Neutral Citation Number: [2024] EAT 182

Case No: EA-2023-000870-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 October2024

Before:

JUDGE STOUT

- -

Between:

CJ **Appellant**

- and -

Respondent

PC

- -
- -

MR RAOUL DOWNEY (instructed by **Consilia Legal**) for the **Appellant**
MR PAUL SMITH for the **Respondent**

Hearing date: 22 October 2024

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JUDGMENT
(Via Microsoft Teams)

SUMMARY

DISABILITY DISCRIMINATION

The claimant was successful before the Employment Tribunal in claims for discrimination arising from disability and victimisation. The Employment Tribunal awarded compensation on the basis that the losses flowing from the discrimination and victimisation included all losses flowing from the termination of her employment by reason of ill-health retirement. The claimant, represented by solicitor and counsel, in her schedule of loss set off the sums she had received and would receive by way of ill-health early retirement pension against what she would have earned had she continued in employment. The Tribunal further set off against her loss of earnings sums that she had earned in alternative employment, by way of mitigation of loss, and further found that she would in future fully mitigate her remaining losses by way of such alternative employment.

The claimant appealed on the ground that the Tribunal should have applied the principle in *Parry v Cleaver* [1970] AC 1 and awarded compensation for loss ignoring the sums she had received by way of ill health retirement pension on the basis that these were insurance-type payments. Alternatively, the claimant maintained that the Tribunal had wrongly set off the sums she had received from alternative employment by way of mitigation of loss. The claimant argued that either *Parry v Cleaver* applied and there was a duty to mitigate loss, or *Parry v Cleaver* did not apply and there was not a duty to mitigate loss.

Held, dismissing the appeal:- The claimant's submissions about the duty to mitigate loss were misconceived. Whether *Parry v Cleaver* applied or not, there was a duty to mitigate loss by taking reasonable steps in mitigation so that the Tribunal was plainly right to set off sums earned from alternative employment. The only two exceptions to that were: (i) payments made gratuitously to the claimant by others as a mark of sympathy ('the benevolence exception'); and (ii) insurance monies ('the insurance exception'), the latter being dealt with in the *Parry v. Cleaver* case. The Employment Tribunal had erred in law by not applying the *Parry v Cleaver* principle and thus setting off the sums the claimant received by way of ill-health retirement pension against her loss of earnings consequent on the termination of her employment. However, that was the basis on which the claimant had advanced her claim below and it was not in the interests of justice to allow this new point to be run on appeal.

JUDGE STOUT:

1. This is the judgment in Case No. EA-2023-000870-RN, CJ v. PC. A restricted reporting order is in place pursuant to an earlier order. I will refer to the parties as they were below.

Background

2. The claimant, who is now the appellant, was employed by the respondent, a local authority, as an HR adviser and this is her appeal against the remedy judgment of the Employment Tribunal in her case.

3. At all material times since 28th August 2018 the claimant has been a disabled person as defined by the Equality Act 2010 by virtue of epilepsy, a benign brain tumour, anxiety and panic attacks and a functional neurological disorder which, among other things, causes a speech impediment. She brought claims against the respondent under the Equality Act 2010 for discrimination arising from disability, failure to make reasonable adjustments, harassment and victimisation in respect of various matters leading up to the termination of her employment on 20th November 2020.

4. The tribunal upheld two of her claims following a hearing that occurred on various dates in March, April and May 2022. The tribunal held that the claimant had been discriminated against when her pay was reduced to half-pay between 16th July 2019 and 17th September 2019 and between 20th October 2019 and 16th November 2019. The tribunal also found that she had been victimised when invited to a trust and confidence meeting on 3rd January 2020.

5. The tribunal reconvened to consider remedy in June 2023. The core facts and the findings of the tribunal in relation to remedy are as follows. On the advice of a relevant medical practitioner, the claimant was accepted by the respondent for ill health retirement at Tier 1 of the local government pension scheme. From the schedule of loss prepared by her representatives, I can see that at the time her employment terminated she was aged 42 and had built up service in both the old style final salary Local Government Pension Scheme and the new career average earnings version. Under the LGPS, an ill health retirement pension is a pension paid early before normal retirement age without actuarial reductions. The tribunal found as a fact (not challenged on this appeal) that the victimisation it had found had caused the claimant to be absent on sick leave prior to the termination of her employment and the respondent was accordingly liable for her lost earnings during that period for which it awarded a total of £20,793.81.

6. The tribunal also found as a fact that the victimisation had caused the termination of the claimant's employment (see paragraph 48) and that, without the victimisation, there was "no chance that her employment would have terminated". It followed that all losses flowing from the termination of her employment were, in principle, recoverable by way of compensation. With the parties' agreement at the hearing, and in accordance with the approach taken in the claimant's schedule of loss prepared by her legal representatives (solicitor and counsel), the tribunal approached compensation on the basis that the ill health retirement pension fell to be set off against the loss of earnings the claimant suffered in consequence of the termination of her employment, in the same way as other sums earned in mitigation of loss are normally set off.

7. With the agreement of the parties, therefore, the tribunal based its calculations in respect of past losses to the date of hearing on the difference between what the claimant's salary would have been if she had stayed in employment and what the ill health retirement pension was. These have been increased at different rates each year. There was no dispute between the parties that the net loss for the period between termination of employment and the date of the remedy hearing was about £13,500. I should interpolate here that, in saying "with the agreement of the parties", the agreement was as to the factual basis of the calculation. Mr Downey takes issue with how things are labelled, and I am going to deal with those points when dealing with the grounds of appeal.

8. For future losses, again with the agreement of the parties and based on the claimant's schedule of loss, the tribunal assumed a salary going forward of just over £40,000 per annum, that representing what her final salary had been with uplift for the pay increases that had happened and those that were expected - the difference between that and the annual value of the claimant's ill health retirement pension, which it took to be nearly £33,000.

9. The claimant had in fact elected to take an initial lump sum and then a reduced pension, but the parties had agreed to ignore this for the purposes of calculations so that the figures used were based on what the claimant's pension would have been if she had not taken an initial lump sum. I note that the claimant's representative, Mr Downey, sought to recant from that particular position at the end of the Employment Tribunal hearing, but this particular issue is not the subject of any of the grounds of appeal.

10. The tribunal also considered other earnings that the claimant had received. The claimant had always done a small amount of work on a freelance basis as a TV or film extra, and also events work. The tribunal found that, since the termination of employment, and since the claimant's health had begun to improve, she had been doing more of such work. The tribunal dealt with this evidence at paragraphs 18 to 19, 21 to 24, and 26 to 29. The tribunal made findings about her actual past earnings in this work, both pre- and post-termination of employment, and also found that in the future, as a minimum, she was likely to earn at least £8,800 per annum for that work.

11. The tribunal rejected the submission made on the claimant's behalf that she should not have to give credit for these earnings (see paragraphs 53 to 55). The tribunal noted that no legal authority had been produced to support that argument and that, on ordinary principles, compensation for discrimination is made on the tortious basis and designed to put the claimant back in the position they would have been in but for the unlawful conduct. Further, the tribunal reasoned that there is a general duty to take reasonable steps to mitigate loss from which there was no principled basis for excusing the claimant.

12. The tribunal deducted the additional earnings that the claimant had received since termination of employment from the past loss calculations, together with the sum that she had been paid by her employer by way of pay in lieu of notice ("PILON").

13. The tribunal found that, as the claimant's pension and likely future income from other sources would be more than her former expected salary, she would have no future financial loss. So it awarded none. The tribunal went on (at paragraph

61) to explain why it considered, in its view, that this was a pessimistic scenario. It noted that, according to the opinion of a Dr Phillips, the claimant has a 60% chance of returning to equivalent work within two years, so that, together with her extra earnings, she was likely to be in a better financial position within a couple of years.

14. The claimant's representatives invited the tribunal to make a notional award of £10,000 by way of compensation for the difference in the claimant's pension at age 68 as it would be given her early retirement and as it would likely have been if she had continued in employment until retirement age. However, the tribunal declined to make any such award, for reasons it explained at paragraph 62, in short, on the grounds that it was speculative and the claimant had provided no figure for calculations in respect of that loss.

15. The tribunal thus made a total award of financial compensation of approximately £32,000 once interest and taxation had been taken into account. It also awarded £35,000 compensation for injury to feelings; £15,256 for psychiatric injury; and £13,834.85 interest on those sums. There is no challenge on this appeal to the non-pecuniary elements of the award. I now turn to the grounds of appeal.

The grounds of appeal

Ground 1: the parties' submissions

16. Mr Downey for the claimant submits that the tribunal erred in law by compensating her in the same way as it would have done for an unlawful

dismissal, rather than compensating her for "forced retirement". In his skeleton argument he expressed the point as follows:

> "By focusing on the consequences of the termination of claimant's employment rather than the consequences of her forced early retirement, the tribunal failed to approach the assessment of compensation in accordance with the general principle. The correct approach was to assess compensation on the basis of putting the claimant in the same financial position as if she had not been forced to retire. This was a simple calculation between the income she would have received from remaining in employment and her income as a retiree. The tribunal should therefore have adopted the claimant's approach."

17. In oral argument, Mr Downey submitted that the claimant was not in front of the Employment Tribunal advancing a claim for loss of earnings caused by the termination of her employment, but for the diminution in income on her being forced to retire. He submits that the tribunal approached loss not on the basis put forward by the claimant, but on the basis put forward by the respondent. When I asked Mr Downey what the difference was between compensation for loss of earnings and compensation for being forced to retire, Mr Downey submitted that the difference is that if you treat it as loss of earnings, then you are expecting the claimant to mitigate her loss, whereas, if it is compensation for being forced to retire, then she does not have to find alternative employment. He accepted that he had no authority for that proposition.

18. He further submitted that it is not reasonable to expect someone who has retired to return to work. When I suggested that this would have been a perversity challenge to the tribunal's conclusions in relation to mitigation of loss that it *was* reasonable to expect this claimant to work in retirement (as she was in fact doing), Mr Downey denied this and suggested that, in reality, it was just a different way of putting the grounds of appeal that he had in fact advanced.

19. Mr Smith for the respondent submits that the tribunal did not fall into error in the manner described in relation to Ground 1, or that, if it did, this is a new argument that the claimant should not be permitted to raise on appeal. He submitted there is no difference between assessing the loss of earnings and assessing the loss flowing from retirement. Loss of earnings is just one head of identifiable financial loss that flows from the termination of employment. Whether it is labelled as ill health retirement, or termination, or dismissal, or something else, it is, he submitted, the same loss.

20. He emphasised that the central point is what did the claimant lose and what did she gain as a result of the unlawful conduct. He referred in this regard to Lord Reid's dictum at paragraph 13 of *Parry v. Cleaver*, together with the general principle which he relied on in *British Transport Commission v. Gourley*: that in tortious compensation a claimant cannot recover more than they have lost. The exception to that, he submitted, is for the insurance-type payments dealt with in *Parry v. Cleaver*, that exception not being one that he was aware of at the time of this Employment Tribunal decision.

21. Mr Smith submitted in relation to Ground 1 that the tribunal did exactly what the claimant asked the tribunal to do. He noted Mr Downey's argument that it was the respondent who was somehow to blame for a mistake by the tribunal in this regard, but he submitted that it was clear from the schedule of loss and the claimant's skeleton argument below, and also paragraph 15 of the tribunal's judgment, that all the respondent did was to agree with the claimant about the basis on which compensation should be calculated.

Ground 1: Analysis and conclusions

22. My analysis and conclusions in relation to Ground 1 are as follows. Mr Downey seeks to draw a distinction between compensation for forced retirement and compensation for loss of earnings on the termination of employment. However, he has identified no legal authority to support the distinction for which he contends, and I am satisfied that it is not a distinction known to law. Mr Downey says that the claimant, on his advice, was claiming compensation for forced retirement and that meant that her compensation should properly have been calculated on the basis of the difference between her former salary and her ill health retirement pension. That is how the claimant put her claim in her schedule of loss, and it is the basis on which the tribunal proceeded, with both parties' agreement at the time.

23. As became apparent in the course of argument, what Ground 1 is really about from Mr Downey's perspective is his argument that, where compensation is awarded for forced retirement (as he calls it), a claimant should be under no duty to mitigate her losses. That point is a point that he also makes under Ground 3, but, since Mr Downey insists it is part of his Ground 1, I will deal with it here.

24. Again, he has identified no legal authority for the proposition he seeks to advance, and I am satisfied that none exists. As the tribunal properly directed itself in its decision, compensation under section 123 of the Equality Act 2010 is awarded on a tortious basis and ordinary tortious principles apply. It is well established (see, for example, *British Westinghouse Electric and Manufacturing Company Ltd v Underground Electric Railways of London Ltd* [1912] A.C. 673, to which the parties have referred) that this means the claimant is entitled to

compensation for (per Viscount Haldane LC at 689): "pecuniary loss naturally flowing from the breach", subject to the important qualification that a claimant has a "duty of taking all reasonable steps to mitigate the loss consequent on the breach", and that the law "debars [a claimant] from claiming any part of the damage which is due to his neglect to take such steps".

25. As such, the fact that the tribunal applied ordinary mitigation principles to its decision does not indicate that it took a wrong approach, as the claimant contends on Ground 1. Compensation for so-called forced retirement and compensation for termination of employment are one and the same thing and the same principles apply regardless of the label you attach to them. For those reasons, I dismiss Ground 1.

Ground 2: the parties' submissions

26. Mr Downey submits that the tribunal erred in law by failing to apply the principle established in the House of Lords' decisions in *Parry v. Cleaver* [1970] AC 1 and *Smoker v. London Fire and Civil Defence Authority* [1991] 2 AC 502. He submits the principle to be taken from that case is that pension benefits are not to be deducted in claims for damages for lost earnings. Mr Downey contends that it does not matter that these authorities were not cited to the tribunal. He submits, as he put it at paragraph 10 of his skeleton argument:

> "It is permissible to raise such an argument on appeal, particularly when neither party could have possibly anticipated the error in the reasoning of the tribunal."

27. Mr Downey acknowledged in answer to my questions that in the claimant's schedule of loss, prepared by him or his instructing solicitor, the *Parry v. Cleaver* principle had not been applied. Paragraphs 3 and 4 of the schedule of

loss both set off the claimant's lost salary against her income as a retiree. He further acknowledged that, if the claimant had prepared a schedule of loss on the *Parry v. Cleaver* basis, the figure claimed on her behalf by way of future loss in paragraph 4 would have been in the region of £1,013,320 rather than the £131,000 that was claimed. I did not ask him during the hearing to do the same exercise for past loss in paragraph 3 of the schedule of loss, but it is convenient to mention here that, as can be seen from the schedule itself, the figure claimed in paragraph 3 would have been in the region of £75,000 had the *Parry v. Cleaver* basis been used rather than £13,500 as claimed (£75,000 being approximately two years' lost salary allowing for the fact that the claimant received a payment in lieu of notice).

28. Mr Downey then argued that he had not advanced the claim on the *Parry v. Cleaver* basis on the claimant's behalf before the Employment Tribunal because, if he had done so, she would have been under a duty to mitigate that loss so that sums that she had been and might be able to earn from future employment would need to be set off against those figures I have just mentioned. Mr Downey said that he had instead chosen to advance the claim on the basis of "losses from forced retirement" because that meant, in his submission, that she was not under a duty to mitigate her loss or to give credit for sums earned from secondary employment and film work.

29. Mr Smith for the respondent agrees that the tribunal erred in law by failing to apply *Parry v. Cleaver*, but submits that this is a new point that the claimant is raising on appeal and that the claimant should not be permitted to do so. Mr Smith argues that the approach the tribunal took to compensation - setting off

the ill health pension against the claimant's salary that she would have earned if she had remained in employment - was the approach advanced by the claimant and her legal representatives at the hearing, and that allowing the claimant to reopen this point now on appeal would require the case to be remitted to the tribunal for further evidence, as the tribunal then would need to consider whether the claimant had, or by what point she could reasonably be expected to have, mitigated part or all of her loss.

30. The respondent refers to a number of authorities in support of the proposition that it would not be appropriate to allow this point to be run on appeal, including *Hendricks v. Metropolitan Police Commissioner* [2003] IRLR 96; *Jones v. Governing Body of Burdett Coutts School* [1998] IRLR 521; *Leicestershire County Council v. Unison* [2006] IRLR 810; and *Kumchyk v. Derby City Council* [1978] ICR 1116.

31. Mr Smith emphasises that there is no suggestion of any deceit here by the respondent in relation to what happened at the Employment Tribunal. He frankly accepts that he had not heard of the principle in *Parry v. Cleaver* at the time of the Employment Tribunal hearing. At the hearing he says all he did was to agree with Mr Downey that compensation should be awarded taking account of the claimant's ill health retirement pension in the way that the claimant proposed. He submitted that there is no pressing public interest why the claimant should be permitted to run this point for the first time on appeal.

32. He submits the claimant may be able to pursue a claim against her representatives if she has lost out as a result of *Parry v. Cleaver* not being applied by them at first instance. Most importantly, if permission is given to

run the *Parry v. Cleaver* point, he submits the case will have to be remitted to consider mitigation. He submits the picture will look very different if the tribunal is having to consider whether the claimant has taken reasonable steps to mitigate over one million pounds' worth of loss over her lifetime, or is tasked with deciding at what point she might reasonably be expected to have fully mitigated the loss.

33. He submits that the tribunal's finding in paragraph 60, although based on uncontested medical evidence, was only that there was a 60% chance that she would have returned to full employment in two years. He submitted there would still need to be more evidence about what might happen to the remaining 40% chance that her losses would continue beyond that point. He submitted that the respondent would wish to have a fair chance to argue that at some point the claimant could reasonably be expected to have fully mitigated her loss. It would also be necessary, he submitted, for the tribunal to consider the current position rather than the position as it was at the time of the remedy hearing.

Ground 2: my analysis and conclusions

34. As the parties are agreed that the tribunal made an error of law in this case, I need first to say something about the principle in *Parry v. Cleaver* and how that would have affected the compensation the tribunal awarded in this case. In *Parry v. Cleaver* a police constable aged 35 years, who had served 12 years in the police force, was severely injured by a motor car driven negligently by the defendant, who was a private individual. The claimant had made compulsory contributions to a police pension fund out of his pay which entitled him, as of right, to a pension on being discharged from the police force for disablement.

The claimant was, however, able still to continue earning in clerical employment after being discharged from the police.

35. The House of Lords held that the police pension should not be counted in computing the losses for which the defendant was liable because the House of Lords determined that a contributory pension of the sort that Mr Parry had was a form of insurance. Lord Reid said "It was unjust that money spent by an injured man on premiums should inure to the benefit of a tortfeasor".

36. The House of Lords was not considering quite the type of case with which we are now concerned, in that in this case the employer is both the tortfeasor, in terms of discrimination, and the body responsible for funding the claimant's ill health retirement pension. Instinctively, one might baulk at the idea that a public authority should have to compensate someone twice for the loss of their employment in the circumstances in which this employer finds itself: once by way of funding a non-actuarially reduced ill health retirement pension; and once by way of a tribunal award for compensation. However, the parties are agreed that this is the effect of *Parry v. Cleaver* if applied to the present case. Indeed, the point is put completely beyond doubt by the subsequent decision of the House of Lords in *Smoker v. London Fire and Civil Defence Authority* where the respondents to those joined claims were both public authorities like the respondent to this claim, and who were in those cases also responsible for funding the ill health pensions that those claimants had received, as well as for paying the compensation in respect of the injury on tortious principles that the claimants sought.

37. It is convenient to add reference here to the case of *Gaca v. Pirelli General Plc* [2004] 3 AER 348, and in particular to what Dyson LJ says at paragraph 11 in that case, which sums up the law on this point. Dyson LJ restates the general proposition that a claimant is normally required to give credit for moneys received in mitigation of loss and is not entitled to double-recovery or to compensation that means that she is put in a better position than she would otherwise have been, save for what Dyson LJ describes as the two exceptions to that rule, being: "(i) payments made gratuitously to the claimant by others as a mark of sympathy ('the benevolence exception'); and (ii) insurance monies ('the insurance exception'), dealt with in the *Parry v. Cleaver* case".

38. Given those authorities, I agree with the parties that there is no scope for arguing at this level that *Parry v. Cleaver* could be distinguished in the present case, or that the tribunal was right not to apply it. However, the question for me is whether I should permit that point to be run on appeal, given that it was not run below. In this respect, I make clear that, for the reasons already given, I reject Mr Downey's attempts to argue that the *Parry v. Cleaver* point somehow was run by him below. It was not. As noted, if Mr Downey had run the *Parry v. Cleaver* point below, his client's schedule of loss would have included a claim in the region of £75,000 rather than £13,500 for past loss, and a claim of over £1 million rather than the £131,000 for future loss.

39. Although the claimant would (as I have held when dealing with ground 1) have been under a duty to take steps to mitigate that loss, it seems to me that it is inevitable that the tribunal would have awarded her substantially more by way of past earnings than the £13,500 figure that it did award, and, likewise, that, if

the starting figure was over £1 million for future loss, it is highly likely that the tribunal would have ended up awarding her substantially more than £0 by way of future loss.

40. Although Mr Downey did not accept this point in oral argument, and sought to maintain that it did not make any significant financial difference to his client whether he ran the *Parry v Cleaver* point or not, I proceed to consider whether I should give permission for this point to be run on appeal on the basis that the claimant has, as a result of the point not being taken on her behalf below, likely lost a very substantial amount of money. I also approach the decision on the basis that this is a very strong legal point, as the parties agree and two House of Lords authorities make clear.

41. I now turn to the authorities dealing with when a party should be permitted to run a new point on appeal. The first case to which Mr Smith has referred me is *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96. At paragraph 35 in that case the Court of Appeal said this:

> "Mr Cavanagh submitted that there had been a concession by Miss Hendricks's former legal representatives in the Employment Tribunal and in the Employment Appeal Tribunal and that Mr Robin Allen QC, who now appears for Miss Hendricks, is not entitled to resile from that concession. Mr Cavanagh cited *Jones –v- Governing Body of Burdett Coutts School* ... for the proposition that only in exceptional circumstances should discretion be exercised to allow a conceded point of law to be reopened: see paragraph 20 of the judgment of Robert Walker LJ. It is clear from that passage that the appellate courts' reluctance to allow conceded points of law to be re-opened is specially strong in cases where the result of doing so would be to open up fresh issues of fact, which had not been sufficiently investigated before a trial court or tribunal, and therefore necessitating a further hearing below."

42. The Court of Appeal in that case went on to decide that there were special circumstances that permitted the point to be taken on appeal for the reasons that the Court of Appeal went on to discuss in the subsequent paragraphs. These come down, essentially, to a conclusion by the Court of Appeal that there had been no clear concession to the effect that Mr Cavanagh argued for, and that the Court of Appeal in that particular case considered that the public interest favoured deciding cases on the basis of the proper law rather than on what it described as "legally mistaken concessions".

43. The case of *Jones v Governing Body of Burdett Coutts School* [1998] IRLR 521 referred to in *Hendricks* also contains further guidance of relevance, and at paragraphs 19 – 21 the Court of Appeal in that case, Robert Walker LJ, said as follows:

> "19. There is a good deal of authority, much of which Miss Morgan cited in this court, to the effect that the Employment Appeal Tribunal does not and should not normally allow an appellant to raise a point of law not raised (or raised but conceded) before the Industrial Tribunal, and indeed that leave to do so should be given only in exceptional circumstances. …
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> 20. These authorities show that although the Employment Appeal Tribunal has a discretion to allow a new point of law to be raised (or a conceded point to be reopened) the discretion should be exercised only in exceptional circumstances, especially if the result would be to open up fresh issues of fact which (because the point was not in issue) were not sufficiently investigated before the Industrial Tribunal. In *Kumchyk* the Employment Appeal Tribunal (presided over by Arnold J) expressed the clear view that lack of skill or experience on the part of the appellant or his advocate would not be a sufficient reason. In *Newcastle* the Employment Appeal Tribunal (presided over by Talbot J) said that it was wrong in principle to allow new points to be raised, or conceded points to be reopened, if further factual matters would have to be investigated. In *Hellyer* this court (in a judgment of the court delivered by Slade LJ which fully reviews the authorities) was inclined to the view that the test in the Employment Appeal Tribunal should not be

> more stringent than it is when a comparable point arises on an ordinary appeal to the Court of Appeal. In particular it was inclined to the view of Widgery LJ in *Wilson v. Liverpool Corporation* ... that is to follow
>
> > 'the well-known rule of practice that if a point is not taken in the course of trial, it cannot be taken in the appeal court unless that court is in possession of all the material necessary to enable it to dispose of the matter fairly, without injustice to the other party, and without recourse to a further hearing below.'
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> 21. In this case the Employment Appeal Tribunal recognised that the consequence of allowing Mr Jones' appeal would be a new hearing with fresh evidence ... It was therefore a case in which the Employment Appeal Tribunal would have had to have exceptionally compelling reasons for taking such an unusual course. It is necessary to consider the course of the proceedings to see whether there were such compelling reasons."

44. The Court of Appeal went on to find that the EAT had erred in law in allowing the new point to be run on appeal in that case.

45. I need also to refer to *Leicestershire County Council v. Unison* [2006] IRLR 810 and especially to paragraph 15 of that case in the judgment of Laws LJ. I go to that really for the case to which Laws LJ refers in that paragraph, which is *Blackpool Fylde and Wyre Society for the Blind* [2005] All ER (D) 32 (Sep), in which, as Laws LJ quotes it in the *Leicestershire* case, the EAT held as follows:

> "The high value of the claim and the fact that it involves construction of a domestic statute against a European Directive are not, in themselves, exceptional circumstances. It was never argued below that the words 'in good time' fix a time with reference to the contemplated redundancy date. There is plainly a public interest in the finality of litigation, particularly this litigation, which is ongoing three years after the relevant events. Unison has been deprived of a judgment by the Employment Tribunal on this issue and thus is facing the point at the EAT for the first time. It is not simply a construction point: issues of fact would need to be determined and the Tribunal would be required to address the construction contended for in the light of its findings."

46. I have also considered *Kumchyk v Derby City Council* [1978] ICR 1116 case itself, but the principle points taken from that have already been covered by the other authorities that I have referred to.

47. Applying the principles set out in those cases, I am satisfied that this is not an appropriate case in which to permit a new point of this nature to be run on appeal. That is for the following reasons.

48. First, there is no question in this case that there was any deception by the respondent at the first instance that led the claimant into the error that occurred. I accept Mr Smith's honesty on that point. He was not taking advantage of any mistake by Mr Downey. He genuinely did not know of the *Parry v. Cleaver* line of authority. I observe that that line of authority may be long established by the highest courts in our land, but it is not, it seems to me, a very well known proposition of law and it has its counter-intuitive elements for the reasons I highlighted when discussing *Parry v. Cleaver*. For those reasons, I accept that the respondent has not been in any way responsible for the error that occurred before the Employment Tribunal.

49. Secondly, the principle of finality in litigation is a strong and important one. There would, if I allowed this point to be run, certainly need to be a further hearing before the Employment Tribunal, perhaps one of more than a day, in which further evidence would need to be heard from the claimant and also from those who have advised in relation to her medical condition. The tribunal would be faced with a very different exercise to the one that faced it when the parties were before it at the remedy hearing. They would be dealing with an initial level of loss far exceeding that which the parties had presented to the tribunal at

the last occasion. That would inevitably require a much more thorough examination as to whether or not the claimant had reasonably mitigated her loss and what she could reasonably be expected to do in future, both in terms of what she has done since the termination of her employment and as to what would happen over the 20 odd years that still lie to her normal retirement date.

50. Those are very substantial areas of fact that would need to be explored. It would, in effect, require starting the remedy hearing all over again, on a completely different basis. Moreover, both parties might have conducted the whole of the litigation before the Employment Tribunal differently if they had appreciated from the outset that the potential value of the claim was as high as it would be if *Parry v Cleaver* were applied. Allowing a new point to be run on appeal in those circumstances is something that the authorities seem to me to make clear is not in the interests of justice, even where the legal error is a clearly established one and even where the potential value to the parties is significant.

51. Thirdly, I have not forgotten of course that the potential value to the claimant has its flipside in the potential cost to the respondent, and justice has to be done between both parties in this case. This is, in essence, a case of a high value mistake having been made by a legal representative. However, Mr Downey is regulated by the Bar Council and he will, or should have, professional indemnity insurance. Mistakes are what that insurance is there for, and the claimant should not be without a remedy in that respect should she choose to pursue it.

52. Finally, it does weigh on me that, although the claimant has not received from the tribunal the remedy to which she was entitled, calculating on the *Parry v. Cleaver* basis in this particular case would mean that to a significant extent a

claimant received a windfall, in that, as a result of unlawful conduct occasioning ill health, she would have recovered twice for the same loss, once through her pension and once through the tribunal award. There is nothing improper in the claimant receiving that double compensation, as the House of Lords' decisions make clear so far as the tribunal award itself is concerned, but it is a factor that it seems to me is relevant when considering what justice requires in the present case in terms of whether I permit a point to be run on appeal that what the claimant has missed out on is, some might say, essentially a windfall. Moreover, that windfall would have been funded by the very same respondent, a public authority that would have had to pay her twice for the same loss.

53. For all those reasons, I refuse permission for the claimant to run on appeal the point based on *Parry v. Cleaver* and it follows that Ground 2 fails and must be dismissed.

Ground 3: the parties' submissions

54. I now deal with Ground 3. The claimant submits that the tribunal should not have deducted the additional sums earned by the claimant in other employment or her PILON from her compensation, although the claimant does accept that the PILON is not money that she should receive twice. Mr Downey's argument is that compensation should start to run from after the point at which that notice expired.

55. The claimant makes these submissions on the basis that these losses were not a direct result of the victimisation. The claimant relies on Viscount Haldane's observations at pages 689 to 690 of *British Westinghouse* as applied by the

Court of Appeal in *Hussey v. Eels* [1992] QB 227 at 241 B-D, and also *Quilter v. Hodson Developments Ltd* [2017] PNLR 7, at paragraphs 34 – 39.

56. Mr Downey submits that the tribunal should not have set these sums off on the basis that there was not a causal connection between the work that the claimant has done in retirement and the injury that she suffered. He submits that she has freely chosen to do work during retirement, although she was not under a duty to mitigate because she had retired (i.e. his Ground 1 argument again).

57. Mr Smith, for the respondent, submits that the tribunal has not erred in law. He submits that, on ordinary principles, sums that the claimant would not have received but for the termination of her employment, fall to be set off against her losses, save to the extent that they are excluded by the exceptional approach taken to insurance-type payments such as pensions following *Parry v. Cleaver*. The respondent submits that there is no authority that being retired means there is no duty to mitigate loss and that, following *Westinghouse*, the fundamental basis is for compensation for pecuniary loss naturally flowing from the breach subject to the duty to mitigate.

58. The respondent adds that, with reference to the Local Government Pension Scheme Regulations, as is plain from the definition of "gainful employment" in those regulations - which means "paid employment for not less than 30 hours in each week for a period of not less than 12 months" - being ill health retired on a tier-one basis does not mean that someone is regarded as being incapable of doing any work ever again. Indeed the claimant in this case has been doing some work, and it would be factually wrong to assume that she is not able to work again.

Ground 3: my analysis and conclusions

59. I have already dealt with Ground 3 to a large extent because Mr Downey brought the same argument into his Ground 1. For the reasons I have given, there is no exception from the duty to mitigate loss in tort for people in retirement. Whether or not it is reasonable to expect a person to find work in retirement will be a question of fact in each case. In this case, the claimant has retired early and so the considerations will be different to those who have retired at normal retirement age, but, even for those who retire at normal retirement age, there is no general rule that they are not under a duty to mitigate their loss by earning if they are in a position to do so.

60. Mr Downey's argument is not advanced on a perversity basis, but, for the avoidance of doubt, in my judgment the tribunal's decision was not perverse. The claimant was permitted to work again under the terms of her ill health retirement, and she has in fact done so. The tribunal needed to consider, as it did, what she might reasonably continue to earn in the future. There is no error of law in its reasoning. The cases referred to by Mr Downey dealing with property transactions do not assist. The context is different, and they are not dealing with the points of general principle with which the tribunal needed to be concerned in this case.

61. The dictum from Lord Reid in *Parry v. Cleaver* encapsulates the fundamental point that what the tribunal needed to consider was what were the losses and gains flowing from the tort. That does import a causation test, but it is one that the tribunal was conscious of and was astute to ensure that it did not treat as loss that needed to be mitigated by the claimant either sums that she would have

earned in any event whilst employed, and nor did it deduct from the losses that it awarded any sums that it was satisfied she would have earned in any event if her employment had continued. That is the causation point, and the cases that Mr Downey has referred to are all wholly consistent with that, looking at what is the loss and what is the gain flowing from what has happened.

62. In this case, the ill health retirement has provided an opportunity for the claimant to take up alternative work and, in so far as the tribunal was satisfied (as it was for the adequate reasons it gave) that she has been able to do work following the termination of her employment that she did not do prior to termination, the tribunal was entitled to – indeed had to – set off those sums against the losses that it was dealing with.

63. So for those reasons I dismiss Ground 3 as well. That means that the whole appeal fails and is dismissed.

Claimant's application for permission to appeal

64. I am afraid I am going to refuse permission because, for the reasons I have outlined, there is no difference between a claim based on loss of earnings and a claim based on diminution of income. The same principles apply to both. The appeal is not arguable in my judgment for the reasons I have given. An application will need to be made the Court of Appeal if the claimant wishes to take this further.
