Neutral Citation Number: [2023] EAT 33

Case No: EA-2021-000791-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 March 2023

Before :

GAVIN MANSFIELD KC (DEPUTY JUDGE OF THE HIGH COURT)

- -

Between :

MR J EDWARD **Appellant**

- and -

TAVISTOCK AND PORTMAN NHS FOUNDATION TRUST **Respondent**

- -
- -

Christopher Milsom (Advocate) for the **Appellant**
William Young (instructed by DAC Beachcroft LLP) for the **Respondent**

Hearing date: 8 December 2022

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JUDGMENT

SUMMARY

RACE DISCRIMINATION

The Claimant was employed by the Respondent as a NHS band 5 data officer. The Respondent downgraded him to band 4 and dismissed him, ostensibly on grounds that it had no band 4 vacancies. The tribunal found that in failing to redeploy the Claimant to a band 4 role the Respondent victimised him for having made allegations of discrimination. The Claimant was out of work for over two and a half years. By the time of the remedy hearing the Claimant had been in a new job, paying a higher salary, for three months. It was a fixed term contract running for five more months. During his period of unemployment the Claimant had not applied for band 4 roles in the NHS. The tribunal found that by a certain time during his period of unemployment he should have started to apply for band 4 roles. It reduced his loss of earnings for the remainder of the period of past loss by 50% to reflect the prospect that he would have obtained work if he had applied for band 4 roles. The tribunal found that the Claimant would be able to find band 4 roles in future, and awarded six weeks loss of earnings, to reflect the prospect that he may not find a new role immediately after the end of his fixed term contract.

HELD

Failure to mitigate.

(1) The tribunal gave itself no directions as to the applicable legal principles, and it was not clear from its reasons that it had applied the correct test. It was not clear whether (i) it had placed the burden of proof on the Respondent to prove failure to mitigate; (ii) it had asked itself whether the Claimant had acted unreasonably in failing to take steps to mitigate. The appeal would be allowed on this ground. It could not be said that no tribunal properly directing itself could have made a finding of failure to mitigate, so the case would be remitted for rehearing on the question of mitigation.

(2) In the circumstances of this case, the tribunal had erred in applying a 50% discount to loss of

earnings over the relevant period. It should have made a finding as to when the Claimant would, acting reasonably, have found new employment and at what rate. **Gardiner-Hill v Roland Berger Technics Ltd**. [1982] IRLR 498 followed. There may be cases where further consideration may need to be given to a "percentage discount" approach in the light of the "loss of a chance" principles deriving from **Allied Maples v Simmons & Simmons** [1995] 1 WLR 1602. However, this was not an appropriate case to depart from the EAT's established approach in **Gardiner-Hill**. Observations about the nature of assessment of the evidence where failure to mitigate is alleged.

Future Loss of Earnings

(3) The tribunal's assessment of future loss of earnings was adequately reasoned and was not perverse. The appeal on this ground was dismissed.

Injury to feelings

(4) The tribunal had assessed the chance of the Claimant being dismissed even if he had been redeployed by the Respondent as 40%. It erred in applying the 40% discount to the injury to feelings award. The appeal on this ground was allowed by consent.

Calculation errors in relation to pension loss and loss of earnings

(5) By consent, appeals and cross-appeals were allowed against errors in aspects of the tribunal's method of calculation.

GAVIN MANSFIELD KC (DEPUTY JUDGE OF THE HIGH CT)

INTRODUCTION

1 This is an appeal against a remedy decision made by the London Central Employment Tribunal (Employment Judge Goodman and members), sent to the parties on 13 May 2021. The Appellant was the Claimant in the tribunal below. The Respondent was his former employer. I will refer to the parties as Claimant and Respondent.

2 The Claimant represented himself in the tribunal. He is now represented by Mr Milsom of Counsel on a pro bono basis, through Advocate. The Respondent is represented by Mr Young of Counsel, who also appeared below.

BACKGROUND AND THE TRIBUNAL'S REASONS

3 The Claimant worked for the Respondent from May 2016 as a "band 5" data officer. He had worked for other employers within the NHS from 2010.

4 In May 2018, the Respondent downgraded the Claimant from band 5 to band 4. The Respondent decided that the Claimant was not capable of working at a band 5 level but was capable of band 4 work. However, the Respondent did not deploy the Claimant into a band 4 post: instead he was dismissed.

5 The Claimant brought claims of discrimination and harassment on grounds of both race and age. He also brought a victimisation claim, which included a complaint that he was not redeployedinto a band 4 role because he had brought a grievance alleging that the decision to put him on a performance improvement programme was discriminatory.

6 In its liability decision, sent to parties on 6 April 2020, the tribunal found that the Respondent victimised the Claimant by failing to redeploy him to a band 4 "service administrator" role. However, it held that if he had been redeployed there was a 40% chance that he would not have been suited to the role and would have had to leave after a four week trial period. All other claims were dismissed.

7 The tribunal held a remedy hearing on 21 April 2021. At the time of the hearing the Claimant was 65 years old. His employment with the Respondent had ended on 8 June 2018 and he was out of work until the end of 2020. He found new employment from the beginning of 2021.

8 The Tribunal identified the main issues at paragraph 5 of its Reasons as follows:

> **"The claimant has only found paid work at the beginning of this year. The main issues in assessing remedy were to determine when the claimant was likely to retire, his prospects of finding work, with or without a defined benefit pension, and at what pay level, and whether he had sought adequately to mitigate his loss."**

9 The Tribunal set out its findings of fact at paragraphs 10-28 of the Reasons. It made those findings having heard evidence from the Claimant himself and from Mr de Souza, the Respondent's Executive Director, HR and Governance. The following findings are particularly relevant to the issues on appeal:

a. On the question of how long the Claimant would be likely to work until retirement, the tribunal set a likely retirement age of 72.

b. After being given notice of dismissal, the Claimant initially applied for NHS band 5 jobs without success.

c. After his dismissal the Claimant stopped applying for NHS jobs. He assumed that as he had been dismissed on grounds of capability he had no chance of success. Further, correspondence with HR around the time of his dismissal left him with the impression that a reference would say that he had been subject to disciplinary action. He believed that would further hinder him in finding a new NHS job.

d. The Claimant instead applied, unsuccessfully, for a wide range of jobs in the private sector. The tribunal summarised his efforts at paragraphs 19-20 of the Reasons.

e. He applied for a post with Public Health England in November 2019. He was interviewed but was unsuccessful.

f. The Claimant found a job at the end of December 2020 as a data analyst under an umbrella company working in the public sector. The contract had been due to end in March 2021 but

had been extended to September 2021. His new employment paid more than he had earned with the Respondent, but his pension arrangements were not as beneficial as the NHS pension scheme.

10 Under the heading "Loss of Earnings Award" the tribunal dealt first with past loss. At paragraph 29 it identified the past loss period as being between the expiry of the Claimant's notice period on 8 June 2018 and the date when he started a new job in December 2020.

11 The tribunal accepted that the Claimant's exchange with HR would have discouraged him in applying for new jobs, but held that he should have been encouraged to apply for NHS band 4 roles by getting an interview with Public Health England in November 2019. The tribunal applied a 50% discount to the loss of earnings from November 2019 to December 2020 to reflect failure to mitigate.

12 After setting out some figures for band 4 posts and for benefits received by the Claimant, the tribunal turned to future loss of earnings. It found that the Claimant would be in a better position to find a new band 4 job in the future. To take account of the risk that he may not immediately find such work as soon as his current contract expired, on 30 September 2021, it awarded six weeks loss of earnings. The tribunal then set out its calculation of loss of earnings, both past and future, before moving on to pension loss and injury to feelings.

GROUNDS OF APPEAL

13 The Claimant now appeals against certain aspects of the award. The Respondent seeks to cross appeal. The development of the appeal has been complex. The Claimant drafted his own notice of appeal. HHJ Beard sifted the appeal and allowed some grounds to proceed to a full hearing but made a r.3(7) order in respect of others. The Claimant applied for a rule 3(10) hearing on the latter grounds. Mr Milsom represented him at that hearing, through ELAAS, and further grounds were allowed through to a full hearing. Mr Milsom later sought to introduce some new grounds of appeal in his Skeleton Argument for the full hearing. In response, the Respondent sought to cross-appeal.

14 Further, at the hearing, the grounds on mitigation became considerably more sharply defined. As a result of the way the mitigation issue developed, I reserved judgment and invited the parties to

make further submissions in writing. That led to detailed supplementary written submissions from both sides, and a large number of additional authorities.

15 I am extremely grateful to both parties, and their counsel, for the pragmatic approach they have taken to all these developments. A number of matters have been disposed of by consent; neither side has taken overly technical points when new grounds have been raised or existing points reformulated. That has allowed me to focus on the substance of the alleged errors of law.

16 The grounds can now be summarised as follows.

a. The tribunal erred in finding that the Claimant had failed to mitigate in the period November 2019 to December 2020. The attack on the mitigation finding, as it has developed, has three limbs:

    i. The Tribunal failed to apply the correct legal test for determining whether a claimant has failed to mitigate, or failed to give adequate reasons to show that it had applied the correct test.

    ii. The Tribunal erred in applying a percentage discount to the losses over the relevant period, rather than determining what would have happened on a balance of probabilities basis.

    iii. The Tribunal's decisions to make a discount at all, or to make a discount of 50%, were perverse and/or inadequately reasoned.

b. The tribunal erred in its assessment of future loss. This is essentially a perversity and/or inadequate reasons appeal.

c. There are some further grounds and a cross appeal relating to future loss of earnings, pension loss and injury to feelings. These are all agreed and do not affect the two main grounds. I will deal with them briefly at the end of this judgment.

LEGAL PRINCIPLES

General approach to the assessment of damages

17 The starting point is the Equality Act 2010:

a. Section 124(2)(b) provides that where a tribunal finds there has been a relevant contravention of the Act it may order the respondent to pay compensation to the complainant.

b. Section 124(6) provides that the amount of any compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court (or a sheriff in Scotland) under section 119.

c. Section 119 provides that if the county court finds that there has been a relevant contravention of the Equality Act the county court has the power to grant any remedy which could be granted by the High Court in proceedings in tort, or on a claim for judicial review.

18 In **Abbey National plc v Chagger** [2010] ICR 397 paras 11-12, Elias LJ summarised a number of points regarding the fundamental approach to assessing compensation in discrimination cases.

a. Compensation for discrimination under the Equality Act 2010 is to be assessed according to tortious principles. Compensation must be assessed so as to put the claimant in the position they would have been in had the tortfeasor not acted unlawfully.

b. Compensation may be awarded for losses that flow directly and naturally from the tort; there is no requirement that the loss should be reasonably foreseeable.

c. However, damages might be limited by the possibility of a break in the chain of causation, or the failure of the claimant to mitigate his loss.

19 The statutory provisions for compensatory awards for unfair dismissal under the Employment Rights Act 1996 are different. However, the cases on the principles for assessment of loss of earnings and failure to mitigate appear to draw no distinction between the two. Of the cases relied on by the parties in this appeal, some are unfair dismissal cases and some are discrimination cases. Neither party has suggested that the principles differ for present purposes.

Mitigation

20 The parties agree that the general approach to mitigation is summarised by Langstaff P in **Cooper Contracting Ltd. v Lindsay** UKEAT/0184/15 at paragraph 16:

> **(1) "The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.**
> **(2) It is not some broad assessment on which the burden of proof is neutral. I was referred in written submission but not orally to the case of *Tandem Bars Ltd v Pilloni* UKEAT/0050/12, Judgment in which was given on 21 May 2012. It follows from the principle — which itself follows from the cases I have already cited — that the decision in *Pilloni* itself, which was to the effect that the Employment Tribunal should have investigated the question of mitigation, is to my mind doubtful. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.**
> **(3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see *Waterlow, Wilding* and *Mutton*).**
> **(4) There is a difference between acting reasonably and not acting unreasonably (see *Wilding*).**
> **(5) What is reasonable or unreasonable is a matter of fact.**
> **(6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.**
> **(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see *Waterlow, Fyfe* and Potter LJ's observations in *Wilding*).**
> **(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.**
> **(9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient."**

21 The citations to the cases referred to in the passage I have quoted above are as follows: **Banco de Portugal v Waterlow & Sons Ltd.** [1932] AC 452**, Wilding v British Telecommunications plc** [2002] ICR 1079, **Ministry of Defence v Mutton** [1996] ICR 590, **Fyfe v Scientific Furnishings Ltd.** [1989] ICR 648.

Future Loss of Earnings

22 The approach to loss of earnings (both past and future) was addressed by the EAT in the well-known series of cases brought against the Ministry of Defence by servicewomen who had been dismissed on grounds of pregnancy. The parties put **Ministry of Defence v Hunt** [1996] ICR 554 before me. **Hunt** draws on the general guidance set out in **Ministry of Defence v Cannock** [1994] ICR 918. In **Cannock**, the claimants argued that if they had not been dismissed they would have returned to service after a period of maternity leave and would have progressed their service careers. Morison J began his general guidance as to compensation by referring to the principles

stated by the House of Lords in **Mallett v McGonagle** [1970] AC 166 (a fatal accident case). He cited (949F-G) the following passage of Lord Diplock:

> **"The role of the court in making an assessment of damages which depends on its view as to what will be and would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past the court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend on its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate of what are the chances that a particular thing will or would not have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."**

23 Morison J then went on to consider a series of hypotheticals that would arise in assessing compensation. In doing so he made the following observation (951A-C):

> **"what are the chances that had she been given maternity leave and an opportunity to return to work, the applicant would have returned? The answer is not, with respect to some industrial tribunals, a question of fact at all…..**
> **The question is to be answered on the basis of the best assessment that the industrial tribunal can make having regard to the available material."**

24 In **Cannock**, Morison J said (953D) that the tribunal should normally calculate damages for future loss of earnings by using the multiplicand and multiplier method adopted by the courts in personal injury cases. He said it was not satisfactory for a tribunal to calculate loss by taking earnings over the full period of loss and then deducting a percentage for contingencies and accelerated payment.

25 While a multiplicand/multiplier approach may be appropriate particularly in cases of long-term or career long loss, in many cases the tribunal will instead make a determination as to when the employee is likely to get another job on equivalent terms and calculate the loss to that date, awarding no loss after that date. This was described as the "usual approach" by Elias LJ in **Wardle v Credit Agricole Corporate Bank** [2011] ICR 1290. In **Wardle**, at the time of the tribunal remedy hearing the claimant was in a new job, paying less than he earned at the respondent. The starting point for compensation was the difference between his old pay and his new pay. However, the tribunal found that there was a 70% chance that within three years of the hearing the claimant would return to a job that was as well paid as his job with the respondent. The tribunal awarded compensation for the whole period through to the claimant's retirement, but discounted it by 70% after the first three years, to reflect the chance of the claimant finding a job that fully replaced his lost earnings. The Court of Appeal held that the tribunal erred in its approach. After considering the rare cases where it is appropriate to assess loss over a career lifetime, Elias LJ said:

> **"[51] However, in my view 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 this case the tribunal has in effect approached the case on the assumption that it must award damages until the point when it can be *sure* that the claimant would find an equivalent job.**
> **[52] In my judgment, this is the wrong approach. 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."**

26 This passage was cited with approval by Underhill LJ in **Griffin v Plymouth Hospital NHS Trust** [2015] ICR 347:

> **"[9] The tribunal considered the issue of future loss of earnings at paras 5.3.2-5 of its original remedy reasons. After referring to various factors affecting the assessment it held that she was likely to obtain suitable alternative employment at 25 hours per week in a year's time; and it awarded one year's loss of earnings, being £15,201.48, on that basis. At the risk of spelling out the obvious, that is not a finding that it was more probable than not that the claimant would find a job after precisely one year. Rather, it is an estimate, made on the assumption that the claimant continued to make reasonable efforts to mitigate her loss, of the mid-point of the probabilities."**

After quoting paragraph 52 of **Wardle**, he continued:

> **"It is, however, convenient to refer to it, as the tribunal did, as the date on which it was likely she would obtain employment."**

THE APPEAL AGAINST THE MITIGATION FINDING

Did the tribunal apply the correct principles?

27 The Tribunal's reasons contain no direction as to the legal principles applicable to the calculation of loss. Neither in relation to mitigation, nor indeed, at all. The sum total of the Tribunal's reasoning on mitigation is at paragraph 29:

> **"There is a loss of earnings from 8 June 2018 when the notice period expired to the end of December 2020. The respondent argues that the claimant did not mitigate his loss, in particular that he made no applications for the band 4 NHS work for which he was best suited. The tribunal accepts the discouraging effect of the exchange with HR at the time of dismissal, and notes nonetheless that he continued to apply for non-NHS work. However, he should have been encouraged by getting an interview (through an agency) in November 2019 with an NHS employer to revise his previous pessimistic view and started to apply, especially as work with an NHS employer will have served to mitigate his pension loss. Doing the best we can, we propose to reduce the loss of earnings by 50% from November 2019 to December 2020, to reflect the prospect that he would have**

> **been able to find NHS work had he applied for any of the band 4 posts being advertised."**

28 The Claimant argues that the Tribunal has not addressed the question of whether the Claimant had unreasonably failed to take an appropriate step. The Claimant prays in aid: the absence of any direction of law; the absence of reference to the component parts of the test; and the fact that the Tribunal made a number of other errors in its assessment of compensation. The Claimant further points to rule 62(5) of the Employment Tribunal Rules 2013, which provides that a tribunal's reasons shall "*concisely identify the relevant law and state how that law has been applied to [the findings of fact] in order to decide the issues*."

29 The Respondent argues that the tribunal can be assumed to have had the correct test in mind in a question concerning mitigation, which is an issue addressed by tribunals on a daily basis. The Respondent further argues that in finding that the Claimant "should have" started to apply for Band 4 jobs from November 2019, the Tribunal in effect made a finding that the Claimant acted unreasonably in failing to do so. "Should", argues the Respondent, in simple language, denotes obligation – something that one was under a duty to do.

30 In **Simpson v Cantor Fitzgerald Europe** [2021] ICR 695 Bean LJ said (at paragraph 30) that a failure to set out the relevant law does not necessarily mean there is any substantive error of law in the tribunal's decision, although it does make it more likely that there will be a challenge to the judgment. Unless a claimant can show that the tribunal made a substantive error of law, a failure to comply with rule 62 leads nowhere (paragraph 32).

31 It may be plain to see that it has properly applied the relevant principles from the questions it addresses and the answers it gives to those questions. However, if a tribunal has not set out any legal directions it may be harder to infer from the reasons that it has applied the correct principles.

32 Although the assessment of compensation might be thought of as the bread and butter work of tribunals, the legal principles are less clear than one might expect and require careful consideration. As Langstaff P said in **Cooper Contracting** at paragraph 10:

> **"Recent experience in this Tribunal shows that the principles by reference to which an assertion of failure to mitigate loss is advanced are too often mis-stated, misunderstood or misapplied. In part this may be because when applying those principles a court may express it in shorthand appropriate to the argument before it and in context of the particular facts but which when applied as a precedent can easily lead to error if too casually extrapolated to those other cases."**

33 Accordingly, one cannot simply assume that the tribunal must have had the right test in mind. Having considered the Reasons carefully, I am not satisfied that the tribunal applied the correct test.

34 I accept the Respondent's submission that the use of the word "should" shows a sense of obligation on the part of the Claimant. However, in the absence of any self-direction as to the law in the Reasons, the tribunal's use of "should" cannot bear the weight placed on it by the Respondent.

a. One cannot tell if the tribunal, in deciding what the Claimant "should" have done, had placed the burden of proof on the Respondent or the Claimant.

b. One cannot tell what standard the tribunal was applying in determining how the Claimant "should" have behaved. The test is whether the Claimant acted unreasonably; but the Reasons do not expressly address reasonableness at all.

35 It is particularly important for the tribunal to direct itself as to the applicable test as this is an area of law that contains some subtle distinctions, in particular in relation to the reasonableness of a claimant's actions. In **Wilding v British Telecommunications plc** [2002] ICR 1079, the parties agreed that the burden was on the employers to show that the claimant acted unreasonably. However, in the Court of Appeal Sedley LJ said (paragraph 53):

> **"But within this area of agreement a dispute lurks. Mr Bean articulated it when he submitted that you act unreasonably if you do not act reasonably. In this field of law, at least, there is a very real difference between the two things."**

Sedley LJ went on to say (paragraph 55):

> **"[I]t is not enough for the wrongdoer to show that it would have been reasonable to take the step he has proposed; he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that 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."**

36 It is simply not possible to be confident that the tribunal applied the correct test. In my judgment, the Tribunal erred in law by misdirecting itself by simply saying that the Claimant "should have" applied for band 4 jobs from November 2019. It did not direct itself as to the burden of proof.

Further, it did not give adequate reasons to explain what it meant by "should have", so that the parties can tell what test had been applied. I will allow the appeal against the tribunal's decision on the question of mitigation.

Was the decision to make a reduction for failure to mitigate perverse?

37 Although my decision on the first limb means that the decision on mitigation cannot stand, I have considered the perversity grounds carefully. The error of law in the first limb would lead to the mitigation issue being remitted. However, if the Claimant were to show that it was perverse to make any mitigation deduction, then it might be appropriate to substitute a decision that there should be no deduction for failure to mitigate.

38 The Claimant argues that no tribunal, properly directed could have concluded that there had been a failure to mitigate having regard, in particular to:

a. The large number of roles the Claimant had applied for in the public and private sectors, including band 3 roles.

b. The fact that in December 2020 the Claimant succeeded in obtaining a role at equivalent remuneration to a band 4 role.

c. The tribunal failed to have regard to the deterrent effect of the prospect of a damaging reference from the Respondent.

d. The Tribunal failed to have regard to the "three-fold stigma" in applying for an NHS role when (i) he had been dismissed on capability grounds; (ii) he had pursued tribunal proceedings against the Respondent; (iii) he was an older worker applying to an NHS with a younger demographic.

e. As to the last of those points, the Claimant argues that the tribunal should have taken judicial notice of the disadvantage faced by older applicants in the labour market. The Claimant criticises the tribunal's analysis of this disadvantage as "cursory at best".

39 In my judgment, it cannot be said that it would be perverse for any tribunal to conclude that the Claimant had failed to mitigate his loss. There was evidence before the tribunal, which it

considered and referred to in its Reasons, as to the availability of band 4 jobs in the NHS. Similarly, the tribunal had evidence which suggested to it that the concerns which limited the Claimant's job search should have been dispelled by a certain time. The points raised by the Claimant are matters for evaluation by the tribunal. It cannot be said that it was not open to a properly directed tribunal to make a finding of failure to mitigate. I reject this ground of appeal – the evidence will have to be evaluated at a rehearing.

Did the tribunal err in applying a 50% discount to reflect failure to mitigate?

40 This limb of the appeal relates not to whether the Claimant acted unreasonably in not looking for band 4 jobs, but to the assessment of what would have happened if he had looked for such jobs.

41 Having decided that the Claimant had failed to mitigate his loss by failing to apply for band 4 NHS jobs from November 2019, the tribunal made a 50% reduction to the compensation that it would otherwise have awarded for the period from November 2019 to December 2020.

42 The Claimant argues that the tribunal erred in law in applying a percentage reduction to the whole period of loss. The Claimant relies on the EAT's decision in **Gardiner-Hill v Roland Berger Technics Ltd.** [1982] IRLR 498 to submit that the tribunal should have made a finding on the balance of probabilities as to when the Claimant would have found alternative employment and at what rate of earnings.

43 The point was not taken in the Notice of Appeal. Nor is the point clearly taken in Mr Milsom's Skeleton Argument. The Skeleton Argument argues that the 50% discount was impermissible for two somewhat different reasons. First, because it was incumbent on the Respondent to identify a particular step which would have remedied loss which it was unreasonable for the Claimant not to take. It was not enough to point to a jobs list "*without close engagement on the likelihood of the Claimant obtaining any such role*". Second, the decision was inadequately reasoned or perverse. Neither party referred to **Gardiner-Hill** in their Skeleton Arguments, though it was in the bundle of authorities for the appeal hearing.

44 Although the point has emerged late in the day, I have allowed the point to be argued.

a. I have determined that there was an error of law in the approach to mitigation and that the matter needs to be remitted for rehearing. It is important that the tribunal has guidance as to the correct approach to be taken at the rehearing.

b. The point of law that arises is closely related to the points that are contained in the Notice of Appeal. It arises from one of the authorities that was put before me on the question of mitigation. Although the point has developed since the Skeleton Arguments, the Claimant's Skeleton did contain a challenge to the tribunal's decision to make a percentage reduction.

c. The point now taken by the Claimant – that the "what would have happened" question should be addressed on the balance of probabilities – is in fact what the Respondent submitted was the correct approach at the tribunal remedy hearing. I was taken to the Respondent's Counter-Schedule of Loss. In that, the Respondent pointed to the Claimant's failure to apply for band 4 roles and said "Had he done so on the balance of probabilities he would have secured an alternative role within a short period of time." A footnote to the expression "balance of probabilities" reads "*Which is the correct test see* ***Wardle v Credit Agricole*** *[2011] ICR 1290.*" The citation is puzzling, as **Wardle** does not address the standard of proof on mitigation issues, it deals with the approach to future loss of earnings. The proposition advanced derives from **Gardiner-Hill**.

d. During the hearing I raised the question as to whether the percentage reduction approach the tribunal took may be permissible in the light of the development, since **Gardiner-Hill**, of the principles for assessing "loss of a chance" where a court or tribunal has to make a counterfactual assessment. I reserved judgment and gave counsel time to provide supplementary written submissions. I am grateful to both counsel for their industry in doing so. It is therefore appropriate that I deal with the issue, and I do not understand the Respondent, by the time it had filed its written submissions, to object to that.

45 The parties' positions, as now stated in their supplementary written submissions, are as follows:

a. The Claimant argues that the tribunal erred in law by reducing damages on a percentage basis where it did not find on the civil standard (i.e. the balance of probabilities) that the Claimant would by a certain date have obtained alternative employment which reduced or extinguished

his losses. The tribunal was bound to follow the approach in **Gardiner-Hill**, as is this EAT, which should not depart from its earlier decision.

b. The Respondent argues that the tribunal was entitled to make a percentage reduction. The Respondent accepts that if **Gardiner-Hill** is binding the tribunal erred in its approach. The Respondent submits that since **Gardiner-Hill** there has developed (or at least been clarified) a principle whereby the assessment of past hypothetical events that depend on the actions of third parties are (so long as the chance of the event occurring is more than speculative/negligible) determined on the basis of a loss of a chance percentage assessment. It relies on **Allied Maples v Simmons & Simmons** [1995] 1 WLR 1602 and **Perry v Raleys Solicitors** [2020] AC 352. The principle is of more general application than the professional negligence context in which it arose. It ought to apply to the assessment of the extent to which losses would have been reduced but for a claimant's unreasonable failure to take certain steps to mitigate them. Accordingly, the Respondent argues that **Gardiner-Hill** should no longer be followed.

Gardiner-Hill

46 In **Gardiner-Hill** the Claimant was unfairly dismissed. Following his dismissal he set up in business on his own account. In the 27 week period between his dismissal and the tribunal hearing his earnings from his business were modest and did not fully replace his previous level of earnings.

47 The tribunal held that the Claimant's "*actual financial loss must be offset by the £1500* [his actual earnings from his new business] *plus 80% of the loss which he sustained in the period of 27 weeks.*" The tribunal found that Mr Gardiner-Hill had spent 80 to 90% of his time organising his own business. That time was not spent in efforts to find new employment. In the light of those findings, the tribunal reduced the compensation that would otherwise have been awarded by 80%.

48 The EAT found that the tribunal had erred, essentially in two respects. The first was that the tribunal assumed that in failing to apply for paid employment Mr Gardiner-Hill had automatically failed to mitigate his loss. It had failed to address the relevant question: "*was it in all the circumstances reasonable for Mr Gardiner-Hill to do what he did do?"*

49 The second was that the tribunal was wrong to apply a percentage reduction. At paragraph 12 Browne-Wilkinson J said:

> **"Moreover, although it is not necessary for us to go into it in great detail, it is well established that it is inappropriate in dealing with failure to mitigate damages to reduce the amount of the compensation by a percentage. In order to show a failure to mitigate, it has to be shown that if a particular step had been taken, Mr Gardiner-Hill would, after a particular time, on balance of probabilities have gained employment; from then onwards the loss flowing from the unfair dismissal would have been extinguished or reduced by his income from that other source. In fixing the amount to be deducted for failure to mitigate, it is necessary for the Tribunal to identify what steps should have been taken; the date on which that step would have produced an alternative income and, thereafter, to reduce the amount of compensation by the amount of the alternative income which would have been earned. Since that is the principle of mitigation, a reduction of a percentage of the total sum representing compensation for the whole period is inappropriate. Therefore, in our view, the Industrial Tribunal erred in the basis on which they have approached the compensation in this case."**

50 It is easy to see that the tribunal had erred in making its percentage reduction. According to the tribunal, the 80% reduction reflected the fact that for 80% of his time Mr Gardiner-Hill had not been looking for new employment. This was plainly the wrong approach: there is no necessary correlation between time spent looking for work and the prospects of finding it. The 80% reduction did not reflect a finding that the Claimant had an 80% chance of finding a job to replace his lost earnings. The tribunal had not assessed the steps Mr Gardiner-Hill should have taken nor what the outcome would have been at all.

51 The correct approach, as Browne-Wilkinson J made clear, was to focus on the steps that should have been taken, and the alternative income such steps would have produced. Those are plainly relevant questions when assessing an argument that a claimant failed to mitigate by unreasonably failing to seek new employment. I do not understand either party to dispute that. The argument in the appeal turns on two propositions derived from paragraph 12:

a. The assessment of what steps should have been taken, and the alternative income such steps would have produced, is to be taken on a balance of probabilities basis.

b. The assessment should be reflected by fixing a date when a specified amount of alternative income would have been earned, and reducing the amount of compensation accordingly.

The EAT decisions prior to Gardiner-Hill

52 Browne-Wilkinson J said that it was well established that it was inappropriate when dealing with failure to mitigate damages to reduce the amount of compensation by a percentage. He cited no authority for that proposition, but Mr Milsom relies on **Peara v Enderlin Ltd.** [1979] ICR 804 at 807H which in turn refers to the earlier case of **Smith-Kline & French Laboratories Ltd. v Coates** [1977] IRLR 220 at 222.

53 From the authorities I have been shown, **Smith Kline** appears to be the earliest EAT decision dealing with the approach to mitigation. The appeal concerned future loss of earnings. The tribunal held that the claimant had failed to mitigate his loss. Although they estimated that he would remain unemployed for a total of 16 months following dismissal, they awarded only 50% of the loss for that period. Kilner-Brown J said as follows:

> **"[8] As a result of the clear finding against this man that he had not tried hard enough to mitigate his loss, this Industrial Tribunal — although broadly speaking they seem to have gone to a great deal of trouble in the case — in our judgment applied a most extraordinary method of approach. It is our experience — and both counsel agree that it is their experience also — that in the context of para. 19 of Schedule 1 to the Trade Union & Labour Relations Act 1974 the duty to mitigate loss, where there has been an unfair dismissal, in practice becomes a question as to the difficulty or otherwise of obtaining other work and the length of period into which that difficulty becomes translated. In other words, as far as we can recall, in every case that has involved the question of compensation and a failure to mitigate the consequential loss, or a successful mitigation of the consequential loss, it has been the practice for some years now for Industrial Tribunals to relate this in terms of so-many months' loss of wages.**
> **[9] Mr Reynolds firmly bases his argument upon the proposition that the finding to which reference has been made (as to the respondent employee's failure to take up the offer of a job with Sterling Winthrop Laboratories Ltd) should have led the Industrial Tribunal to say quite firmly, 'We are not going to look beyond 29.2.76. In fact what this Industrial Tribunal did was to say, 'Here is this man still out of work. We think that he will still be out of work until the end of March 1977' — that is to say, about 16 months from the date of the dismissal — 'and when it comes to calculating the estimated future loss of benefit we shall work it out at the full period up to the end of March 1977 and then knock 50% off.' It seems to us that that may be a useful preliminary investigation into the proper allowance to be made for the mitigating factors, but in the end it ought to be translated, when dealing with future loss of benefit, into a term of so-many weeks or months.**
> **[10] We have endeavoured to do just that. We feel that we must reject Mr Reynolds's submission that the Industrial Tribunal were manifestly wrong in going beyond 29.2.76; and we feel that the proper way, once they had assessed his failure to mitigate in the realm of 50% and had said 'The true position is that he is unlikely to get work before March 1977,' was to have halved the period. We think that within the limits of the findings of fact in this case the Industrial Tribunal have erred, and manifestly erred, in simply taking 50% off the total amount."**

(my emphasis added)

54 I make the following observations about the reasoning in this case:

a. The unlawfulness of the percentage reduction approach appeared to be based in the endorsement of an established practice, rather than any principle of law.

b. The case does not address the question of the standard of proof. There was no challenge to the tribunal's finding of failure to mitigate – only the mechanism by which it reduced the compensation: the EAT held that the findings of failure to mitigate should have been expressed by a reduction in the period of loss, not a percentage reduction to losses over a longer period.

c. Although the tribunal disagreed with the tribunal's mechanism for calculating loss, it did not disapprove of the tribunal taking a percentage assessment of the prospects of finding a new job: the 50% assessment was said to be "*a useful preliminary investigation into the proper allowance to be made for the mitigating factors*".

d. Fourth, the case was put as one of future loss of earnings; the claim was for 16 months losses from the date of dismissal – a period which extended beyond the tribunal hearing. No distinction was drawn between the past losses up to the date of the tribunal and future loss.

55 In **Peara**, after being dismissed the claimant was out of work for five months. The tribunal found that if he had tried harder he would have found suitable employment much quicker, and reduced the total loss of earnings by 40%. The EAT held that this was the wrong approach, and the tribunal should have decided on a date by which the claimant should have found work. The EAT relied on the earlier decision of **Smith Kline**. A further factor that influenced the EAT was that the rules for recoupment of social security benefits produced very different results depending on whether one stopped loss at a date when a new job would have been found, or applied a percentage reduction to a longer period of loss. The EAT clearly felt that the latter produced an unjust result. So there was a policy reason why the percentage reduction approach was not appropriate. Although I have not heard argument on the current recoupment regime, the same point would appear to apply.

56 There was no discussion in **Peara** as to the standard of proof in assessing what would have happened if the Claimant had taken reasonable steps to mitigate. The EAT's concern was as to

the effect of calculating compensation by making a percentage reduction of a longer period of loss instead of fixing a date when losses stop.

57 It is easy to see the roots of Browne-Wilkinson J's proposition, in **Gardiner-Hill** that it was "well-established" that it was inappropriate in dealing with failure to mitigate to reduce the amount of compensation by a percentage. The earlier cases established that the failure to mitigate should be reflected by fixing a date by which the claimant would have found a new job to replace his lost earnings. However, they did not address the question of whether fixing that date required a finding on the balance of probabilities, or some broader assessment of the chances of finding a new job.

Subsequent Decisions

58 I turn now to the cases which have referred to **Gardiner-Hill** subsequently. The Claimant relies on Court of Appeal decision in **AON Training Ltd. v Dore** [2005] IRLR 891 which referred to **Gardiner-Hill** with approval describing it as demonstrating the conventional way to assess compensation arising from a dismissal where the employee attempts to mitigate his loss by setting up his own business (per Peter Gibson LJ para 33). However:

a. The Tribunal's error had been to award damages based only on the interest the claimant had paid on the money he needed to borrow to set up his new business. The claimant's loss of earnings from the respondent and his earnings from his new business were known facts but had been ignored by the tribunal.

b. The Court of Appeal held that was an error, relying on a passage in **Gardiner-Hill** which stated that the correct approach was to calculate the loss of remuneration from the old employer, then add the costs incurred in mitigating loss and then deduct earnings from the new business.

c. All of these components were known facts. Therefore no issue as to the basis of evaluation of the evidence as to counterfactuals arose.

59 Mr Milsom's supplementary written submissions draw my attention to multiple occasions on which **Gardiner-Hill** has been followed by the EAT since **Allied Maples**. He relies on **Savage v Saxena** [1998] I.C.R. 357, **Glasgow City Council v Rayton** UKEATS/0005/07, **C&A Pumps Ltd. v Thompson** UKEAT/0218/06, **Williams v North Tyneside** Council UKEAT/0414/05,

Window Machinery Sales Ltd. t/a Promac Group v Luckey UKEAT/0301/14, **Cooper Contracting** (to which I have referred above) and **Somerset County Council v Chaloner** UKEAT/0064/14.

60 Each of these cases illustrate the importance of considering questions as to what would have happened if the Claimant had not failed to take reasonable steps to mitigate. They do not engage (and on their facts did not need to engage) with the loss of a chance authorities, nor with the standard of proof on issues of mitigation. Nonetheless, they represent a substantial body of authority applying the **Gardiner-Hill** approach, if not subjecting it to detailed analysis.

61 The appropriateness of a percentage chance approach was considered in **Hakim v The Scottish Trade Unions Congress** UKEATS/0047/19. The tribunal found that the claimant had unreasonably failed to take various steps to mitigate his loss. In the circumstances, the tribunal applied a 30% reduction to the claimant's loss of earnings. The Claimant appealed on the basis that the percentage reduction was an error of law, relying on **Gardiner-Hill** and also on **Glasgow City Council v Rayton**. The EAT accepted that the tribunal erred in failing to follow **Gardiner-Hill** and **Rayton.** However, on my reading of his judgment, Lord Summers decided that the tribunal had erred in failing to follow **Gardiner-Hill** where there was sufficient evidence for it to do so. He left open the possibility that a percentage reduction may be appropriate in some cases. At paragraph 14 he said:

> **"If a percentage reduction is to be applied in cases involving compensation under s. 123 of the 1996 Act the tribunal should be in a position to justify the adoption of a crude approach. It may lack evidence of the prospects of alternative employment or of the wages that employment would attract. It may not be satisfied that the employee would on the balance of probabilities regain employment but nevertheless consider that some reduction should be made for that prospect. But in this case the Claimant regained employment and the tribunal had evidence of the relative rates of remuneration. The Tribunal was satisfied that he would have gained employment at an earlier stage had he fulfilled his duty to mitigate loss. In such a situation I consider that following *Gardiner-Hill* and *Royston* the tribunal should have fixed the date when in its judgement he should have regained employment and calculated the differential wage loss. As it appears to me broad reductions based on percentages are appropriate where it is not possible to engage in a more precise assessment."**

62 Although Lord Summers left open the possibility of a percentage reduction in compensation, his remarks were obiter and he did not explore in any detail the circumstances in which such an approach might be appropriate.

63 Although Lord Summers found that the tribunal should have applied the **Gardiner-Hill** approach, I note his observations at paragraph 18 as to what that may entail in terms of evaluation of the evidence:

> **"In finding that he should have looked for work outside his specialist area the Tribunal covered the first step identified in *Gardner-Hill*. But it should then have sought to work out the consequences of that conclusion. Although the cases above ask the tribunal to identify the "date" upon which he would have found employment, the tribunal should not strive for a false appearance of precision. The tribunal is entitled to use its judgement and fix a suitable point in time for the purpose of the calculation. In performing this exercise, it should be recalled that the burden of proof is on the Respondents. It was for the Respondents to satisfy the tribunal that the Claimant's steps were unreasonable. In the absence of satisfactory evidence, the claimant should no doubt get the benefit of the doubt. After making suitable findings the tribunal should then assess the differential loss."**

(my emphasis added)

64 I particularly endorse the passage I have highlighted. Although the tribunal's task was to fix a date when the claimant would have found employment, the exercise is the evaluation of a counterfactual, and in fixing a date the tribunal was making an evaluative judgment of the evidence, somewhat different to deciding whether a past fact had occurred or not.

Loss of a chance

65 The leading authority is **Allied Maples**, at p.1611 Stuart-Smith LJ said:

> **"In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on balance of probability …. that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages? …. I have no doubt that … the second alternative is correct."**

66 These principles have been recognised in many subsequent cases, notably by the Supreme Court in **Perry v Raley.** The principle of assessment of loss of a chance has its roots in professional negligence cases, but it is of wider application. The general principle is explained in **Palliser Ltd. v Fate Ltd** [2019] EWHC 43 (QB) by Andrew Burrows QC (as he then was), a case about loss of profits of a restaurant business following a fire caused by the defendant's negligence:

> **"[27] Before looking at the evidence, I should make clear the relevant standard of proof that, as a matter of law, I am required to apply. This was not in dispute between the parties. The burden of proof lies on the claimant and, even though this issue goes to quantum rather than liability, the test that the claimant must satisfy can be referred to**

> **as the 'all or nothing balance of probabilities' test. Although when assessing damages resting on hypothetical events, damages can be awarded that are proportionate to the chances – one might call these 'damages for loss of a chance' or, synonymously, 'damages for the chances of loss' – such proportionate damages are inappropriate where the uncertainty is as to what *the claimant* (in contrast to a third party) would have hypothetically done. The correct picture of the law on proof in relation to damages is therefore that where the uncertainty is as to past fact, the 'all or nothing balance of probabilities' test applies. Where the uncertainty is as to the future, proportionate damages are appropriate. Where the uncertainty is as to hypothetical events, the correct test to be applied depends on the nature of the uncertainty: if it is uncertainty as to what the claimant would have done, the all or nothing balance of probabilities test applies; if it is as to what a third party would have done, damages are assessed proportionately according to the chances. For that general distinction between past fact and future or hypothetical events, see *Mallett v McMonagle* [1970] AC 166 at 176 (*per* Lord Diplock). That there is a contrast between the test applicable to what hypothetically the claimant would have done and what hypothetically a third party would have done emerges from cases such as *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, CA, and *4 Eng Ltd v Harper* [2008] EWHC 915 (Ch), [2009] Ch 91, at [41] - [92]."**

67 As Andrew Burrows QC points out in this passage, assessment on the balance of probabilities is either all or nothing. If a claimant establishes a loss on the balance of probabilities then they recover the whole loss. In contrast, the loss of a chance approach reduces the "whole loss" to reflect the percentage chance of a particular event occurring. That cuts both ways. A claimant with a less than 50% of a particular event occurring may recover a smaller percentage of loss (provided the chance is still big enough to be substantial). On the other hand, if they have a chance of more than 50% but less than 100% the damages are still reduced by the relevant percentage.

68 Mr Milsom argues, by reliance on **Palliser** paragraph 27, that the position is clear that with "matters past" the court has to determine whether the defendant's act caused the claimant's loss. Where uncertainty revolves around past facts the courts apply the usual civil standard of proof. This is an oversimplistic approach. It does not take account of the distinction between past facts and counterfactuals; nor does it take account of the further distinction between counterfactuals depending on the act of the claimant, and counterfactuals dependent on the act of a third party. Those distinctions are clear from the full text of para 27 in **Palliser**, which I have cited above.

69 Mr Milsom relies on **BCCI v Ali (No.2)** [2002] ICR 1258. In that case, the Claimants had established that the Bank had breached the implied term of trust and confidence. They argued that they had suffered loss and damage in that the stigma arising from the Bank's actions (in breach of contract) had prevented them from finding new employment. The trial judge found, after a detailed consideration of evidence at trial, that the stigma had not been the cause of the claimants' inability to find alternative work. The employees appealed on a number of grounds, including that

the court should have taken a loss of a chance approach to assessing the loss. The Court of Appeal rejected that argument.

70 Mr Milsom argues that this case demonstrates that whilst success in obtaining alternative employment may depend on the acts of a third party, namely the prospective employer, loss of a chance should have no role to play. He points to dictum of Pill LJ at paragraph 14:

> **"To obtain substantial damages the claimant must prove, on a balance of probabilities, loss resulting from the breach of contract. The loss alleged in the present case results from the failure to obtain employment. It is for the appellant employees to establish that the breach of the trust and confidence term is a cause of that failure."**

71 However, in **BCCI** the claimants had applied for specific jobs, which they failed to obtain. They argued that stigma was the reason they did not obtain the jobs. The question was one of causation: was the stigma the reason they did not obtain the jobs for which they had applied for? Mr Young argues, and I agree, that this was a determination of past fact, not a counterfactual. So there was no scope for a loss of a chance evaluation.

72 Pill LJ said, at paragraphs 24-25:

> **"[24] I do not consider the judge was obliged to apply the loss of a chance principle in the present case. It is a useful tool for applying the general principle, that it is for the claimant to prove causation, in circumstances in which the consequences of the breach cannot easily be determined because it is impossible or extremely difficult to reconstruct events on the basis that there had been no breach."**
> **[25] In the present case it may be said that it cannot be known with certainty what would have happened if the appellant employees had applied for jobs without having the alleged stigma of previous employment with BCCI. The relevance of that alleged stigma to the events in question was however analysed in the most detailed and comprehensive way in at the trial. The effect, if any, upon their employment prospects of the appellants having previously been employed by a corrupt employer was capable of analysis and was thoroughly analysed. Upon the judge's findings …. he was not obliged to assess the loss of a chance; he found on the evidence that stigma played no part in the failure to obtain employment."**

73 The trial judge had rejected both (a) the argument that the claimants had failed to obtain specific jobs because of stigma and (b) the argument that they suffered general stigma on the job market. It is clear from the judgments in the Court of Appeal that had the trial judge found there was general stigma in the market, it would not have been necessary, in order for damages to be awarded, to find that the stigma had caused the failure to obtain any particular job. At paragraphs 22-23 (immediately prior to the paragraphs I set out above) Pill LJ had considered a patent infringement case (**Gerber Garment Technology Inc v Lectra Systems Ltd.** [1997] RPC 443) where, on appeal, it was argued that the judge erred in awarding compensation based on the loss

of 15 sales without identifying the particular 15 sales which would have been achieved but for the infringement. The Court of Appeal had rejected that argument. Pill LJ said:

> **"[23] With respect, *Gerber* was not a loss of a chance case in quite the sense that the expression is used in class 3 in *Allied Maples*. The loss, if any suffered by the parties by reason of the infringement was capable of analysis in the light of actual events. The decision is, however, entirely explicable on the conventional basis already considered. It was open to the judge to infer, on an evaluation of the evidence that 15 sales were lost. …. The judge in *Gerber* was entitled to infer that 15 sales were probably lost without identifying 15 specific transactions. On different evidence he would have been entitled to reach a different conclusion."**

74 At paragraph 93 Robert Walker LJ also referred to the approach in **Gerber**, he said:

> **"In my view, the same approach would be appropriate in this case. If in relation to any particular claim the trial judge was satisfied that a job-search which was successful after (say) 12 months would (but for the job-seeker's stigma) have been successful after six months then damages would in my view be recoverable for that six months' loss of employment, even if it was impossible to identify which particular job application would, but for the stigma have been successful."**

75 If the stigma had caused a loss on the job market then in assessing the loss (even when not applying a loss of a chance approach) then (a) the court is conducting an exercise in evaluation of the evidence overall, and need not find that the breach has caused loss of a specific job, or sale; and (b) that overall evaluation can be expressed in terms either of a number of sales lost, or a date by which a job would have been obtained. This approach is analogous to the exercise the tribunal conducts in considering what would have happened if a claimant had taken reasonable steps to mitigate: the tribunal conducts an evaluation of all the available evidence to reach an assessment of when an alternative job would have been obtained. It need not find that a specific job would have been secured. It is also an evaluation of a similar character to that conducted in assessing future loss, seen in **Wardle**, where the date the claimant is likely to find new employment is the tribunal's best estimate of the chances having regard to all the evidence.

Discussion and Conclusion on the "percentage chance" issue

76 It might seem somewhat anomalous that on the question of failure to mitigate, the tribunal has to determine the counterfactual (which includes the hypothetical actions of third parties) on a balance of probabilities basis, given the prevalence of assessment of percentage chances in other components of assessing loss:

a. In an unfair dismissal claim a *Polkey* reduction is a percentage reduction in the compensatory award. The Court of Appeal in **Chagger** held that a similar principle to *Polkey* arose in

discrimination claims: *it is necessary to ask what would have occurred had there been no unlawful discrimination. If there is a chance that dismissal would have occurred in any event even had there been no discrimination, then in the normal way that must be factored into the calculation of loss.* (para 57). *The compensation which otherwise would have been awarded will have to be reduced by the proportion reflecting that chance* (para 64).

b. Assessment of future loss is not to be done on making findings on the balance of probabilities as to future events. When looking at a future loss it is well established that the assessment has to be made by focussing on the degree of chance, not a balance of probabilities basis – **Chagger**, para 76-80. I note though that the assessment of chance does not mean that compensation should be calculated on the basis of a percentage reduction on losses that would accrue over a whole career. Indeed, normally that is not the approach. In **Chagger** itself, the tribunal applied a multiplier/multiplicand approach (para 40), an aspect of the decision that was not criticised by the Court of Appeal. In **Wardle**, as I have set out above, the approach is to reflect the chances by identifying the period of time until the claimant will find equivalently paid employment.

c. In **Hunt**, the percentage chance of the claimants remaining in service for their full career was assessed on a percentage basis. No distinction appears to have been drawn between the impact of that chance on past loss and future loss.

d. Mr Young points out that loss of a chance also applied in other areas of assessment of loss in employment sphere. For example in **Timothy James Consulting Ltd. v Wilton** [2015] ICR 764. That case concerned a discriminatory dismissal; the compensation claimed included loss of a chance to gain equity as a result of dismissal. The tribunal applied **Allied Maples** and the approach was upheld by the EAT.

77 However, in my judgment, the approach in **Gardiner-Hill** is binding on me, and it would not be appropriate to depart from it in this case.

78 The criteria for the EAT departing from one of its previous judgments are set out in **British Gas Trading v Lock** [2016] ICR 503 paragraph 75 per Singh J (as he then was). I need not set them out in full. The Respondent accepts that it would probably not be right to say that the loss of a chance cases are inconsistent with **Gardiner-Hill**. However, he submits that the difference in

approach between the loss of a chance cases and **Gardiner-Hill** gives rise to exceptional circumstances justifying a departure from **Gardiner-Hill** (i.e. the fifth and final ground for departure mentioned in **Lock**). He argues that there is an inconsistency of approach in separate but closely analogous areas of the law, and that the cases following **Gardiner-Hill** have not had regard to the developments in **Allied Maples** and the cases following it.

79 In my judgment, in the current appeal, the "exceptional circumstances" ground is not made out.

a. The **Gardiner-Hill** approach has considerable pedigree. It is an approach commonly applied in the tribunals. Even when **Smith Kline** was decided in 1977, the approach appears to have been regarded as established practice. Browne-Wilkinson J's judgment in **Gardiner-Hill** has been referred to and followed repeatedly by the EAT in subsequent years. The Court of Appeal has referred to it with approval in **Dore**. Although none of those cases (with the exception of **Hakim**) has addressed the loss of a chance alternative, nor directly been concerned with the standard of proof, it is clear that the **Gardiner-Hill** approach has stood the test of time for forty years.

b. As the EAT identified in **Peara**, there are practical reasons, such as the calculation of the compensation for the prescribed period, where a loss of a defined amount for a specified period is more appropriate than a loss reduced by a percentage over a longer period.

c. The loss of an amount for a defined period is also consistent with the approach taken to calculating future loss of earnings, as in **Wardle**.

d. Although there are some tensions between the approach in the loss of a chance cases and the **Gardiner-Hill** line of authority, there is no case directly on point dealing with mitigation. Similarly, apart from **Hakim**, there are no cases in the EAT approving a loss of a chance basis to the assessment of damages, and in **Hakim** the remarks about loss of a chance were obiter.

e. As the EAT remarked in **Timothy James Consulting** at paragraph 107, although it is well established that in principle there will be circumstances in which damages can be obtained for loss of a chance, the area is one that continues to cause real difficulties of classification and application. For the following three reasons I do not think this is an appropriate case to determine the boundaries of the loss of a chance approach.

f. First, a departure from **Gardiner-Hill** is not necessary for the just determination of this appeal. I have already decided that the appeal should be allowed, on the ground that the tribunal failed properly to direct itself as to the general principles of mitigation. The main relevance of the percentage reduction issue is to give guidance to the tribunal when it comes to conduct the rehearing.

g. Second, although for my own part, free of authority, I would be prepared to accept that there may be cases where a loss of a chance is appropriate, this is not such a case. The tribunal gave no reason for departing from the balance of probabilities approach (despite that being the test identified by the Respondent). While there may be circumstances which justify departure from the balance of probabilities approach, it would be incumbent on the tribunal to give reasons for doing so. In this case, the failure to mitigate argument concerned one particular band of jobs in the NHS. The tribunal heard some evidence as to the prevalence of those jobs. It ought to be possible to make a finding on a balance of probabilities basis in this case.

h. Third, the circumstances in which the point has arisen also make this an unsuitable case to try to resolve matters. The question of whether the approach in **Gardiner-Hill** is correct or not only really became clear during the course of the appeal hearing. Neither party had addressed it in their Skeleton Arguments. Although I have been assisted by supplementary submissions and authorities by both sides, the parties' positions have not been fully tested in argument in the way they would have been had the point been clearly taken prior to the appeal hearing.

80 Therefore, the tribunal erred in law when it made a percentage reduction to the loss of earnings over the period November 2019 to December 2020. Following **Gardiner-Hill**, it should have made a finding as to the date by which the Claimant would have found a job, and the amount he would have earned.

81 I would add the following remarks:

a. The starting point is the EAT's guidance set out in **Cooper Contracting** (quoted above at paragraph 20). The burden of proof is on the respondent at all times.

b. The tribunal should consider the questions identified by **Gardiner-Hill**: (a) what steps was it unreasonable for the claimant not to have taken? (b) when would those steps have produced an alternative income? (c) What amount of alternative income would have been earned.

c. While the questions raised in **Gardiner-Hill** will be live in most cases, they are not exhaustive and may not be applicable in every case. Mitigation arguments may arise in a range of different circumstances, and may therefore give rise to a range of different issues.

d. The questions (a) did the claimant fail to take reasonable steps? and (b) what would have happened had the claimant take the steps he should have taken? are interrelated and will need to be considered together. The reasonableness of steps may, for example, be affected by the state of a particular job market at the relevant time.

e. Although **Gardiner-Hill** requires the tribunal to make findings as to when the claimant would have found a job and what it would have paid on the balance of probabilities, the tribunal should bear in mind that nature of the exercise is the assessment of a counterfactual. That is not the same as determining whether a past alleged fact happened or did not happen. The tribunal should make a finding based on a broad evaluation of all the available evidence. As Lord Summers said in **Hakim**, the tribunal should not strive for a false appearance of precision; the tribunal is entitled to use its judgment to fix a suitable point in time.

f. It is not necessary for the tribunal to find that a claimant would, on the balance of probabilities, have been successful in obtaining a specific job at a particular point in time. In most cases that would be a very difficult exercise, if not impossible. Apart from anything else, it would depend upon the evidence of the decision makers for specific jobs and an assessment of the field of competition for the jobs. In my experience, that sort of enquiry has not been necessary in order to prove a failure to mitigate. The passages from **Hakim** (paragraph 63 above) and from **BCCI v Ali** (paragraphs 73-75 above), which I have cited support the view that in finding that a claimant would have obtained employment by a stated date it is not necessary to identify the particular job that they would have obtained.

The parties' competing interpretations of paragraph 29

82 Before I leave the question of mitigation, I need to deal with the parties' competing arguments based on the interpretation of the tribunal's findings in paragraph 29.

83 The Claimant argues that the effect of the Tribunal's finding that "doing the best it can" the reduction in compensation was to be 50% shows that it did not, and could not, find on the balance

of probabilities that the Claimant would have obtained a Band 4 job by any particular date. The Claimant goes onto say that in the light of that "finding" if the Tribunal erred in applying a percentage discount, then the appropriate disposal of the appeal would simply be to undo the effect of the 50% discount. The Claimant then argues that the EAT can see that the tribunal effectively found that it was not satisfied on the balance of probabilities that the Claimant would have mitigated his loss if he had taken reasonable steps; therefore there is no need to remit the matter to the tribunal for rehearing, and I should simply substitute an order compensating the Claimant for the full loss of earnings for the period November 2019 to December 2020.

84 I reject that submission. As the Claimant correctly argues, the tribunal did not ask itself what would have happened on the balance of probabilities; it took a different approach. The assessment of percentage changes is, to an extent, a rough and ready one. One cannot be at all confident that the tribunal's assessment of a 50% chance over the whole period meant that it was not satisfied, on the balance of probabilities, that any earnings could have been achieved for any part of the period. One simply cannot tell what answer the tribunal would have reached if it had applied a different test.

85 On the other hand, the Respondent argues that the effect of the 50% discount throughout the 12 month period (November 2019 to December 2020) is no different to a finding that the Claimant would have found a Band 4 job six months through the period. The tribunal should be taken as having made the latter finding, and its decision upheld.

86 I also reject that submission. While I agree with Mr Young that the effect of a 50% discount over 12 months may be the same as finding that the Claimant would have found a job which extinguished his loss after six months, that is not the same as saying that the Tribunal found the latter. If that is what the Tribunal meant, it would have said so. In any event, 50% of a loss over 12 month period is not necessarily the same as 100% loss over a six month period. The two would only be the same if loss accrues at the same rate over the whole period. In real life that is often not the case: pay rates change, bonuses and other benefits are awarded at specific times of year.

FUTURE LOSS OF EARNINGS

87 At the time of the remedy hearing in April 2021 the Claimant was in work, but his contract was due to expire in September 2021. He claimed future losses for the period from September 2021, both in relation to loss of earnings and loss of pension.

88 The tribunal dealt with future loss in paragraphs 32-33:

> **"[32] As for the Claimant's prospects from now on, the fact that come September he will have been in work for nine months is likely to mean he is better placed to find more work now than he was with a record of unemployment. Further, he can expect his current employer to provide a reference and so could put aside his fear of any discouragement in the respondent's reference. On the evidence, there are plenty of band 4 NHS posts regularly available, many of them for generic administrative posts, very few requiring special knowledge - we saw only one, requiring experience of an endoscopy clinic; we discount the claimant's dispute on another involving working for clinicians, as the post holder was not required to be a clinician. We do not anticipate any difficulty finding work on account of the claimant's age. Many, possibly most, agencies and employers do not ask for evidence of age. In our finding the low number of older people employed in the NHS reflects the fact that most older people employed in the NHS reflects the fact that most older NHS employees have accrued enough pension to retire comfortably. It does not indicate that the NHS prefers to hire younger people. The claimant's circumstances are unusual.**
> **[33] Nevertheless, to build in some compensation for the risk he may not be able to find such work to start as soon as his current contract term expires, we award a further 6 weeks from 30 September 2021."**

89 The tribunal then went on to assess pension loss on the basis that the claimant would be able to obtain work in the NHS by 14 November 2021, and would then be able to rejoin the pension scheme.

90 The Claimant appeals on the basis that the tribunal concluded there was a 100% likelihood of obtaining a role in the NHS by 14 November 2021. While the Claimant accepts that some measure of speculation is an inherent feature of assessing future loss, he argues that the tribunal's assessment did not consider all relevant factors, ignored relevant ones, and was not adequately reasoned. It is argued that:

a. The tribunal paid no or no adequate regard to: the Claimant's age disadvantage; the requirement for a reference and the need for him to explain his dismissal; and his period of hiatus from NHS employment.

b. A period of employment in a different sector would not make up for the problem of a two year gap in employment.

c. The tribunal failed to address the consistent failure to secure interviews for NHS roles, including at band 3 level.

d. The tribunal erred in saying that it did not have the Claimant's CV before it.

e. The tribunal's approach to future loss was infected by its approach to mitigation. Had the tribunal approached the question of mitigation properly it would have concluded that it was not unreasonable for the Claimant to remain outside the NHS, albeit that would lead to an ongoing pension loss.

91 The Respondent argues, essentially, that the tribunal made a factual determination that was adequately reasoned and not perverse.

92 I agree with the Respondent's submissions. Having heard the evidence the tribunal evaluated the evidence and made a finding as to the prospect of the Claimant obtaining another NHS role. Although the Claimant argues that the tribunal did not address factors such as the age disadvantage and the reference problem, it is clear from paragraph 32 that the tribunal expressly considered those factors and incorporated them into their assessment. Although the Claimant argues that the tribunal overlooked the fact that the Claimant was not successful in applying even for band 3 roles, I was not taken to anything to suggest that this was a material matter at the tribunal hearing. Indeed, there is only a single sentence reference to band 3 roles in the Claimant's remedy witness statement. The tribunal did not err in law by not specifically addressing the point.

93 Although I have allowed the appeal against the tribunal's findings on past mitigation, that does not infect the assessment of future loss. When looking at past failure to mitigate, the burden is on the Respondent at all stages, including to show as I have explained above. However, in assessing future loss, a tribunal may assume that a Claimant will take reasonable steps to mitigate his loss in future. The tribunal's view was that the Claimant would be successful in obtaining band 4 roles in future. The question of whether it was unreasonable of him not to do so in the past is a different question from whether it would be reasonable for him to do so in future. There was no reason for the Claimant not to apply for band 4 roles, beyond his belief that he would not be successful. By

the time of the tribunal's remedy hearing, many of the factors that fuelled that belief in 2019/2020 had fallen away:

a. The Claimant had a job, and would have a reference from his new employer;

b. The Claimant's evidence was that when he applied for jobs he explained that he had been dismissed on grounds of capability. A point canvassed at the remedy hearing (Reasons paragraph 21) was that it would have been more accurate to state that he had been downgraded from band 5 to band 4, which would allay concerns when he applied for a band 4 role. While it may not have been unreasonable for the Claimant not have framed things that way in the past loss period, after the remedy hearing he would have been able to do so.

94 Accordingly, the tribunal's error of law in approach to past mitigation did not lead to an error in its assessment of future loss.

95 The tribunal does appear to have been mistaken about the Claimant's CV – the CV was in the bundle, though I cannot see that would have made any material impact on the tribunal's assessment.

96 The tribunal's reasoning is clear and adequate. The Claimant's challenges are no more than disagreements with the factual findings, and come nowhere near establishing that the tribunal's decision was perverse. I dismiss this ground of appeal.

THE REMAINING GROUNDS OF APPEAL AND THE CROSS-APPEAL

97 In his Skeleton Argument for this hearing Mr Milsom sought to add an additional ground, with 2 limbs, alleging an error on the part of the ET in application of the 40% reduction in compensation which it had decided upon at the liability hearing. Although the application to introduce the new ground was made very late, the Respondent consented to the amendment, provided that it was allowed to raise a cross-appeal. Ultimately, the parties agreed that not only should these amendments be allowed, but that the new ground of appeal and the cross-appeal should succeed in substance. Accordingly, at the beginning of the hearing I allowed the new points to proceed, and I will allow the appeal on the new grounds, and the cross-appeal by consent. I am grateful to both parties for their sensible approach to these issues. Given the position is agreed, I can deal with the points briefly.

Error in the application of the 40% reduction to the injury to feelings award

98 The tribunal assessed the Claimant's injury to feelings award at £10,000. It discounted that figure by 40% on the basis that the Claimant might have found himself in the same position without victimisation" (Reasons paragraph 44). Accordingly it awarded £6,000 for injury to feelings.

99 The parties agree that the tribunal erred in making this deduction: to do so was contrary to the Court of Appeal's decision in **O'Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615.

100 Accordingly, I allow this ground of appeal and substitute an award for injury to feelings of £10,000.

Error in the application of the 40% reduction to pension loss

101 The tribunal found, in its liability decision, that if the Claimant had been transferred into a band 4 role he would have completed a four week trial period and thereafter there was a 40% chance that he would have been lawfully dismissed. However, the tribunal applied the 40% discount to pension loss four weeks earlier. As the Claimant puts it, this appears to be an arithmetical oversight which results in the Claimant being under compensated. The Respondent agrees, as do I. I allow the appeal on this ground.

Cross-appeal: pension loss and future loss of earnings

102 The Respondent argues that the tribunal made two errors in the calculation of pension loss:

a. The tribunal did not require the Claimant to give credit, against his pension loss, for the pension contributions he would in fact receive from his new employer from April 2021 onwards.
b. Although the tribunal awarded future loss of earnings after the end of the Claimant's new employment (i.e. after September 2021), it erred in failing to give credit for the fact that the Claimant's earnings in his new role were higher than the earnings in the role from which he had been dismissed. The Respondent argues this is contrary to the approach in **Ging v Ellward Lancs Ltd.** [1991] ICR 222 and **Dench v Flynn & Partners** [1998] IRLR 653.

103 The Claimant accepts that these were both errors of law by the tribunal. I agree, and I allow the cross-appeal.

104 I invite the parties to work out the effect of these errors on the relevant heads of loss. If figures can be agreed, I will make an order substituting agreed figures. If there remain any outstanding issues, the tribunal can resolve them at the remitted hearing.

CONCLUSION

105 In conclusion, I allow the appeal in part:

a. I allow the appeal against the tribunal's finding on the question of failure to mitigate in respect of past loss. I reject the argument that I am able to substitute a decision that there should be no reduction for mitigation. The question of mitigation of past loss will have to be remitted to the tribunal for rehearing.

b. By consent, I allow the appeal against the tribunal's award of £6,000 for injury to feelings, and substitute an award of £10,000. The parties agree that the revised interest figure for this award is £2,407.89 and I substitute that figure for the interest on injury to feelings originally awarded by the tribunal.

c. By consent, I allow the appeal against the application of the 40% reduction to the pension loss calculation. The 40% reduction should run from what would have been the end of the four week trial period, not the date of dismissal. The parties agree that the effect of this is to increase the pension loss figure by £437.20.

d. By consent, I allow the Respondent's cross appeal on both limbs. The parties agree that the effect of this is that there should be a deduction of £520 in respect of the point about pension contributions and a deduction of £1,402 for the **Dench** point

e. The aggregate effect of all these adjustments is to increase the award by £4,923.09. The total would be £70,867.09 but that is without taking account of the rehearing of the mitigation question.

f. It follows that the tribunal's awards for interest for past loss of earnings and the grossing up for tax cannot stand, and will have to be recalculated once the tribunal has reheard the mitigation issue.

g. The remaining grounds of appeal are dismissed.

106 I have considered whether to remit the case to the same tribunal, or to a freshly constituted tribunal. The Claimant invites me to remit to a freshly constituted tribunal. I have had regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. I do not think this is a case which demands remission to a fresh tribunal. Although I have found the tribunal misdirected itself as to the question of mitigation, I have no doubt that, once properly directed as to the applicable principles, it will apply itself professionally, assiduously and with an open mind. Although I have allowed appeals on a number of other grounds, they are essentially errors in the detail of calculation of loss. They do not by any means suggest this was a totally flawed decision of the tribunal. If practicable, the case should be remitted to the same tribunal, if not, then to a tribunal composed in accordance with the directions of the Regional Employment Judge.

107 Finally, I would like to record my thanks to both counsel for their assistance, both at the hearing and in their supplementary submissions. I would particularly like to thank Mr Milsom for his assistance to the Claimant pro bono, under the aegis of Advocate.