Neutral Citation Number: [2022] EAT 151

Case No: EA-2021-000629-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 February 2022

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS

- -

Between :

HEALTH & SAFETY EXECUTIVE

Appellant

- and –

MR M JOWETT

Respondent

- -
- -

Jack Feeny (instructed by Mills & Reave LLP) for the **Appellant**
Matthew Jowett the **Respondent** in person

Hearing date: 18 February 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The Health and Safety Executive, the respondent below, appealed a case management order determining that documents it wished to rely upon for the purposes of resisting the claimant's five years loss of future earnings claim were inadmissible and could not be referred to at the remedy hearing. The claim related to the withdrawal of a job offer of Trainee Health and Safety Inspector in February 2019. The claimant had a previous period of employment with the respondent from April 2008 to January 2011 in a very similar position, from which he had resigned. The respondent wanted to rely on documents from the earlier period of employment to support its contention that there was at least a substantial prospect that the claimant would not have remained in the role for five years from 2019 had his employment commenced.

It was held that the Employment Judge ("EJ") had misdirected herself in failing to appreciate that it was incumbent on the tribunal to assess the chance of the claimant remaining in the role, even if it could not be shown on a balance of probabilities that his employment would have lasted less than five years: **Abbey National plc and another v Chagger** [2010] ICR 397. Furthermore, the EJ had not directed herself in accordance with the guidance at paras 13(7) and (10) in **HSBC Asia Holdings BV v Gillespie** UKEAT/0417/10/DA, that it will generally be better to leave such assessments for the tribunal of fact, rather than excluding the documentation at the interlocutory stage; and she had failed to take into account that the result of her decision was to deprive the respondent of the ability to effectively present its case on loss of earnings at the remedy hearing. Additionally, in all the circumstances the EJ's decision was perverse.

Accordingly, the appeal was allowed, and an order substituted that the documents were admissible and could be relied upon by both parties at the remedy hearing.

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS:

Introduction

1. The appellant, the HSE, is the respondent to the employment tribunal ("ET") claim. I will refer to the parties as they were known below.

2. The respondent appeals an aspect of the case management order made by Employment Judge Ayre (the "EJ") following a preliminary hearing on 8 April 2021 ("the Order"). The Order was dated 10 June 2021 and sent to the parties on the following day. The EJ determined that the documents the respondent wished to rely upon relating to the claimant's earlier period of employment with the HSE were inadmissible and should not be referred to in evidence in the proceedings.

3. The appeal was permitted to proceed to a full hearing by Bourne J by an order sealed on 12 July 2021.

4. In summary, the respondent advances two grounds of appeal. Ground One is that the EJ erred in law in that she failed to take into account and apply the guidance contained in the appellate caselaw concerning the evaluation of loss of future earnings. Ground Two is that her decision was perverse in all the circumstances. The claimant resists this appeal.

Facts and circumstances and the EJ's ruling

5. In these proceedings the claimant alleged that the respondent's withdrawal of his job offer of the position of Trainee Health and Safety Inspector amounted to disability discrimination. The position was offered on 20 December 2018 with a start date of 04 March 2019, but was withdrawn on 28 February 2019.

6. I am told that the final merits hearing took place in July 2021 and that by a judgment dated 14 October 2021 (which I have not seen) the ET upheld the claimant's complaint of direct discrimination because of disability and that this was on the basis that although the ET found that the claimant was not a disabled person within the meaning of the **Equality Act 2010**, the decision to withdraw the job that had been offered to him was made on the basis of perceived disability.

7. The liability judgment is not under appeal and the case is now to be set down for a remedy hearing.

8. It is not disputed that the claimant held the role of Trainee Inspector with the respondent at an earlier stage. This appointment commenced on 21 April 2008 and he resigned on 17 November 2010 with his employment terminating on 07 January 20111. He did not complete his training. The reasons for his resignation and the relevance of this period of employment to the value of his current claim are very much an issue.

9. Two issues were considered by the EJ at the 18 April 2021 preliminary hearing. One issue concerned allegedly privileged documentation. The ET's determination has not been appealed and I need say no more about that aspect.

10. The second issue arose because the claimant had objected to certain documents disclosed by the respondent. The issue was described by the EJ in the following terms:

> **"Whether documents relating to the claimant's previous employment with the respondent are relevant and can be included in the bundle of documents for use at the final hearing? The documents in question are approximately 45 different documents which appear to have been created during the period from April 2008 to July 2012."**

At that stage it was envisaged that the final hearing would include consideration of remedy, if the claim was successful. Subsequently, and in light of this appeal, the ET sensibly listed a hearing to address merits only.

11. At paragraphs 33-38 the EJ recorded the respondent's submissions in relation to these documents. The respondent contended that they were relevant to its arguments on remedy; as if the claim succeeded the ET would have to consider and make findings on what would have happened had the claimant started working for the respondent in 2019, in the context of a substantial future loss of earnings claim. By the time of the hearing, that claim had been reduced to five years loss of earnings, calculated to be £250,000. There would also be related pension loss. The respondent submitted that the ET would need to consider the likelihood of the claimant remaining in the role and for how long and that, in this regard, the events of his previous employment with the respondent was relevant.

12. The respondent also responded to an argument raised by the claimant that the documents had been unlawfully retained by the respondent in breach of data protection obligations. I will return to the details of this point when I address the submissions made on this appeal.

13. At paragraphs 42-44 the EJ recorded the claimant's submissions in relation to this issue. In addition to contending that the documents had been retained in breach of data protection obligations, he submitted that the events concerning the earlier employment were irrelevant, having occurred a long time previously and that, in any event, it would be immoral for the respondent to rely on this line of argument having discriminated against him.

14. At paragraphs 20-22 the EJ referred to the ET's powers to admit evidence and to the fundamental principle that in order to be admissible, evidence must be relevant. She referred to the speech of Lord Bingham in **O'Brien v Chief Constable of South Wales Police** [2005] 2 AC 534 HL and to the judgment of Underhill P (as he then was) in **HSBC Asia Holdings BV v Gillespie** UKEAT/0417/10/DA ("**HSBC Asia**"). I will set out the relevant legal framework in due course. In any event, it is not suggested that these paragraphs in themselves disclose any error of law on the part of the EJ.

15. The EJ set out her conclusions at paragraphs 51 – 55, as follows:

> **"(51) My primary consideration in deciding whether the Documents are admissible or not is their relevance to the issues which the Tribunal has to determine. The fact that they may have been retained illegally by the respondent is a factor , but not an important factor in my decision making on this issue.**
>
> **(52) I have reminded myself of the guidance in *O'Brien v Chief Constable of South Wales Police* that 'relevant' means that the evidence must be "*logically probative or disprobative of some matter which requires proof*"; and of the guidance *HSBC Asia Holdings BV and anor v Gillespie* that evidence may be theoretically relevant but nonetheless too marginal or otherwise unlikely to assist the court, for its admission to be justified.**
>
> **(53) I am not persuaded that the documents which relate to the claimant's previous employment with the respondent, which terminated in 2011, could be probative or disprobative of the question of how long the claimant may have remained in employment with the respondent had he re-joined them 2019. Some of the documents are more than ten years' old, and I struggle to see how the Tribunal that hears this claim will make any relevant findings based upon such old documents.**
>
> **(54) It seems to me that the Documents may be theoretically relevant, but that their relevance is marginal at best.**
>
> **(55) I therefore find that the Documents are inadmissible and should not be referred to in the evidence in these proceedings."**

16. Because the claimant places reliance on it, as he did before the ET, I will refer to his correspondence with the Information Commissioner's Office ("ICO").

17. By emailed letter sent on 22 January 2021, Mr Elliott, a Lead Case Officer with the ICO, wrote to Mr Jowett thanking him for his email of 3 November 2020. It appears that this email had raised a concern about the respondent's solicitors, Mills and Reeve, processing the documents relating to his earlier period of employment on the basis that they should not have been retained by the respondent for this length of time. Mr Elliott said:

> **"…We are of the view that Mills and Reeve has complied with its data protection obligations.**
>
> **This is because we consider Mills and Reeve to be entitled to decline your cease processing request where it is processing information, on behalf of its client, for the purposes of representing that client in legal proceedings.**
>
> **We consider HSE, and its representative, entitled to submit the disputed**

> **information to the employment tribunal on the basis that it, the HSE, considers the past employment information relevant to the ongoing legal proceedings.**
>
> **Data protection provides an exemption allowing personal data to be processed for the purposes of legal proceedings, including prospective legal proceedings, as well as for the purpose of obtaining legal advice, and as well as for the purpose of establishing, exercising or defending legal rights.**
>
> **Under this provision HSE is entitled to provide information it holds to its legal representative for the purposes of their advice and representation.**
>
> **If the client and its advisers consider the held information (about the past employment) to be relevant to the current legal proceedings then they are entitled to submit that information to the tribunal for the purpose of those proceedings.**
>
> **Should you believe that the historical employment information is irrelevant to the ongoing proceedings then that is a matter for the tribunal to rule upon, that you should raise with the tribunal itself…**
>
> **Data protection law does not set any specific timescale after which past employment records must be deleted. Employers are entitled to continue to retain information for longer than just the statute of limitations if that organisation finds or considers it necessary for it to hold information for a longer period. In the case of statutory regulators, such as the HSE, the statutory role of the organisation can mean that it is necessary for the organisation's employment records to be retained for longer to avoid prejudice to the organisation's past and ongoing statutory functions.**
>
> **Whilst you retain the right to submit a GDPR deletion request to the HSE, the ICO consider it likely to be the case that the HSE have breached data protection by still retaining your past employment information (from prior to 2011) at the time of your complaint to the ICO."**

Fresh evidence application

18. The claimant had sought to rely on a number of additional documents for the purposes of this appeal that were not before the ET.

19. In his written application to do so emailed to the Employment Appeal Tribunal ("EAT") on 3 February 2022, the claimant said: *"I think it's relevant as it shows that the respondent itself knew at the time that I had worked for them previously and it did not influence their decision-making then so it seems inconsistent that it should influence things now"*. (The reference to *"at the time"* is a reference to the time of the job offer relating to the second appointment.)

20. By letter dated 8 February 2022 the respondent opposed the application, indicating that: *"It is not disputed that the Appellant knew of the previous employment".*

21. In these circumstances, the claimant has not pursued this application.

The legal framework

22. Rule 41 of schedule 1 to the **ET (Constitution & Rules of Procedure) Regulations 2013** provides that:

> **"The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts."**

23. In **HSBC Asia** at paragraph 13, Underhill P very helpfully summarised the principles relating to the ET's power to exclude evidence on the grounds that it is irrelevant or insufficiently relevant. In terms of the principles that bear or may bear on the present case, he said as follows:

> **"I heard full submissions about the extent of the power of an employment tribunal to exclude evidence on the grounds that it is irrelevant or insufficiently relevant. Although the position in the courts is now the subject of express provision…, it is common ground that the approach in employment tribunals is in principle no different. In my judgment the law is in fact reasonably clear, though superficial confusion may be caused by some inconsistencies in terminology. I will attempt to summarise the position as follows.**
>
> **(1) The basic rule is that if evidence is relevant it is admissible and if it is irrelevant it is inadmissible. In *O'Brien v Chief Constable of South Wales Police*… para 3, Lord Bingham of Cornhill said:**
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> > **"Any evidence, to be admissible must be relevant…Relevance must, and can only, be judged by reference to the issue which the court…is called upon to decided. As Lord Simon Glaisdale observed in *R v Kilbourne* [1973] AC 729, 756: 'Evidence is relevant if it is logically probative or disprobative of some matter which requires proof…relevant (ie logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable."**
>
> **(2) Crucially for present purposes, relevance is not an absolute concept. Evidence may be, as it is sometimes put, 'logically' or 'theoretically' relevant but nevertheless too marginal, or otherwise unlikely to assist the court, for the admission to be justified…**
>
> **(3) …..**
>
> **(4) There is, as I have already said, no distinction in principle between the powers in this regard of the civil courts…and those of the employment tribunal. If anything, it is arguable that employment tribunals, while guided by the same**

> **principles, should be rather more willing to exclude irrelevant, or marginally relevant evidence…**
>
> **(5) …there have been a number of subsequent decisions of this tribunal in which decisions of an employment tribunal that evidence was insufficiently relevant to be admissible have been upheld…**
>
> **(6) …..**
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> **(7) The fact that evidence is inadmissible because it is insufficiently relevant does not, however, mean that it is necessary to take steps to exclude it in every case, and certainly not to seek to do so interlocutorily or at the outset of a hearing. On the contrary, employment tribunals are constantly presented with irrelevant evidence; but most often it is better to make no fuss and simply disregard it or, if the evidence in question is liable to prejudice the orderly progress of the case, to deal with it by a ruling in the course of the hearing. In the generality of cases that cost and trouble involved in a pre-hearing ruling are unjustified. Further, where there is genuine room for argument about the admissibility of the evidence, a tribunal at a preliminary hearing may be less well placed to make the necessary assessment. As Mummery LJ observed in *Beazer Homes Ltd v Stroude* [2005] EWCA Civ 265 at [10]:**
>
> > **"In general disputes about the admissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or at the trial of the action, rather than at a separate preliminary hearing. The judge at a preliminary hearing on admissibility will usually be less well informed about the case. Preliminary hearings can also cause unnecessary costs and delays."**
>
> **(8) Notwithstanding the general position as stated at (7) above, there will be cases where there are real advantage in terms of economy (in the broadest sense of that term) in ruling out irrelevant evidence before it is sought to be adduced and, more specifically, in advance of the hearing…But it may also come up by way of a frank application to exclude evidence as a matter of case management – for example where if the evidence in question is called it will seriously affect the estimate for the hearing or where its introduction might put the other party to substantial expense or inconvenience.**
>
> **(9) …..**
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> **(10) Whether a pre-hearing ruling on admissibility should be made in any particular case will depend on the circumstances of that case. For the reason identified at (7), caution is necessary…If a judge is satisfied on the facts of a particular case that the evidence in question will not be of material assistance in deciding the issues in that case and that its admission will…cause 'inconvenience, expense, delay or oppression', so that justice will be best served by its exclusion, he or she should be prepared to rule accordingly."**

24. In **Software 2000 Ltd v Andrews** [2007] ("**Software 2000"**) the EAT considered the correct approach to assessing loss of future earnings in respect of a compensatory award for unfair dismissal pursuant to s.123 of the **Employment Rights Act 1996**. The ET had made no reduction in its award

to take account of any chance that the claimant would have been dismissed in any event.

25. At paragraph 31 Elias P. (as he then was) said:

> **"In determining the loss sustained, it is plainly material for a tribunal to consider what would have happened had no dismissal occurred. Sometimes that might be a matter of fact, such as where the workplace closed shortly after the dismissal making everyone redundant: see e.g. James Cook and Co.(Wivenhoe) Ltd v Tipper [1990] ICR 716. In most cases, however, it involves a prediction by the Tribunal as to what would be likely to have occurred had employment continued."**

26. In paragraph 35 Elias P referred to the predictive assessment an ET would have to make in circumstances where the evidence showed that an employee would have been dismissed in the near future in any event, whether or not for a wholly unrelated reason.

27. From paragraph 36 onwards he considered whether a tribunal is obliged to carry out this exercise in all cases or whether it is entitled to say that it is too speculative to do so because the evidence is too unreliable. He summarised his conclusions in paragraph 54 as follows:

> **"The following principles emerge from these cases: (1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had a fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself… (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to that evidence…(6)…It follows that even if a tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers that it can properly rely and from which it could in principle conclude that the**

> **employment may have come to an end when it did, or alternatively would not have continued indefinitely. (7) Having considered the evidence the tribunal may determine…(b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly; (c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself…"**

28. **Abbey National plc and another v Chagger** [2010] ICR 397 ("**Abbey National v Chagger"**) confirms that a similar approach is to be applied in discrimination cases. In this case the Court of Appeal rejected a submission that the EAT had been wrong to allow an appeal against an award of future earnings calculated on the basis of full loss until the claimant attained retirement age and wrong to ask whether dismissal might have occurred even if there had been no discrimination.

29. At paragraph 57 Elias LJ said:

> **"…It is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss."**

30. At paragraph 59 he observed:

> **"…This exercise requires the court to determine what, in fact, were the chances that dismissal would have occurred had there been no unlawful discrimination. It focuses on what the employer would have done not what he could lawfully have done. There is no injustice in this exercise."**

31. At paragraph 64 Elias LJ indicated that the case would have to be returned to the ET to determine what the prospects were of the claimant being dismissed had there been no discrimination. He said: *"The compensation that would otherwise have been awarded will then have to be reduced by the proportion reflecting that chance."*

32. Both **Software 2000** and **Abbey National v Chagger** were cited and applied by Underhill P. in **Eversheds Legal Services v De Belin** [2011] ICR 1137. He emphasised at paragraph 45 that "*speculative"* is *"not a dyslogistic term in this field"* and he found that the ET was seduced into

abandoning its proper role in assessing its award for future loss of earnings by submissions that to do so would entail some speculation.

33. Accordingly, it is clear that it will be incumbent upon the ET determining remedy in this case to assess how long the claimant would have remained in post, absent the established discrimination; and if there is a material chance / realistic prospect that he would not have stayed in post for the entirety of the period for which he claims loss of earnings, to apply a percentage reduction to the award for future loss that it would otherwise make.

Submissions

The Respondent

34. In support of Ground One of its appeal, the respondent submits that the EJ erred in failing to take into account and apply guidance contained in the **Software 2000** line of authorities**.**

35. The respondent contends that the EJ failed to appreciate the relevance of the documents relating to the first period of employment because she wrongly approached the question on the basis that the respondent would need to prove facts on a balance of probabilities, for example, that the claimant would not have completed his probation second time around. In turn, applying this incorrect approach, she was not persuaded that the material was relevant, as she did not think it would meet the balance of probabilities standard.

36. The respondent further submits that in ruling that the documents were inadmissible, the EJ impermissibly prejudged the task of the ET considering remedy at the final hearing and improperly deprived the respondent of the opportunity to argue at that stage that an award for five years loss of earnings should not be made as there was at least a realistic prospect that, absent discrimination, the claimant's employment would have been terminated before that time.

37. In relation to Ground Two, the respondent contends that the EJ's decision that the documents were of marginal relevance at best, was perverse in light of the points emphasised under Ground One taken with the combined effect of the following:

- The role of HSE inspector has not fundamentally changed between the time of the two appointments. The claimant resigned his first employment with the respondent after an extensive period of performance management. The role is one that includes fixed stages of performance measurement. It is therefore reasonable to consider that the claimant's past performance in the role will provide an indication of his likely success second time around.
- The claimant did not commence his second period of employment and accordingly, the ET will have a limited amount of material to go on in terms of assessing what would have happened absent discrimination, if the documents relating to his previous period of employment are not to be taken into account.
- The claimant seeks to distinguish between the two periods, arguing that there were particular reasons why he decided to resign his position during the earlier period of employment (a transient health condition and / or the way he was treated by his then line manager), which would not apply to the later period. However, the respondent does not accept this proposition and the rival contentions cannot be properly or fairly evaluated without reference to the contemporaneous documentation. If the respondent is unable to rely upon the documents, its ability to cross examine the claimant on this issue will be substantially impaired.
- The respondent has not been able to locate a witness who could give direct evidence to the claimant's performance in the role during the earlier period of employment, accordingly, the contemporaneous documentation is of particular significance.
- As identified at paragraph 54 of **Software 2000**, the onus lies on the respondent to adduce supporting evidence when it argues that employment would have terminated in any event. Accordingly, its opportunity to do so should not be compromised; and

- It was not suggested that admission of the documentation would prejudice the orderly progression of proceedings.

38. As regards the claimant's data protection argument, the respondent submits:

- As was indicated to the EJ below, the documents can be redacted to remove any personal information that is not directly relevant to the issue before the ET.
- The **General Data Protection Regulation** ("GDPR") came into effect on 25 May 2018. Prior to that there was no *"*right to erase*"*. Accordingly, the period during which the respondent should arguably have taken steps to delete data was around nine months from this point until 28 February 2019. From this later date the claimant had indicated an intention to commence litigation against the respondent and therefore it was entitled to retain the material for these purposes.
- Any breach of data protection obligations bears no causal relationship to the discrimination now established in this case.
- In any event, if the respondent was in breach of data protection obligations, this in itself does not render the evidence inadmissible. Applying **Fleming v East of England Ambulance Services NHS Trust** UKEAT/0054/17/BA ("**Fleming"**) by analogy, there is a balance to be struck between the public interest in litigants being able to avail themselves of relevant evidence, on the one hand, and the public interest in holding organisations to their obligations under the GDPR on the other.

The Claimant

39. Mr Jowett points out that the respondent already knew about his earlier period of employment when the job offer was made to him in 2018. Accordingly, it did not consider it relevant at that stage in the sense that it did not preclude a further offer of employment being made to him and, accordingly, the respondent must have thought he was suitable for the role. It therefore follows that the respondent

cannot change its position at this stage and now say that the events of the earlier period of employment did bear on his ability to perform the role second time around.

40. The claimant says that he resigned on the previous occasion as a result of difficulties with his then line manager, with whom he had a personality clash and also due to difficulties he was experiencing with a (mental) health condition at the time, which subsequently resolved. He has had employment in the interim and is now more experienced. Accordingly, the position in 2019 was quite distinct from the much earlier period of employment and the documents from the earlier period are simply irrelevant or, at most, they are of only marginal relevance to how he would have performed in the role from 2019.

41. He submits that as there are so many uncertainties, the ET would be unable to make a sensible prediction on the basis of this material, if the documents were admitted.

42. The claimant also explains that some of the contents of these documents are personal and he would prefer for them to not be aired in a public forum. He sees admission of these documents as *"opening up a can of worms"* as he puts it, that he would prefer to remain sealed.

43. As regards to the data protection issue he raised, the claimant says that the respondent's retention of the documentation from his earlier employment was illegal as the ICO confirmed. He also drew my attention to a recommendation of the CIPD (the professional body for HR personnel) that HR records be retained for six years, rather than any longer period, after the employment ceases.

Discussions and conclusions

Ground One: error of approach

44. I conclude that this ground of appeal is well founded.

45. Strikingly, the EJ's reasoning makes no reference to the **Software 2000** line of authorities and

no reference to the now established principles relating to the evaluation of future loss of earnings, although it is clear from her summary of the respondent's submissions that these cases were cited to her.

46. Her reasoning at paragraph 53 indicates that she did appreciate that the respondent sought to admit the documents as going to the question of how long the claimant would have remained in its employment.

47. However, the EJ made no reference to either: (a) the fact that the length of the claimant's notional employment with the respondent from 2019 (absent the discrimination) was an issue that it was incumbent on the ET to grapple with, in light of the five years future loss of earnings claim; or (b) that if the evidence did not meet a balance of probabilities threshold , that was not the end of the matter and the tribunal's assessment was to be approached on a percentage prospect basis.

48. Within the longer passage that I have already quoted from paragraph 54 Elias P's judgment in **Software 2000** he said:

> **"… the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."**

49. It is apparent from her stated reasoning that the EJ did not direct herself in accordance with this approach. Not only did she fail to reference it, but if she had done so, in light of this guidance and the similarity of the two roles, she would inevitably have concluded that the documentation relating to the claimant's earlier employment with the respondent had at least some relevance that went beyond the theoretical.

50. I also agree with Mr Feeny's submission that the EJ's observation in paragraph 53 that "*I struggle to see how the Tribunal that hears this claim will make any relevant findings based upon*

such old documents" indicates that she must have been restricting her consideration to a balance of probabilities approach.

51. I also agree that the EJ erred in determining the relevance, or in this case, the lack of relevance, of the documents at the preliminary hearing stage. She did not suggest that there was any particular reason why the evaluation needed to be made at this juncture and could not await the determination of remedy. The amount of documents was modest and its admission would not disrupt preparation for the hearing, then some three months away.

52. As I have explained, the factual issues around the circumstances in which the claimant left his earlier employment with the respondent and the extent to which that provided an indicator of how matters would or may have panned out in the second period of employment (had the job offer not been withdrawn) were and are very much in dispute. These are matters that the ET would have to resolve at the remedy hearing. The tribunal would hear the claimant's evidence on this issue, his cross examination and the submissions made. It would be in a far better position than the EJ at the preliminary hearing to decide what this documentary material said about the prospects of the second period of employment continuing to the end of and beyond the training period. However, by making the decision that she did, the EJ deprived the remedy tribunal of the opportunity to consider these documents and decide what weight to attach to them, and indeed deprived them of even hearing any reference made to them.

53. As Underhill J emphasised in paragraph 13(7) and (10) in **HSBC Asia** (cited above), it will generally be better to leave such matters for the tribunal of fact and it will not always be possible to make a reliable judgment on the issue of relevance at an interlocutory stage. The identified exception to this is where admission of the evidence is likely to prejudice the orderly progress of the case. That was not suggested in this instance, by the claimant or by the EJ. As I understand it, the material in question comprised around 100 pages and it had already been disclosed.

54. There is no indication in the EJ's reasoning that she directed herself in accordance with this aspect of the **HSBC Asia** guidance.

55. Additionally, the EJ does not appear to have taken into account that the result of her approach was to deprive the respondent of the ability to effectively present its case on loss of earnings at the remedy hearing. At that hearing, the claimant would still be able to give the evidence in support of his claimed five years earnings. The respondent would raise the earlier period of employment and its account of the reasons why he left. The claimant would deny this, and the respondent would be unable to rely on contemporaneous material to seek to make out its case to the contrary. Again, this was not a point addressed by the EJ in her relatively brief reasons.

56. For all these reasons, taken cumulatively, I am satisfied that the EJ erred in law in misdirecting herself in her approach to the admissibility of these documents.

57. I have carefully taken into account the claimant's submissions in relation to this ground**,** but they appear, at least in substantial part, to spring from a misunderstanding as to what is in issue at this stage. I am not deciding that the respondent is correct in its future loss contention. Equally, I am not suggesting that the claimant's reasons for saying that his earlier period of employment is distinct, are wrong. Those are matters for determination at the remedy hearing where the claimant will still be able to advance his claim for five years loss of future earnings. The claimant will have a full and fair opportunity to air his contentions at that stage, but the ET will then decide the issue on the basis of all the relevant evidence, rather than in an artificial vacuum without regard to the contemporaneous documents.

58. The claimant will not be precluded from emphasising at that stage that the respondent offered him a position in 2018 knowing what had happened in relation to his earlier period of employment, but this point does not deliver a "knockout blow" at this stage. It simply does not follow as a matter of logic from fact that the respondent decided to offer him the second role in 2018-2019, that there is

no appreciable chance at all that he would not have lasted the full five years in that position.

59. Accordingly, I uphold the first ground of appeal.

60. Accepting that Ground One is well founded, means that the ET's decision must be set aside.

61. If this was the only ground that I upheld (that the EJ had erred in law in her approach to the issue before her) then the normal course would be to remit the issue to the ET for further consideration.

62. However, as I have indicated, the respondent relies on a second ground of appeal, namely that there was, in effect, only one right answer to the issue before the preliminary hearing, so that the ET's conclusion that the documents should not be admitted was perverse. If I uphold that ground, then it must follow that I should order at this stage that the documents are admissible and may be relied upon by both parties at the remedy hearing stage. I therefore turn to ground two.

Ground Two

63. I am very mindful of the fact that perversity is a high threshold to satisfy, and I have borne the claimant's points very much in mind.

64. I have considered whether a reasonable ET at the preliminary hearing stage, properly directing itself in accordance with the legal framework I have set out, could find that the documents were of such marginal relevance that in the exercise of its discretion they should not be admitted to go before the ET at the remedy stage. I focus on the "marginal relevance" question, because I am quite clear that no reasonable tribunal could determine at the preliminary hearing stage that these documents were of no relevance, given the approach that I have explained the ET must adopt. In relation to the assessment of future loss of earnings.

65. I conclude that a finding that the documents were of such marginal relevance that they should not be admitted for use at the remedy hearing was perverse given:

(i) The task that the ET would have to undertake at the remedy stage in respect of the five years loss of future earnings claim, which I have already described;

(ii) That the ET was duty bound to try and make an assessment of the prospects of the claimant remaining in post for the full five years that he claimed, given the respondent disputed this proposition and even if a degree of speculation was involved;

(iii) In undertaking this task, the fact-finding tribunal would be best assisted by being able to consider the entirety of the evidence that bore on this issue, rather than by being restricted to seeing only a portion of that evidence or material;

(iv) Although it was a number of years ago, the claimant had previously worked for the respondent in a very similar position, leaving after three years. In the interim the claimant had been employed in a very different kind of work;

(v) The reasons why he left that position were in dispute between the parties and it would be necessary for the ET to resolve this issue;

(vi) The **Software 2000** line of authority recognises that the onus lies on the respondent to adduce supporting evidence if it is alleged that the notional employment would have come to an end at a stage earlier than the period for which the loss of earnings is claimed;

(vii) The claimant intended to give evidence at the remedy hearing to the effect that the two periods were quite distinct and that the reasons why he left the respondent's employment in 2011 did not bear on his circumstances in 2019 onwards. The respondent wished to cross examine him on this aspect, but, on the EJ's ruling it would be unable to rely on contemporaneous documentation and would be deprived of the opportunity to effectively advance its case on this issue;

(viii) As the claimant had not commenced the second period of employment there was no other material that directly bore on the question of how he would have performed in the role;

(ix) There was very little, if anything, to be balanced in the other direction as capable of outweighing this relevance;

(x) Admitting the documents would not just prejudice the orderly progression of proceedings, as I have already addressed.

66. In light of these considerations there was, in truth, only one answer that a reasonable tribunal could have given in relation to the application.

67. I have, of course, borne in mind the points made by the claimant; but as I have explained when considering Ground One, they are largely of a kind that he may make at the remedy hearing, rather than being reasons that support the decision made by the EJ that the remedy hearing should neither consider nor hear reference to these documents.

68. The claimant suggests that it is unfair to permit the respondent to bring up his earlier period of employment (he said it felt like *"victim blaming"*), but I am afraid that this is the consequence of him seeking compensation for 5 years loss of future earnings in circumstances where he did not start working in the role in 2019. Although a finding of discrimination has been made, the respondent is perfectly entitled to challenge the proposition that underpins this part of his damages claim, rather than simply agreeing to pay him the substantial sum sought.

69. I have also considered the claimant's submission in relation to data protection obligations**.** It is right to note that neither party has provided me with the GDPR material, domestic data protection legislation or any case law and no reference has been made to particular provisions. The claimant rests his case in this regard squarely on the assessment made by the ICO and the CIPD's

recommendation. However, read in the context of the fuller passage from the ICO's letter that I have quoted, I accept that the ICO's reference to retention being likely to breach data protection requirements, was (at its highest) concerned with the nine month period between the GDPR coming into effect and the claimant indicating an intention to commence litigation (as referred to by Mr Feeny in the submissions I summarised earlier). The ICO accepted that the HSE was entitled to use the material in the legal proceedings.

70. I also accept that any failure to adhere to data protection obligation has no causal relationship to the discrimination that the ET found in this case.

71. In any event, in so far as the Respondent was in breach of data protection law for the nine month period I have referred to, it does not follow from this that the documentation was inadmissible in the ET proceedings, all the more so where once the prospect of litigation was apparent, use of the material in the ET litigation was within a data protection exemption. The primary consideration remains the relevance of the material to the issues before the ET.

72. I accept the respondent's submission that an analogy can be drawn with the approach identified in **Fleming.** The case concerned a claimant who wished to rely upon his covert recordings of conversations between members of the internal disciplinary panel during breaks in the disciplinary hearing that led to his dismissal. The EAT held that the ET had erred in its approach to the question of admissibility and the parties were agreed that the EAT should itself re-determine the extent to which the covert recordings could be relied upon in the ET proceedings. At paragraph 17 HHJ Shanks said:

> **"17. I was referred to three EAT authorities on this topic: Chairman and Governors of Amwell View School v Dogherty [2007] ICR 135, Williamson v Chief Constable of Greater Manchester Police (unreported, UKEAT/0346/09/DM, 9 March 2010), and Punjab National Bank v Gosain (unreported, UKEAT/0003/14/SM, 7 January 2014). It seems to me the legal position is as follows in relation to evidence of the private deliberations of an internal panel:**
>
> > **(1) The fact that such evidence is the product of a covert recording is not in itself a ground for not admitting it.**

> **(2) There is however an important public interest in preserving the privacy of such deliberations; otherwise, full and open discussion may be inhibited and the integrity of the outcome may be undermined.**
> **(3) When a party seeks to rely on such evidence a balance must be struck between that public interest and the public interest in litigants being able to avail themselves of any relevant evidence.**
> **(4) The balance must be struck having regard to the particular circumstances of the case; that may involve a consideration of the nature and quality of the deliberations on the one hand and the value and weight of the evidence on the other.**
> **…..**"

73. Applying that approach by analogy, a balance is to be struck between the competing public interests of, on the one hand, allowing the parties to rely on relevant evidence in the ET proceedings and, on the other, holding organisations to their legal obligations in respect to data protection.

74. In the circumstances of this case, the documents were plainly relevant to a significant issue, as I have described; and if there was a breach of data protection obligations it was for a limited period of time and to the limited extent that I have identified. There was no reason, particular to these documents, identified before the ET as to why the data protection issue should lead to their exclusion; and, as I have indicated, the respondent proposed making redactions and has confirmed to me today that this remains the position.

75. I consider the ET was correct to say in paragraph 51 of her Reasons that the data protection issue raised by the claimant was not in this case an important factor in her decision making.

76. I therefore uphold ground two.

Disposal

77. As I have allowed the appeal from the ET's decision on both Ground One and Ground Two, for the reasons explained earlier there is only one correct outcome. Accordingly, I will substitute an order that the documents are admissible and may be relied on by the parties at the remedy hearing.

78. It has not been suggested that there is any further information which is needed before this decision is made.

79. I encourage the parties to liaise sensibly with each other in advance of the hearing to see if redactions to the documentation can be agreed. I expect that the EJ will intervene proactively during the remedy hearing if the respondent were to question the claimant in an inappropriate or unnecessarily distressing way in respect of these materials.