Appeal No. UKEAT/0063/14/JOJ
UKEAT/0064/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 23 June 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

UKEAT/0063/14/JOJ

SOMERSET COUNTY COUNCIL — APPELLANT

MS H R CHALONER — RESPONDENT

UKEAT/0064/14/JOJ

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SOMERSET COUNTY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For Somerset County Council	MS ADRIENNE MORGAN (of Counsel) Instructed by: Somerset County Council Legal Services County Hall Corporation Street Taunton Somerset TA1 4DY
For Ms H R Chaloner	MISS DEBBIE GRENNAN (of Counsel) Instructed by: Messrs Porter Dodson Solicitors Central House Church Street Yeovil Somerset BA20 1HH

SUMMARY

UNFAIR DISMISSAL - Compensation

Claimant's appeal

The question of grossing up was a live issue before the Tribunal and the Respondent accepted that, in order to achieve an award that was just and equitable, grossing was required to the extent the award exceeded £30,000. The Employment Tribunal accepted this point in its Review Judgment but failed to then make the necessary correction. Having accepted an error in this regard, it was simply inconsistent for the Tribunal to then confirm its original Judgment. Further, it was agreed that there were errors of calculation in the original Judgment; again, apparently accepted by the Tribunal's Review Judgment but there was then an error in the failure to make the necessary corrections.

On the Claimant's next ground of appeal, the question arose as to the basis upon which the Tribunal had limited her claim. Neither side had approached this as being a case where there had been a break in the chain of causation. Both saw it as about adequacy of mitigation. There was a real difficulty in understanding the Tribunal's decision as being one of a break in causation. This term was used for the first time in the Review Judgment. This was not a case where the Claimant had taken up an entirely new career path and the facts found by the Tribunal did not obviously speak of a break in the causative chain. There was no explanation for the Tribunal's finding that this is what had occurred and the language used seemed only to address the question of reasonableness of mitigation. If this was a finding of a break in the chain of causation then it was inadequately reasoned.

Further, on the question of mitigation, the Tribunal had failed to ask the correct question. It needed to identify: what step should have been taken; the date on which that step would have produced an alternative income; and then to reduce the compensation by the amount of the alternative income (**Gardiner-Hill v Raymond Berger Technics Ltd** [1982] IRLR 498). The Tribunal's Reasons - whether for the original Judgment or on Review - failed to demonstrate that this exercise was undertaken.

The Claimant's appeal was allowed on the above grounds.

Although the Claimant's third ground of appeal (relating to the 60% withdrawal factor on the pension award) did not succeed, given the view formed on the other grounds of appeal (both the Claimant's and the Respondent's), this point would go in any event.

The Respondent's appeal

Accepting that the Tribunal was not obliged to adopt the guidelines or any particular approach *and* that it would not be an error of law to find pension loss continuing for longer than the loss of earnings in terms of basic pay, it remained the case that the Tribunal's reasoning for its conclusion on pension loss was simply opaque. The Respondent could not understand why finding that the Claimant's taking up the new position with Artslink broke the chain of causation in terms of its liability for basic pay but had no impact on pension loss (and see per Elias LJ in **Aegon UK Corp Services Ltd v Roberts**[2009] IRLR 1042, CA).

If the Tribunal was really holding that there was no break in the chain of causation but this was all about mitigation, the reasoning would still be inadequate. This is because the Tribunal did not adopt the approach laid down in **Gardiner-Hill** (see above).

Similar points arise in respect of the Respondent's second ground of challenge to the Tribunal's finding, in respect of the Claimant's mitigation for the first year of unemployment. The Tribunal's reasons were simply inadequate in this respect.

Respondent's appeal also allowed.

Case remitted to a new Tribunal for fresh consideration of all points on remedy.

HER HONOUR JUDGE EADY QC

1. There are two appeals in this matter, both parties having appealed against the Employment Tribunal's Judgment on remedy. For ease of reference I will refer to the parties as the Claimant and the Respondent as they were before the Employment Tribunal below.

Introduction

2. The appeals relate to a Judgment of the Exeter Employment Tribunal under the chairmanship of Employment Judge Griffiths, sitting with members on 11 July 2012, and sent with Reasons to the parties on 16 July 2012. The parties were represented by the same Counsel as now appear before me.

3. The Claimant's original claim was one of unfair dismissal relating to her dismissal by the Respondent with effect from 1 February 2011. There had been a Liability Hearing before the Employment Tribunal in February 2012, and the Judgment in the Claimant's favour in that regard had been sent to the parties at the end of that month. The hearing before the Tribunal on 11 July 2012 was in relation to remedy only.

4. The Employment Tribunal awarded £49,288 as compensation for unfair dismissal. That comprised £600 for a basic award with the compensatory award constituting the remainder, which included loss of earnings, loss of statutory right and pension loss. After the Remedy Judgment had been sent to the parties, both applied for a review. A Review Hearing took place on 28 November 2012 before the same Employment Tribunal, which confirmed the earlier Judgment albeit providing more detailed reasons for its conclusions.

5. Although both the appeals before me relate to the initial Judgment on remedy (neither party sought to put in a further Notice of Appeal in respect of the Review Judgment), both have referred to the broader Reasons provided at the review stage and have agreed it is permissible for me to have regard to that fuller Judgment when assessing the merits of the appeals.

The Background facts

6. The Claimant commenced her employment with the Respondent on 2 November 2009 in a newly created position as Deputy Director of Dillington House, which I understand to be a former stately home, conference centre and venue in Somerset. Ultimately, however, there was a redundancy situation, which resulted in the Claimant's dismissal with effect from 1 February 2011.

7. Prior to working for the Respondent, the Claimant had had a variety of positions in her career, many of which had been part-time. She had, however, relocated from London to Somerset to take up this position with the Respondent. Her evidence was that, being then in her 50s, she saw this as a permanent long-term position, something of which she had been reassured by the Respondent, albeit that the continuation of its involvement at Dillington House was under review given its own financial constraints.

8. When working for the Respondent, the Claimant's remuneration package included a final salary pension scheme, which the Tribunal found was particularly valuable to her. When that employment terminated the Claimant looked for alternative work and found a part-time position with Artslink, which started on 13 February 2012. That, however, left her with a continuing loss and no final salary pension scheme, albeit that the Employment Tribunal found that she might still have freelance and/or self-employed opportunities open to her.

The Employment Tribunal's conclusions and reasons

9. In its original Judgment on Remedy, the Tribunal set out its conclusions in fairly summary form. The Claimant's effective date of termination was 1 February 2011. She took reasonable steps to mitigate her loss. She accepted an alternative part-time role on 13 February 2012. That did not fully mitigate her income loss. She did not take further steps to mitigate after that date.

10. The Claimant's remuneration package with the Respondent had included a final salary pension scheme. Having regard to Chapter 4 of the pension loss guidelines, *Compensation for Loss of Pension Righ*ts, 3rd edition, the Tribunal concluded, applying paragraph 4.14(a) thereof, that the substantial loss approach was the correct way of approaching the Claimant's pension loss. In calculating that loss, however, the Tribunal concluded that, having regard to the Claimant's own employment history and the Respondent's financial situation, it was very unlikely that the Claimant's employment with the Respondent would have continued until her retirement aged 65 and it assessed the appropriate withdrawal factor at 60%.

11. The parties' applications for review raise largely the same issues as raised in their respective appeals. On the Review Hearing, the Tribunal confirmed its finding that the Claimant had taken reasonable steps to mitigate its loss and its conclusion that "...the chain of causation for any continued shortfall in her income [from 13 February 2012] had been broken".

12. On the pension loss withdrawal factor, the Employment Tribunal had regard both to the Claimant's evidence regarding her relocation to Somerset to take up what she had seen as a long-term role with the Respondent, and also to the significant cuts that the Respondent was undergoing and the fact that its involvement in Dillington House was under review:

> **"Putting all those factors into the mix, we assess the withdrawal factor of 60% to be just and equitable."**

13. On the question of grossing up, the Employment Tribunal concluded:

> **"We accept that it is proper to gross up monetary awards in contractual claims, such as wrongful dismissal, where the sums being paid relate to remuneration. However, in cases of unfair dismissal, the award can include elements of compensation, which is not pay, and not, therefore, subject to the need to gross up. The revenue treatment of compensation is, by extra statutory concession, that the first £30,000 is tax free; the balance is taxable at the claimant's marginal rate. That seems to us to be the correct approach in the circumstances, and, therefore such part of the compensatory award of this tribunal as exceeds £30,000 will be properly subject to tax at the claimant's marginal rate."**

14. The Tribunal further stated that it had corrected the mathematical errors in its earlier Judgment. There is, however, no amendment to the earlier Judgment that I have seen and no revised schedule setting out the corrected calculation or demonstrating how the Tribunal approached the issue of grossing up (if, indeed, it did) as discussed at paragraph 8 of its Review Judgment.

15. As for the points raised by the Respondent, the Tribunal rejected what it saw as the Respondent's attempt to re-open the evidence on the Claimant's mitigation of loss. On the correct approach to pension loss, the Tribunal noted that it was common ground that, under section 123 of the **Employment Rights Act 1996**, the overriding principle was that of justice and equity. The pension guidance had no statutory force and was just that, guidance. The pension guidance itself stressed the need to take account of the particular facts of each case. Doing that, and taking into account the Claimant's view of her job with the Respondent as long-term, with a particularly valuable final pension scheme, which she had been prepared to relocate to obtain (and see more generally the Tribunal's findings, as set out at paragraph 10b of the Review Judgment) the Tribunal concluded that justice and equity would be best served in this case by applying the substantial loss approach to the question of assessing compensation for pension loss.

The appeals

16. The Claimant's appeal raises four heads of challenge. First concerning the Tribunal's failure to gross up the award to the extent that it exceeded £30,000. Second, in respect of the Tribunal's finding in relation to the Claimant's claim for losses continuing after 13 February 2012, when she obtained her job with Artslink. Third, the Claimant challenged the Tribunal's findings in relation to the withdrawal factor in respect of pension loss. Fourth, she again raised the arithmetical error in the calculations.

17. For its part the Respondent's appeal was essentially twofold. First, it contended that the Tribunal erred in adopting the substantial loss approach to assessing the Claimant's pension loss. That was either an error of approach or perverse given the Tribunal's findings of fact. Second, it argued that the Tribunal reached a perverse conclusion in failing to find that the Claimant had failed to mitigate her losses during 2011, i.e in the first year of her unemployment and before she obtained the job at Artslink.

The legal principles

18. Both appeals concern the application of the statutory test for the compensatory award for unfair dismissal as set out in section 123 of the **Employment Rights Act 1996**, which provides relevantly as follows:

> **"...the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.**
>
> **...**
>
> **(4) 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 applied to damages recoverable under the common law of England and Wales...."**

19. The approach to be adopted in the assessment of compensation pursuant to section 123 has been described as a threefold one, see the Judgment of the EAT in **Simrad Ltd v Scott** [1997] IRLR 147 (albeit dealing with the earlier legislative provision; there is no difference of substance). First, the Tribunal has to undertake a factual quantification of the losses claimed. Second, it has to assess the extent to which any or all of those losses are attributable to the dismissal or action taken by the employer; that is to look to see whether there is a direct and natural link between the losses claimed and the conduct of the employer in dismissing. Third, in all the circumstances, taking into account its conclusions reached on the first and second questions, the Tribunal must ask what award would be just and equitable.

20. In considering the question of mitigation in the light of this approach, the EAT in **Simrad** went on as follows (see paragraph 6 of the Judgment):

> **"While the facts relating to a question of mitigation will frequently bear upon the question of causative link, mitigation is essentially an equitable plea to be judged in the context of reasonableness at common law and thus on not too fine a balance. Accordingly the issue of mitigation will feature in the application of the third test rather than the second..."**

21. The need to be careful not to confuse a break in the chain of causation with the question of mitigation is also highlighted by the learned editors of *McGregor on Damages*, 18th edition, paragraph 7-018:

> **"… [T]he matter can no doubt be put in this way in terms of causation, but it does not tell us very much. What must be ascertained is whether the claimant has or has not acted, or failed to act, reasonably. This, as we have seen, is a question of fact and one that is capable of resolution by examination of the circumstances of the particular case. Adding causation into the mix gives no assistance. There is indeed a danger here, as elsewhere, of using causation as a disguise for the real ground of a decision."**

22. On the question of the duty to mitigate, whilst the duty is that of the Claimant, where one party seeks to allege that the other has failed to mitigate a loss, then the burden of proof is on the party making that allegation, that is, the Respondent (see per Roskill LJ in **Bessenden Properties Ltd v Corness** [1974] IRLR 338 CA).

23. When assessing the amount of deduction for a Claimant's failure to mitigate her loss, a Tribunal should decide when the employee would have found work and take into account any income which the Tribunal then considers she would have received from that other source, see the EAT's guidance in **Gardiner-Hill v Raymond Berger Technics Ltd** [1982] IRLR 498 and also in **Savage v Saxena** [1998] ICR 357.

24. On the question of pension loss, the Tribunal here had regard to the guidelines on *Compensation for Loss of Pension Rights*, 3rd edition. It would, however, not be an error of law *not* to follow the guidelines, **Greenhoff v Barnsley MBC** [2006] ICR 1514. The guidelines relevantly identify two different approaches the assessment of pension loss: a simplified approach and a substantial loss approach. It was common ground before me that, just as no error of law would arise if there was a failure to follow the guidelines, it would not be an error of law of itself to follow one approach rather than another.

Submissions

The Claimant's Appeal

25. The first ground of appeal related to the question of grossing up. It was common ground that this had been a live issue before the Employment Tribunal and the Respondent did not seek to dispute that, in order to achieve an award that was "just and equitable", grossing up would be required to the extent that the award exceeded £30,000. In its Skeleton Argument, however, the Respondent contended that any initial oversight in this regard on the part of the Tribunal was rectified on the review. For her part, the Claimant argued that, although the Tribunal's reasoning on review demonstrated that it accepted that it was appropriate to gross up the award (see paragraph 8), it had failed to then revise the calculation to take that into account.

26. The second challenge by the Claimant related to the Tribunal's approach to the question of mitigation and the limitation of her losses to the date when she obtained an alternative part-time role with Artslink on 13 February 2012. Having taken up that role, the Employment Tribunal found that the Claimant had not attempted to seek further employment and on that basis did not award her further compensation from that date. It expressed its reasoning for this approach in its Judgment on review as follows:

> **"We found, therefore, that the chain of causation for any continued shortfall in her income had been broken and that the respondent should no longer be liable for any losses occurring after that date."**

27. The Claimant observed that neither side had argued that the new employment amounted to a break in the chain of causation. If the Tribunal's reasoning was solely based on causation, it was unfair as there had been no opportunity for the Claimant to address the point. Properly analysed, however, the Claimant did not feel that that was what the Tribunal had meant to find. It would have inconsistent with its finding later on that the Claimant was of an age when she was unlikely to find other alternative permanent employment; it was hard to see how that finding was compatible with a conclusion that the Claimant's taking a job which partly mitigated her losses had amounted to a break in the chain of causation. If in reality, this was a finding as to the adequacy of mitigation, then the Claimant contended that the Tribunal had at no stage made a finding that she had acted unreasonably in failing to apply for other employment. In any event, the Tribunal had asked the wrong question. As laid down by the EAT in **Gardiner-Hill** (see paragraph 12), the Tribunal needed to identify what steps should have been taken, the date on which those steps would have produced an alternative income, and then reduce the amount of compensation by the amount of the alternative income which would thus have been earned.

28. In response, the Respondent objected to this point being taken, contending that there had been no challenge to the Tribunal's finding of a break in the chain of causation and it was not enough for the Claimant to rely on a challenge to its finding on the question of mitigation of loss. The Respondent further contended that this was a finding of fact that could not be overturned on appeal. Although neither side had sought to characterise the situation as a break in the chain of causation, that had been a permissible finding for the Tribunal given the three-stage approach it was required to undertake under section 123 **Employment Rights Act**: i.e causation was plainly an issue before it. In any event, the Respondent would refer back to the Claimant's employment history, which was predominantly one of working part-time. The Claimant had also failed to apply for suitable alternative employment with the Respondent. The facts supported the Tribunal's apparent conclusion: if not a break in the chain of causation, the Claimant had failed to take reasonable steps to mitigate her loss.

29. The Claimant's third ground of appeal sought to challenge the Tribunal's finding of a 60% withdrawal factor in respect of pension loss. The Claimant contended that the Tribunal had thereby failed to have sufficient regard to the circumstances in which she had taken up her position with the Respondent, in particular her uncontested evidence that she had regarded this as a long-term appointment when she took it up in her 50s and had relocated to do so. As for the Respondent's evidence as to the potential uncertain future for this part of its organisation, account also needed to be taken of the possibility of a transfer or sale of the business and the Tribunal had apparently ignored this relevant factor.

30. In response, the Respondent contended that this was a permissible finding of fact on the part of the Employment Tribunal. The challenge was really one of perversity, but the finding was not susceptible to challenge on appeal.

31. Finally, in respect of the fourth ground of the Claimant's appeal, both parties accepted that there had been an arithmetical error in the Tribunal's original calculation. That had also been accepted by the Tribunal at the Review Hearing, but the Claimant objected that there had been no correction as a result, so the actual error of calculation remained.

The Respondent's Appeal

32. For its part the Respondent first sought to challenge the Tribunal's approach to the award of continuing pension loss. Whilst accepting that the Tribunal was not bound to follow the guidelines or adopt any particular approach, the Respondent made the point that the reason for the approach adopted by the Tribunal was not explained and was inconsistent with the Tribunal's finding as to a break in the chain of causation in terms of remuneration, alternatively, inconsistent with its finding that - from the date of taking up her new job - the Claimant had not established that she had taken reasonable steps to mitigate her loss.

33. If a break in the chain of causation, the Respondent should not continue to be held liable, see the Court of Appeal's Judgment in **Aegon UK Corp Services Ltd v Roberts** [2009] IRLR 1042. If a question of mitigation of loss - and the Claimant had failed to establish that he had continued to take reasonable steps to mitigate her loss - the question arose as to why the Respondent should be held liable for a continuing pension loss award.

34. That finding also did not sit consistently with the finding that there was a 60% likelihood that the Claimant would have withdrawn from the pension scheme in any event.

35. In response, the Claimant submitted that there was no error of law in a Tribunal failing to follow the pension loss guidance or in seeking to use one approach rather than another. Moreover there was no error of law in a Tribunal's awarding pension loss for a longer period than loss of earnings (see **Bentwood Bros (Manchester) Ltd v Shepherd** [2003] IRLR 364). The **Aegon** case had to be seen on its facts. It did not lay down any more general point.

36. On its second ground, the Respondent sought to take issue more generally with the Tribunal's finding that the Claimant had taken reasonable steps to mitigate her loss prior to obtaining her position with Artslink. If the Employment Tribunal had found that the Respondent had not discharged the burden of proof upon it to show that the Claimant had not taken reasonable steps to mitigate her loss, it should have said so. The Respondent was entitled to understand whether the Employment Tribunal had indeed so found and, if so, why. In answer to that second ground of appeal, the Claimant submitted that this was an attempt to overturn a finding of fact. The burden had been on the Respondent. There had been a great deal of evidence before the Employment Tribunal on the question of mitigation, much of which had been put to the Claimant in cross-examination and she had answered the points. The Employment Tribunal was entitled to simply state its conclusion in this regard. That was a conclusion of fact not law.

Discussion and Conclusions

37. Before turning to the individual grounds, I make the general observation that it is unfortunate in this case that both parties have been left dissatisfied with the Tribunal's reasons, even after an attempt - by both sides - to obtain greater clarification on review. Moreover, although the Tribunal's Review Judgment acknowledged some errors in the original Judgment, it did not go on to make the obvious corrections. The parties cannot be criticised. They

endeavoured to resolve their concerns by what must have seemed the more sensible and proportionate means, i.e. by applying for a review of the Judgment. On anyone's case, that did not address the problems and they have been put to the additional time and cost of having to resolve these matters by appeal. It may well that certain of the points would have had to have been rehearsed at an appeal hearing in any event, but one has to reflect that the parties do not appear to have been well served in seeking clarification of the original Judgment in this case.

38. Turning to the individual grounds of challenge, I start by considering that which is not really contentious: the Claimant's first and fourth grounds of appeal, the grossing up point and the calculation error point. It was common ground that the question of grossing up was a live issue before the Tribunal. Further, the Respondent did not dispute that, in order to achieve an award that is just and equitable, grossing up can be required to the extent the award exceeds £30,000. It would seem that the Employment Tribunal, at paragraph 8 of its Review Judgment, also accepted this point (albeit that the reasoning is not entirely clear). That correction should then have been made. Having accepted an error in its approach in this regard, it is simply inconsistent for the Tribunal to then simply confirm its original Judgment. Moreover both parties were in agreement that there were errors of calculation in the original Judgment, and the Tribunal's Review Judgment seems to accept this, saying that those errors were corrected. I am unable, however, to see where that happened; there was, so far as I am aware, no revised schedule and no correction to the original Judgment.

39. If those were the only two points on appeal, then I could simply allow the appeal and substitute my own findings based on the correct calculations involved. That is not, however, the position and I next turn to the more contentious grounds of appeal before me.

40. For convenience, I turn next to the Claimant's second ground of appeal, which - once one gets into the substance overlaps with the Respondent's first ground of appeal. Before considering the merit of the point, I first need to address the Respondent's objection that this point of challenge was not foreshadowed by the Claimant's Notice of Appeal - the Respondent's point being that the Claimant had not expressly challenged the finding that there had been a break in the chain of causation and so that conclusion must still stand. I do not agree. Both appeals - which were lodged before the Review Judgment and Reasons - relate to the first Judgment, not the Review Judgment. It has been agreed that I can look at the Review Judgment in considering the merits of both appeals, and both parties have referred to it in making their submissions before me. That was obviously a sensible and pragmatic way to proceed. If, however, one takes an overly technical view of the matter, then I am to judge these appeals on the basis of the original Remedy Judgment alone. Doing so, the Claimant would have been entitled to understand the finding as being one relating to mitigation. The Tribunal at that stage do not talk in terms of a break in the chain of causation.

41. Did, then, the Claimant need to put in a fresh Notice of Appeal in response to the Review Judgment and Reasons? Looking at the substance of the second ground of appeal, it is plain, in my judgment, that she did not. She had clearly challenged the limitation on the claim for loss of earnings to the point when she accepted the part-time post with Artslink. That was sufficiently broad to comprehend the introduction of a break in the chain of causation in the Review Judgment in any event.

42. If I was wrong about that, I would in any event allow a late amendment to that Notice of Appeal; alternatively I would exercise my discretion and allow the Claimant an extension of time to put in a Notice of Appeal against the Review Judgment. It seems to me that the

approach the Claimant took in this appeal was sensible and proportionate. The substance was always clearly set out in the Notice of Appeal and there could be no possible prejudice to either party by dealing with this point in this appeal.

43. I turn, then, to the substance of the point raised by this ground: i.e on what basis did the Tribunal limit the Claimant's claim of loss and whether its decision in this regard was properly open to challenge? At the Remedy Hearing, neither side had approached this as being a case where there had been a break in the chain of causation. Both saw it, so far as relevant, as all about adequacy of mitigation. The fact that the Tribunal had not canvassed this point expressly with the parties might explain why its conclusion is hard to understand. The Claimant says that that of itself is sufficient to give rise to a good ground of challenge. The Respondent says not. Even if not expressly raised by either party, the issue of causation was plainly live. So the Tribunal was entitled to find that the causative link had been broken by the Claimant's failure to look for work opportunities after taking up her position with Artslink.

44. Even if the Respondent is correct in this regard, then there is a real difficulty in understanding the Tribunal's decision as being one of a break in causation. The starting point is the original Judgment on remedy, where at paragraph 3 the Employment Tribunal seemed to make a finding limited to the reasonableness of the Claimant's mitigation. That would be consistent with its finding on pension loss, which allowed a continuing award under that head subject to a 60% reduction for withdrawal. Similarly the Review Judgment, which was the first time the phrase "break in the chain of causation" was used, speaks of the problems for the Claimant in mitigating her loss given her age (see paragraph 10b of the Review Judgment) and confirms the award for pension loss as continuing after the Claimant took up her job with Artslink.

45. Try as one might, it is hard to see a consistent basis for those two aspects of this Judgment. Moreover this was not a case where the Claimant had taken up an entirely new career path. Her job search was apparently seen by the Employment Tribunal as reasonable until she took up the Artslink post. She then took a job, which did not, at least on the face of things, seem to have been outside the scope of what might reasonably have been expected given her age, job history and so on. There might be criticism of her failure to continue her job search thereafter. But the facts do not so obviously speak of a break in the causative chain so far as the Respondent's liability was concerned as not to require any explanation by the Tribunal for so finding. Yet there is none.

46. The language used indeed seems to address the question of reasonableness of mitigation and what might be just and equitable. That also seems to be the approach the Tribunal adopted when looking at the question of continuing pension loss. I am not satisfied, on the reasons provided by the Employment Tribunal, that this was a finding of a break in the chain of causation. If it was, then it was inadequately reasoned as the Claimant was in no position to understand how the Tribunal arrived at this conclusion given its other findings.

47. In truth, I suspect that this is really a finding that the Claimant had failed to continue to take reasonable steps to mitigate after taking up a new role, so doing what was warned against by the Court of Appeal in **Simrad v Scott** and by the editors of *McGregor on Damages*. If so, then the Claimant's appeal might have to address the argument that that was a conclusion open to the Tribunal on the facts.

48. The difficulty which arises, however, is that it would seem that the Tribunal has failed to ask the correct question. The Tribunal needed to identify: what step should have been taken; the

date on which that step would have produced an alternative income; and then to reduce the compensation by the amount of the alternative income (**Gardiner-Hill**). The Tribunal's Reasons - whether for the original Judgment or on Review - fail to demonstrate that this exercise was undertaken. I would therefore allow the Claimant's appeal on the second ground.

49. The failings in the Tribunal's Judgment identified in this exercise also have repercussions, however, for the Respondent's appeal; in particular, on the first ground of the Respondent's appeal relating to the award for continuing pension loss. Accepting, as I do, that the Tribunal was not obliged to adopt the guidelines or any particular approach *and* that it would not be an error of law to find pension loss continuing for longer than the loss of earnings in terms of basic pay, it remains the case that the Tribunal's reasoning for this conclusion is simply opaque. As the Respondent complains, on the Tribunal's Reasons (even if supplemented by the Review Judgment), it cannot understand why finding that the Claimant's taking up the new position with Artslink broke the chain of causation in terms of the Respondent's liability for basic pay but had no impact on pension loss.

50. The Respondent accepts that there could be different assessments of loss in this regard (in terms of what is just and equitable), but on the question of causation it would be difficult to see why this would not apply to both aspects of loss (per Elias LJ in **Aegon UK Corp Services Ltd v Roberts**).

51. If the Tribunal was really holding that there was no break in the chain of causation but this was all about mitigation, then I agree with the Respondent that the reasoning would still be inadequate. This is because the Tribunal did not adopt the approach laid down in **Gardiner-Hill** of assessing what income would have been earned had the Claimant taken (and continued to

take) adequate steps to mitigate. The parties are simply left not knowing what the Tribunal's finding was on alternative positions and, thus, on the availability of any alternative income, including pension benefits. Without making those findings, it is hard to see how the Employment Tribunal could reach an informed view as to which approach it should adopt on the question of pension loss. Whether assessed as an error of approach or of inadequacy of reasons, I agree with the Respondent: this is not a conclusion that can properly stand.

52. Similar points arise in respect of the Respondent's second ground of challenge to the Tribunal's finding, in respect of the Claimant's mitigation for the first year of unemployment. The Claimant says that this is really an attempt to overturn a finding of fact. Initially I had some sympathy with that view. The burden of proof was on the Respondent and it could be said that simply stating the Tribunal's conclusion that the Claimant had taken reasonable steps in the circumstances was sufficient to express the finding that the Respondent had not discharged the relevant burden. If that is what the Tribunal found, however, I have sympathy for Ms Morgan's submission that the Respondent was entitled for that much, at least, to be said.

53. I am told that quite extensive evidence was put before the Tribunal on various alternative jobs that it was said that the Claimant could and should have applied for. I am equally told that the Claimant dealt with a number of those possibilities in cross-examination. None of that is hinted in the Reasons, and I simply do not know whether the Tribunal is saying that the Respondent did not meet the burden of proof upon it or whether it its saying that, notwithstanding that the burden shifted to the Claimant, she was able to meet it. I agree with the Respondent that this challenge on adequacy of reasoning should also be upheld.

54. The final point that remains, then, is the Claimant's third ground of appeal relating to the 60% withdrawal factor on the pension award. The Claimant seeks to argue this point as a failure on the Tribunal's part to take into account relevant factors and taking into account irrelevant factors. I share the Respondent's view that this is in reality a perversity appeal. Taking into account the additional reasons provided on the Review Judgment (see paragraph 7) the Claimant would have a difficulty job persuading me that this ground was still sustainable if there was nothing else wrong with this Judgment. Ms Grennan fairly accepted that this was not her strongest point and, if her only ground, that she might be in difficulty. Given, however, the view I have formed of the other grounds of appeal (under both appeals), it seems to me that this point will go in any event. Indeed, both parties are agreed that if I upheld the other substantive grounds of appeal, the case would need to be remitted to a new Employment Tribunal for an entirely fresh consideration on all aspects of remedy. If so – and I return to this point below - then this finding will go in any event and it is probably not helpful for me to comment further.

55. For the reasons stated above, I allow both appeals. Given that the substantive grounds of appeal allow for more than one possible outcome, I am bound to remit this matter to the Employment Tribunal. I then have a choice as to whether to remit it to the same Employment Tribunal or not. Both parties have addressed me on this point, and agree that it would be preferable for the matter to go to an entirely fresh Tribunal. Having had regard to the guidance laid down in **Sinclair Roche Temperley v Heard** [2004] IRLR 763, I agree and accordingly direct that this matter is remitted to a new Tribunal for fresh consideration of all points on remedy. The original Tribunal had the opportunity to address most of the concerns raised on its review. The impression given to both parties was that the Tribunal was not prepared to revisit the points raised. Given that the hearing is likely to be relatively short and given the possible concerns held by the parties that the previous Tribunal might have reached concluded views on

certain of the issues, I agree that the more satisfactory course is that it should be heard afresh by a new Tribunal and, on remission, that Tribunal should make its own findings and reach its own conclusions on the questions raised on the issue of remedy in this case.