009] UKEAT/0408/09/LA**: "We do in fact see good reasons of policy for setting the test comparatively high..... If the relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the claimant, until the conclusion of the proceedings; that is not consequence (sic) that should be imposed lightly."

b. "Thus in order to make an order under ss. 128–129 the judge had to have decided that it was likely that the tribunal at the final hearing would find five things:

i. that the claimant had made a disclosure to his employer;

ii. that he believed that that disclosure tended to show one or more of the things itemised at (a)–(f) under s. 43B(1);

iii. that that belief was reasonable;

iv. that the disclosure was made in good faith; and

v. that the disclosure was the principal reason for his dismissal.

c. The application failed because it could not be said to be likely that the tribunal would conclude that the claimant's belief that his grievances disclosed a breach of legal obligations by the employer was reasonable.

83. For useful observations on procedure in interim relief applications: see **Dandpat v The University of Bath and Anor [2009] UKEAT/0408/09/LA** and **[2010] EWCA Civ 785**. See, also, the Underhill Review recommendation that oral evidence will not be received unless the Tribunal orders otherwise. Key issues in terms of preparation are:

a. Whether/how to present evidence. The general rule is that formal evidence is not necessary or desirable. The Tribunal should take a preliminary view on the material available.

b. For the respondent, whether to plead the Grounds of Resistance before the application hearing. This will frequently be advisable as the pleading will provide a useful basis for resisting the application.

Reinstatement and Reengagement

84. Whilst such orders are rarely pursued by claimants, the current state of the job market, taken together with the judicial listing policy to list standard unfair dismissal claims (i.e. of one day duration before a judge sitting alone) within 16 weeks of issue may make such orders a more attractive proposition for claimants. The fact that a claimant does not tick the reinstatement or reengagement box (taken together, "reemployment") on the ET 1 form does not preclude them from asking the Tribunal to consider those remedies at the hearing itself.

85. Pursuant to s116 ERA 1996, when considering whether or not to exercise its discretion to make an order for reemployment, the Tribunal must adopt the following approach:

a. First consider whether to make an order for reinstatement (i.e. ordering that the claimant be permitted to return to the same job with the same employer), taking into account:

i. Whether the claimant wishes to be reinstated;

ii. Whether it is practicable for the respondent to comply with such an order; and

iii. In circumstances where the claimant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

b. If the Tribunal decides not to make an order for reinstatement, it must then consider whether to make an order for re-engagement (i.e. ordering that the claimant be permitted to return to a different job with the same employer, or a successor / associated employer); and, if so, on what terms, taking into account:

i. Any wish expressed by the claimant as to the nature of the order to be made;

ii. Whether it is practicable for the employer (or a successor or an associated employer) to comply with such an order; and

iii. In circumstances where the claimant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement and (if so) on what terms.

86. It is clear, therefore, that questions of "practicability" will be central to the Tribunal's decision-making process in this regard; and it is vital that employers seeking to resist an order for reemployment adduce cogent evidence on this issue. It is unlikely that Tribunals will simply accept an assertion from the respondent's counsel that (for

example) "the claimant would be a disruptive influence is he/she were permitted to return to the office…" Witness evidence from line managers as to the practical ramifications of a reemployment order (including the inter-personal difficulties which may arise as a result[8]; and/or the financial implications for the employer – for example in cases where a redundancy dismissal is held to be unfair, but the employer can demonstrate that it has implemented a recruitment freeze across the board, owing to budgetary constraints) is likely to be appropriate and necessary, in order to persuade a Tribunal that such an order is not practicable. In **Port of London Authority v Payne [1994] IRLR 9**, the CA held that:

> "…The employer does not have to show that re-employment was impossible. It is a matter of what is practicable in the circumstances of the employer's business at the relevant time…"

87. In considering the question of practicability, it would be natural to assume that the fact a dismissed employee has been permanently replaced by his former employer would be a strong factor militating against the practicability of a reemployment order. Significantly, however, in considering the practicability of a reemployment order, the Tribunal must not take into account the fact that the respondent has engaged a permanent replacement for the unfairly dismissed claimant, unless the respondent can show that:

    a. It was *not practicable* for the claimant's work to be carried out without engaging a permanent replacement; or

    b. It engaged a permanent replacement after the lapse of a reasonable period of time, without knowing that the claimant wishes to be reemployed; and at the time when the recruitment was made, it was no longer *reasonable* for the respondent to arrange for the claimant's work to be carried out except by a permanent replacement (s. 116 (5) ERA 1996).

[8] Particularly in cases where there has been a genuine breakdown in trust and confidence – see for example **Wood Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680**, where the EAT (Scotland) overturned an order for re-engagement, in circumstances where the claimant had been unfairly dismissed for allegedly dealing drugs in the workplace, but the employer genuinely believed in the guilt of the employee.

88. It can be seen that this statutory exception is narrowly defined. Given the availability and willingness of agency workers to carry out a wide variety of jobs, it may be difficult to persuade a Tribunal that the recruitment of a permanent replacement for the dismissed claimant is a relevant factor to take into account.

89. As to the timing of the Tribunal's assessment of practicability, in **Rembiszewski v Atkins Ltd [2012] (UKEAT/0402/11/ZT)** the EAT (*per* Slade J) held (at paras. 39 and 41) that:

> "As a matter of principle the practicability of reinstatement or re-engagement is to be determined as at the date it is to take effect"; and
>
> "…In our judgment a decision on practicability and justice of reinstatement or re-engagement taking into account all statutorily required considerations is to be taken when the ET has received all the material to be placed before them…"

90. One important consequence of an order for reemployment, which is sometimes overlooked by respondents, is the potential removal of the statutory cap applicable to unfair dismissal awards: **Parry v National Westminster Bank [2005] IRLR 193**. In circumstances where a reemployment order is made, the Tribunal is required to specify (*inter alia*) :

a. "any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of [reemployment]" (ss. 114 (2) (a) and (115 (2) (c) ERA 1996); and

b. "any rights and privileges (including seniority and pension rights) which must be restored to the employee" (ss. 114 (2) (b) and 115 (2) (e) ERA 1996).

91. These sums are not subject the ordinary statutory cap on compensation. Whilst credit should be given for: (a) any sums paid to the claimant by way of a PILON or *ex gratia* payments; (b) earnings from alternative employment during the relevant period; and/or (c) such other benefits as the Tribunal thinks appropriate in the circumstances (ss. 114 (4) and 115 (3)), it remains the case that for high earning employees who are unable to secure alternative employment for a considerable period of time[9], requesting a reemployment order may be a financially attractive option – and certainly something which can increase an employee's bargaining position during WP negotiations.

92. The use of the words "any benefit which the complainant might reasonably be expected to have had but for the dismissal" means that a claimant will, for example, be able to include a claim (in the Tribunal) for a contractual / discretionary bonus payment, which s/he might reasonably be expected to have received but for the dismissal (i.e. after the dismissal but before the date of reemployment), and which may greatly exceed the ordinary cap on compensation for unfair dismissal.

93. In circumstances where an reemployment order is made by the Tribunal, but the respondent fails to comply with the terms of the order, the Tribunal has a wide discretion to make an additional award of compensation:

    a. If the claimant is reemployed but not strictly in accordance with the Tribunal's order, the amount of compensation payable shall be "…such as the tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the order" (s. 117 (2) ERA 1996) – subject to a statutory maximum of £72,300;

    b. If the claimant is not reemployed (in breach of the Tribunal's order), the Tribunal shall make:

        i. An award of compensation for unfair dismissal (i.e. a basic and compensatory award, calculated in the usual manner); and

[9] And who do not have a claim of whistleblowing or discrimination before the Tribunal.

ii. An additional award of compensation of an amount not less than 26 nor more than 52 weeks' pay (capped at the statutory maximum – currently £430 per week); unless

iii. The respondent satisfies the Tribunal that it was not practicable to comply with the order.

94. In considering at what point on the '26 – 52 week scale' the additional award should sit, the Tribunal should consider factors such as the respondent's conduct and the extent to which the 'ordinary' compensatory award has properly compensated the claimant for the actual loss suffered: **Morganite Electrical Carbon Ltd v Donne [1988] ICR 18**).

Recommendations

95. Section 124 (2) (c) of the EqA 2010 confers a power on Tribunals to make an "appropriate recommendation", which should have as its purpose "obviating or reducing the adverse effect of any matter to which the [discrimination] proceedings relate": section 124 (3) EqA. Such a recommendation need not be aimed at the particular complainant, but can be aimed at obviating or reducing the negative impact of discrimination on "any other person" (e.g. the workforce in general, or future job applicants): sections 124 (3) (a) and (b) EqA. The Tribunal has the discretion to determine the particular action that should be taken (e.g. equality and diversity training, a review and/or revision of internal policies, or putting in place a system for monitoring of equality and diversity statistics), as well as the time limits within which those steps must be completed.

96. As to the exercise of the Tribunal's discretion, see **Lycée Français Charles De Gaulle v Delambre [2011] EqLR 948** for general guidance:

a. It would not be right for a tribunal to recommend that an applicant who has been the victim of discrimination in selection for employment should be

appointed to the next suitable job that becomes available, because this would be unfair to the other applicants for that post: **Noone v North West Thames Regional Health Authority (No 2)[1988] IRLR 530 CA**;

b. Nor does the legislation allow positive discrimination such as the claimant being promoted automatically, without consideration of merit, as other workers who are disappointed may in turn be the victims of sex or race discrimination: **British Gas plc v Sharma [1991] ICR 19 EAT**;

c. Any recommendation should not require an individual to make statements (e.g. conceding points or apologising) where they cannot do so in good conscience because they do not agree with them, even if the Tribunal has made findings adverse to the respondent on those issues: **St Andrew's Catholic Primary School v Blundell [2010] (UKEAT/0330/09)**.

97. The following examples of possible recommendations are given in the explanatory notes to the 2010 Act

> "A tribunal could recommend that the respondent:
>
> a. introduces an equal opportunities policy;
> b. ensures its harassment policy is more effectively implemented;
> c. sets up a review panel to deal with equal opportunities and harassment/grievance procedures;
> d. re-trains staff; or
> e. makes public the selection criteria used for transfer or promotion of staff."

98. Recommendations cannot be specifically enforced. However, they may be a potent weapon nevertheless in serving to draw attention to the claimant's victory in the employer's organisation and "teaching the employer a lesson". Moreover, a respondent's failure to comply with a Tribunal's recommendation is not necessarily without sanction. In so far as the recommendation "relates to the complainant" and the employer fails, "without reasonable excuse", to comply with it, the Tribunal has

the power to increase the amount of compensation awarded to the complainant; or, if no compensation was originally awarded, to make such an award: section 124 (7) EqA.

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