

# Labour market disadvantage and the need for evidence

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1. In *Hilco Capital Limited v Denise Harrington [2022] EAT 156* the EAT gave guidance on the evidential burden in considering mitigation of loss in respect of loss of earnings, in relation to “stigma damages” in particular.
2. As per the Court of Appeal in *Abbey National v Chagger [2010] ICR 397*, it will be for the claimant to provide evidence of such stigma as an aspect of future losses, or as an explanation for what might appear prima facie to be a failure to reasonably mitigate.

## The Case at First Instance

3. Ms Harrington had been employed by Hilco Capital Ltd, a financial services company, until dismissed for the purported reason of redundancy on 13 October 2017. At a final hearing on liability it had been found that the reason, or principal reason, for her dismissal was the making of a protected disclosure. Judgment had been reserved and was issued in February 2019.
4. The appeal related to the calculation of damages that was made following a remedies hearing. The evidence of Ms Harrington was that she had not applied for any employed positions as she considered herself likely to be prejudiced by the reason of her dismissal. She intended to wait until the full facts were in the public domain.
5. The ET effectively accepted Ms Harrington’s assessment in respect of her being prejudiced in her attempts to find work by the reason for her dismissal, and determined a period of loss from dismissal until 3 months following the date of the liability judgment.

## The Appeal to the EAT

6. The Respondent appealed on the basis that the ET had erred in law in not following the principle for “stigma damages” set out in *Abbey National v Chagger [2010] ICR 397*.

7. In *Chagger*, the Court of Appeal determined that stigma damages are in principle recoverable from an employer, notwithstanding that the claimant concerned may have a cause of action against other potential employers in respect of (in that case) victimisation. However, tribunals should take “a sensible and robust approach” on this question and that it would be wrong to infer stigma from “[a claimant’s] assertion to that effect, or because he is suspicious that this might be the case”. If a claimant does not “make good” that suspicion by taking proceedings against the alleged wrongdoing employer, they cannot expect a tribunal to put much weight on their assertion, “which is little more than conjecture”.
8. The Respondent argued that the ET had accepted Ms Harrington’s assertion or conjecture as to the existence of stigma. The fact of the Claimant having blown the whistle was not, so far as was known, in the public domain, prior to the judgment being published. In *Chagger* there was (per the Court of Appeal in that case) “very extensive evidence of attempted mitigation failing to result in a job”, which was in contrast to the facts before the ET in this case.
9. The Claimant argued that the question of failure to mitigate was a matter of fact, susceptible only to an appeal on the basis of perversity, so long as the general approach of Section 123 of the Employment Rights Act 1996 was followed. Neither *Chagger* nor *Ur-Rehman v Ahmad [2013] ICR 28* (relied upon by the Respondent for the same point) disturbed this.

### **The EAT’s Decision**

10. HHJ Auerbach confirmed the learning in *Chagger* and *Ur-Rehman*: a claim for stigma damages must be based in evidence. He noted that the same broad approach was applicable to the question of future losses (as in *Chagger*) and failure to mitigate past losses (as in this case) [Para 50].
11. That evidence may come from a variety of sources. In particular, stigma can be inferred from the fact that extensive job applications have been made but have consistently failed. Where this is not the case (and particularly, as here, where no job applications have been made) the claimant must put forward some evidential basis in support of that action – or inaction – being reasonable. A failure to make any job applications will not necessarily be “fatal”, where there is “sufficiently compelling” evidence to support suspicions or concerns about stigma [Para 52].

12. While the issue is ultimately one for determination by the tribunal, there does need to be “some factual finding by the tribunal, which draws on some evidence presented to it” [Para 53].
13. The judge considered a submission made on behalf of the Claimant, that the ET as an industrial tribunal can draw from its own experience that whistleblowers or those who bring claims against former employers are prejudiced in the labour market. While not rejecting that generalised proposition he did not accept that it supported the ET’s conclusion that the Claimant’s failure to apply for any jobs in this case was reasonable because any such attempts would be fruitless [Para 54].
14. The matter being decided in this appeal was distinguished from a scenario where it is asserted (and evidence provided) that a former employer is “poisoning the well” behind the scenes. While the Claimant had provided some evidence on that question, it was not the subject of a finding by the ET in this case and was not the subject of any of the points of this appeal.

## **Conclusion and Summary**

15. A claimant cannot simply assert that they are, or will be, subject to stigma in respect of efforts to obtain new employment. While potential future employers are unlikely to freely admit the reason for a refusal of employment on this basis, evidence of some kind needs to be provided in support of a claimant who makes this assertion.
16. The evidence that a claimant is most likely to be in a position to obtain is that they have made extensive applications which have not met with any success. In the absence of any other explanation, a tribunal may on the facts be entitled to draw an inference that stigma has – at the least – played a part. A claimant who has made no (or very limited) attempts to obtain employment will, to avoid a potential finding that this represents an unreasonable failure to mitigate their losses, require some other distinct evidence in support of their assertion or belief that any such attempt would be pointless.

7 November 2022

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