Appeal No. UKEATS/0016/14/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 9 November 2016

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

MS ALAINA DONALD — APPELLANT

AVC MEDIA ENTERPRISES LTD — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Mr Colin Howie, Solicitor Howie (Scotland) Limited Smiddy Brae Kingswells Aberdeen AB15 8SL
For the Respondent	Ms L Beedie, Solicitor First Employment Law 7 Queens Garden Aberdeen AB15 4YD

SUMMARY

REMEDY: MITIGATION OF LOSS

DISCRIMINATION: JURISDICTIONAL POINTS: Extension of time: just and equitable

In a case where the claimant had succeeded in a claim of constructive unfair dismissal, the Employment Tribunal erred in its approach to mitigation of loss. The judgment contained no acknowledgment of where the onus of proof lay. The exercise of examining a claimant's actions against a requirement that it was for the respondent to prove that she acted unreasonably had not been carried out. In any event, the Tribunal's conclusion that the claimant had effectively chosen not to work once pregnant again appeared to be based on suspicion or conjecture rather than on facts proved by the respondent. The Tribunal had not approached the matter in the way required by the principles enunciated in **Wilding v British Telecommunications Plc [2002] ICR 1079** and **Cooper Contracting Ltd v Lindsey UKEAT/0184/15**.

The Tribunal had erred further in its approach to the claimant's pregnancy related discrimination claim. On the facts found she had been passed over for promotion as a result of her pregnancy and maternity leave, there being good evidence that she was someone who would otherwise have been considered for the post. She had delayed in making claim under section 18 of the Equality Act 2010 during a period when the

respondent had offered her an alternative post following her return to work. In considering whether it was just and equitable to extend time in relation to that claim, the Tribunal had failed to address the question of prejudice at all. Further, no account was taken that, in not allowing the claim to proceed out of time the claimant had lost not simply a speculative claim but an arguably good claim on its merits.

The appeal was allowed and both issues of mitigation of loss and the pregnancy discrimination claim referred to a freshly constituted tribunal for determination. A cross appeal in relation to quantum was dismissed.

THE HONOURABLE LADY WISE

1. The claimant was employed by the respondent as a Senior Account Manager with effect from 28 February 2011. On 3 April 2014 the Employment Tribunal issued a Judgment, deciding unanimously that she had been constructively unfairly dismissed from that post on 17 May 2013 when she resigned in consequence of the respondent's actions, which were a breach of the implied duty of trust and confidence.

2. A monetary award was made that excluded the claim for future wage loss. The Tribunal also dismissed the claimant's pregnancy related discrimination claim on the basis that it was out of time and that it was not just and equitable to extend the time limit. The claimant appeals against the Judgment in so far as it relates to the level of the monetary award for the constructive unfair dismissal and the dismissal of the pregnancy related discrimination claim. The respondent has a cross-appeal in relation to quantum.

3. I will refer to the parties as the claimant and respondent as they were in the Tribunal below. The claimant was represented by Mr Colin Howie, solicitor, both before the Employment Tribunal and the Employment Appeal Tribunal and the respondent was represented on both occasions by Ms Linda Beedie, solicitor. The progress of this appeal towards final determination has been hampered by several unrelated events. Four full hearing dates have been postponed: the first due to the closure of the Forth Road Bridge in December 2015 and consequent difficulties to parties in travelling to Edinburgh; the second due to my unavailability while presiding over a lengthy High Court trial; the third due to the respondent's solicitor suffering an injury on the day of the hearing; and the fourth due to the claimant's solicitor's non-attendance as he had apparently not received notification of the date fixed. The passage of time has not affected the issues under discussion but it has some bearing

on my decision not to delay matters even further for investigation of a factual dispute that was brought sharply into focus at the hearing before me as I will detail below.

4. The claimant's appeal can be separated into two discrete sections and I will address the arguments on each of those in turn.

Mitigation of Loss

5. In order to understand the first main argument for the claimant on appeal it is necessary to narrate some of the relevant findings made by the Tribunal. These are set out at paragraphs 7-50 of the Judgment. Many of them relate to the circumstances in which the claimant resigned. In essence, following a return to work after the birth of her first child the claimant's role was changed by the respondent and she was effectively demoted without prior consultation, such that she was entitled to repudiate the contract of employment. The findings most pertinent to the mitigation of loss argument are in the following terms:

> **"12. AVC is a well established company based in Aberdeen ... It provides a range of media services including animation, design and media training. The company focuses on the oil industry and creates publicity and training digital videos for them. It employs approximately 100 employees.**
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> **48. The claimant was unemployed following her resignation. She looked for similar work but could not find any part time work in her industry.**
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> **49. The claimant became pregnant in August 2013 and is due to give birth to her second child on 30 May 2014. She remained unemployed as at the date of the Tribunal hearing in December and had no immediate prospects of employment. She continued to search for positions similar to the one she had with the respondents in the Advertising Industry. She was unsuccessful. She had applied for five posts and received one interview. There are few part time positions in that Industry. The claimant became pregnant again in 2013 and expects a second child on the 30 May 2014. At the date of the Tribunal hearing she had not obtained employment.**
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> **50. If the claimant had remained in the employment of the respondent's she would have been entitled to take Maternity Leave for her second child and to statutory maternity pay for 33 weeks at £136.78 per week."**

Having upheld the claim of constructive unfair dismissal the Tribunal turned to remedy. At

paragraph 94 the awards for past loss are set out. In giving reasons for its rejection of the claim for future loss at paragraph 95, the Tribunal states the following:

> **"There is a duty on a claimant to take reasonable steps to mitigate their loss as the respondents indicated. The Tribunal was of the view that the claimant was entitled, at least initially to seek employment in her profession, namely in advertising and marketing, and to seek similar positions to the one she had left. However, at some point the claimant should have taken steps to widen her search outwith her profession. We do not necessarily criticise her for not applying for benefits although by failing to do this she did not get any assistance from the Job Centre. We also note that at the date of the hearing she had only been able to apply for a handful of posts. We suspect that although initially keen to remain at work the claimant possibly because of the lack of opportunities and her pregnancy had accepted the difficulty of getting back into her chosen field and had resigned herself to not being employed. In all the circumstances while we sympathise with her in the situation in which she finds herself we came to the opinion that it would not be appropriate to award the claimant future loss although we will award her loss to the date of the hearing in December."**

6. The claimant argues that this reasoning illustrates that the Tribunal failed to take account of where the onus of proof lies with regard to mitigation of loss and also to apply the correct standard of reasonableness (or unreasonableness). In his written argument Mr Howie relied on the approach set out in **Gardiner-Hill v Roland Berger Technics [1982 IRLR 498** and other general authorities on mitigation of loss including **McBride on Contract (3rd edition) at page 631-632**. In her written argument, Ms Beedie contends that the facts and circumstances which may have impacted on the claimant's ability or enthusiasm to look for work were properly taken into account by the Tribunal and that the assessment was simply part of the decision on what would be a just and equitable award overall. Neither party sought to rely on the relevant authority on mitigation of loss in the employment context, namely **Wilding v British Telecommunications Plc [2002] ICR 1079**, recently approved in **Cooper Contracting Ltd v Lindsey UKEAT/0184/15** by Langstaff J, the then President, who took the opportunity to summarise the various statements of principle in relation to this matter. Accordingly, I gave notice prior to the hearing that I expected to be addressed on those principles.

7. At the appeal Mr Howie submitted that the Tribunal's error in this case was that it

refused to award future loss exclusively on the basis of the claimant's alleged failure to mitigate her loss. The Tribunal had failed to explain the basis for its decision on mitigation of loss. There had been no challenge to the claimant's evidence in relation to the steps she had taken to secure alternative employment. No submissions were made on behalf of the respondent following the evidential hearing that the claimant had failed to mitigate her loss, notwithstanding a suggestion to the contrary in the first sentence of paragraph 95 of the Judgment. It was an error for the Tribunal to proceed as if there had been a challenge to the steps taken by the claimant and to imply that the claimant had to prove that she had mitigated her loss. The Tribunal had fallen into the approach criticised by Langstaff J in **Cooper Contracting Ltd v Lindsey** at paragraph 16(1). The Tribunal should have addressed where or what the claimant did was reasonable or unreasonable as a matter of fact. Had the respondent indicated that they were challenging her decision not to apply for jobs outwith her chosen field she could have answered that in evidence. But in the absence of challenge, there was no evidence upon which to base the Tribunal's view that she should have done so.

8. The standard of proof on mitigation of loss was that of a reasonable person and the Tribunal must not apply too demanding a standard on the victim – Langstaff J in **Cooper** at paragraph 16(7). Had she been challenged, the claimant would have explained that she applied for jobs and had continued to do so as recently as October 2014 a few weeks before the hearing. There was no evidence whatsoever to support a conclusion that she had resigned herself to not being employed. The Tribunal had placed far too high a standard on her. There seemed to be an underlying assumption that she did not seek work in alternative fields or even want to work because she was pregnant but there was no evidence to support that. The Tribunal failed to approach the whole question of future loss appropriately and so erred.

9. Mr Howie accepted that future loss was a less certain exercise than past loss but the

Tribunal as a minimum required to ask itself questions about how long the loss would be likely to last. There was a complete failure to address the issue of how long it might take the claimant to find work. Reference was made to **Savage v Saxena 1998 EAT/605** which referred back to the **Gardiner-Hill** case. The amount of compensation can be reduced by the amount of income which would have been earned had the claimant mitigated her loss. In this case, the date on which any identified steps would produce an alternative income had not even been identified. So even if the respondent, on whom the onus lay, had proved that the claimant had failed to mitigate loss, there would have to have been evidence about what alternative employment she could have applied for, when she might have secured it and how much she would earn from it. In the absence of any evidence, no such analysis was or could have been made by the Tribunal. There was a specific finding that the claimant would have been entitled to maternity pay in relation to her second pregnancy, yet this was ignored in the assessment of future loss.

10. Mr Howie also advanced a perversity argument in relation to this aspect of the case. He sought to argue that some of the inferences drawn by the Tribunal were not justified by the evidence. He accepted that the hurdle for perversity was a very high one and, following a question from me, acknowledged that these criticisms were all really arguments that findings and conclusions were made without there being evidence to support them. The key point was that the evidence illustrated that the claimant had not strictly restricted herself to applying for jobs in her chosen field. The summary of jobs she had produced to the Tribunal illustrated that. Further, it was inappropriate for the Tribunal to effectively penalise the claimant because she was pregnant and worked part time hours. There was an implicit assumption that a pregnant woman would not take such active steps to secure employment. This could only have been based on some preconceived notion about women on the part of the Tribunal which Mr Howie characterised as perverse.

11. In response, Ms Beedie indicated that she wished to rest primarily on her written argument. That argument points out that the Tribunal's decision related to what was a just and equitable award to make in the circumstances of the case. This was distinct from a finding of a failure on her part to mitigate her loss. It was all a question of whether future loss could be said to have naturally flowed from the breach by the respondent. It was indisputable that the claimant could only recover such loss as was attributable to action taken by the employer respondent. The claimant was wrong to argue that in taking into account the relevant facts and circumstances that impacted on the appellant's ability or enthusiasm to look for work there was a failure to apply the common law principle that the wrongdoer must take the employee as he find him.

12. It was clear from the case of **Cooper Contracting Ltd v Lindsey** that the assessment was what was fair, just and equitable in the mind of the employment judge. That case illustrates that the Tribunal is entitled to find in the particular circumstances that loss has not been mitigated. The respondent does not need to pay the claimant for the privilege of reaching a decision that she had come to about whether or not to pursue employment opportunities.

13. Ms Beedie disputed Mr Howie's recollection of the hearing. She said that she recalled cross-examining the claimant in relation to mitigation. She had been asked why she did not think she could perhaps seek work in a family business that had been mentioned. Ms Beedie accepted, however, that there was nothing in the written submissions she had given to the Tribunal after the evidential hearing relating to mitigation of loss. There had been no oral submissions and the written submissions comprised all of the arguments. The dispute in fact that arose between her and Mr Howie was in relation to whether there had been a challenge in cross-examination to the claimant's evidence about the steps she had taken to mitigate her loss.

14. Ms Beedie relied on the written submissions she had made regarding perversity. The often cited authority of **Yeboah v Crofton [2002] IRLR 634** cautioned that an appeal of this nature is not a re-trial of the case and that the appellate body must not substitute its own assessment of the evidence for the findings of fact made by the Employment Tribunal. Ms Beedie indicated that if the dispute in relation to whether there had been challenge to the claimant's evidence about mitigation of loss the matter should be remitted back to the Employment Tribunal for the judge's notes of evidence to be produced. In response to that particular matter Mr Howie explained that he had raised this matter in correspondence in October 2015 but that another EAT judge had refused his application for the notes.

Pregnancy Related Discrimination Claim – Extension of Time

15. The claimant's argument before the Tribunal was that in terms of sections 18 and 39(2) of the Equality Act 2010 she had suffered discrimination by being denied the opportunity to apply for a promoted position within the company due to her pregnancy. The merits of her claim in this respect were explored at the hearing. Having narrated the background of the claimant expressing an interest in taking on the role of creative director prior to her maternity leave the Tribunal made the following relevant findings:

> **"14. In July 2011 the Director in charge of the Creative Department, Mr Stewart Buchanan, resigned from the company. He had joined the respondents when they had purchased his own media business. He had retained a number of high profile clients and managed their accounts. In addition he had management responsibilities for the Department. After Mr Buchanan resigned the claimant met Mr Buchan for a handover to her of the majority of Mr Buchanan's clients. Thereafter until her maternity leave the claimant managed these clients and carried out many of the responsibilities that Mr Buchanan had previously carried out.**
>
> **15. Mr Stuart Buchan spoke to the claimant about this time and indicated that she would step up into a higher role. He gave the impression that she would be promoted to the position of General Manager of the Creative Department. He asked the claimant to write a proposal document setting out how she envisaged the post would work.**
>
> **16. The claimant set out her ideas sent these by email to Mr Buchan on the 9th August (JB 18).**

The e-mail began:

> ***'Hi Spencer***
> ***Had a think about how I see my role going forward. Essentially, I've looked at the issues/gaps/opportunities within Creative and detailed how I think my role can address these. Much of this is similar to the original role we discussed before I started at AVC but as you said at the time you fled you had enough people driving AVC/the team forward and the role wasn't there. Stewart leaving has presented this opportunity'.***

17. the e-mail ended:

> ***'I guess what I'm saying is I am looking to take on Stewart's role supporting the Creative team without the responsibility for the studio but working closely with Barry to ensure that we exceed clients expectations. In terms of the job title, what I am looking for is an Account Director position. I appreciate that this has its own connotations with AVC so not sure I could take that job title, perhaps Creative Manager would work. With the added responsibility I would expect an increase in salary/package and am keen to discuss this with you'***

18. Mr Buchan responded:

> ***'Hi this is all good Alaina, I appreciate you taking the time to do this together, lets chat it through before Friday.'***

19. The anticipated meeting did not take place. At this time Mr Buchan was particularly busy with work and the claimant, believing that she was to succeed to a new role, did not press for a meeting although she contacted his P.A on a number of occasions to arrange a meeting. She assumed that at the latest he would discuss this matter when he met her to carry out her annual appraisal. The appraisal was scheduled to take place shortly. On a number of occasions the appraisal meeting was cancelled and no appraisal meeting took place nor any further discussion of her email.

20. Around October 2011 the claimant discovered that she was pregnant. Her expected date of delivery was late May 2013. She informed the respondents that she was pregnant in or around November 2011. She decided to take her full entitlement to Maternity leave.

21. The respondents wrote to the claimant on the 18 January 2012 (JB 19) setting out her start date for leave as the 8 May 2012 and that her leave would end on the 7 May 2013. The claimant went on maternity leave in April 2012. At that point there had been no steps taken to advance the discussions of her proposal.

22. The claimant was aware that the respondent's policy was that staff on maternity leave could have what were known as 'keeping in touch days' where they would return to the respondents offices and get up dated on developments and changes.

23. The respondents decided to progress with the appointment of a General Manager for the Creative Department. The closing date for applications was to be the 15 June 2012. The claimant was unaware of this.

24. In January the claimant met Mr Buchan by chance and he had told her about Mr Lenthall's promotion. Following this Lynn Sangster contacted her and asked if she wanted to have a keep in touch day. She was told that there had been a number of changes and that she could get an up date from Mark Lenthall (JB 22). At or about this time the claimant discovered that the contract for her Blackberry telephone, which had been supplied by the respondents for work, had been cancelled. She had no notice that this was to occur. The claimant normally accessed work related emails form that device but had not done so while on leave. When she later checked her email account at work she could find no trace of an email about the post to which Mr Lenthall was appointed.

25. The claimant responded to Mrs Sangster (JB 22) that she was surprised that she was being

asked to come in and see Mr Lenthall. This was because she had previously complained about his behaviour towards her. She asked why, given her previous interest in the job, she had not been promoted to the post or given an opportunity to apply. She indicated that she was not prepared to have close contact with him. She wrote:

> **"Firstly after Stewart left the company I was told by Spencer that he wanted me to take over as head of the department. I sent a proposal to Spencer in this regard and suggested the title of "Creative Manager". He said this sounded good and agreed to firm up the details of the new position at my appraisal. Unfortunately my appraisal did not take place. It was scheduled to take place on a number of occasions but Spencer cancelled each time and it had still not taken place when I went off on maternity leave.**
>
> **Secondly I was not even offered the opportunity of applying for the role as I was on maternity leave at the time. Thirdly, Mark clearly lacks the attributes to run the department effectively. This is clear from the number of complaints and the number of staff and clients who have left in recent months.**
> **I made it clear to Spencer I am not prepared to work for or have close contact with Mark. Please therefore confirm who will be present at my return to work days and confirm suitable dates which confirm suitable dates."**

26. When the claimant had discovered that Mr Lenthall had been appointed to the position of General Manager of the Creative Department she was upset both that she had not been given the opportunity to apply for the post and about the failure to inform her about his appointment.

27. The respondents were concerned at the turn of events. They took legal advice on their position."

16. The Tribunal then expressed the following view:

"71. The principal argument made by the respondents was that any such claim is out of time and the Tribunal has no jurisdiction to hear it. We accept that the claimant did not know about the internal advertisement of the General Manager's job in the Creative Department until January 2013 or it being filled by Mr Lenthall. We accept her evidence that she did not know if the post was temporary or permanent until later in that month. In doing so we reject Mrs Sangster's evidence that the claimant received an email about the post. No evidence, for example from someone conversant with the respondent's IT system gave evidence to counter the claimant's position that the email was not in her email account when she checked it in January 2013.

72. We also found it impossible to accept Mr Buchan's evidence that he did not think at the time the post was internally advertised about contacting the claimant specifically about the job which she had previously been keen to have and which seems a virtual mirror image of the post they had been discussing prior to her maternity leave. We are drawn to the conclusion that that the claimant's interest in the post was not pursued by him especially once she indicated that she was pregnant and that it was hoped that by making the appointment in her absence that the claimant would accept the situation if and when she returned. Be that as it may be the claimant gave clear evidence that she made an informed decision after taking legal advice and being aware that she might have claim for sex discrimination arising from these circumstances not to pursue them.

73 We have no doubt that part of her decision making related to a willingness for the same of her future career to put the matter behind her but also to her hope that a new suitable part time post could be found outside the Creative department rather than the respondents forcing her to return there or to leave. We accept that in principle it might be just and equitable to allow a claim out of time if it was not pursued timeously because of promises or assurances made by the employer which were then broken. However that is not the situation here as the employers never accepted that they had been in the wrong."

On behalf of the claimant it is argued that these paragraphs illustrate that the claim would have

been upheld had it been brought within the time limit, failing which it would have been just and equitable to extend time.

17. The claimant's position is that it was an error of law for the Tribunal to rely only on the evidence that the claimant had made an informed decision, after taking legal advice at the time and being aware that she might have a claim for sex discrimination not to pursue the matter. It is said that the Tribunal failed to address other significant factors, including the length and impact of the delay and the issue of prejudice where the claim would otherwise succeed on the merits. The well-known passage from **British Coal v Keeble [1997] EAT/496/96** sets out a list of particular circumstances to which the Tribunal should have regard in considering whether to extend time. These are:

> **"(a) the length of and reasons for the delay;**
>
> **(b) the extent to which the cogency of the evidence is likely to be affected by the delay;**
>
> **(c) the extent to which the party sued had co-operated with any requests for information;**
>
> **(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;**
>
> **(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."**

In **London Burgh of Southwark v Afolabi [2003] IRLR 220** the Court of Appeal confirmed that there is no requirement on a Tribunal to go through the list in **Keeble** in every case provided that no significant factor is left out of account.

18. Mr Howie argued that there was a complete absence of any consideration by the Tribunal of the issue of the balance of prejudice in this case and that, taken with the cogency of the evidence amounted to an error of law – **Baynton v South West Trains Ltd UKEAT/0848/04** at paragraph 59 and **Bahouse v Pizza Express Restaurant Ltd [2011] UKEAT/0029/11** at paragraphs 16-20. The proposition to be derived from these authorities

was that if prejudice was not addressed to the effect that the claimant has lost, not a speculative claim, but a good claim on the merits, that was a significant error. Mr Howie also sought to rely on the Inner House decision in **Malcolm v Dundee City Council [2012] SCIH 13** as support for the contention that where a Tribunal had found that a case would have succeeded on its merits, the case for an extension of time was exceptionally strong and the issue of the absence of prejudice to the employer had to be weighed in the balance – see paragraphs 7, 8 and 20.

19. On the assumption that the Tribunal had erred in failing to consider all significant factors and that it would therefore have been just and equitable to extend time, there were sufficient findings from which it could easily be inferred that the claim would have succeeded. The first part of paragraph 72 of the Judgment illustrates that there was a conscious and deliberate decision to exclude the claimant from consideration for the promoted post because of her pregnancy. The claimant did not know that she had any basis for a sex discrimination case until January 2013. By the time the initial three month limit expired, it had been agreed that she would be returning to work in a suitable post comparable to that which she had done before but in a different department. That had to be taken into account in the round. In all the circumstances the claimant's knowledge that she had a claim and had decided not to pursue it should not have been relied on to the exclusion of all other factors.

20. For the respondent Ms Beedie did not accept that the findings of the tribunal were a sufficient basis for a conclusion that the claim under section 18 would have succeeded on the merits. So far as extension of time was concerned, the arguments now being made for extension were not all before the tribunal. In particular the issue of the balance of prejudice was not raised earlier. Accordingly, while the authorities on the matter were of interest, those had to be considered against a background in this particular case of the claimant having to

persuade the tribunal on this matter, which she had not done. The tribunal had addressed the relevant significant factors on this aspect of the case. It had not been accepted that the claimant had been promised the post of creative director and so the example given of a promise being made and then broken did not apply such as to create prejudice to the claimant.

21. In the particular circumstances, where the claimant had a possible claim that she had decided, on legal advice, not to pursue and a subsequently claim that she had successfully pursued, it was difficult to see that she was prejudiced in having let the time limit on the first claim pass. Further, Ms Beedie drew attention to the reconsideration judgment of the tribunal dated 10 December 2014. Reconsideration had taken place because the tribunal had overlooked the claimant's victimisation argument. In the event the tribunal found that the claimant had not been victimised as a result of her, complained in an email of 25 January 2013 that she had not been given an opportunity for promotion because she exercised her right to take maternity leave. The claim was in terms of section 27 of the Equality Act 2010. In Ms Beedie's submission, there was clearly a relationship between the pregnancy discrimination claim in terms of section 18 in which the claimant contended that the respondent had treated her unfavourably because of her pregnancy and the claim under section 27 alleging that she had been subject to a detriment by the respondent because she had carried out a protected act in terms of the legislation by making the complaint. At paragraph 44 of the reconsideration judgment the tribunal had concluded as follows:

> **"The manner in which the respondent handled matters was not in our view reasonable in all the circumstances but was not tainted by discrimination."**

Ms Beedie argued that, albeit in the context of addressing the victimisation claim the conclusion of the reconsideration judgment could be read as inferring that the tribunal would have rejected the sex discrimination claim even had it considered that it would be just and equitable to allow it to proceed out of time.

22. It was acknowledged on behalf of the respondent that the judgment could be regarded as being less fully expressed in terms of reasoning than might be desirable. However, returning to prejudice it was said that although there is no specific reference to the balance of prejudice one could not rush to the conclusion that the tribunal had given the issue no consideration. The issue was whether there was enough in the judgment to infer that the tribunal had had regard to the balance of prejudice. Ms Beedie argued that there was just sufficient in this respect. Paragraph 73 of the judgment could be read as balancing a clear prejudice that might be suffered by a claimant who had been given promises or assurances by the employer which were then broken with the claimant's situation where she had never been promised the post of creative director.

The Respondent's Cross Appeal

23. The respondent also advanced a cross-appeal in relation to the quantum of the award made by the Tribunal. This was lodged after the respondents had sight of a submission of the claimant in the grounds if appeal that she suffered a debilitating shoulder injury and was unable to work for some two months prior to the Tribunal hearing. Accordingly, the Tribunal had erred in awarding her past loss down to the date of the Tribunal hearing. At the hearing before me Ms Beedie accepted that the claimant had now provided information that suggested on the face of it that she may have been absent from work for only one month to six weeks as a result of this injury and that had she still been in employment she would have received full pay for a month and half pay for the second month. She accepted also that there had been no evidence about the shoulder injury before the Tribunal. While there remained a question mark about whether the wage loss was accurate in the circumstances, she acknowledged that in a sense her query about this was a new matter and not one that the Tribunal was asked to decide or really

could have decided. She suggested that a pragmatic approach to the cross-appeal might be to remit the matter of the accuracy of the current wage loss award back to the Tribunal only if the claimant's appeal succeeded in any part and was being remitted back anyway. If the opposition to the substantive appeal succeeded then she would not insist on her cross-appeal.

24. In reply, Mr Howie confirmed that there had been no evidence led before the Tribunal in relation to the claimant's shoulder injury. An *ex parte* statement had been made that she was taking painkillers in relation to a debilitating shoulder injury. While the grounds of appeal had referred to a period of two months in relation to this injury, the claimant's medical records had subsequently been checked and this was found to be in error. The injury was sustained on 23 October 2013 and ceased to be debilitating just prior to the Tribunal hearing on 28 November 2013. The respondent had been given notice of the matter at the outset of the hearing and had not pursued it. In any event, there was no suggestion that the claimant was unable to work by the date of the hearing. Her losses were accordingly unaffected by the injury.

Discussion

(i) Mitigation of Loss

25. Section 123(1) of the Employment Rights Act 1996 ("ERA") provides that the amount of any compensatory award:

> **"… shall be such an amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employers."**

Underneath section 123(4) provides:

> **"In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of … Scotland."**

26. The leading authority in relation to mitigation of loss in an employment context is **Wilding v British Telecommunications Plc [2002] ICR 1079**. In that case Porter LJ confirmed beyond doubt for such cases that while it was the duty of the claimant to act in mitigation of his loss as a reasonable person unaffected by the hope of compensation from his former employer, the onus was on the former employer as the wrongdoer to show that the claimant had failed in his duty to mitigate his loss by acting unreasonably. Further the test of unreasonableness is an objective one based on the totality of the evidence. Importantly, the court or tribunal deciding the issue must not be too stringent in its expectations of the wronged party, namely the claimant. In the recent decision of Langstaff J in **Cooper Contracting Ltd v Lindsey UKEAT/0184/15,** the then president of the EAT warned against the considerable dangers in an approach that suggests that the duty to mitigate is to take all reasonable steps to lessen the loss. What the wrongdoer must prove is that the claimant acted unreasonably. To put it another way the claimant need not show that he or she acted reasonably.

27. What occurred in this case must be examined against that settled legal backdrop. I turn first to address the factual dispute that emerged during the course of the appeal hearing. There is no doubt that, whatever the position in evidence, no submissions were made to the tribunal that this claimant had acted unreasonably and so failed to mitigate her loss. Accordingly, the reference in paragraph 95 to the respondent having indicated that there is a duty on a claimant to take reasonable steps to mitigate their loss may be inaccurate. On the other hand, if there was cross-examination of the claimant about other work she could have undertaken that expression could refer to the evidence rather than submissions. I have reached the view that there is no need to ask the tribunal for clarification of this matter in light of the substantive decision that I have reached. I would in any event consider it disproportionate to do so standing the history of the appeal process in this particular case as outlined above.

28. The statement in the judgment that there is a duty on the claimant to take reasonable steps to mitigate their loss is of course accurate. Accordingly, whether that statement came from the respondents or from the tribunal itself matters not. It is what follows after the first sentence of paragraph 95 that is in my view deficient in a number of respects. First, there is no acknowledgment of where the onus of proof lies. The duty on a claimant is stated baldly without any reference to evidential onus. Secondly, the exercise of examining the claimant's actions against a requirement that the respondent proves that she acted unreasonably is not carried out. The tribunal refers to the claimant being "entitled" to do one thing and by inference not another. The proper barometer of unreasonableness is not mentioned. Thirdly, even if the tribunal's views could be read as addressing the issue of whether the claimant acted unreasonably, the conclusion appears to be based on suspicion or conjecture rather than on facts proved by the respondent. In my opinion, at best the tribunal has approached the matter in the very way disapproved in **Cooper Contracting Ltd v Lindsey**, namely as ***"… some broad assessment in which the burden of proof is neutral."*** This is illustrated with language such *as* ***"in all the circumstances while we sympathise with her … we came to the opinion that it would not be appropriate to award the claimant future loss."***

29. The task before the tribunal was to assess whether the respondent had proved that the steps taken by the claimant to secure alternative employment were unreasonable. On the facts found, she was someone who had returned to work after the birth of her first child. She had applied, unsuccessfully, for a number of posts following her constructive unfair dismissal, most recently within two months of the tribunal hearing. The breach of the implied duty of trust and confidence by the respondent was the reason for her unemployment and as a matter of undisputed fact she had no imminent prospect of employment at the date of the hearing. For the tribunal then to begin to make assumptions about the claimant's private views on future employment was unjustified and was, paraphrasing the tribunal's own words, a suspicion rather than a conclusion properly drawn from the facts found. Finally, the Tribunal recorded (at

paragraph 50) one aspect of effectively undisputed future loss, namely the maternity pay the claimant would have received had she still been at work, yet failed to acknowledge the inconsistency between that finding and rejecting the claim for future loss.

30. For these reasons, I consider that the tribunal erred in its approach to mitigation of loss and its decision to refuse the claim for future wage loss cannot stand. It is unnecessary in the circumstances to reach a decision on the perversity arguments.

Pregnancy Related Discrimination Claim - Extension of Time

31. Again there was no real dispute in relation to the applicable law in relation to the approach to extending time on the just and equitable ground. The cases of **British Coal v Keeble [1997] EAT/496/96** and **London Burgh of Southwark v Afolabi [2003] IRLR 220** set out the list of factors to be considered and confirm that while it is not an exhaustive list, the tribunal must consider the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the parties sued had co-operated with any requests for information, the promptness with which the claimant acted once he or she knew of the facts giving rise to the course of action and the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action. In this case the particular consideration on which the tribunal relied was that the claimant, having realised that she could make a discrimination claim based on being passed over for promotion as a result of her pregnancy and absence on maternity leave, took advice and chose not to do so at the time. The sharp points are whether the tribunal erred in (i) effectively treating that as the end of the matter rather than going on to consider in more detail the circumstances in which she had initially decided not to pursue her claim, namely the ongoing nature of her employment and the anticipation that a suitable alternative post was available to her on her return to work and (ii) failing to address expressly the balance of

prejudice before reaching a decision

32. Regrettably, the tribunal's reasoning in this regard is not only brief but is somewhat opaque. At paragraph 73 it is acknowledged that an out of time claim of this type may be allowed to proceed on the just and equitable ground if it was not pursued timeously because of promises or assurances made by the employer which were then broken. The tribunal suggests that the claimant's situation was different **"… as the employers never accepted that they had been in the wrong."** It is difficult to know what to make of that expression. An employer might never accept they were in the wrong where they had in fact made a promise or assurance which was then broken. On the clear facts of this case the claimant was passed over for promotion as a result of her pregnancy and maternity leave, there being good evidence that she was someone who would otherwise have been considered for the post. She was not given any particular assurance following her return from maternity leave, she was simply offered an alternative position which she accepted as something she would try to work with. The respondent's lack of acknowledgment of fault in the whole matters seems to me to be irrelevant. That takes the case into the territory of the failure to consider prejudice. It is clear that an outright failure to address the question of prejudice at all in this context amounts to an error of law - **Baynton v South West Trains Ltd UKEAT/0848/04** and **Bahous v Pizza Express Restaurant Ltd [2011] UKEAT/0029/11**. The balance of prejudice becomes particularly significant where a claimant has lost not simply a speculative claim, but a good claim on its merit – **Bahous** above, and **Malcolm v Dundee City Council [2012] CSIH 13 at para 20.** Accordingly, it is often appropriate to address the merits as part of the task of balancing prejudice.

33. In the present case, I consider that there was complete failure on the part of the Tribunal to consider prejudice and the view of the Tribunal on the merits, which in the circumstances would have been relevant to the balance of prejudice can at best be inferred in the absence of

any clear conclusion being stated. Had the Tribunal balanced prejudice in this case it would no doubt have taken into account that, without an extension of time the claimant would be unable to pursue her pregnancy related discrimination claim at all and it would then have addressed the merits of that claim. There are certainly clear findings favourable to the claimant on the issue at paragraph 72, where the Tribunal expresses being drawn to the conclusion ***"... that the claimant's interest in the post was not pursued by him (Mr Buchan) especially once she indicated that she was pregnant and that it was hoped that by making the appointment in her absence that the claimant would accept the situation if and when she returned."***

34. The test in section 18 is whether the claimant was treated unfavourably because of her pregnancy. Section 18(2) of the 2010 Act provides:

> ***"A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –***
>
> ***(a) because of the pregnancy ..."***

Further, section 18(4) provides:

> ***"A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave."***

While there are sufficient findings to allow the pregnancy discrimination claim to succeed, there is, as indicated, a lack of clarity as to the Tribunal's position would have been on its merits. There is the curious finding in the reconsideration decision, which was restricted to the victimisation claim brought under section 27 of the Equality Act 2010, that the *"... manner in which the respondents handled matters was not in our view reasonable in all the circumstances but was not tainted by discrimination."*

35. The victimisation claim related to the claimant's email of 25 January 2013 when she was on maternity leave, complaining that someone else had been appointed to the post of General Manager of the Creative Department. The issue was whether the making of the

complaint (a protected act) was the reason for the respondent subjecting the claimant to a detriment on her return to work. The Tribunal concluded that in giving the claimant a role in another department on her return the respondent had not acted deliberately to victimise the claimant because of her earlier complaint. There were business reasons to support the change in role. That conclusion is elaborated on in the reconsideration judgment, following which the conclusion that the decision to move the claimant to a new department was not tainted by discrimination is given. However, that conclusion does not relate to the pregnancy discrimination claim under section 18 of the 2010 Act. While the relevant factual background for the two claims was similar, the timing and specific allegations differ. The decision not to give the claimant the opportunity of the promoted post in the Creative Department was taken some time before any alleged victimisation due to her complaining about that decision. Accordingly, the reference to a lack of discrimination in the reconsideration judgment cannot be "read across" to the section 18 claim.

36. I have reached the conclusion that the Tribunal erred in its decision on the pregnancy discrimination claim. First, it failed to consider and balance the issue of prejudice in deciding whether it was just and equitable to extend time. Secondly, it failed to reach any coherent conclusion on the merits at all or even to consider the merits generally as part of the balance of prejudice exercise. Accordingly, the decision on the section 18 claim cannot stand. The claim ought to have been allowed to proceed out of time, there being a sufficiently strong case on the merits to render it just and equitable to allow it to proceed, standing the prejudice of the claimant if it did not and the absence of any real prejudice to the respondents, whose evidence on the merits had been given. However, I do not consider it appropriate to substitute a substantive decision on the merits of this claim. The Tribunal did not do so and both parties are entitled to a clear first instance decision on the merits, preserving the appeal rights of both thereafter.

Disposal

37. Both parties invited me to remit matters to the Tribunal in the event of the appeal being successful, although Mr Howie submitted that the pregnancy discrimination claim could be determined by me on the basis of the findings already made. If any matters were being remitted, Mr Howie suggested it be to a freshly constituted Tribunal. He accepted that the quantum of both claims would require to be remitted even if I reached the view that the section 18 claim was well founded as well as it being just and equitable for it to proceed out of time.

38. Ms Beedie agreed that a remit to the Tribunal would be required in the event of any success for the claimant. She indicated that the matter could be remitted to the same Tribunal who had a thorough knowledge of the case.

39. For the reasons already given, I have decided that, in allowing this appeal, I should remit the matter for a re-hearing on two issues. First, the question of what award for future loss, if any should be made and secondly, the disposal on the merits, of the pregnancy discrimination claim, the Tribunal having erred in refusing to allow it to proceed out of time I do so on the basis that all of the findings in fact in the Tribunal's judgment remain in place. The freshly constituted Tribunal may give directions as to the conduct of the hearing including whether any further evidence should be allowed.

40. So far as the cross-appeal is concerned, by the stage of the hearing before me, it was accepted that, even if it could be established that the claimant had been unable to work for a period, had she been in employment (which she would have been but for the unfair dismissal by the respondent) she would have been remunerated. In any event, the Tribunal cannot have erred in failing to address a matter that was never before it. Standing the negligible amount that

could ever be involved were this issue to be allowed as a new matter before the freshly constituted Tribunal, I consider that it would be disproportionate to allow the matter to be ventilated. Accordingly I will dismiss the cross-appeal.