

Neutral Citation Number: [2026] EAT 51

Case No: 2022-000827-DXA

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 10 March 2026

**Before:**

**JUDGE KEITH**

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**Between:**

**MACAUSLAND DESIGN LIMITED**

**- and -**

**MS A PORTOSI**

**Appellant**

**Respondent**

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**Rad Kohanzad** (instructed by Croner Group Limited) for the **Appellant**  
**Patrick Tomison** (instructed by Thompsons Solicitors) for the **Respondent**

Appeal and Cross-Appeal  
Hearing date: 10 March 2026  
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**JUDGMENT**

## **SUMMARY**

### **Unfair dismissal**

The Employment Judge did not err in her analysis of the claimant's attempts to mitigate her losses, following her dismissal. On the specific facts of this case, the EJ was entitled to assess losses not on the basis of an immediate reduction in those losses once the possibility of alternative employment arose, but at a later date, after a period during which the appellant had given assurances that she would not leave the employment of a less-remunerated, new employer. What had to be proved was that the employee acted unreasonably. The employee did not have to show that she acted reasonably. The EJ's conclusions were not perverse.

**JUDGE KEITH:**

**Introduction**

1. These written reasons reflect the oral decision which I gave to the parties at the end of the hearing. I dismissed the appeal of MacAusland Design Limited and the cross-appeal of Ms Portosi, for the reasons set out.

2. I refer to the parties as they were before the Employment Judge, namely to Ms Portosi as the claimant and to MacAusland Design Limited as the respondent.

3. The respondent has appealed, and the claimant has cross-appealed, the judgment on remedy given by Employment Judge Henderson (the ‘EJ’) at a hearing at London Central Employment Tribunal on 21 July 2022 and confirmed in written reasons sent to the parties on 26 July 2022, following the EJ’s earlier judgment that the claimant had been unfairly dismissed.

4. There is no appeal on the EJ’s finding that the respondent unfairly dismissed the claimant. Rather, the appeals concern the findings which, it is said, were infected by errors of law on whether the claimant had failed to mitigate her financial loss, on her dismissal, and the appropriate amount of the award thereby arising.

**The Judgment under challenge**

5. Turning to the EJ’s reasons, at para [3], the EJ had recorded the following issues as agreed between the parties’ representatives.

“3. At the commencement of the hearing I clarified with the parties’ representatives the issues to be determined at this hearing. These were agreed as follows:

- has the respondent shown on a balance of probabilities that the claimant has failed to mitigate her loss?
- at what point would the claimant have returned from furlough to full pay? The claimant maintained in her schedule of loss that she would have returned from furlough on 30 November 2020. The respondent had made no indication as

to the relevant date, but in his oral evidence (in response to tribunal questions) Mr MacAusland said that hypothetically the claimant would have returned once the furlough scheme had ceased, which the parties agreed was on 30 September 2021;

- should the tribunal increase the compensatory award by 25% for an unreasonable failure to comply with the ACAS Code of Conduct on Disciplinary or Grievance procedures 2015?”

6. The EJ then went on to make the following findings:

“9. Following her dismissal with effect from 30 September 2020, the claimant said that whilst her preference was to remain in the UK, she also investigated the option of moving to Italy as her father had been unwell. At that time there were very limited openings in architectural businesses because the pandemic was still ongoing; there was limited commissioning of new projects.

10. The claimant applied for various roles in both the UK and Italy shown at pages 1-28 of the remedies bundle. The respondent accepted that the claimant had applied for 13 jobs in the period October 2022 - 19 January 2021.

11. It was put to the claimant in cross-examination that she had been unduly aspirational in her applications and had not been realistic in applying for suitable roles. However, the tribunal finds that the respondent has not produced any evidence to support that allegation. In responding to the question, the claimant was able to demonstrate references in her CV to appropriate experience, even if this was not lengthy or significant experience.

12. The claimant obtained temporary alternative employment in Italy from 8 February 2021 - 31 July 2021 with two different organisations. She then obtained a fixed term contract, which is due to expire in July 2024, in Italy with ASUGI, a public sector employer. The claimant explained that she had given assurances to her employer that she would remain in the contract for at least one year. The claimant also explained that her father had died in December 2021 and that she needed for family reasons to remain in Italy to provide care and support to her mother.

13. The claimant was taken in cross-examination to an email dated 28 August 2021 from Amos Goldreich to whom she had applied for a role in January 2021. This updated the claimant to say that the company was recruiting for project architects and also needed freelance architects. There were various job opportunities but the pay for a project architect would not be more than £39,000 per annum. The claimant was asked why she had not taken up this opportunity and she repeated the reasons she had given for wishing to stay in Italy for family reasons and because she had promised her employer that she would remain in her contract for at least one year.

14. I accept the claimant’s evidence as honest, but this shows that the decision not to

pursue the opportunities with Goldreich, were essentially a matter of personal choice. I find that the claimant was not reasonable in refusing the possibility of mitigating her loss at this stage.....

17. I find that the respondent has not shown on a balance of probabilities that the claimant's has failed to mitigate her loss.....

23. I accept that the claimant took reasonable steps to mitigate her loss following her dismissal. However, I also find that the claimant could and should have pursued the opportunities with Goldreich in August 2021. It was agreed that the maximum pay available would have been £39,000 gross which translated to a net weekly pay of £580.46. Given that the claimant's full net pay with the respondent was £592.49: the ongoing shortfall was £12 per week.”

7. On the issue of when the claimant would have returned from furlough had she not been dismissed, the EJ preferred the claimant's evidence that she would have returned to work had she not been dismissed, on 30 November 2020, on full pay (para [25]). The EJ rejected Mr MacAusland's oral evidence that the claimant, if not dismissed, would have returned at a later date in September 2021.

8. The EJ awarded the amount of furlough pay from the date of dismissal, 30 September to 30 November 2020. For the period thereafter, the EJ awarded the claimant her net salary as employed by the respondent, less sums earned in temporary employment, which had started on 1 August 2021. The EJ awarded future loss at the date of the remedy hearing on 21 July 2022 based on the difference between the claimant's salary when employed by the respondent and what she would have earned had she pursued and accepted employment by Mr Goldreich, which was remuneration higher than that which she had earned with her employment by ASUGI, for a further 26 weeks (para [29]):

“29. The parties' representatives agreed the relevant figures as set out in the schedule of loss and I make my calculations based on those figures.

Basic award - £2421 (being 3 years' service x 1.5 x £538)

Loss of Earnings

From 30 September 2020 to 30 November 2028 [sic] – 8 weeks at £444.06 per week (Furlough Pay) - £ 3552.48

From 30 November 2020 – 21 July 2022 85 weeks x £592.49 (full net weekly pay) - £50,361.65

Less the amounts credited by the claimant for her temporary employment and her contract commencing on 1 August 2021 totalling £26,015.48

Plus future loss of earnings at 26 weeks times £12 per week (representing the shortfall between full net week pay (£592.49) and the net pay which would have been payable if the job opportunity at Goldreich had been taken (£580.43) £312

Plus pension loss (as agreed by the respondent) - £973 .02

Plus loss of statutory rights. The claimant claimed £450 but given her short length of service the tribunal awards - £250

Total compensatory award - £29,433.67

Plus uplift of 15% - £4415 - £33,848.72

Less 50% contributory fault - £16,924.36

Plus basic award £ 2421”

**The Respondent’s Appeal**

9. By its appeal filed on 10 September 2024, the respondent argues that the EJ erred in calculating the claimant’s past loss by not taking into account her failure to mitigate her past losses arising before July 2022. Rather, the EJ had deducted the claimant’s earnings since the date of her dismissal, from her earnings had she not been dismissed. The EJ ought to have calculated losses reflecting her failure to mitigate her losses in respect of past losses, just as the EJ had done in respect of her future losses. This was in the context of the EJ’s specific findings at para [14] about the opportunity of employment by Mr Goldreich, and at para [23], that the claimant could and should have pursued the opportunities with Mr Goldreich in August 2021. It was a matter of her personal choice to decide not to do so. The EJ ought, in the period from August 2021 to 21 July 2022, have calculated losses

by a lesser difference, namely the difference between her net salary when she was employed by the respondent and the possible ‘Goldreich’ remuneration.

### **The Claimant’s Cross-Appeal**

10. The claimant argues first that the EJ erred in finding that the claimant’s decision not to pursue potential opportunities was a matter of personal choice and thereby was not reasonable. The EJ was required to consider whether the claimant had taken reasonable steps in her particular circumstances. Second, and alternatively, the EJ’s decision was perverse as there was only one conclusion open to her, namely that the claimant could not be expected to give up her fixed-term AGUSI employment for the Goldreich opportunity.

11. The claimant relied on the authority of, amongst others, **Beijing Ton Ren Tang (UK) Ltd v Wang** (UKEAT/0024/09/DA) in which this Tribunal had highlighted for tribunals to consider all the circumstances in decided whether a claimant had acted unreasonably in failing to find fresh employment. In contrast, the EJ had considered that because of ‘personal choice’, caring for a surviving parent following the death of the other, was not relevant to whether or not pursuing an alternative job in the UK was unreasonable in the claimant’s particular circumstances, which was an error of law. It was perverse, moreover, to have found that it was not reasonable for the claimant to have pursued opportunities with Goldreich in her particular circumstances, which would have required relocation back to the UK, which she could not do, because she was providing care and support to her mother following the death of her father.

12. I should add in the context of the litigation history, there was reference to a request for reconsideration, which was refused, but I say no more about that. Permission was also granted on both the appeal and cross-appeal, without limitation.

13. I set out below the parties’ respective cases on the appeal and cross-appeal, which I summarise before reaching my decision. In doing so I refer to the skeleton arguments and

submissions made before me today by Mr Kohanzad and Mr Tomison.

## **The appeal**

### **The Respondent's position**

14. The respondent reiterates that the EJ's failure to calculate a past loss on a basis that was consistent with the calculation of future loss, when it had made findings as to the claimant not being reasonable and that she could have pursued opportunities in August 2021, was an error. This was the only fair reading of paras [13] and [14]. Para [14] had referred to the appellant's actions as being not reasonable "at this stage". Referring back "at this stage" to para [13] could only mean August 2021.

15. Both parties were agreed that the EJ's reference at para [17] to there having been no failure to mitigate loss, must be incorrect.

16. The claimant's suggested answer to this appeal, namely that factors relevant to an unreasonable failure by the claimant to mitigate her losses had changed by July 2022, required an impermissible rewriting of the judgment. Para [23] did not suggest a later date. It followed that the calculation for loss, resulting in a lower loss, as explained at para [23], ought to have been applied at para [29].

### **The Claimant's position**

17. In contrast, the claimant argues that this appeal is a misreading of the judgment. The EJ had concluded that the claimant had failed to mitigate her losses from July 2022. She did not conclude that there was a failure to mitigate from August 2021 and had made no finding as to when the claimant should have obtained employment with Mr Goldreich. This was open to the EJ and when properly read, the EJ's judgment was that it was reasonable for the claimant to remain in the employment

which she had obtained on 1 August 2021 for a period of a year, as reflected in her evidence recorded at para [12], after which she had failed to mitigate her loss.

18. The claimant referred, in resisting the appeal, first to Section 123(4) of the Employment Rights Act 1996 and well known principles set out in a number of cases, including by Langstaff P in **Cooper Contracting Limited v Lindsey** (UKEAT/0184/15/JOJ):

“(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.”

19. What had to be proved was that the claimant acted unreasonably. She did not have to show that what she had done was reasonable. There was a difference between acting reasonably and not

acting unreasonably. It may be perfectly reasonable for a claimant to have taken a better paid job. That did not satisfy the test that she had acted unreasonably. By reference to **Gardiner-Hill v Roland Berger Technics Ltd** [1982] IRLR 498, there were the following questions. What steps should the claimant have taken; when would that step have produced an alternative income; and thereafter, to Reduce the amount of compensation by the amount of the alternative income which would have been earned.

20. Moreover, as the authority of **Hakim v The Scottish Trade Unions Congress UKEATS/0047/19/SS** noted, whilst enquiries should be made, if possible, as to the date on which the claimant would have found employment, the Tribunal should not strive for a false appearance of precision. In the absence of a specific date, the claimant should get the benefit of the doubt and after making suitable findings, the Tribunal should assess the differential loss.

21. Crucially in this, the Tribunal needed to consider all of the circumstances as confirmed in **Beijing Ton Ren Tang**, as derived from the earlier cases of **Fougere v Phoenix Motor Co Ltd** [1976] 1 WLR; **Wilding v British Telecommunications plc** [2002] ICR 1079; and **Fyfe v Scientific Furnishings Ltd** [1989] ICR 648. The appropriate test was whether the claimant had taken reasonable steps to mitigate her loss. This could only be challenged on appeal on the basis that the wrong legal test had been applied or that in applying the legal test, the EJ took into account irrelevant factors or left out of account relevant factors, or came to a perverse conclusion.

22. The respondent had not identified a precise date from when the failure to mitigate losses should be reflected, other than to refer to August 2021, which ignored the further question that had the claimant in this case replied to an email from Mr Goldreich that she had received on 28 August 2021, when would that have yielded a higher income?

23. The EJ had concluded that the date on which the Goldreich opportunity would have yielded the higher income was 22 July 2022, which was a finding open to the EJ. If not so explicitly stated,

it was the obvious and the only possible inference from the judgment. The claimant had started a new job with ASUGI on 1 August 2021 and had promised ASUGI that she would remain in their employment for at least a year. Her father had also, sadly, died the previous December and she needed to remain in Italy to provide care for her mother.

24. Following the guidance in **Hakim**, the claimant was entitled to the ‘benefit of the doubt’ in assessing her losses. Even if the claimant had replied to Mr Goldreich’s email shortly after 28 August 2021, there was no certainty that she would have obtained a role, let alone as to when it would have resulted in alternative income. The EJ had used her judgement and fixed the date of 22 July 2022 for the calculation of when loss ended, which was open to her. This was in the context of the email chain between December 2020 and January 2021, to which Mr Tomison took me in this hearing. In summary, Mr Goldreich previously seemed keen initially, but when the claimant responded, she had heard nothing further from him. There was no reason to think that had she responded in August 2021, however warm Mr Goldreich’s initial communication, this would have resulted in an offer of remunerative work.

## **The Cross-Appeal**

### **The Claimant’s position**

25. The EJ was obliged to consider that the claimant was living in Italy, in circumstances where her father had died in December 2020 and she had decided to stay in Italy to care for her mother. She had been offered a role with ASUGI in Italy and was employed by it from 1 August 2021 on a fixed term, multi-year contract. The EJ accepted that these were the honest reasons for the claimant not seeking a job with Mr Goldreich, following his email on 28 August 2021.

26. In referring to these matters as ones of ‘personal choice,’ rather than considering what weight to attach to them, the EJ had impermissibly discounted them. In doing so, she had erred by applying the wrong test and/or failing to take into account relevant factors. Whether to accept a job offer or

not was always a personal choice, as Mr Tomison invited me to consider, in the context of para [38] of **Wilding**. The issue of ‘choice’ was an impermissible question or an irrelevant factor. There was no authority for distinguishing between compulsion or choice when assessing the duty to mitigate loss.

27. The EJ had failed to explain why, at para [14], the personal factors were outweighed so as to make the claimant’s actions not reasonable. This Tribunal should be circumspect in its deference to the EJ’s reasons, where there was the error accepted by both parties at para [17].

28. Moreover, there was only one permissible conclusion, namely that the respondent had not shown that it was unreasonable for the claimant to decline to seek a job with Mr Goldreich in August 2021. At the time of receiving his email, the claimant had been in her new role with ASUGI for a mere 27 days. She was living in another country, caring for her mother, crucially had secured alternative employment and was partially mitigating her loss. Indeed, as the EJ found at para [15], the respondent had not produced any evidence of suitable jobs available for which the claimant had failed to apply in the relevant period.

29. The proper conclusion was, as the EJ had stated at para [17], that the respondent had not shown on the balance of probabilities that the claimant had failed to mitigate her loss. Whilst the EJ had considered the claimant’s circumstances, when asking the “When?” question in a **Gardiner-Hill** sense (the date on which a mitigation step would have produced alternative income), she had failed to consider them at the first stage of the analysis, namely what step was the claimant obliged to take.

### **The Respondent’s Case on the Cross-Appeal**

30. The EJ had unarguably considered the claimant’s personal circumstances, referring to them explicitly. The claimant’s cross-appeal on ground (1) could not succeed if the respondent’s appeal failed. The claimant’s argument on the appeal was based on the premise that the EJ had considered

the claimant's personal circumstances, which had included her promise not to change jobs in the first year of her employment with ASUGI.

31. It was trite law that a judge did not have to mention every matter they took into account or address every argument. It was wrong to say that the EJ considered that caring for a parent following the death of another parent was not relevant. This, with respect, conflated two separate propositions. The first was that the EJ failed to consider personal circumstances. The second was that having considered them, the EJ was bound to find that they made the claimant's inaction in pursuing the Goldreich opportunity reasonable.

32. As to the first proposition, it could not be properly said that the EJ had failed to take into account personal circumstances. The EJ went on to state that she had accepted the claimant's evidence as honest. The word "but" in para [14] demonstrated that the EJ had considered the claimant's personal circumstances, weighed them and reached a conclusion on them. The EJ was obliged to consider whether the claimant took reasonable steps in her particular circumstances. The EJ did precisely that. That was an evaluative judgment.

33. As to the second proposition, namely that there was only one conclusion open to the EJ, nothing in the legal authorities established that the existence of caring responsibilities or contractual commitments, or even promises to a third party, must as a matter of law, render a failure to accept an alternative job offer reasonable. Whether a particular circumstance made a failure to pursue available employment unreasonable was a question of fact. The claimant's argument, stripped to its essentials, was not that the EJ applied the wrong test but that she had reached the wrong conclusion.

34. The cross-appeal had proceeded on the basis that taking up the 'Goldreich' opportunity would have required the claimant to relocate to the UK. The EJ was aware of this and knew the claimant was based in Italy, and recorded her reasons for wishing to remain there. There was no finding that the claimant was unable to leave Italy, only that she chose not to do so. Nor was there any finding

that the claimant was the sole carer for her mother or that her mother required full time care, or that alternative arrangements could not be made. The EJ was entitled to treat these matters as factors going to weight rather than absolute bars.

35. The test for perversity, namely that no reasonable judge, with a proper appreciation of the evidence, could have reached the decision which the EJ had, was not met. In essence, the claimant's perversity challenge was a disagreement. The EJ's findings were, on any view, open to a reasonable Tribunal.

## **Discussions and Conclusions**

### **The Respondent's Appeal**

36. I am conscious of the need to read the EJ's reasons in context and not to treat specific phrases in isolation unless it is tolerably clear that there has been a misdirection or misapplication of the law or perversity. I do not accept that to construe the EJ's reasons as meaning that the claimant's unreasonable failure to mitigate her loss crystallised in July 2022 requires an impermissible redrafting of the judgment, as contended by Mr Kohanzad. It is sufficiently clear from para [13] of the judgment that the EJ accepted the claimant's evidence as to why she had accepted employment on a fixed term multi-year contract with ASUGI in preference to a mere opportunity, as Mr Tomison points out, from Mr Goldreich. This was in circumstances where the claimant had given her reasons for wishing to stay in Italy for family reasons and because she had promised ASUGI that she would remain in her contract for at least one year.

37. The EJ's reference at para [14] to finding that the claimant was not reasonable in refusing the possibility of mitigating her losses 'at this stage', was not a finding that the alternative income from any Goldreich opportunity would have crystallised at the stage of July 2021. The only fair reading of the judgment, when read as a whole, was that the failure to mitigate crystallised in 2022, by which stage the claimant's assurances to ASUGI about working for them for at least a year had

expired. The reference to: “at this stage” has to be read in context, whereby if the claimant had pursued the opportunity at the earlier stage, albeit consistent with her promise to ASUGI, it would have crystallised the following year.

38. Contrary to Mr Kohanzad’s analysis that the reference, “at this stage” has to be read only in the context of para [13], (the events of August 2021) it must also be read in the context of para [29], from which it is sufficiently clear that the EJ’s analysis was that the Goldreich income was only relevant from July 2022.

39. I accept the submissions of both representatives that the clarity of the judgment is not assisted by the reference at para [17] to the claimant not having failed to mitigate her loss. However, that does not detract from the judgment when read as a whole, that the losses from the failure did not crystallise until the date of the remedy hearing, such that there was no historic loss calculated on the basis of the Goldreich opportunity, only a future loss.

40. I conclude that the EJ did not err in law, as claimed by the Respondent in its appeal. The appeal is therefore dismissed.

### **The Cross-Appeal**

41. In dismissing the respondent’s appeal, I accept Mr Kohanzad’s submission that it is logical that my conclusion fundamentally undermines one aspect of the cross-appeal. In other words, the EJ had unarguably considered the claimant’s personal circumstances, in assessing the loss which arose from her unreasonable failure to mitigate her losses, which crystallised the following year. I do not accept that the EJ’s reference to matters being of ‘personal choice’, amount to treating them as a ‘separate category’ or the EJ thereby erred in attaching no weight to them.

42. I note Mr Tomison’s submission that when considering the issue of alternative job offers there is always a question of personal choice. However, that conflates “personal choice” used in

different senses. Instead, what the EJ did was to evaluate the claimant's circumstances. It was tolerably clear from the EJ's judgment that she found that the claimant had not given a formal contractual commitment to ASUGI not to look for another job in the first year of her engagement by them. The EJ evaluated the difficulties which the claimant's caring arrangements posed, should she have to return to the UK.

43. I further do not accept Mr Tomison's submission that there was an error in considering the circumstances only at 'stage two' of the **Gardiner-Hill** analysis rather than 'stage one'. Instead, what the EJ was grappling with was the consequences of the claimant having made a commitment to her current employer, which would, in her mind, prevent her from being unable to accept job opportunities with another employer. That did not, however, prevent her from exploring those opportunities so that by the end of that period she would thereby be able to take up alternative employment. Instead, she closed her mind to that opportunity. It was on that basis that the EJ concluded that the claimant had failed to mitigate her losses.

44. In relation to the ground of the cross-appeal based on perversity, I accept Mr Kohanzad's submission that the EJ's decision is not perverse on the basis that the EJ had failed to consider and attach appropriate weight, by discounting of personal circumstances. The EJ was unarguably conscious of those personal circumstances, and took them into account. In doing so, I am also not satisfied that there was only one answer, namely that the claimant was entitled to reject the opportunity from Mr Goldreich.

45. Instead, the EJ assessed the claimant's personal circumstances, which included that she had previously worked in the UK, had subsequently moved to Italy in circumstances where she cannot be criticised, but also in circumstances where the factors preventing her from returning to the UK were not absolute ones, and instead ones which had weight attached, rather than amounting to a 'bar' to return to the UK. It was a question of weight to be attached by the EJ, rather than the evidence pointing either to only one answer that the claimant was acting unreasonably in refusing to return to

the UK at any stage or that there was only one alternative answer in the alternative, namely that she was entitled to refuse any further offers from Mr Goldreich. The perversity challenge and the wider cross-appeal also fails and is dismissed.