

# Documents from claimant's previous employment with respondent admissible in respect of remedy

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[Health & Safety Executive V Mr M Jowett \[2022\] EAT 151](#)

## Factual background

1. The Claimant was offered a job by the Respondent as a Trainee Health and Safety Inspector on 20 December 2018 with a start date of 4 March 2019, this offer was withdrawn on 28 February 2019. The Claimant claimed the withdrawal of the offer amounted to direct disability discrimination. The ET held upheld the Claimant's claim and this decision was not appealed.
2. The Claimant had previously worked for the Respondent in a similar role from April 2008 through to January 2011 and had resigned from the position.
3. The Respondent wanted to rely on documents from the previous period of employment to support its contention that the Claimant would not have remained in the role for 5 years had the second period of employment commenced in 2019. The Respondent submitted that the ET would need to consider the likelihood of the Claimant remaining in the role and for how long, and therefore the events of his previous employment were relevant. The Claimant considered the previous events to be irrelevant and asserted that the Respondent's retention of the documents breached data protection provisions.
4. At a preliminary hearing on 8 April 2021, the ET ruled that the documents the Respondent wished to rely on were inadmissible on the basis that they would not assist in determining how long the Claimant would have remained in the role or that their relevance would be marginal at best.
5. The Respondent appealed this decision on the basis that the ET erred in law in that it failed to consider and apply the guidance contained in appellate caselaw concerning the evaluation of loss of future earnings.

6. The EAT upheld the Respondent's appeal, and considered that the documents were admissible. The EAT made the following findings.

### **Assessment of the likelihood of remaining in the role must be made**

7. The EAT found that the ET had failed to appreciate the principles in *Software 2000 Ltd v Andrews [2007]* ("*Software 2000*") where it was held that assessing future earnings will usually involve:

*"a prediction by the Tribunal as to what would be likely to have occurred had the employment continued"* (*Software 2000*, paragraph 31)

8. The EAT considered that the ET should have assessed the likelihood of the Claimant remaining in the role even where it finds the evidence is not capable of showing on the balance of probabilities that employment would not have continued because:

*"Having considered the evidence the tribunal may determine...(b) there was a chance of dismissal but less than 50% in which case compensation should be reduced accordingly"* (*Software 2000*, paragraph 54)

9. The EAT found that the ET did not direct itself correctly regarding speculation and should have followed the following guidance:

*"it should have regard to any material and reliable evidence that might assist it in fixing just compensation.....the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence"* (*Software 2000*, para 54).

10. While *Software 2000* was concerned with unfair dismissal, the EAT noted that *Abbey National plc and another v Chagger [2010] ICR 397* confirmed that a similar approach should be taken in discrimination cases [28].

11. The EAT held that had the ET taken the correct approach it would have inevitably concluded that the documentation relating to the Claimant's earlier employment had more than marginal relevance [49, 65].

### **Determining the relevance of evidence at a preliminary hearing**

12. As the ET correctly identified, the ET is not bound by "any rule of law relating to the admissibility of evidence in proceedings before the court" (*ET (Constitution & Rules of Procedure) Regulations 2013*).

13. In *HSBC Asia Holdings BV v Gillespie UKEAT/0417/10 DA* ("*HSBC Asia*") Underhill P summarised the principles relating to the ET's power to exclude evidence because it is irrelevant or insufficiently relevant.

14. The EAT found that the ET had not properly applied the principles in paragraphs 13(7) and 13(10) of *HSBC Asia* where it was emphasised that it will generally be best to leave determinations regarding the relevance of the evidence to the tribunal of fact rather than

to make rulings about admissibility at preliminary hearings. The exception is where the admission of the evidence is likely to prejudice the orderly progress of the case [51-53].

15. It was held that the ET had not given any reason why the evaluation could not await the determination of the remedy, and this did not appear to be a case where the admission of the evidence would prejudice orderly progress.
16. The EAT held that to decide inadmissibility at this interlocutory stage deprived the tribunal at the remedy hearing of the opportunity to determine what weight to attach to the documents. It also deprived the Respondent of the opportunity to argue at the remedy stage that an award for five years loss should not be made as there was a realistic prospect that the Claimant's employment would have terminated before that time. Since the onus would lie on the Respondent to adduce supporting evidence when making such an argument, depriving the Respondent of the documentation would impair its ability to cross-examine the Claimant on the issue [55].

### **Data Protection**

17. The EAT found that the ET was correct to find that the data protection issue raised by the Claimant was not an important factor in this case.
18. While neither party had provided legislation or case law in this regard, the EAT considered that the retention of the documents was likely a breach of data protection requirements.
19. The EAT held that it does not follow that the documentation was inadmissible in ET proceedings, and even more so once the prospect of litigation was apparent since the use of the material in the ET litigation falls in a data protection exemption. The EAT held that the primary consideration remained the relevance of the material.
20. The EAT accepted the Respondent's submission that an analogy can be drawn with *Fleming v East of England Ambulance Services NHS Trust UKEAT/0054/17/BA* which concerned the use of covert recordings as evidence. A similar balance between the competing public interests of holding organisations to their legal obligations, and, allowing the parties to rely on relevant evidence must be struck.

### **Practical Implications**

21. Assessing future losses will often be based on predictions and may involve speculation. Even if the tribunal considers the evidence cannot demonstrate on the balance of probabilities that the employment would have lasted less than the period claimed, the tribunal must assess the chance of a claimant staying in the role in order to make any relevant percentage-based deductions from an award.

22. The relevance and admissibility of evidence should usually be assessed by the tribunal of fact rather than at a preliminary hearing.
23. Documents do not become inadmissible simply because they are in breach of data protection provisions, the primary consideration remains the relevance of the documentation to the issues in front of the tribunal.

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