Probabilistic Assessment of Past Losses? No (loss of) chance

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Mr J Edward v Tavistock and Portman NHS Foundation Trust [2023] EAT 33

A case in which the EAT carefully considered the relevant principles for approaching questions of failure to mitigate losses, and in particular where percentage reductions similar to "loss of chance" cases are appropriate.

1. This was an appeal brought by the Claimant (together with some cross-appeals by the Respondent) on a number of bases, regarding the Employment Tribunal's approach to calculating financial losses – and in particular the principles to be applied where there is a failure to make mitigate loss.

2. The ground of appeal that will be of most interest and use to practitioners, taking up the bulk of the judgment, is the correct approach to calculating losses where there has been a failure to mitigate. In particular, the EAT considered the application of caselaw from the civil courts in relation to loss of chance cases which take a probabilistic "percentage chance" approach.

3. The conclusion of the EAT was that the approach set out in ***Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498*** remained binding on it and Employment Tribunals, and that a percentage chance approach to past losses are impermissible. The correct approach is to determine when a Claimant would, if they had taken the relevant steps to mitigate their loss, on the balance of probabilities, have obtained equivalent employment.

4. The case also serves as a warning to Employment Tribunals to set out their reasoning adequately on these points, the principles being applied being far from straightforward: It might not be possible to infer that the correct principles have been applied from simple

statements of what a Claimant "should" have done by way of obtaining alternative employment.

Factual Background

5. It is not necessary to set out the facts of the case in detail, but in summary the Claimant was found to have been discriminated against by the Respondent with the result that he lost employment, and therefore suffered financial losses.

6. Part of the background was a capability review which found that the Claimant was only capable of "Band 4" work when his post was "Band 5". He was also under the impression, as a result of correspondence with the Respondent's HR department, that any reference would say that he had been subject to disciplinary action.

7. The Claimant argued, and the Tribunal accepted, that this provided an explanation for why he did not apply for Band 4 posts in the NHS.

8. Seventeen months after his employment ended, the Claimant in fact was successful in getting a job interview for an NHS job through an agency. The Tribunal found that the Claimant "should have been encouraged" by this to "revise his previous pessimistic view and started to apply" for Band 4 NHS jobs.

9. The Tribunal applied a deduction of 50% of the Claimant's losses from November 2019 to December 2020 (when he did obtain employment) "to reflect the prospect that he would have been able to find NHS work had he applied for any of the band 4 posts being advertised".

10. As indicated above, there were various grounds of appeal not all of which are likely to be of interest outside of the parties to this case. The below focuses on two grounds of appeal, on both of which the Claimant was successful.

Adequacy of Reasons

11. The first ground considered was that the Tribunal hadn't directed itself on the correct tests in relation to mitigation of loss and it wasn't clear if it had applied the correct tests.

12. In particular, the EAT found that a general statement of what a Claimant "should" have done in relation to finding alternative employment couldn't – at least in this case – bear the burden of showing that the Tribunal had:

    a. Placed the burden of proof on the Respondent; and
    b. Asked itself the correct question, being whether the Claimant had acted unreasonably in not taking some step that would have mitigated losses.

13. The EAT highlighted, by way of example, the distinction between not taking a step that was reasonable, and unreasonably not taking a step (noted in ***Wilding v British Telecommunications Plc [2002] ICR 1079***). This is a somewhat subtle distinction and a mere statement of what a Claimant "should" have done, without further direction on the law, may not sufficiently demonstrate that the Tribunal has applied the right test.

14. Parties seeking to appeal findings on mitigation of loss – particularly where the reasoning is not clear – may find this a useful authority.

Hypothetical Past Events and Percentage Reductions

15. Having found in favour of the Claimant and remitted the matter for a rehearing, the EAT nonetheless went on to provide guidance on the appropriate approach to take in mitigation of loss cases and in particular whether the percentage reduction approach taken by the Employment Tribunal was permissible.

16. The Claimant's position was that it was not permissible as it was not the approach set out by the EAT in ***Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498***. In that case, the EAT had endorsed what is the familiar approach in Employment Tribunal litigation: that the Tribunal makes a finding as to (a) when, on the balance of probabilities, if the Claimant had taken the relevant steps, he or she was likely to have obtained employment (or other income), and (b) what, on the balance of probabilities, that income would have been, and to award losses accordingly.

17. The Respondent's position was that the Tribunal was entitled to take the approach it had, in light of the development of the principles relating to "loss of chance" claims, following ***Allied Maples v Simmons & Simmons [1995] 1 WLR 1602*** and ***Perry v Raley's Solicitors [2020] AC 452***. Those authorities are professional negligence rather than employment cases, but principles were said to be of wider application.

18. The EAT began by looking at the reasoning of ***Gardiner-Hill*** and of cases prior to it. It noted that the position was primarily based upon what was regarded as established practice, rather than specific authority or principled argument – other than that a percentage reduction may produce different and unjust results in relation to the recoupment of social security benefits.

19. The EAT also considered the “substantial body of authority” applying the ***Gardiner-Hill*** approach since the decision in ***Allied Maples***, while noting that only one of these explicitly addressed the “loss of chance” approach and in that case, the Scottish EAT case of ***Hakim v The Scottish Trade Unions Congress UKEATS/0047/19***, Lord Summers had made brief obiter remarks suggesting that percentage reduction approach may be appropriate “where it is not possible to engage in a more precise assessment”.

20. Against that, it was noted that the approach required by ***Gardiner-Hill***, of making a finding on the balance of probabilities, appears “somewhat anomalous” given that a percentage approach to assessing damages is used, for instance, as part of *Polkey/Chagger* deductions. It was also noted that this isn’t, technically, the approach taken to future losses (although a similar method of identifying the point at which equivalent employment will be found is the usual approach).

21. The EAT allowed the Claimant’s appeal on the basis that ***Gardiner-Hill*** was binding on both it and the Employment Tribunal, and the percentage reduction approach to past losses therefore impermissible.

22. Interestingly, the EAT carefully set out the reason why it would not, in this case, depart from its previous judgment in ***Gardiner-Hill***. One of those was that the particular case before it was not “an appropriate case to determine the boundaries of the loss of a chance approach”. Those comments seem to leave open the possibility of a future appeal on this issue finding greater favour, if the facts and procedural history merited it.

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