Appeal No. UKEAT/0250/18/VP

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 25 February 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR M SANHA — APPELLANT

FACILICOM CLEANING SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING – APPEAL & CROSS APPEAL

APPEARANCES

For the Appellant	MR JONATHAN COOK (of Counsel) Instructed By: Camden Community Law Centre 2 Prince of Wales Road Kentish Town London NW5 3LQ
For the Respondent	MR NICK SINGER (of Counsel) Instructed By: Peninsula Business Services Ltd The Peninsula Victoria Place 2 Cheetham Hill Road Manchester M4 4FB

SUMMARY

UNFAIR DISMISSAL

The Claimant was employed by the Respondent as a cleaner. He is a national of Guinea Bissau but married to an EEA national exercising Treaty rights in the UK. That being so, the Tribunal correctly found that the Respondent was not at any risk in continuing to employ him after his residence permit expired. However, following inconclusive ECS checks it dismissed him. The Tribunal found that the dismissal was unfair because the Respondent had not shown that it had dismissed for the fair substantial reason of a genuine, though mistaken, belief that he could not lawfully remain employed. The Tribunal had not heard any evidence from the person who made the decision to dismiss and concluded that it could make no finding about their thought process.

However, the Tribunal reduced the compensatory award under Section 123(6) **Employment Rights Act 1996**, relying on conduct whereby it found that the Claimant was less than forthcoming with the Respondent about matters related to his application to renew his residency permit. It also further reduced or limited that award on the basis that the Claimant had failed to mitigate his loss by not applying for night work vacancies with the Respondent. Five live grounds of appeal and one ground of cross-appeal all related to those two decisions.

Held:

(1) In relation to the Section 123(6) reduction, the Respondent conceded, rightly, that the Tribunal had erred because it wrongly assumed that there was no requirement for the conduct relied upon to be blameworthy. It is a prerequisite of a reduction of either a basic award under Section 122(2) or a compensatory award under Section 123(6), that the Tribunal find the conduct in question to have been blameworthy. **Nelson v BBC (No2)** [1979] IRLR 346 and **Steen v ASP Packaging Limited** [2014] ICR 56 considered.

(2) In view of this conceded, and found, error of law, in relation to the Section 123(6) decision, an alternative ground of perversity fell away.

(3) A cross-appeal to the effect that the Tribunal should have drawn a distinction between deliberate and inadvertent conduct was also dismissed. Blameworthy conduct can be of a variety of kinds, and its nature, and extent in the given case, will be relevant to the Tribunal's decision as to the degree of reduction that is just and equitable. But a Tribunal is not obliged to make that particular distinction, and the suggested opposition of inadvertent and deliberate conduct is unhelpful.

(4) The Tribunal's conclusion that the conduct relied upon was not blameworthy could not stand. It was not supported by any consideration of the law relating to this concept, or any factual reasoning, and fell within the context of a part of the decision which was in error of law. It was not safe.

(5) It would have been open to the Tribunal to find that the conduct in question was, in some sense, blameworthy. But it would not be open to it to find that it caused or contributed to the decision to dismiss, to any extent. This was having regard, in particular, to the fact that the Tribunal was unable to make findings about the thought process of the person who took the decision to dismiss. A decision that there be no reduction under Section 123(6) was the only legally correct decision, and would be substituted.

(6) In relation to mitigation, the Tribunal had failed to take account of the fact that the burden was on the Respondent, and that the question was not answered merely by considering whether it would have been reasonable to apply for night work. The Tribunal had to consider whether the decision not to do so was unreasonable. **Wilding v British Telecommunications plc** [2002] ICR 179 and **Cooper Contracting v Lindsey** 2015 UKEAT/0184/15 followed. The evidence provided by the Respondent was so scant that it would not even properly support a finding that it would have been reasonable to apply; and the Tribunal failed to consider whether it was in all the circumstances unreasonable not to apply. The reduction was also unfair because the Claimant

was not cross-examined about his decision not to apply for night work, and the matter was not raised in submissions. There was no sufficient evidence from which the Tribunal could properly have found that the Claimant unreasonably failed to mitigate his losses by not applying for night work. This issue would, therefore, also not be remitted, as the only possible correct decision was that there should be no reduction on that account.

(7) The matter was remitted to the same Tribunal to decide the final amount of the compensatory award, without any reduction under Section 123(6) or for failure to mitigate.

HIS HONOUR JUDGE AUERBACH

1. I will refer to the parties as they were in the Employment Tribunal (the "Tribunal") as Claimant and Respondent. The Claimant was employed by the Respondent as a cleaner from 3 August 2015 until his dismissal on 29 September 2017. A claim for holiday pay was conceded. There was a Full Merits Hearing before Employment Judge Reid, sitting at the East London Hearing Centre on 28 June 2018, of claims for wages and of unfair and wrongful dismissal.

2. The Claimant was represented by Mr Cook of counsel, the Respondent by Mr Joshi, a Peninsula representative. The Tribunal's reserved Decision was promulgated in July 2018. All the claims succeeded. In respect of unfair dismissal, the Tribunal made basic and compensatory awards. The grounds of appeal and cross appeal that have been permitted to proceed to this full Hearing relate only to aspects of the Decision concerning the remedy for unfair dismissal.

3. The Claimant is a national of Guinea-Bissau. He had a UK resident's permit which was valid from 16 August 2012 to 16 August 2017. It showed that he was permitted to work in the UK because he was married to a Portuguese national who was herself an EEA national exercising Treaty rights in the UK. The Tribunal found that in these circumstances the Claimant did not need leave to remain in the UK and the Respondent could not be penalised for employing him, so long as he remained resident with his wife in the UK whilst she exercised her Treaty rights. The Respondent's employment of him after his permit exercised was not, the Tribunal found, in breach of any statute. There is no dispute that the Tribunal was right about that.

4. Under the heading "The Claimant's application to the Home Office in July 2017" the Tribunal said this:

> **"7. The Claimant's residence permit was due to expire on 16th August 2017 and I find he made a written application to the Home Office on 24th July 2017. The Claimant kept a proof of posting for this and gave a copy to the Respondent taking into account Ms Preston's oral evidence that she was aware that the Claimant had provided a copy to the Respondent (although no copy was available from either party at the hearing). The Claimant said it was an application for a permanent residence card but he did not (and has never) produced a copy of that application, though I have found an application was sent on 24th July 2017. More noticeably he did not at the time provide the Respondent with a copy of the follow up letter received from the Home Office (C witness statement para 11) or his reply. I find therefore that the Claimant was being less than forthcoming with the Respondent prior to his dismissal because showing a copy of the actual application and a copy of the follow up letter and his response would have shown to the Respondent the basis of his application for a residence card and what any issues/delays were about, rather than simply relying on proof of postage to the Home Office on 24th July 2017 and subsequently on 22nd September 2017 (page 89-91) when he replied to the Home Office follow up letter."**

5. The Claimant was suspended without pay from 18 August 2017. On 5 September 2017, the Respondent made its first Employer Checking Service ("ECS") check. As to that the Tribunal said the following:

> **"9. … The ECS check confirmed that as yet no certificate of application had been issued showing that an application had been made by the Claimant. The ECS check advised that whilst no certificate had been issued and that therefore a statutory excuse against a civil penalty could not be relied upon, the ECS check went on to say that the individual may nonetheless have the right to reside and work in the UK and that professional advice may be needed before taking an employment decision. It also stated that it was up to the individual to supply acceptable documents to the employer. The Respondent was aware that the basis on which the Claimant was working in the UK was his wife's exercise of Treaty rights in the UK."**

6. The Tribunal went on to describe that Ms Preston, a Senior Operations Manager and the Respondent's sole witness at the Tribunal Hearing, wrote to the Claimant enclosing the copy of the ECS check. Her letter invited him to a meeting and advised that his employment may be at risk if he could not provide satisfactory proof of his right to work in the UK. The Tribunal found that Ms Preston was simply asked to carry out this meeting. She did not have any specific knowledge of the Claimant's circumstances or the legal position regarding the employment of EEA family members. She was not aware that the Respondent was not at risk of a penalty in the Claimant's case. She did not give any consideration to the fact that the ECS check did not state that the Respondent could not legally employ him.

7. It is convenient to set out the next few paragraphs of the Tribunal's Reasons in full:

"12. The meeting on 25th September 2017 was very brief (page 88). I find based on the Claimant's oral evidence that the minutes were accurate and that all he said at the meeting was that his paperwork had been sent to the Home Office and provided the 22nd September 2017 proof of postage (page 89-91). The Claimant did not produce the letter he said he had received from the Home Office or his reply which would have given the Respondent more information to go on in terms of the reason for the delay to the issue of the certificate of application. In particular I find that the Claimant did not tell the Respondent (as he does now in his witness statement para 11) that the Home Office had in fact sent back his July 2017 application and asked for further documents which was likely to mean that his July 2017 application had not in fact been accepted by the Home Office when it was made and would only be accepted as made once resubmitted with the correct documents on 22nd September 2017. All the Respondent knew was that an application submitted on 24th July 2017 was still not showing as made because the ECS showed that no certificate of application had been issued. However the Respondent was aware that the Claimant had sent an application to the Home Office and some further documents which he had now evidenced by two sets of postal receipts. It would therefore have been reasonably apparent to the Respondent that the issue was some unexplained delay in the issue of the certificate of application, given it accepted that an application had been made.

13. Having been given proof that something further had been sent to the Home Office on 22nd September 2017 the Respondent waited until 29th September 2017 to do a second ECS check (page 93) with the same response that no certificate of application had been issued and containing the same advice. The Respondent was nonetheless aware that the Claimant had sent some further documents to the Home Office on 22nd September 2017 which could not have reached the Home Office before 23rd September 2017 and it was unreasonable of the Respondent to then rely solely on an ECS check made less than a week later knowing that some further documents had been sent to the Home Office only a few days previously and which were unlikely to have been acted on by the Home Office by 29th September 2017.

14. I find based on her oral evidence that Ms Preston did not take the decision to dismiss the Claimant but that the dismissal letter (page 92) was drafted by someone in HR (either Robin Taylor or Vicky Hall according to Ms Preston) and sent to her to put on the Claimant's file. She was not responsible for approving the letter or confirming it could be sent out although she saw it before it was sent. She did not sign it herself. Based on her oral evidence I find that her input to the Claimant's dismissal had been to do the 25th September 2017 meeting and to file his dismissal letter. I therefore had no evidence before me from the decision maker as to how the decision to dismiss was reached and what was in the mind of the decision maker.

15. I find that the Respondent did not act reasonably either in not making a further enquiry of the Home Office before dismissing the Claimant or asking the Claimant further questions about what he understood the delay to be caused by or to see the 22nd September 2017 correspondence. As far as the Respondent was aware an application had been made in July 2017 and there was an inexplicable delay in the issue of the certificate of application but the Respondent knew and accepted that documents had been sent to the Home Office, some in the recent few days. Whilst the Claimant did not help himself by being more forthcoming about what the delay was caused by, I find based on the evidence before me that the Respondent relied solely on the two ECS checks and did not sit back and consider the Claimant's status as an EEA family member or consider that the problem possibly lay with a delay at the Home Office. Ms Preston did not call the Claimant as she had said she would at the meeting (page 88).The Respondent had already suspended the Claimant without pay and whilst concerned about possible penalties (given the statement in the ECS check that there might be no statutory excuse) it unreasonably jumped to dismissal based on the two ECS checks when it accepted that the Claimant had in fact made an application, such that a short delay to make further enquires would have been reasonable, taking into account the Respondent is a large employer with an HR department. There was also an absence of evidence that the Respondent had in fact made the 'repeated requests' to the Claimant referred to in the dismissal letter (page 92). The advice given in the ECS checks was not entirely helpful in that it referred to no statutory excuse but also referred to the individual nonetheless possibly having the right to live and work in the UK but I find based on the evidence before me that no consideration was given by anyone within the Respondent to the Claimant's actual circumstances taking into account I have heard no evidence from the person who took the decision to dismiss, having found it was not Ms Preston."

8. The Tribunal went on to find that the Claimant did not appeal against the dismissal; and that he received his certificate of application some three weeks later. It continued:

> **"17. By this stage the Claimant's old job had been taken by someone else and whilst the Claimant was informed by Ms Preston during a brief discussion on 26th October 2017 that he could now apply for any vacancies the Respondent had, the Claimant did not do so. I find there were around 10 vacancies based on her oral evidence. I find based on the fact that the Claimant went in person to see Ms Preston when he got the certificate of application shows that he was prepared to consider working again for the Respondent in some way, whether that was reinstatement in his old job or in another job and whether or not with a break in his continuity of employment. The lack of an appeal by the Claimant evidenced that he accepted that he had been dismissed and implicitly therefore that if he worked again for the Respondent it might be with a gap ie with his continuity of employment broken. If what the Claimant was prepared to accept was only reinstatement in his old job or re-engagement in a new job with no break in his continuity of employment I find he would have appealed his dismissal at the latest when he received the certificate of application (albeit beyond the usual 5 day time period) because he by then had the very document which might persuade the Respondent to re-instate or re-engage him with no break in his continuity of employment. Ms Preston said at the hearing that he said at the time that he would not consider the vacancies because they involved working at night Whilst it was then put to her that there were medical reasons why the Claimant could not work nights about which the Claimant had informed the Respondent in 2016, this was not the reason he gave in his witness statement for not applying for the vacancies (para 22) and no evidence was produced by him of what that medical condition was (or the condition even identified) which would mean he could not work nights. I therefore find that there was no medical reason why the Claimant could not have applied for one of the Respondent's then night vacancies. I therefore find that the Claimant's failure to apply for the Respondent's vacancies after 26th October 2017 was a failure by him to mitigate his losses. I find it likely that the Respondent would have re-employed him given the situation had now been resolved with the issue of the certificate of application and given there had been no issue about any misconduct on his part (albeit he had been less than forthcoming) or any past performance issues."**

9. In the course of a section setting out the law the Tribunal said the following:

> **"21. Reduction of the basic award for conduct can be made under s122(2) Employment Rights Act 1996. The conduct must be blameworthy (*Nelson v BBC (No 2)* 1979 IRLR 346). Reduction of the compensatory award under s123(6) of the Employment Rights Act 1996 can be made in relation to any action of the Claimant which caused or contributed to his dismissal."**

10. The Tribunal concluded that the Respondent had not shown that the dismissal was for a substantial reason falling within the **Employment Rights Act 1996** ("the **ERA**") Section 98(1)(b). It said:

> **"26. …The Respondent knew that the Claimant was an EEA family member from the outset of his employment and knew from the EDS checks that as such he was not in fact required to have a residence document and that the absence of a certificate did not mean he had no right to work in the UK. In the absence of any evidence from the person who took the decision to dismiss, the Respondent has not shown what the thought process was (if there was one) and what the Respondent believed to be the situation meaning that it had to dismiss the Claimant when it did (as opposed to continuing the suspension for a short period pending further enquiries). The Respondent has not therefore shown that it had a genuine but mistaken belief as to the Claimant's immigration status which might mean that the dismissal was fair for some other substantial reason within Bouchaala v Trusthouse Forte."**

11. On the question of remedy for unfair dismissal, the Tribunal said the following:

> **"28. Taking into account the above findings of fact I find that the Claimant failed to mitigate his losses by applying for the October 2017 vacancies at the Respondent. Although there was an absence of specific evidence as to the hourly rate he would have earned doing nights and the number of hours involved, I find that that it is unlikely that the hourly rate would be any lower than Claimant was being paid for day work. Had the Claimant re-applied to the Respondent now having the certificate of application I find that his new employment would have started within 2 weeks of providing the certificate on 26th October 2017 ie by 9th November 2017.The Respondent had no issue with the Claimant's work and appreciated that he had to a degree been caught in an awkward situation because of Home Office delays such that it was likely that they would have re-employed him in such a vacancy and likely, given it is a large employer, that it would have been able to give him extra hours that meant he could earn a similar amount as he had done prior to his suspension. I find given the Claimant's prior willingness to work beyond 40 hours that he would have continued to do so or that any reduction in his hours was likely to have been offset by a higher rate of pay for night work. There was no medical reason on the evidence before me that the Claimant could not have been expected to work nights. I therefore limit his loss of earnings to 6 weeks.**
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> **29. Taking into account the above findings of fact, the Claimant's actions in being less than forthcoming with the Respondent contributed to his dismissal. I find that it is just and equitable to reduce his compensatory award by 25%. I do not make a reduction to the basic award because the test is slightly different and requires blameworthy conduct."**

12. Grounds 1 and 2 of the appeal concern the Tribunal's decision to reduce the compensatory award under Section 123(6) of the **ERA** by 25%. The one live ground of the cross appeal also relates to that decision. Grounds 3, 4 and 5 of the appeal relate to the decision to limit the period in respect of which loss of earnings was awarded, on the basis that the Claimant had failed to mitigate his losses by not applying for night work with the Respondent. The six live grounds of the appeal and cross appeal can therefore conveniently be considered in two groups of three.

13. Before considering the first two grounds of appeal, together with the cross appeal, it is convenient to set out both Section 122(2) of the **ERA**, concerning a possible basis for reducing a basic award, and Section 123(6), concerning a possible basis for reducing a compensatory award:

> **"122. (2)Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.**
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> **123. (6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

14. Ground 1 of the appeal argues that it is apparent from paragraphs 21 and 29 of the Tribunal's Reasons that it considered that a difference between Section 122(2) and Section 123(6) was that a reduction to a basic award required a finding that the conduct of the complainant was blameworthy, but a reduction to a compensatory award did not require any such finding. That is said to be an error of law on the basis that both those provisions require such a finding. In its Answer, the Respondent conceded that the Tribunal had erred in this respect, as the correct position is indeed that there cannot be a reduction under either of these provisions in the absence of a finding of blameworthy conduct.

15. Ground 2 of the appeal contends that, in the absence of a finding of blameworthy conduct in this case, the Tribunal's decision to reduce the compensatory award by 25% was perverse. The findings that the Claimant had been less than forthcoming, and did not help himself by not being more forthcoming about his dealings with the Home Office at the meeting with Ms Preston, were insufficient to support that reduction. The Tribunal had also not adequately set out its reasoning in support of the conclusion that the Claimant's actions had caused or contributed to the dismissal.

16. The Answer maintains that, in view of the error identified by ground 1, ground 2 does not need to be considered, but also disputes that a reduction of 25% would be perverse.

17. The live ground raised by the cross appeal is that the Tribunal failed to consider whether the Claimant's conduct in being less than forthcoming was either deliberate or inadvertent, and hence, if it was the former, whether it was blameworthy. A Reply to the cross appeal disputes that there was any such error, in particular on the basis that there was no necessity in law for the Tribunal specifically to distinguish between deliberate and inadvertent conduct. Potentially, conduct of either kind could in law be adjudged blameworthy.

18. These respective arguments were developed in the skeleton arguments for this Hearing and orally before me this morning by Mr Cook of counsel, appearing once again for the Claimant, and Mr Singer of counsel, now appearing for the Respondent. Mr Cook also argued in his skeleton that the cross appeal should not be considered at all, on the basis that the Respondent was thereby seeking to run on appeal, an argument that had not been run before the ET.

19. While the Respondent has conceded that the appeal should be allowed on ground 1, and I consider that it was right so to concede, I will start by addressing why that is. The legislation concerning unfair dismissal, originally a creation of the **Industrial Relations Act 1971**, has been through a number of amendments and incarnations over the decades. In **Nelson v BBC (No 2)** [1979] IRLR 346 the Court of Appeal was concerned with the provisions relating to remedy for unfair dismissal found in the **Trade Union and Labour Relations Act 1974**. It cited paragraph 19(3) of Schedule 1 to that Act, providing as follows:

> **"Where the Tribunal finds that the matters to which the complaint relates were to any extent caused or contributed to by any action of the aggrieved party in connection with those matters, the Tribunal shall reduce its assessment to such extent as, having regard to that finding, the Tribunal considers just and equitable."**

20. After considering arguments about the interpretation of that provision Brandon LJ said the following:

> **"43. I agree with the conclusion there reached that, on a proper interpretation of para. 19 (3), an award of compensation to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied on for this purpose was culpable or blameworthy. This conclusion can be arrived at in various ways. First it can be said that the epithet 'culpable' or 'blameworthy' should be implied before the word 'action'. Or, secondly, it can be said, that the expression 'caused or contributed' impliedly incorporates the concepts of culpability or blameworthiness. Or, thirdly, it can be said that, in any case, it could never be just or equitable to reduce a successful complainants compensation unless the conduct on his part relied on as contributory was culpable or blameworthy. For my part, I prefer the third way of arriving at the conclusion to either the first or the second, and would approach the application of para .19(3) on the basis.**
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> **44. it is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative**

> **epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."**

21. Stephenson and Gough LJJ gave concurring Judgments. In **Steen v ASP Packaging Ltd** [2014] ICR 56 the Employment Appeal Tribunal ("EAT") considered the wording of the current legislation – Sections 122(2) and 123(6) of the **ERA** – and said this:

> **"10. The two sections are subtly different. The latter calls for a finding of causation. Did the action which is mentioned in section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be addressed in dealing with any reduction in respect of the basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent. Both sections involve a consideration of what it is just and equitable to do.**
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> **11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault, (2) having identified that it must ask whether that conduct is blameworthy.**
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> **12. It should be noted in answering this second question that in unfair dismissal cases the focus of a Tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is upon what the employee did. It is not upon the employer's assessment of how wrongful that act was; the answer depends what the employee actually did or failed to do, which is a matter of fact for the Employment Tribunal to establish and which, once established, it is for the Employment Tribunal to evaluate. The Tribunal is not constrained in the least when doing so by the employer's view of wrongfulness of the conduct. It is the Tribunal's view alone which matters.**
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> **13. (3) The Tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent there can be no reduction on the footing of section 123(6), no matter how blameworthy in other respects the Tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent then the Tribunal moves to the next question, (4).**
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> **14. This, (4) is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the Tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a Tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.**
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> **15. In any case therefore, a Tribunal needs to make the findings in answer to questions 1, 2, 3 and 4 which we have set out above. Here this Tribunal did not do so, except in the words we have quoted from paragraph 26. It did not set out what precisely the Claimant's conduct was since it had made no finding about what was said in the conversations on 15 April and made no finding as to precisely what was said between the Managing Director and the Claimant on 5 April. It had simply not made the relevant findings in respect of his conduct for it to be assumed that what it had already set out in the earlier part of its decision led inevitably to a finding that there was contributory conduct."**

22. I draw the following points from these authorities, so far as relevant to the issues in the present appeal. First, there can be no reduction to either a basic or a compensatory award without

a finding from the Tribunal that there has been conduct on the part of the complainant which it regards as culpable or blameworthy. These words are synonyms, not two different alternatives: "culpable" just means "deserving of blame".

23. Secondly, the reason why this is a minimum requirement is, as explained in the reasoning of Brandon LJ in **Nelson**, because, if the Tribunal does not consider the conduct or, to use the word used in Section 123(6), "the action" (which is the same thing), of the complainant to be culpable or blameworthy, then it could not be just or equitable to reduce their compensation on account of it. That is why, I think, that requirement is necessary for there to be a reduction of *either* the basic *or* the compensatory award, as it is a common feature of these provisions that the Tribunal must, in either case, consider it to be just and equitable to make some reduction.

24. Thirdly, Brandon's LJ speech gives broad examples of the types of conduct that might be regarded as culpable or blameworthy, but all must depend on the circumstances of the case. Brandon's LJ guidance has stood the test of time and I do not think it would be either helpful or necessary now to start to gloss or expand upon on it. The overriding requirement is that the Tribunal must properly identify some feature of the conduct that makes it culpable or blameworthy, so as to support a conclusion that at least some reduction to the award in question would be just and equitable.

25. As Brandon LJ contemplates, that may potentially apply to conduct that is merely foolish, and at least to some conduct that is unreasonable. I think it is clear that it may include conduct which is negligent. The nature and degree of culpability in the given case will be among the factors relevant to the Tribunal's consideration of the degree of reduction which it is just and equitable to make.

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26. In the present case, it is indeed, I think, clear from paragraphs 21 and 29 of its Reasons, that the Tribunal proceeded on the basis that a finding of blameworthiness is a prerequisite only of a Section 122(2) reduction to a basic award, and not of a Section 123(6) reduction to a compensatory award. In light the foregoing authorities that was indeed an error of law and the Respondent was right to concede ground 1. I therefore allow the appeal on that ground.

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27. That being so, it seems to me that ground 2 falls away. Although, and I will return to this, the parties disagree about whether it could ever be possible for the Tribunal, based on the evidence it had in this case, properly to make a reduction of the compensatory award under Section 123(6), whether of 25% or indeed any amount, the actual reduction which it made in the Decision under appeal plainly cannot stand, as it was based on a finding that was reached in error of law. There is therefore no need to consider the alternative perversity argument in relation to what the Tribunal actually did in this Decision under appeal. I therefore dismiss ground 2.

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28. What is the consequence of allowing the appeal on ground 1, in terms of what should happen next; and how, if at all, does the cross appeal affect the picture? Mr Singer's position was that I should remit the matter to the Tribunal to consider afresh, applying the law correctly: whether there was blameworthy conduct within Section 123(6); if so, whether it caused or contributed to the dismissal; and, if so, what reduction to make to the compensatory award on account of it. The point argued by the cross appeal was effectively advanced in support of that position.

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29. Mr Cook, however, submitted that the Tribunal had made a finding at paragraph 29 that the Claimant's conduct, in being "less than forthcoming", was not blameworthy. That was as such, he said, a proper finding which it was entitled to make. The cross appeal should also not be

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entertained, as it raised a new point on appeal for the first time. But, in any event, submitted Mr Cook, the cross appeal was not meritorious. The Tribunal was not required, when deciding whether the conduct was blameworthy, to apply a distinction between conduct which is inadvertent and conduct which is deliberate. Conduct of either kind could potentially be blameworthy. He suggested that **Kwik Save Stores Ltd v Clerkin** [1996] EAT/295/96 and **Department for Work & Pensions v Coulson** UKEAT/0572/12 illustrate that point.

30. Further submitted Mr Cook, the Tribunal had made no finding that the Claimant's conduct in being less than forthcoming had caused or contributed to the dismissal. Further, there was no basis on which it could properly have so found. That was bearing in mind that it had been unable to make a finding about the thought process of the person who decided to dismiss, and its findings that the Respondent had merely acted on the results of the two ECS checks, and had done so despite knowing that the Claimant was married to an EEA national exercising Treaty rights.

31. The Tribunal, he said, therefore could not have properly concluded that the Claimant's conduct had caused or contributed to the dismissal to any extent. Accordingly, concluded Mr Cook's argument, applying the guidance in **Jafri v Lincoln College** [2014] ICR 920 there was no need to remit. Instead, I could and should substitute a Decision that there should be no reduction under Section 123(6), as this was the only possible legally correct outcome.

32. Mr Singer's position was that the Tribunal had made findings that could potentially support a conclusion that there had been culpable or blameworthy conduct on the Claimant's part, specifically: that he had been less than forthcoming, because he failed to share with the Respondent correspondence that would have given it more information about the delay in the issue of his certificate of application; and that he had failed to tell it that his July application had

been sent back with a request that he submit further documents. Further, the Tribunal had not properly explained or reached a reasoned conclusion that such conduct was *not* blameworthy. Further, drawing on the point advanced by the cross appeal, the Tribunal should have considered whether the conduct was inadvertent or deliberate, there was a potential basis for it to find that it was deliberate, and that would in turn have a bearing on the application of Section 123(6).

33. As to the requirement for a finding that the conduct have caused or contributed to the dismissal, at least to some extent, Mr Singer said that the finding that the Respondent relied solely on the responses to the two ECS checks did not resolve the matter. That finding had to be placed in context, including what information the Respondent did or did not have from the Claimant in relation to that process. The matter needed to be remitted to enable the Tribunal to consider further whether the lack of information from the Claimant, for example about possible reasons for a delay in the process, could have influenced the decision to dismiss which followed the meeting with Ms Preston.

34. My conclusions on this aspect are as follows. First, it is right, as such, that it is implicit, if not explicit, in what the Tribunal said in paragraphs 21 and 29, that it did not consider the Claimant's conduct in, as it put it, being less than forthcoming, to be blameworthy. However, I do not agree with Mr Cook that such conclusion was properly reached and should stand. In particular, there is no reasoning in the Decision that might explain how the Tribunal came to that view. The Tribunal did not cite the **Nelson** case or any authority on the scope and significance of the concept of blameworthiness, or otherwise direct itself as to how to approach that concept, even for the purposes of Section 122(2), of which it recognised that it was an ingredient. Nor did it explain why, *factually*, it considered the conduct in question *not* to be blameworthy. Further,

A the conclusion that it was not blameworthy emerges from a context in which the Tribunal had made a fundamental error about the law on this point.

B 35. Given all of that, the Tribunal's conclusion that the conduct in question was not blameworthy is not sufficiently reasoned, and is not one that I can be confident reflected a correct application of the law on that question. It is unsafe and it cannot stand.

C 36. The question must therefore be remitted unless, applying the law correctly to the evidence before the Tribunal and the facts found by it, only one outcome is possible. That in turn breaks down into two aspects. First, would it be open to the Tribunal, applying the law correctly, to D conclude that the conduct in question was culpable or blameworthy? As to that, as I have explained, its task would be decide whether it was properly so described, applying the guidance in **Nelson**. If it could, and were to, properly find the conduct to be in some sense culpable or E blameworthy, then it would need to have regard to the nature and degree of culpability when deciding what reduction to the award would be just and equitable.

F 37. I repeat that I do not think any further refinement of the **Nelson** guidance from me would be helpful or necessary. In particular, I do not think it helpful or necessary to introduce a distinction between conduct which is inadvertent and conduct which is deliberate. Indeed, "inadvertence" is, I think, an ambiguous term. If it is intended to describe conduct that occurs in G ignorance of some fact or matter – and the authorities cited to me by Mr Cook are I think both examples of that – then the suggested contrast with conduct which is deliberate is not, I think, quite right. Conduct can, I think, be both inadvertent, in *that* sense, *and* deliberate. It seems to me that the point which Mr Singer sought to make, and which is highlighted by the cross appeal, H

is, rather, concerned with whether the Claimant's failure to be forthcoming was the result of a deliberate decision on his part to hold information back or not.

38. I conclude that, leaving aside whether I should entertain it at all, the cross appeal does not, I think, really add anything to the outcome of ground 1 of the appeal. The Tribunal was not obliged to draw a specific distinction between deliberate and inadvertent conduct; but it *was* obliged to come to a reasoned decision on whether the conduct in question was culpable or blameworthy in any sense, applying the guidance in **Nelson**, which could potentially include both conduct which was deliberate and conduct which was not.

39. Having regard to the breadth of the concept, and the guidance in **Nelson**, I do not think I can say that the conduct in question in this case could not properly be regarded as in some sense, and to some degree, culpable or blameworthy. The evidence, and the Tribunal's findings therefore put this issue in play. The Tribunal was therefore obliged to consider it, even if it had not been pleaded. See **Swallow Securities Services Ltd v Millicent**, UKEAT/0297/08, an authority which I drew to the attention of both counsel, at paragraph 27. However, I should add that basic principles of fairness would still require the Tribunal to flag up the issue, to allow a fair opportunity for submissions to be made on it, and for evidence to be given and tested in cross-examination on any factual matter which might lead to a finding adverse to the Claimant on this issue. That could potentially include not just the fact of the conduct concerned, but the state of the mind of the Claimant in relation to it.

40. The second issue relevant to remission, however, is whether the conduct, even if it might potentially have been viewed as in some way culpable or blameworthy, caused or contributed to the dismissal to any extent. Mr Singer accepted that this would fall to be judged on the basis

solely of the evidence that was in fact presented to, and facts properly found by, the Tribunal in this case. However, as I have noted, he argued that there was room in this case for the Tribunal to give further consideration to whether the Claimant being less than forthcoming did, or might, have influenced the decision to dismiss based on the two ECS results. He relied in particular on the following passage in paragraph 15 of the Tribunal's Decision:

> **"Whilst the Claimant did not help himself by being more forthcoming about what the delay was caused by, I find based on the evidence before me that the Respondent relied solely on the two ECS checks and did not sit back and consider the Claimant's status as an EEA family member or consider that the problem possibly lay with a delay at the Home Office."**

41. I spent some time exploring this point with both counsel in oral submissions. Ultimately, I have come to the conclusion that, based on its existing findings and the evidence that it had, the Tribunal could *not* properly make a finding that this conduct caused or contributed to the dismissal to any extent. I say that for two reasons.

42. Firstly, I read paragraph 15 differently to Mr Singer. It seems to me that the natural reading is that the Tribunal is making the point that, notwithstanding that it might be said that the Claimant did not help himself by being more forthcoming, the Tribunal in fact relied solely on other matters. Secondly, there is a fundamental problem for the Respondent, which is that the Tribunal heard no evidence from the decision maker, and felt able to make no findings about their specific thought processes. Nor did the Tribunal have any evidence from Ms Preston about what happened between the conclusion of her meeting with the Claimant and the production of the dismissal letter which was provided to her to give to him. There was, for example, no evidence about whether she reported back on the meeting to anyone, or, if so, the content of that report.

43. In order for the Tribunal to reduce a compensatory award under this provision, it must make a positive finding, properly rooted in the evidence before it, not only that there was culpable or blameworthy conduct, but that it caused or contributed to some extent to the decision to dismiss.

Since the conduct in this case was a failure on the part of the Claimant to do something, in order to make such a finding, the Tribunal would have to consider whether, if he had been more forthcoming, this might have affected the decision to dismiss, and to make a positive finding about that. However, without any evidence from the decision-maker about their own thought process in making the decision to dismiss, or any other basis to infer what their specific thought process was, I cannot see any basis on which the Tribunal could properly make a positive finding to that effect, so as to support a reduction in compensation on that account.

44. Pausing here, I therefore conclude that the appeal on ground 1 is upheld. Ground 2 and the cross appeal are dismissed. I will not remit this issue to the Tribunal but will substitute, for the Tribunal's decision to reduce the compensatory award by 25% under Section 123(6), a decision that there should be no reduction to the compensatory award under that provision.

45. I turn to the three grounds of appeal which all relate to the Tribunal's decision separately to reduce or limit the compensatory award on the basis of a failure by the Claimant to mitigate his loss. Ground 3 is to the effect that the Tribunal erred, because it took the wrong approach to the burden of proof on this issue. It contends that the Respondent bore the burden of showing that the Claimant had unreasonably failed to mitigate his loss by not applying for night work; but the Tribunal instead wrongly placed the burden on him to show that he was not medically fit to do night work and that it was not reasonable for him to apply for it.

46. Ground 4 argues that the Tribunal erred by making findings of fact about matters that were not supported by evidence, not put to the Claimant in cross-examination and/or not the subject of submissions. Specifically, four features of the findings are referred to. They are: that it was likely that, had he applied, the Respondent would have re-employed the Claimant in a night-

working role; that he would have started in such a position by or around 9 November 2017; that the Respondent would likely have been able to offer him a similar number of hours in a night job as he had previously worked; and/or that any reduction in hours would have been offset by a higher hourly rate for night work. Ground 5 argues, further or alternatively, that such findings were perverse.

47. The Answer argues that the Tribunal properly found that the Claimant was told in October 2017 that he could apply for any vacancies that he wanted; that he did not do so; that there were around 10 night vacancies; that he was prepared to consider working for the Respondent in some capacity; and that there was no medical reason why he could not do night work. The burden of proof might be significant in a marginal case where the position was uncertain, but it was not significant where the Tribunal was able to make firm findings of fact and draw proper conclusions from them. **Re B (Children)** [2009] 1 AC 11 was cited in support.

48. In the present case, said the Answer, the Tribunal had drawn a proper conclusion on the mitigation issue from the primary findings of fact that it made. It had also drawn proper inferences from the evidence, to support further findings on the balance of probabilities that, had he applied, the Claimant would have been given a night job, and as to when he would have started, the likely hours and what he would likely have earned. These findings were therefore not perverse. The mitigation issue did not have to be specifically pleaded. It was generally in play and the essential facts were not in dispute.

49. These rival arguments were developed in the skeletons and oral arguments presented to me today. Mr Cook cited **Wilding v British Telecommunications Plc** [2002] ICR 1079 and in particular the speech of Sedley LJ at paragraph 55:

> **"Lord Justice Simon Brown's formulation in *Emblem v Ingram Cactus Ltd* (CA, unreported, 5 November 1997), although it cites no authority and is addressed to the facts of that case, a restatement of the principle set out by Lord Macmillan in *Banco de Portugal v Waterlow and Sons Ltd* [1932] AC 452, 506:**
>
> **'The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."**
>
> **In other words, it is not enough for the wrongdoer to show that it would have been reasonable to take the steps 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."**

50. In addition, he also cited the guidance given by the EAT, Langstaff J, in **Cooper Contracting Ltd v Lindsey** UKEAT/0184/15 at paragraph 16:

> **"16. It is plain, given those authorities, that it should be understood as a very broad-brush summary by way of introduction to the principles that Wood J then went on to elaborate. It does not and cannot affect the statement of principle in the higher authority to which I have referred and to which the subsequent Appeal Tribunal authorities of *Hunt* and *Mutton* give voice. Therefore:**
>
> **(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."**

51. Mr Cook cited other authorities, which he said also illustrated the importance attached to the Tribunal demonstrably keeping in mind where the burden lies and the difference between the proposition that it would have been reasonable to take a step and the Respondent showing that it was unreasonable for the Claimant not to have taken that step: **Wright v Silverline Care Caledonian Ltd** UKEATS/0008/16 and **Singh v Glass Express Midlands** UKEAT/0071/18.

52. In this case, said Mr Cook, the Tribunal did not find that the Respondent had shown that it was unreasonable for the Claimant not to apply for a night working job with it. The Tribunal did not consider that question. It reached its conclusion on the mitigation issue simply on the basis that there was no medical reason why the Claimant could not work nights and that it would have been reasonable for him to apply for such a job.

53. Further, submitted Mr Cook, the evidence put before the Tribunal was sparse, being limited to the propositions that Ms Preston informed the Claimant that there were night vacancies but that he was not interested, and that there were 10 of them. The Respondent did not adduce any more evidence on the subject of these vacancies than that. Nor, he said, was it put to the Claimant in cross-examination that he had acted unreasonably by not applying for any of the night jobs. Nor was there any closing submission from the Respondent's representative, specifically that he had failed to mitigate by not applying for night jobs.

54. The Tribunal's conclusion was also perverse, he said, given the sparsity of the evidence and the obvious and fundamental differences between night work and day work. Nor was there any evidence sufficient to support the findings impugned by ground 5. Further, the Claimant gave evidence about his job search, and the job that he had in fact started some four months after being dismissed, which the Tribunal failed to take into account in this context.

55. Mr Singer's submissions followed the lines of the Answer. He emphasised that the issue was in play. He referred to paragraph 16.6 of the original grounds of resistance, which asserted that if the Claimant wanted to reapply for any role, he was free to do so, but failed to do so. There was nothing wrong in the Tribunal examining the Claimant's case that he had a medical reason that he could not work nights and whether there was any evidence to support it. The other conclusions that it reached were all rooted in the evidence and/or based on inferences properly drawn from it.

56. The Tribunal was also, he submitted, entitled to take what he called a rough and ready approach to what might have probably been the terms of any night work, had the Claimant taken it up, in respect of when he probably would have started, what hours he probably would have been able to work, and what he probably would have been paid. These were just the sort of findings that would have been made had the Claimant given evidence that he had got a job with a different employer. Not every aspect of the reasoning had to be set out. The Judge was entitled to rely on her industrial experience and to make findings doing the best she could on the balance of probabilities. A failure to mitigate did not have to be fully pleaded and the Claimant did not have to be cross-examined on the basic facts when these were not in dispute.

57. My conclusions on this aspect of the appeal are as follows. First, I am not entirely sure that it is fair to say that the grounds of resistance put this issue into play as an argument about mitigation. However, I accept that it may not be crucial or essential in every case for a mitigation point to be pleaded in the original grounds of resistance. However, what is important is that, if a Respondent wishes to run a particular mitigation point, the onus is on it to raise that point. In addition, it must be fairly raised, one way or another, at a time and in a manner such that the

A Claimant has a fair opportunity to address and respond to it, both in evidence and in submissions, before the Tribunal reaches a decision about it.

B 58. The starting point here is that the authorities, in particular **Wilding**, and **Cooper**, are clear and consistent that the onus is on a respondent to advance and make good a case that there has, for some particular reason, been an unreasonable failure to mitigate loss on the part of a claimant. Secondly, the authorities are clear that it is not enough for a respondent to show, or for the C Tribunal to be satisfied, that it would have been reasonable to take some particular step. The Tribunal must be satisfied that it was in all the circumstances unreasonable not to take it.

D 59. That said, as point 7 of the guidance in **Cooper** recognises, while the proposition that it would be reasonable to take a step is not the same as the proposition that it would be unreasonable not to take it, the former, if found, may be a factor to consider when deciding the latter. Certainly, E if the Tribunal is not, at least, satisfied that it would be reasonable to apply for, or take up, a particular job, it could not possibly conclude that it was unreasonable not to do so. If it is satisfied that that would be a reasonable step, that is something that it can potentially, and with care, take into account, when deciding whether it would be unreasonable not to; but it would be an error to F end the enquiry without coming to a conclusion on that ultimate question.

60. Further, the burden of proof lying with a respondent means that the onus is still on it, at least G in the first place, in a case of this sort, to adduce the evidence to support the initial conclusion that there was, for example, a job or jobs that it would have been reasonable for a claimant to apply for or, if offered, to accept. Even if that can be established, I repeat, the Tribunal also, and H crucially, needs to be satisfied that it was unreasonable for them not to do so. Even if in some cases the latter is something that it may be more difficult for a respondent to show by adducing

positive evidence itself, that proposition should still at least be put to the claimant in cross-examination, so that they can respond to it. Further, there must be a fair opportunity, in any case where the Tribunal is contemplating making such a reduction to compensation, for submissions to be made about whether it should do so or not, on the particular basis advanced.

61. In this case, I do accept that the Tribunal was entitled to take a view that the evidence did not support the conclusion that there was a medical reason why the Claimant could not work nights. That appears to have been asserted in cross-examination of Ms Preston, but not supported by any evidence, as such. However, regardless of that, and even if the medical issue had never been raised on the Claimant's behalf, the Tribunal did not in my judgement have a proper or fair basis to conclude that he had failed to mitigate his loss, in such a way that his compensatory award should be limited on that account. My reasons are as follows.

62. Firstly, in my judgement the evidence presented by the Respondent fell far short of establishing facts from which the Tribunal could conclude even that it would have been reasonable for the Claimant to apply for the night jobs. The evidence went no further than that the Claimant had not entirely ruled out working for the Respondent again, and that he was told he could not have his old job back, but that there were ten night vacancies and he could apply for them. There was no other evidence about these night jobs, whether as to what they were, where they were, the hours or the pay. There was no evidence about whether, if the Claimant applied, he would automatically be given one of them, or by what process whether to give him such a job would be decided.

63. I do not agree that these were questions about which the Tribunal properly drew inferences on the balance of probabilities and applying its industrial judgement. They were all questions

about which the Respondent, if it wished to advance this mitigation argument, could and should have adduced evidence. The Tribunal could not plug that gap and should not have attempted to do. The evidence was that Ms Preston mentioned the night jobs in response to the Claimant saying, in so many words, that he wanted his old job back. There was also a later letter to his MP saying that he was welcome to apply, and that any application would be considered. It was a not a proper inference from this evidence that, had he applied, he would have got, or automatically been given, such a job. What the Tribunal said about the likely hours and pay was also essentially speculative and not properly rooted in any evidence that was before the Tribunal.

64. Secondly, the Tribunal failed to address the crucial question of whether the Claimant acted unreasonably by not applying for a night job. It said nothing to show that it had taken into account his evidence about his efforts to find work, and the job that he had in fact taken up and when, or what it made of that evidence. It did not consider whether there might have been other reasons why he might reasonably have been unwilling to switch from day work to night work, and it did not consider whether that had been fairly explored. Whilst ultimately the mitigation issue is one for the objective decision of the Tribunal, evidence about the views and wishes of the complainant in relation to such matters is potentially relevant: see the **Cooper** guidance at paragraph 16(6).

65. Thirdly, the Claimant was not specifically cross-examined about why he did not apply for the night jobs or to the effect that he had acted unreasonably by not doing so. Nor did the Respondent make a specific submission that he had unreasonably failed to mitigate by not applying for night jobs. Mr Cook, who had appeared for him at the Tribunal Hearing, confirmed this. The notes in my bundle did not show otherwise and Mr Singer, having checked his records of what had been stated by the representative who appeared for the Respondent at the Hearing, accepted that he could not gainsay this. It was not, I conclude, fair for the Tribunal to limit the

A Claimant's compensation on this account, when he had not been cross-examined specifically on the subject of night work and it had not been raised in closing submissions.

B 66. Mr Cook fairly accepted that the Tribunal did not necessarily need to give itself an explicit direction on the burden of proof, or cite from **Wilding** or other authorities, so long as it could be seen that it had taken the right approach. However, for all these reasons, I conclude that it did not do so because, despite there being very limited evidence from the Respondent about the night C jobs, it took the approach that it was for the Claimant to come up with a good reason why it was not reasonable for him to apply for them. Ground 3 therefore succeeds.

D 67. In light of what I have said, all the limbs of ground 4, relating to findings being made that were not sufficiently based on the evidence, and the unfairness of matters relating to the night work mitigation issue not being put in cross-examination or raised in submissions, also succeed. Ground 5 also succeeds, because, on the evidence that it had, the Tribunal could not properly find E that, by not applying for night jobs, the Claimant unreasonably failed to mitigate his loss.

68. I therefore uphold grounds 3, 4 and 5 and I quash the Tribunal's Decision to limit or reduce F the Claimant's compensatory award by reference to the proposition that he had failed to mitigate his loss. Further, given that ground 5 has succeeded, it follows that I also conclude that, on the evidence presented to it, the Tribunal could not properly reduce or limit the Claimant's G compensatory award for failure to mitigate by reference to not applying for night jobs. Therefore, I will not be remitting that matter to the Tribunal for further consideration.

H 69. Both counsel agreed, however, that, unless the parties are able to resolve the issue between them, the matter will need to be remitted to the Tribunal in order to revisit its calculation of the

compensatory award, eliminating the reductions for contributory conduct and failure to mitigate; and giving further consideration now to the Claimant's loss of earnings claim without, in particular, the limitation in point of time that the Tribunal applied because of its decision on mitigation. I will now hear submissions from counsel on whether I should direct that, in order to determine that outstanding matter, remission be to the same Tribunal, if available, or not.

70. I have now heard further submissions on whether remission for the limited purpose that I have described should be to the same or a different Tribunal. Mr Singer submits that it should be to the same Tribunal. Mr Cook at any rate does not oppose that and I do direct that remission should be to the same Tribunal.

71. Notwithstanding the errors of law that I have detected in other parts of its Decision, this is an aspect of the matter that the Tribunal has not considered before. I think it can be trusted to deal with it professionally. It is desirable that it be dealt with by the same Judge if possible, who, notwithstanding the passage of time, will, I am sure, still have some recollection of the material. What needs to be decided is fairly limited in scope and it is more much proportionate for it to be considered by the same Judge if still available. Accordingly, I so direct.

72. I cannot leave this appeal without encouraging the parties, entirely neutrally, but given that they both have representation as well, to give some consideration now to whether they might not be able to resolve this point without the need for a further determination by the Tribunal.