

A2/2005/0404

Neutral Citation Number: [2005] EWCA Civ 1547
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
(MR JUSTICE BURTON)

Royal Courts of Justice
Strand
London, WC2

Friday, 4 November 2005

B E F O R E:

LORD JUSTICE CHADWICK

LADY JUSTICE SMITH

LORD JUSTICE WILSON

MR A MELIA

Appellant

-v-

MAGNA KANSEI LIMITED

Respondent

(Computer-Aided Transcript of the Palantype Notes of
Smith Bernal Wordwave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

THE APPELLANT APPEARED IN PERSON

MS ALISON RUSSELL AND MR RICHARD TUTT (JUDGMENT ONLY) (instructed
by Messrs Vizards Wyeth) appeared on behalf of the Respondent

J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE CHADWICK: This is an appeal from an order made on 26 November 2004 in the Employment Appeal Tribunal (Burton J, President, Mr Gammon MBE and Mr Singh) on the hearing of an appeal from a decision of the Employment Tribunal, sitting at Newcastle-upon-Tyne, entered on 2 February 2004.
2. The proceedings before the Employment Tribunal arose out of the circumstances in which the appellant in the Appeal Tribunal and before us, Mr Adrian Melia, terminated his employment without notice on 9 November 2001. Mr Melia was formerly employed by the respondent to these proceedings, Magna Kansei Limited, a manufacturer and supplier of components to the automotive industry carrying on business in this country at Pennywell Industrial Estate, Sunderland, Tyne and Wear. The employer is a member of an international group of companies controlled from Canada and Japan.
3. Mr Melia was recruited as senior design engineer. From 1 January 1999 he was employed as manager of the design department. He has conducted his appeal in person, as he did before the Employment Appeal Tribunal. It is right to recognise, as I do, the skill with which he has done so. His written submissions demonstrate a well-researched appreciation of the relevant principles in this area of the law; and his oral submissions -- in a matter in which he is personally involved and in relation to which he is entitled to feel aggrieved -- have been moderate, sharply focused and concise.
4. In his application to the Employment Tribunal, presented on 9 November 2001, Mr Melia complained of "unfair constructive dismissal for making a protected disclosure". The thrust of that complaint appears from the following paragraphs in section 11 of his application form IT1:

"11.1. I was unfairly constructively dismissed on 9 November 2001 as a consequence of making a Protected Disclosure as defined in the Public Interest Disclosure Act 1998. Subsequent to making the Disclosure, my employer variously acted and failed to act, with the consequent effect that I suffered varying degrees of detriment short of dismissal. Ultimately, after my employer asked me to elaborate on the details of the Disclosure, my employer told me that because of my opinion of the character of the employee primarily implicated in the Disclosure, my continued employment would be intolerable, with the implication that termination of my employment was inevitable. Shortly afterwards, I was suspended pending an investigation of a spurious allegation of gross misconduct.

11.2. The Protected Disclosure primarily alleged that Mr Leslie Graham, the General Manager of Magna Kansei Limited, had caused me bodily harm, and that my employer had not adequately performed its duty of care under the Health and Safety at Work Act 1974.

11.3. One aspect and consequence of my employer's activity subsequent to my making the disclosure was a breakdown of the trust that underpinned the contract of employment. While the severity of some

individual incidents was relatively low, the overall pattern of incidents demonstrated a consistent, deliberate and effective endeavour by my employer to deny me various rights, and an apparent disregard for Health and Safety responsibilities."

5. There is then set out, under section 11, a brief history of the events said to amount to what was described as "bullying" on behalf of the employer. Those events led to a meeting at the end of October 2001; following which Mr Melia proposed terms for the termination of his employment. Those terms were rejected by the employer, who made a counter-offer which it subsequently withdrew. The counter-offer was withdrawn on the evening of 8 November 2001, and Mr Melia was then informed that he was suspended pending an investigation into an allegation of gross misconduct. His reaction to that is described at paragraphs 11.13 and 11.14 of his complaint:

"11.13 ... It confirmed that my employer is not capable of, nor willing to perform my contract of employment, nor its legal duties under various statutory instruments including the Health and Safety at Work Act and Public Interest Disclosure Act.

11.14. On the morning of 9 November 2001, I accepted all of my employer's repudiatory breaches of my employment contract, and terminated the contract with immediate effect."

6. As I have said, Mr Melia's complaint was that he terminated his employment without notice in circumstances which amounted to constructive dismissal. That followed -- and, as he alleged, was consequent upon -- complaints which he had made about working practices at his place of work. In short, he alleged that he was forced to resign because he was a "whistleblower".
7. In 1998, Parliament enacted legislation for the protection of whistleblowers. That legislation is contained in the Public Interest Disclosure Act 1998. The long title to the Act sets out the statutory object. The Act is an Act "to protect individuals who make certain disclosures of information in the public interest, to allow such individuals to bring action in respect of victimisation, and for connected purposes".
8. The 1998 Act has the effect of introducing new provisions into the existing employment legislation contained in the Employment Rights Act 1996. Part IVA of the 1996 Act (Protected Disclosures) is introduced by section 1 of the 1998 Act. It contains provisions, at sections 43A to 43L, which explain and define what is meant by "Protected Disclosure". Section 2 of the 1998 Act introduces a new provision, section 47B, into Part V of the 1996 Act. Section 47B confers on workers a right not to suffer detriment as a consequence of making a protected disclosure. The section as enacted in 1998 was in these terms:

"47B (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(2) Except where the worker is an employee who is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where-

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of that Part).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, 'worker', 'worker's contract', 'employment' and 'employer' have the extended meaning given by section 43K."

Section 47B, as enacted, was amended in minor respects by the Employment Relations Act 1999 (as from 25 October 1999), so that in its present form the introductory words in sub-section (2) no longer appear; but nothing turns on that.

9. It will be apparent from section 47B(3), read with section 43K, that "worker" has a more extensive meaning than "employee" in the employment rights legislation. It will also be apparent that the right conferred by section 47B(1) is limited by section 47(B)(2): the section does not apply where the worker is an employee and the detriment of which he complains "amounts to dismissal" within the meaning of Part X of the 1996 Act.

10. Part X of the 1996 Act makes provision for unfair dismissal. Section 94 confers on an employee the right not to be unfairly dismissed by his employer. Section 95 sets out the circumstances in which, for the purposes of Part X, an employee is unfairly dismissed by his employer. In the present context, section 95(1)(c) is in point:

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, only if) ...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

It is that provision which brings within the scope of Part X termination of employment in circumstances amounting to constructive dismissal.

11. Section 95(1)(c) must be read with section 97(1) of the Act, which defines the effective date of termination. In a case falling within section 95(1)(c), the relevant provision is that in section 97(1)(b):

"(1) Subject to the following provisions of this section, in this Part "the effective date of termination"-

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect."

12. Section 97 of the Act is followed by a group of sections -- sections 98 to 107 -- under the generic cross-heading, "Fairness". Those sections prescribe circumstances in which an employee who is dismissed is to be regarded for the purposes of Part X as unfairly dismissed.
13. A further element of the protection afforded to whistleblowers by the 1998 Act was the addition of a new category to the categories in which an employee was to be regarded as unfairly dismissed. This addition was enacted by section 5 of the 1998 Act, which introduced a new section -- section 103A -- into the group of sections in the 1996 Act to which I have just referred. Section 103A of the 1996 Act is in these terms:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."
14. The position, therefore, is that an employee who has made a protected disclosure and is subsequently dismissed in circumstances where the fact that he has made the protected disclosure is the reason (or the principal reason) for the dismissal, will be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed; and so will have the rights and remedies which are conferred on Part X on an employee who has been unfairly dismissed.
15. As I have explained, sections 47B and 103A of the 1996 Act spring from the same root -- the Public Interest Disclosure Act 1998. The two sections are parallel elements in the protection which Parliament has decided to give to whistleblowers. The sections would, in any event, be read together; if only because they are now sections in the same Act, the 1996 Act. But the fact that they spring from the same root (the 1998 Act) -- and the fact that section 47B is plainly made subject to the limitation imposed by subsection (2) with section 103A in mind -- lead irresistibly to the conclusion that the two provisions are intended to be complementary. To put the point more simply: Parliament did not intend to confer a right under Part V of the 1996 Act for the protection of whistleblowers in circumstances where the worker (being an employee) would have a right under Part X of that Act in relation to the same loss or detriment.
16. Parts V and X of the 1996 Act each contain their own discrete provisions in relation to the remedies which may be granted for infringement of, in the one case, the right not to suffer detriment conferred by sections 43M to 47E of the 1996 Act and, in the other case, the right not to be unfairly dismissed conferred by section 94 of that Act. The provisions relevant to Part V are contained in sections 48 to 49A under the cross-heading "Enforcement". Those relevant to Part X are contained in Chapter 2 of that Part, sections 111 to 132.
17. Section 49 of the 1996 Act is in these terms, so far as material:

"(1) Where an employment tribunal finds a complaint under section 48 well-founded, the tribunal-

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

(2) ... The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to-

(a) the infringement to which the complaint relates, and

(b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.

(3) The loss shall be taken to include-

(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and

(b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act."

18. The remedies for unfair dismissal under Part X of the Act are rather more elaborate. Section 112, which applies where an Employment Tribunal finds the grounds of complaint are well-founded, is in these terms, so far as is material:

"(2) The tribunal shall-

(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and

(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.

(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126 . . .)."

19. Section 113 enables the Tribunal to make an order for reinstatement or re-engagement, as it may decide, if that is what the employee/complainant asks it to do. If the Tribunal does not make an order to that effect, then it must make an order for compensation -- section 112(4). Section 118 provides that where a Tribunal makes an order of compensation for unfair dismissal under section 112(4), the award shall consist of-

"(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and

(b) a compensatory award (calculated in accordance with sections 123, 124, 126 and 127)."

20. Section 123, which makes provision for compensatory awards, is in these terms, so far as material:

"(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include-

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal."

21. It is clear, therefore, that in a case where compensation is to be awarded under Part X it is limited to compensation for loss sustained in consequence of the dismissal. It will not include compensation for loss sustained prior to the dismissal. Loss sustained prior to the dismissal cannot be loss sustained in consequence of the dismissal. That is an important feature to keep in mind when considering the inter-relation between compensation under section 49 for detriment suffered as a result of the infringement of the right conferred by section 47B, and the compensation which can be awarded under Part X of the Act.
22. Mr Melia's complaint came before the Employment Tribunal at a hearing which extended over several days in July and November 2002. The tribunal's decision was entered on 12 May 2003. It was the unanimous decision of the tribunal that: (1) the applicant's complaint that he was subjected to a detriment on the ground that he had made a protected disclosure in contravention of section 47B of the Employment Rights Act 1996 was well-founded; (2) the applicant was dismissed, and the principal reason for his dismissal was that he had made a protected disclosure, accordingly he was unfairly dismissed; but (3) prior to and unconnected with his dismissal, the applicant had committed an act, namely the serious misuse of the respondent's computer system, which was a blameworthy act for which he might, but not necessarily, have been fairly dismissed in any event. The tribunal directed that the case be re-listed for the hearing of all issues on remedy at which the tribunal should take such account of the blameworthy act as it may consider appropriate. That decision was accompanied by extended reasons, which are set out over 39 closely-typed pages.
23. The remedies hearing came before the same tribunal in November 2003. As I have said, the decision on remedies was entered in 2 February 2004. It was the unanimous decision of the tribunal that:

"1. The respondent is ordered to pay the applicant as compensation for subjection to a detriment (in contravention of section 47B of the Employment Rights Act 1996) the sum of £6,000.

2. The respondent is ordered to pay the applicant as compensation for unfair dismissal the further sum of £12,441.85, being a basic award of £840 and a compensatory award of £11,601.87."

24. The Employment Tribunal gave extended reasons for that decision. In reaching its conclusion that the appropriate compensation for the subjection to detriment in contravention of section 47B of the 1996 Act was £6,000, the tribunal took the view that it should assess that compensation by reference to a period up until June 2001, rather than for the whole period to November 2001. The tribunal accepted, in principle, that compensation for detriment suffered by reason of a contravention of section 47B could and should cover injury to feelings. But it took the view (correctly as it seems to me) that when considering the appropriate award for the injury to feelings, or even psychiatric damage, caused by the detrimental treatment by reason of the protected disclosure, it had to "separate from that and effectively discount such of that treatment (and thus its consequences) as effectively amounted to the unfair dismissal". The tribunal could not "award within compensation for unfair dismissal a sum of money to reflect the injury to feelings or even psychiatric damage caused by the manner, still less the fact, of that dismissal". It came to the conclusion that:

"... the appropriate course was to consider the treatment, and with that the consequences of the treatment, up to the point at which it became so serious that it amounted to a fundamental breach of contract. Temporally that point was not the date by which the applicant decided that his employment had to end. In our judgment, it was the date by which the conduct moved from being a detriment to being a matter of dismissal. We came to the conclusion that that point was probably in late June 2001."

25. In assessing the compensatory award under Part X, the tribunal took account of the loss of past earnings and benefits and the expectation of loss of future earnings and benefits. It reduced the latter figure by two and a half per cent per annum for each of the future years. But it did not include in its award any sum to reflect the fact that salary for past years had not been received. It took the view that, to do so, "would give the applicant an entitlement which Parliament had clearly failed to enact". It also took the view that the compensation to be awarded under Part X should be reduced by 50 per cent to reflect the determination which had been made in paragraph 3 of the earlier decision.
26. Mr Melia appealed to the Employment Appeal Tribunal. In his notice of appeal, dated 8 March 2004, he set out nine grounds of appeal. Those included, at ground 2 (Incorrect finding as to date of dismissal: detriment not compensated), the following paragraph:

"2(1) The Tribunal made a finding as to the effective date of dismissal which runs counter to the provisions of section 97(1)(b) of the 1996 Act,

and consequently determined (in error) that no non-economic losses were recoverable in respect of ongoing detriment that contravened section 47B."

It also included at item 6, (Incorrect assessment of other losses attributable to the employer's action), the complaint that:

"6(1) The Tribunal did not order compensation for two financial losses incurred in consequence of the dismissal.

(a) The first loss was the legal fee connected with the preparation of a compromise agreement. At paragraph 9 the Tribunal stated:

'we excluded the legal fees because they were incurred in contemplation of termination but not as a consequence of the dismissal'."

27. Ground 7 (Interest: Application of two conflicting principles) drew attention to the fact that the tribunal had made a deduction to reflect the early receipt of compensation for future losses, but had not made an award to compensate for the late receipt of compensation for losses already sustained. At paragraph 7(7) Mr Melia pointed out that the loss of the use of money "amounts to a loss that quite reasonably falls within the definitions given in sections 49(2) and (3) ... of the 1996 Act".
28. The matter came before the Employment Appeal Tribunal on 16 and 17 November 2004. The order made by the Appeal Tribunal provided that the appeal should be allowed in respect of grounds 6(1) and 7(7) of the appellant's notice of appeal. It increased the award in favour of the appellant by £600. In all other respects, the appeal was dismissed. It was directed that any application for leave to appeal should be made direct to the Court of Appeal.
29. The Appeal Tribunal did not set out, in terms, how the figure of £600 was reached. But we were told that that figure was agreed between Mr Melia and counsel for the employer in the light of the Appeal Tribunal's reasons. It emerged that the agreed figure of £600 included two elements. The first was to reflect legal fees incurred by Mr Melia in connection with advice taken before 9 November 2001. The legal fees actually incurred were £592.20. They were incurred in obtaining legal advice with regard to the possibility of a severance payment leading up to termination of Mr Melia's employment. The second element in the figure £600 was to reflect the fact that Mr Melia had received, late, the past benefits that he would have received earlier if he had not been dismissed. The exact calculations do not appear; but what seems to have been agreed is that £300 be attributed to the legal fees on the basis (as it seems to me, a mistaken basis) that that figure could be reduced by 50 per cent for the same reason as the Part X losses were reduced; and £300 was agreed to represent two and a half per cent over three years on lost income of £8,391.
30. It appears, therefore, that, of the £600 additional award made by the Appeal Tribunal, £300 relates to compensation awarded under Part V, and £300 relates to compensation

awarded under Part X of the Act. There is no issue as to the £300 that was awarded under Part V. But Mr Melia points out with considerable force that, if the Appeal Tribunal was prepared to make an award in respect of expenses incurred in November 2001, it should have appreciated that the Employment Tribunal had misdirected itself in refusing to make a compensation award generally under Part V in respect of the whole period prior to 9 November 2001. It is that complaint which forms the basis of his appeal to this court. He asks that the matter be remitted so that his compensation under section 49 of the 1996 Act for the detriment suffered as a result of the infringement of his right under section 47B should be assessed over the whole of the period up to 9 November 2001.

31. The employer, on the other hand, cross-appeals on the grounds that the Appeal Tribunal should not have awarded the other element of the £600; that is to say, the element which reflects the delay in Mr Melia receiving compensation under Part X in respect of lost income. It is said that the Appeal Tribunal have awarded what was, in substance, interest to reflect the loss of the use of money.
32. Mr Melia's appeal can, I think, be addressed shortly. He submits that the rights given by section 47B of the Act are only limited by the words "where the worker is an employee and the detriment in question amounts to dismissal within the meaning of Part X". So, he submits, the relevant inquiry is: "to what extent is the detriment about which he is complaining a detriment for which he can be compensated under Part X?" To the extent that the loss is one for which he can be compensated under Part X, he will obtain compensation under Part X and he cannot be compensated under Part V. But there is no reason why he should be denied compensation under Part V in respect of any detriment flowing from the fact that he made a protected disclosure if his loss arising from that detriment is not capable of being compensated under Part X.
33. Mr Melia points out that the detriment for which he can be compensated under Part X -- having regard to section 123 -- is loss sustained in consequence of the dismissal. That is loss which he suffered after the effective date of dismissal -- 9 November 2001. Detriment sustained before 9 November 2001 is not taken out of section 47B (and Part V) by the limitation in section 47B(2). It is not detriment which "amounts to dismissal" when the two sections are properly read together.
34. In my view, Mr Melia is correct in the submissions which he makes. When the two sections are read together, the proper meaning to be given to the phrase "the detriment in question amounts to dismissal" is that it excludes detriment which can be compensated under the unfair dismissal provisions. If the detriment cannot be compensated under the unfair dismissal provisions -- for the reason that it is not a loss sustained in consequence of the dismissal -- then there is nothing to take it out of section 47(B); and the provisions in section 49, which require compensation for that detriment, should apply.
35. The Appeal Tribunal took a different view. In the careful judgment given by the President the Appeal Tribunal held that the phrase "detriment which amounts to dismissal" was intended to include any detriment suffered in the process leading up to the dismissal. The Appeal Tribunal accepted, I think, that there was no true analogy

between statutory compensation for breach of the right conferred by Part V of the 1996 Act and damages for breach of contract -- which must be approached on the basis explained by the House of Lords in Eastwood v Magnox Electric plc [2004] IRLR 733. The question, under the statute, turned on construction of the phrase "amounts to dismissal" in section 47B(2). The Appeal Tribunal accepted, also, that there was an attractive simplicity in the test for which Mr Melia contended. But it went on to say:

"So far as constructive dismissal is concerned, the act of termination of the contract is that of the employee, which obviously cannot amount to a detriment to himself. The detriment of which he would wish to complain is the conduct of the employer, which has caused him or her to accept the repudiation and resign; and it is that conduct, as described in section 95(1)(c), of an employer which entitles the employee to treat a resignation as a constructive dismissal, and thus to 'amount to dismissal (within the meaning of Part X)'. It is thus quite clear that there is no other possible construction of the words 'amounts to dismissal (within the meaning of Part X)', than that it applies section 47B to constructive dismissal. We can find no other alternative meaning for the words 'amounts to', or to the reference to Part X, than that constructive dismissal was intended to be included within section 47B. It may be a matter for the Legislature if, in order to meet what the Applicant would wish the statute to say, some amendment were thought right to be implemented. But it appears quite clear to us that section 47B was intended to apply to anything short of dismissal (including constructive dismissal) and that the detriment which is excluded from section 47B is thus not only the actual dismissal, but also the behaviour of the respondent which amounts to dismissal, within the meaning of section 95. In those circumstances we must find that the Tribunal was correct in its approach to the claim by the Applicant, and the Applicant's case in this regard fails."

36. I do not find that reasoning persuasive. I accept, of course, that "dismissal" for the purposes of section 47B(2) includes dismissal in the sense described in section 95(1)(c) of the Act. But neither section 47B(2) or section 95(1)(c) speak of "constructive dismissal"; and, in particular, neither section suggests that the employer's conduct, of itself, amounts to dismissal or "constructive dismissal". It is the employee's determination of the contract under which he is employed (in circumstances in which he is entitled to terminate it without notice -- which are likely to include the employer's conduct prior to termination) which amounts to dismissal, under section 95(1)(c), for the purposes of Part X of the Act. I reject the proposition that the act of termination by the employee (in circumstances where he may have no other realistic option) cannot, of itself, amount to a detriment. Section 47B(2) of the 1996 Act requires that "dismissal" be given the meaning that it has in Part X. The meaning of "dismissal" in Part X, as I have sought to explain, is that dismissal occurs when the employment is terminated, which, in the present case, was 9 November 2001; and not at some earlier date. For those reasons, I would allow Mr Melia's appeal.
37. I turn, therefore, to the cross-appeal. This is pursued by the employer notwithstanding that it appears to be common ground between the parties that it makes no financial

difference to either of them whether or not the cross-appeal is allowed. On any basis the amounts involved are small.

38. The Employment Rights Act 1996 does not contain any provision which, in terms, enables the Tribunal to award interest either on or as part of a compensatory award under Part X. There is specific provision as to interest in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (S.I 1996/2803). Regulation 2 of those Regulations does make provision for the inclusion of interest on the sums awarded under what (for the purpose of those Regulations) is "relevant legislation". Relevant legislation is defined in Regulation 1(2). Put shortly, it is legislation in the field of discrimination: in particular, the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995. Awards made under the provisions of those Acts may include an element of interest in the calculation of compensation. But it is important to have in mind that awards under those provisions will often include an award in respect of hurt feelings; that is to say, awards under those provisions will not be limited to loss actually suffered -- in the sense of deprivation of income which would otherwise be received. It is not difficult, therefore, to see why in the discrimination context a regulation which permits the inclusion of interest in an award should have been thought necessary.
39. The question in the present case is whether the absence of such a provision prevents the Tribunal from taking into account -- in making the award which it is required to make of such compensation as is just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal -- the fact that he did not receive payments of salary which (if he had not been unfairly dismissed) he should have received at the time when he should have received them; and from recognising that simply to order some years later that he receive those payments fails to compensate him for the loss of the use of the money in the meantime.
40. The Appeal Tribunal was struck by the anomalous situation which arose in the present case if (i) no recognition be given to the fact that Mr Melia had been out of his money for some years, but (ii) he was subjected to a discount in relation to future earnings. There was an obvious unfairness in discounting the money which he would have received in the future from his employment by two and a half per cent per annum -- to recognise the fact that he was getting it earlier -- but in failing to reflect in the award in respect of the money which he should have had in relation to past years the fact that he had not received it when he should have done. The point is put by the President in his judgment at paragraph 28:

"But the Applicant here is not seeking interest. He puts his case much more simply and attractively. He submits that he has suffered loss. He is seeking to recover compensation, such as is just and equitable, within section 123 of the 1996 Act, to which we shall refer; and that, particularly in a case where, as here, a deduction of 2.5% per annum is made from a calculation in order to make an allowance for accelerated payment, so there ought to be an increase or premium of 2.5% per annum in respect of what one might loosely call 'decelerated' or 'delayed' payment; if the one

is doable within the ordinary concept either of common law damages or, here, of just and equitable compensation, so should the latter. No authority has been cited to us by either side which prevents us from doing what we conclude to be justice here, and concluding that the Tribunal should have done the same, had it considered it had jurisdiction to do so. We are satisfied that it is appropriate, particularly in a case where, as we have indicated, and as the Applicant has persuaded us, the reverse being the case by way of discount for accelerated payment, it is, and would have been, and should have been, appropriate in calculation of the compensation to have a premium for decelerated payment at the same rate."

41. In my view, the Appeal Tribunal were entitled to reach that conclusion on the facts of this case. The task which an Employment Tribunal is set by section 123(1) is to assess the compensatory award in such amount as it considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal. In a case where the loss sustained by the complainant in consequence of the dismissal includes a loss of past earnings as well as a loss of future earnings, it seems to me just and equitable to treat the two losses in a consistent way. If loss of future earnings is to be discounted to reflect the early receipt of that money, so loss of past earnings should be increased to reflect the late receipt of that money. That, as it seems to me, is a conclusion to which the Appeal Tribunal were entitled to come; having in mind the overall requirement that the compensatory award should be an amount which the tribunal considers just and equitable.
42. It is important to keep in mind that interest is not awarded on the amount of the compensatory award. Rather, the Tribunal takes into account in deciding what the amount of the compensatory award should be the fact that full compensation requires a recognition that money which is paid later than it should have been gives rise to a loss. In that context interest is a measure of the loss of the use of the money which the recipient should have had earlier.
43. It may be necessary, in a future case, to consider whether that approach should be adopted in circumstances in which the Tribunal is not also awarding compensation for future loss. But in the present case the unfairness of the Employment Tribunal's approach is very striking; and, as it seems to me, that was an unfairness which the Appeal Tribunal were entitled to redress.
44. For those reasons, I would dismiss the cross-appeal.
45. LADY JUSTICE SMITH: I agree and add a few words of my own, only because we are differing from the view of the Employment Appeal Tribunal.
46. It is common ground that if an employee suffers a detriment due to making a protected disclosure and is then dismissed by the employer, the employee will be entitled to compensation for the detriment under section 47B of the Employment Rights Act up to the date of dismissal. That compensation, may include compensation for personal injury and injury to feelings. He may also claim compensation for the consequences of

unfair dismissal, including a compensatory award under section 123. But, say the respondents, the position is different with a case of constructive dismissal. There, the employee may only recover for the detriment he suffers until the time comes when the employer's conduct amounts to a repudiatory breach of the employment contract. If that were right, it would follow that an employee might suffer from gradually deteriorating and increasingly unlawful treatment by the employer, but if he does not resign immediately when the conduct has become bad enough to amount to a repudiatory breach, but waits some time before he accepts the breach, he will not be able to recover for the detriment he has suffered during that intervening period. I, for my part, cannot accept that Parliament should have intended so unjust a consequence.

47. For the reasons given by my Lord, Chadwick LJ, I accept Mr Melia's submission that the phrase "amounts to dismissal" should be construed as being the equivalent of dismissal, and that the compensation for a section 47B detriment should include all those matters that occur up to the time of the acceptance of the repudiatory breach. Accordingly, I would allow the appeal on that issue.
48. As to the question arising on the cross-appeal, I agree with all that Chadwick LJ has said, and I too would dismiss the cross-appeal.
49. LORD JUSTICE WILSON: I agree with both judgments.

Order: appeal allowed. The case to be remitted to the Employment Tribunal for an assessment of the Part V compensation. The cross-appeal is dismissed. Costs awarded in favour of the appellant, summarily assessed in the sum of £6,332.