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# Monetary remedies in the Tribunal (including interim relief); Maximising the value or minimising the pain
**Simon Devonshire QC**

1. A recession tends to lead to more claims but fewer trials. Employees naturally look for ways to maximise the value of their claims – particularly by reference to causes of action that bust the cap for a 'vanilla' unfair dismissal - often (in the case of high value employees) by reference to the whistleblowing legislation. The 'bar' for what qualifies for protection as a whistleblowing disclosure is set relatively low, and an employee dismissed from (say) employment in the financial services sector can usually identify something he or she has said in the recent past that can be held out as 'revealing' the employer's true motivation for dismissing and/or as supporting a section 103A claim. On the flip side, recessions may give employers greater scope for 'Polkey Chance' arguments – market uncertainty undermines security of employment, and even if the employee has been unfairly dismissed now, who is to say that he or she would still have been in post in a year's time?

2. This paper focusses on some recent litigation trends and decisions with resonance in the current economic climate. Even if parties are more reluctant to go the whole way, there is added pressure to maximise the economic settlement value of a claim or a defence and/or to have a 'prize' worth the fight if a compromise cannot be agreed. Equally, are there any short cuts to resolution - ways of using interim applications to promote the prospects of an advantageous settlement (one way or another), often the purpose of interlocutory warfare in High Court proceedings? Some of these topics will be touched on by other speakers, but the starting point for this paper is interim relief.

**Interim Relief**

3. A good start for a dismissed employee would be to get some form of mandatory injunction compelling his employer to 'keep him on the books' (and keep paying him) until his substantive claim is heard. Such an order would be even more beneficial if the dismissed employee got to keep any wages he was paid, even if he lost at the full substantive hearing.

**Simon Devonshire QC,** 11KBW
e.Simon.Devonshire@11kbw.com t. 020 7632 8500

The High Court would not make such an order – the common law has set its face against the enforcement of contracts for personal service, and interim relief will usually require a cross-undertaking in damages from the beneficiary, against the contingency that it turns out at full trial to have been wrongly granted. Surprisingly, however, the employee may be able to get such an order in the Tribunal. The Tribunal has power to make "Interim Relief" orders for certain classes of proscribed dismissal. The claimant beneficiary of such an order gets to keep the sums he has been paid thereunder, even if he loses at the full substantive hearing. The legislation imposes no disgorgement obligation in such circumstances, and there is no requirement (or power to require) that the employee gives a cross-undertaking as a *quid pro quo* to its grant. Perhaps even more surprisingly, this jurisdiction (which has existed for many years) is only infrequently invoked, although there is some anecdotal evidence (at both practitioner and judicial level) that this position is changing.

4. The power to make interim relief orders is found in ERA s.128 <u>et seq</u>. The employee can apply for interim relief if: (i) he alleges that the reason or principal reason for his dismissal was trade union, health and safety or whistleblowing reasons; and (ii) he applies to the ET within 7 days of the EDT[1]. Subject to the requirement that the ET give the employer 7 days notice of any hearing, it is obliged to determine the application as soon as practicable, and must not postpone the hearing (once fixed) absent special circumstances[2]. The details of the order depend on whether the employer is prepared to reinstate or re-engage[3]. If the employer is prepared to reinstate, the Tribunal makes an order to that effect. If the employer offers re-engagement and the employee is prepared to accept that offer, the tribunal makes a re-engagement order. If the employee refuses the offer of re-engagement but the refusal is unreasonable, the Tribunal makes no order. In all other circumstances (i.e. employer not prepared to reinstate or re-engage and/or employee reasonably refuses re-engagement offer), the Tribunal makes an order for the continuation of the employee's contract[4].

[1] Ss. 128(1) & (2)
[2] Ss. 128(4) & (5)
[3] S. 129
[4] S. 130



**Simon Devonshire QC,** 11KBW
e.Simon.Devonshire@11kbw.com t. 020 7632 8500

5. A continuation order must give credit for a PILON (if already made); conversely, the sums paid under a continuation order go towards discharging any contractual liability for breach of contract (e.g. not giving notice)[5]. A continuation order keeps the contract in force for the purpose of pay and benefits and continuity of employment from the EDT until determination or settlement of the complaint (ERA s.130(1)), but "*[i]t does not provide for the continuation of the contract of employment* ***for all purposes*** *as if he had not been dismissed, save that the determination of the fairness of the dismissal would still be made at the date when the employer sought to terminate it*"; Dowling –v- M E Illic Haulage & Anor [2004] ICR 1176 at para 24.4. Thus a claimant under a continuation order would not qualify as an employee for the purpose of determining TUPE transfer rights (because "*there is no continuing contract of employment after the determination*"; Dowling at para 25[6]), or rights against the Secretary of State on insolvency; Blitz –v- Vectone (2010) UKEAT/0253/10/DM at para 11[7]. The reasoning in Dowling is not without its critics; *Harvey* NI paras 626.03-623.07 (arguing that the beneficiary of a continuation order is an employee suspended on full pay) but is consistent with other parts of the statutory scheme (e.g. that any payment under a continuation order "*in respect of a period goes towards discharging any liability of an employer under, or in respect of a breach of, the contract of employment in respect of that period*" (ERA s.130(5)). But this has some odd consequences. What happens to the employee's good faith duty whilst a continuation order is in place? Can he compete with the payer (or take steps to compete) without acting in breach? What is the status of the obligation to mitigate? Either party may apply for a variation or revocation of any order made "*on the ground of a relevant change of circumstances since the making of the order*"[8]. Would disloyalty to/competition with the payer provide a relevant circumstance? It is a pre-condition to the making of such an order that the employee must accept reinstatement or a reasonable offer of re-engagement. So would a continuation order still be appropriate once the employee is working elsewhere?

[5] Ss. 130(5) & (6)
[6] Though note that the position might be different if the ET is prepared to make an interim relief reinstatement/re-engagement order, having regard to ERA s.129(4); Dowling para 24.4.
[7] The employee sought expedition of his appeal against the discharge of a continuation order, on the basis that he wanted to qualify qua serving employee for rights on insolvency under Part XII before the imminent insolvency of his former employer.
[8] S. 131



**Simon Devonshire QC,** 11KBW
e.Simon.Devonshire@11kbw.com t. 020 7632 8500

6. An ET can only make an interim relief order where "*it appears to the Tribunal that it is likely that on determining the complaint to which the application relates the Tribunal will find*" that the dismissal was for one of the proscribed reasons (e.g. whistleblowing). What is the bench-mark? In Taplin v Shipman [1978] IRLR 450 (an alleged dismissal for trade union participation) the EAT (Slynn J.) held that "*likely*" meant more than merely probable (i.e. 51%) and that it was not enough for the tribunal to conclude that the application has a reasonable prospect of success. An applicant had to show more than this – that he had a "*pretty good chance of succeeding in his final application*", see paras 21 to 25.

7. In a recent 'slew' of EAT cases involving whistle-blowing dismissals, this standard has been applied and/or approved; see Blitz –v- Vectone Group (2009) UKEAT/0306/09/DM esp at paras 17 to 20, Raja v Secretary of State for Justice [2010] UKEAT/0364/09/CEA, Dandpat v The University of Bath and Anor [2009] UKEAT/0408/09/LA, and Ministry of Justice v Safraz [2011] IRLR 562. In Dandpat, Underhill (P) said (para 20) that:-

> *"We do in fact see good reasons of policy for setting the test comparatively high, in the way in which this Tribunal did, in the case of applications for interim relief. 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 the proceedings; that is not consequence [sic] that should be imposed lightly."*

In Safraz he went further – Taplin had established that "... '*likely' does not mean simply 'more likely than not' – that is at least 51% - but connotes a significantly higher degree of likelihood*" [para 16] *….connotes something nearer to certainty than mere probability* [para 19]".

8. All of this is in marked contrast to the meaning given to 'likely' in the context of the DDA in SCA Packaging Ltd v Boyle [2009] IRLR 746, and has attracted the critical displeasure of the editors of *Harvey* (NI para 615 et seq) and the IRLR (Vol 40, No.7). But the reasons given for setting the bar relatively high are compelling. An employee who qualifies for interim relief may secure an (ultimately undeserved) windfall benefit. And given the speed with which interim relief applications are brought on (frequently before the expiration of the time limit for



**Simon Devonshire QC,** 11KBW
e.Simon.Devonshire@11kbw.com t. 020 7632 8500

the lodging of the ET3), the employer is often put at a procedural disadvantage. In the right case, such an application is a powerful weapon in the arsenal of the whistle-blowing claimant.

9. Interim relief applications are dealt with by way of PHR under ET Rules r.18. There is no settled practice for the disposal of such applications. A tribunal can entertain live oral evidence, but is not obliged to do so. As the EAT observed in Dandpat, "*the application is necessarily summary in character, and there was no reason why importance should be attached to whether the materials before it were presented in the form of a witness statement or whether, as is common in all forms of interim application in an [ET], they took the form of submissions and contemporary document*" (para 12). In their nature, interim relief applications are likely to be brought on before the time limit for the employer's response has elapsed. Equally, such applications are likely to present greater factual complication then the common run of cases, and the employer may not wish to rush the preparation of the ET3. But technically, the employer has no right to be heard until he has lodged his response (ET Rules r. 9). One solution is to lodge a 'holding response', reserving the right to amend in due course. This problem is to be considered by the Rules Committee.

10. Whilst providing potentially valuable remedies for employees, interim relief applications also provide opportunities for employers. Treated like an interim injunction application and successfully and robustly defended, the employee/claimant will have incurred a significant unrewarded costs burden before the claim has really got under way. And judicial observations at an early stage about the apparent strength (or otherwise) of the proscribed reasons claim can promote or facilitate early settlement, or powerfully support a 'Calderbank' offer pitched by reference to the statutory cap.

11. The focus on an interim relief application is likely to be on the reason for dismissal - on the set of facts known to the dismissing officer, or the set of beliefs held by him, that cause him to dismiss. It is not enough to apply a 'but for' causation test (LB of Harrow v Knight [2003] IRLR 140 at para 16, and Fecitt, discussed below, at para 65), or to allege that the dismissing officer was the unwitting dupe of the victimiser (Orr v Milton Keynes Council [2011] ICR 704,



**Simon Devonshire QC,** 11KBW
e.Simon.Devonshire@11kbw.com t. 020 7632 8500

exp at paras 5 and 58). Convincing evidence (particularly in the form of contemporary documents) that the employer had some reason in mind other than the supposed disclosures is likely to suffice to defeat the application.

**NHS Manchester v Fecitt & Ors [2011] EWCA Civ. 1190.**

12. On the subject of whistleblowing claims, it is worth taking a brief diversion to the very recent CA decision in Fecitt. This establishes two important principles:

12.1 Employers are only vicariously liable for the legal wrongs of their employees. Unlike the discrimination legislation, there is no provision making it unlawful for workers to victimise whistleblowers. Thus the employer is not vicariously liable for the whistleblowing victimisation of the claimant by his colleagues (paras 32 to 35). But what is the position where the victimiser (whilst not the maker of the detrimental decision) is in a position of management responsibility? What if he uses his malign influence to punish the whistleblower, but (say) the investigating and/or dismissing officers does not realise that they are being duped? Would the claimant have a 'claim over' under section 47B? Is the answer that the victimiser must be the decision maker through whom the employer acts – i.e. it requires the application of an agency test?

12.2 Whilst for section 103A purposes, whistleblowing must furnish the reason or principal reason for the dismissal, the test under section 47B (pre-dismissal detriments) is different. *"Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"* (para 45). Will the claimant have a section 47B detriments claim against a dismissing officer who instigates the disciplinary process (infringing section 47B) but does not contravene section 103A in dismissing (because whilst a material influence, the whistleblowing is not the principal reason for dismissal)? Will the tribunals draw a Johnson v Unisys style exclusion zone around



**Simon Devonshire QC,** 11KBW
e.Simon.Devonshire@11kbw.com t. 020 7632 8500

the dismissal process? A 'worker' (with no unfair dismissal protection) can claim under section 47B even where his contract is terminated. On the face of it, it should be easier for him to prove that his 'dismissal' is for whisteblowing than the employee – and he will be able to claim hurt feelings compensation for the termination, such compensation being available under section 47B but not 103A[9]. Or is this more a matter of academic interest for employment lawyers, with the problem being avoided in practice by tribunals making robust findings of fact, one way or the other? As Underhill (P) observed in Martin v Devonshires Solicitors [2011] ICR 352 (at para 39) debates about the burden of proof are irrelevant "*where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct classification in law*" (para 39).

**Monetary Compensation; Maximising Value and Minimising Pain**

13. If the employee can establish that his entitlement to dismissal compensation is uncapped, damages are 'at large'. The assessment of future loss inevitably involves elements of speculation, but this cannot allow the Tribunal to be deflected from its task; Scope v Thornett [2007] IRLR 155. If an employee suffers career long loss, it is incumbent on the Tribunal to do its best to calculate the loss, albeit that there is a considerable degree of speculation; Wardle v Credit Agricole Corpn & Investment Bank [2011] IRLR 604, esp at para 50. In a shrinking market/recessionary times, it is probable that the Tribunals will have to engage with more career-long loss claims. What are the principles that should guide the Tribunal's approach?

*Fixing on the Loss Period*

14. In Kingston upon Hull City Council v Dunnachie (No.3) [2003] IRLR 843, the EAT sought to give some general guidance, in terms (taken from the report headnote) that:-

[9] Virgo Fidelis –v- Boyle [2004] ICR 1210



**Simon Devonshire QC,** 11KBW
e.Simon.Devonshire@11kbw.com t. 020 7632 8500

"*Use of the Ogden tables in calculating unfair dismissal compensation for future loss of earnings should be rare. They should only be relied upon where it is established that there is a prima facie career-long loss. Whether there is such loss should be addressed by reference to "old job facts" and "new job facts". "Old job facts" include whether the applicant would have remained in the job anyway and, if so, for how long, whether he would have been promoted and whether his earnings would have remained stable. "New job facts" require the tribunal to ask first whether the applicant would be likely to obtain a new job and, if so, what job would be likely to be obtained, by what date and at what remuneration. The next step is to establish whether there is a pay differential between the old and the new job and, if so, whether that differential would be affected by the applicant getting a better paid job in the future or being promoted or receiving pay increases. The tribunal must not abdicate from the job of deciding what, on the balance of probabilities is likely to happen, and the Ogden tables, coupled with a substantial discount, should not be a substitute or alternative for such an exercise*."

15. The EAT in Dunnachie had in mind the development of a pleading practice whereby the parties set out the old and new job facts for which they contended. Whilst this guidance has not been universally adopted in practice, it provides some convenient 'boxes' for the purposes of analysis.

16. In addressing "Old Job Facts", the first question for the Tribunal is: What would have happened but for the unfair or discriminatory dismissal? Would the employee have been fairly dismissed in the near future, come what may? Would he have left of his own accord, or taken early retirement? In Dunnachie, it was said that contingencies of more than 50% should lead to the conclusion that a claim for career long loss is inappropriate (para 30).

17. However, it is not always as simple as asking when the old job would in fact have lawfully determined. As the CA explained in Chagger v Abbey National Plc [2010] IRLR 47 esp at paras 69 to 73:-

*"… The task is to put the employee in the position he would have been in had there been no discrimination; that is not necessarily the same as asking what would have happened to the particular employment relationship had there been no discrimination. The reason is that the features of the labour market are not necessarily equivalent in the two cases. The fact that there has been a discriminatory dismissal means that the employee is on the labour market at a time and in circumstances which are not of his own choosing. It does not follow therefore that his prospects of obtaining a new job are the same as they would have been had he stayed at Abbey [i.e. the former employer]. For a start, it is generally easier to obtain employment from a current job than from the status of being unemployed. Further, it may be that the labour market is*



**Simon Devonshire QC,** 11KBW
e.Simon.Devonshire@11kbw.com t. 020 7632 8500

*more difficult in one case compared with another. For example, jobs may be particularly difficult to obtain at the time of dismissal and yet by the time they become more plentiful, when in the usual course of events Mr Chagger might have been expected to have changed jobs had he remained with Abbey, he will have been out of a job and out of the industry for such a period that potential employers will be reluctant to employ him. In addition, he may have been stigmatised by taking proceedings, and that may have some effect on his chances of obtaining future employment.*

*The result of these factors is that the discriminatory dismissal does not only shorten what would otherwise have been Mr Chagger's period of employment with Abbey; it also alters the subsequent career path that might otherwise have been pursued.*

*It follows that in our judgment the period during which Mr Chagger would have remained in employment with Abbey had there been no discrimination is irrelevant given that this is a case where he would only leave for another job. The employment tribunal concluded that Mr Chagger would not have left Abbey unless and until he was able to move to a post at least as favourable as his Abbey job. In our view that is a wholly unrealistic assumption; few employees voluntarily leave employment for a worse paid job. We are not sure that Abbey were contending otherwise.*

*On the facts as found by the tribunal, the proper assessment of loss is therefore to be determined by asking when Mr Chagger might expect to obtain another job on an equivalent salary to his Abbey salary. His loss is fixed by that period. Whether that is shorter than the period he would have served with Abbey, or whether it is longer and includes time when, but for the discriminatory dismissal he would have been employed elsewhere, is immaterial.*

*The best evidence available to answer that question is provided by the efforts Mr Chagger has made to obtain employment. This is the best indication of the labour market conditions at the time when the unlawful dismissal has occurred*."

18. Turning to the 'New Job Facts' in Wardle v Credit Agricole [2011] IRLR 604, the CA suggested that it would be a rare case where it was appropriate to award career-long loss. It was wrong to assess compensation to the point where the Tribunal was "*sure*" that the employee would have secure equivalent employment, even with percentage discounts to reflect the chance of earlier employment. Once the Tribunal was satisfied that there was a more than evens chance that the employee would have found equivalent employment, that should provide the 'cut-off' point. As Elias LJ observed (at paras 52 and 34):-

"*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. In practice the speculative nature of the exercise means that the tribunal's prediction will rarely be accurate. But it is the best solution which the law, seeking finality at the point where the court awards compensation, can provide.*



**Simon Devonshire QC,** 11KBW
e.Simon.Devonshire@11kbw.com t. 020 7632 8500

*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. Chagger is an example of such a case. By the time the tribunal came to assess compensation in his case he had already been out of a job for some years. The evidence was that he had made every effort to obtain employment in his chosen field, having made countless applications for new employment. There was a suggestion that he had been stigmatised in the eyes of other employers as a result of the manner of his dismissal. He had taken reasonable steps to mitigate his loss by going into teaching. In these circumstances the tribunal was entitled to conclude that he had suffered permanent career damage and should be compensated accordingly. Where such a loss is established, a tribunal has to undertake that ask, however difficult and speculative it may be.*

*The tribunal's findings here demonstrate that this was not such a case. The tribunal found that the claimant had a 70% chance of returning to banking in an equivalent job by the end of 2011. It follows that the tribunal was n any view wrong to assess any compensation after that date, and arguably the cut off date should have been sometime before then, when the prospects of an equivalent job would still have been greater than 50% …*".

19. This chimes with the approach of the EAT in Dunnachie (No.3). In a career-long case, it would be appropriate to apply a discount for accelerated payment, and there might also be a case for an Ogden Tables style reduction for generated contingencies (e.g. mortality and ill-health) if these had not been ironed-out in the selection of the multiplier and period. But substantial contingencies indicate that a claim to career-long loss is unlikely to be justified (para 30).

*Pension Loss*

20. In cases where the employee has lost the benefit of a money purchase pension ("MPS") calculating pension loss is (comparatively) straightforward. Given current interest rates and the modest performance of invested funds, the loss may not fall to be enhanced much beyond the lost contributions. Much more problematic is the position where the dismissed employee has lost the benefit of a final salary pension scheme ("FSPS") and is unlikely to be able to replace that benefit, even if he is otherwise successful in mitigating his loss.

21. Calculating pension loss in FSPS or defined benefit cases has always been problematic. The Substantial Loss Approach ("SLA") to the calculation of such loss in the 3rd Edition of the ETS

"Compensation for Loss of Pension Rights" Booklet ("the 3rd Edition") was published in 2003. The SLA is said to be appropriate in career-long loss cases - e.g. where the Claimant is unlikely to find an alternative job (and/or an alternative job with an equivalent FSPS) before retirement age[10]. But the Booklet is not prescriptive – an ET is not obliged to follow it. There is no necessary error of law if the ET adopts a different approach – e.g. by reference to the Ogden Tables; e.g. Evans -v- Barclays Bank Plc (2009) UKEAT/0137/09/SOJ. And the 3rd Edition was published at a time when earnings had risen faster than prices (giving rise to a loss of enhancement on accrued pension rights at the date of dismissal). A number of financial assumptions underpin the SLA in the 3rd Edition - in particular that pensions in payment will increase at RPI (3.5% per annum), compared to earnings that will rise at 5.5% (i.e. 2% faster than RPI). The SLA prescribes different multipliers for the pension accrued at date of dismissal and for the "but for" pension, to reflect this underlying assumption (at least in part). It is highly doubtful that these assumptions hold good in current economic conditions, and the SLA takes no account of proposed revisions to public sector FSPS. A strong case can be made for saying that the SLA no longer provides a sound basis for computing pension loss. But what should be used in its place?

22. There is no right answer. One possible approach is to ascertain: (i) the value of the pension at retirement age, on the basis of his contributions/service to the date of dismissal; (ii) the value of the pension at the date that the employment would have determined but for the unfair dismissal; and (iii) the cost of purchased or deferred annuity to give the employee the difference. The variable here is (ii). By way of example, some schemes award fractions of final salary for each year worked, the final salary being adjusted to the pension in payment by RPI or CPI. In periods of wage deflation (where the RPI/CPI outstrips earnings increases) the real terms value of the final salary may go down with continued employment. The 'but for' pension may still be bigger (because the employee has more added years) but the final salary on which it is based may be smaller (because it has been adjusted for actual wage increases rather than RPI/CPI). Adjusting the assumptions can significantly affect the ultimate award,

[10] 3rd Edition para 4.14.



**Simon Devonshire QC,** 11KBW
e.Simon.Devonshire@11kbw.com t. 020 7632 8500

and (once the ET can be persuaded that it is appropriate to depart from the SLA) there is real scope for both maximising the reward or minimising the pain. The employer will also no doubt seek to argue for abatement to reflect any loss in the real terms value of the benefit (or the costs to the employee), particularly in the public sector, given the proposals to reform state pension entitlements. A discount for contingencies may well be appropriate to such a calculation (as in Evans –v- Barclays supra)

*Grossing Up*

23. Typically, compensation is calculated net of tax and NI, but then "grossed up" to reflect the incidence of tax under s 401 ITEPA on the sum due to the claimant (after taking account of the £30,000 tax free element); British Transport Commission –v- Gourley [1956] AC 185; Shove –v- Downs Surgical plc [1984] ICR 532. These principles are applicable to Tribunal compensation claims as they are to High Court damages claims; Williams –v- Ferrosan Ltd [2004] IRLR 607. The applicable grossing up rates should be those prevailing at the date of payment.

24. Contrary to what is sometime thought (and indeed to some suggestions in the ETS Pension Loss Booklet) compensation in respect of pension loss is not per se exempt from a charge to tax in the claimant's hands (Yorkshire Housing v Cuerden (2010) UKEAT/0397/09/SM) but that does not necessarily mean that it should be 'grossed up'. The SLA calculates pension loss by reference to gross (rather than net) sums, and the lump sum amounts have themselves been grossed up to leave the claimant with "the equivalent taxable payment"(although presumably be reference to a 40% rather than a 50% to rate tax bracket).

**Simon Devonshire QC**
E. Simon.Devonshire@11kbw.com
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