All England Reporter/2002/March/Wilding v British Telecommunications plc - [2002] All ER (D) 278 (Mar)

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Wilding v British Telecommunications plc

[2002] EWCA Civ 349

Court of Appeal, Civil Division

Potter, Brooke and Sedley LJJ

19 March 2002

Unfair dismissal - Compensation - Mitigation of loss - Employee refusing offer of re-employment by employer - Employment tribunal finding employee failing to mitigate loss - Whether tribunal having to apply objective test.

The employee was dismissed from his employment by the employer. An employment tribunal found that the employee had been discriminated against contrary to s 4(1)(d) of the Disability Discrimination Act 1995 and that he had been unfairly dismissed. A further hearing was listed to deal with the issue of remedies. Prior to that hearing the employer wrote to the employee offering him part-time employment, based on advice given by the employer's medical expert. The employee rejected that offer, stating that he had lost all trust and confidence in the employer. At the remedies hearing the tribunal found that the employee had not mitigated his loss and was therefore not entitled to certain damages. The employee appealed to the Employment Appeal Tribunal on the ground that the tribunal had erred in law by, inter alia, not applying an objective test to the reasons why the employee had refused the offer. The EAT dismissed the appeal, holding that the tribunal had applied the correct test and that the decision it had reached had been open to it. The employee appealed on the ground that the tribunal had failed to apply an objective test to the question of mitigation.

The appeal would be dismissed.

In seeking to recover damages for loss resulting from the actions of a wrongdoer, a claimant had to take reasonable steps to mitigate his loss and reference to objectivity did no more than emphasise that the duty was to act reasonably. However, all the circumstances also had to be considered by

the tribunal, and those were inevitably related to the individual conduct and circumstances of the particular claimant. To that extent the subjective reasons of the claimant would fall to be examined in the light of the explanations he gave. Where a claimant gave reasons for turning down an offer such as that in the instant case, the ultimate question for the tribunal was whether it had been shown that the claimant had acted unreasonably in turning down the offer, taking into account the history and all the circumstances of the case (including the claimant's state of mind), bearing in mind the burden of proof and ensuring that the standard of reasonableness was not too high. That had been the approach of the tribunal in the instant case.

Per curiam. Although an employment tribunal is treated in effect as an 'industrial jury', it is generally the position that if, on appeal, it is asserted that a tribunal has failed to apply a correct test or has erred in law in its approach, it will not be regarded as an answer simply to assert that the issue is one of fact.

Emblem v Ingram Cactus Ltd (5 November 1997, unreported) explained. *Payzu Ltd v Saunders* [1919] 2 KB 581, *Banco de Portugal v Waterlows* [1932] AC 452 and *Fyfe v Scientific Furnishings Ltd* [1989] IRLR 331 considered.

Decision of the EAT [2001] All ER (D) 03 (Apr) affirmed.

Laura Cox QC and John Horan (instructed by Russell Jones & Walker) for the employee.

David Bean QC and Philip Thornton (instructed by Group Legal Services, British Telecommunications plc) for the employer.

James Brooks Barrister.

Judgment

[2002] EWCA Civ 349

COURT OF APPEAL (CIVIL DIVISION)

19 MARCH 2002

LORD JUSTICE POTTER

LORD JUSTICE BROOKE

and

LORD JUSTICE SEDLEY

JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Lord Justice Potter:

1. In this appeal, Mr Wilding appeals from a judgment of the Employment Appeal Tribunal ("the EAT") dated 9th April 2001, dismissing his appeal from the decision of the London (North) Employment Tribunal ("the Tribunal") dated 10 June 1999. ("The Remedies decision").

2. On 21 January 1999, the Tribunal, after a contested five-day hearing, had decided that the respondent, British Telecommunications Pic ("BT"), Mr Wilding's former employers, had

i) unlawfully discriminated against Mr Wilding contrary to S.4(1)(d) of the Disability Discrimination Act 1995 and

ii) unfairly dismissed Mr Wilding.

("The Liability Decision")

3. The Remedies hearing took place on 18/19 May 1999, two issues were dealt with, namely

i) whether the appellant failed to mitigate his consequent loss of earnings by his refusal to accept the offer of a job made to him by BT by letter of 15 February 1999 and

ii) the appropriate amount of damages for injury to feelings, which Mr Wilding argued should include an element of aggravated damages.

4. The Tribunal found:

i) that Mr Wilding had unreasonably refused the offer of further employment and

ii) that no element of aggravated damages should be included in relation to the injury to Mr Wilding's feelings.

5. Mr Wilding appealed both of these findings to the EAT, but did not pursue the appeal as to aggravated damages at the appeal hearing. The EAT dismissed his appeal on the issue of mitigation and it is against that decision that he appeals to this court.

The History and Background.

6. For the purpose of a full understanding of the matters argued before us, it is necessary to set out the history in some detail.

7. At the time of his dismissal in March 1998, Mr Wilding had worked for BT for 29 years (virtually all his working life) and was employed as a senior manager. However, in March 1998 he had not been working for some time because of a back problem, which stemmed from a severe injury to his back, suffered in a road accident in 1993.

From 1994, adjustments had been made to his working conditions to enable him to continue working and, until 1997, his reviews and appraisals showed that he was performing his duties satisfactorily. Following his accident in 1994, he was under the care of a General Practitioner, Dr. O'Neill and, in July 1995, during a period when he was off work, the question arose whether he should be medically retired. An assessment from the BT Occupational Health Service (Dr Sinha) and from a specialist were obtained, according to which the prognosis was that Mr Wilding had a good chance of full recovery provided that no complications ensued. Adjustments were made by BT to Mr Wilding's car-parking facilities and he returned to work in December 1995. Thereafter, further adjustments were made to his work schedule to enable him to work from home. However, he was off work again in November 1996.

8. Around that time Mr Wilding saw a specialist who advised that surgical treatment was unlikely to be successful. Further, in January 1997, Mr Wilding indicated that he did not wish to consider medical retirement and returned to work. He became concerned about his financial position and started to explore the possibility of obtaining compensation for industrial injury under the scheme which was in place with BT. In April 1997 he became manager of BT's NET and CSC NET Operations and was supervised by a Mr Townsend. At the end of May 1997 Mr Townsend interviewed his managers, of which the applicant was one of eight. Mr Wilding's disability and

work capability were discussed. Mr Townsend allocated a project with a substantial budget to Mr Wilding in relation to which he reported back to a Mr O'Neill. This project allowed Mr Wilding to work from home and gave him the flexibility he needed.

9. Unfortunately Mr Wilding's back problem recurred and he was absent through sickness and unable to work, to the extent that Mr Townsend had to reallocate his work to another team member in his absence. In the ensuing several months, Mr Townsend kept in contact with Mr Wilding who constantly consulted his GP. Dr O'Neill advised Mr Wilding not to return to work and not to work from home either, as he had further medical problems which may or may not have been related to his back. He was advised to speak to the Occupational Health Service to seek counselling. On 2 October 1997 Mr Townsend visited Mr Wilding to discuss how his work could be progressed and mentioned the question of medical retirement. The course of events over the next six months up to the date of Mr Wilding's dismissal are best taken from the findings of the Tribunal's Liability Decision:

> "14 ... Mr Wilding was reluctant to take this step [i.e. medical retirement] because of the financial consideration and it was at that time that he was optimistic that his compensation under the Injury Compensation Scheme would be successful. He indicated that whilst this was being processed by his union he would wish to remain in employment. In regard to working from home [he] said he would take the advice of his doctor.
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> 15. Miss Flanagan requested the Medical Report from Dr. O'Neill, the applicant's GP in October 1997 who reported
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> "*There is really no effective treatment other than pain relief which we are providing him with. I think therefore that medical retirement is the only viable conclusion to his unfortunate story., I know that he has been to work as long as possible, perhaps the time has come for him to consider medical retirement*".
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> We saw many notes of subsequent conversations between the nurses as the Occupational Health Scheme's Office during November and December 1997 and his medical condition was discussed and also inability to return to work. Dr Sinha did not re-examine him personally but on the notes of his staff and on the notes of telephone conversations, Dr Sinha concluded that medical retirement was the only option, having had discussions with Mr Wilding about his condition in the light of consideration of a general practitioner's report. Dr Sinha was of the view that Mr Wilding accepted that medical retirement would be the doctor' decision and this was confirmed in a letter

from Dr Sinha to Mr Townsend on 10 December. He stated:

"I have now reviewed Mr Wilding's papers and discussed with Mr Wilding his health and future prospects. Mr Wilding is now in full agreement that he is unable to give a regular and effective service. His medical condition is permanent and long-standing and therefore it is unlikely that he will be able to give a full and effective service. Medical retirement has been discussed and now I am fully agreeable that medical retirement should be considered here as the best option. I agree to issue you a Medical Retirement Certificate in this case subject to authorisation. Mr Wilding is fully aware of this decision".

16. Mr Townsend wrote formally to Mr Wilding regarding his sick pay on 12 December 1997 and on the 16th Mr Townsend informed Mr Wilding that he was changing the PCGU work and consolidating it under Roy Traube and suggested that he co-operated with this man.

17. On 19 December 1997, Mr Townsend wrote finally to Mr Wilding asking for continuation of Medical Certificates and suggested he contacted his union about the matter of sick pay and at the same time the injury compensation was being pursued. To that end Dr White wrote on 7 January that in his opinion Mr Wilding did not qualify under the scheme as his injury appeared not to have been caused by the accident in 1993.

18. On 8 January 1998 Mr Wilding saw his GP, Dr O'Neill, again, who said he would if necessary give the applicant a medical certificate for one year if he would recover greater benefits in that way. Mr Wilding informed the General Practitioner he did not wish for this to happen and asked for a month's certificate but he also informed Mr Townsend that this is what the GP had offered. On the same day the applicant learnt that his application under the Injury Compensation Scheme had been refused. Under that scheme he would have been entitled to 80% of lost earnings until his retirement which appeared to be at 65. The applicant informed us that because of this he was determined to return to work.

19. It is clear that the respondents were now actively considering medical retirement under the scheme. Mr Townsend held a case conference on 16 January with personnel for Human Resources to ensure that correct procedures were followed. As a result Ingrid Simmons of the Equal Opportunities Advisor, who wrote to Dr Sinha on 29

January 1998 pointing out that Mr Wilding had been classified as disabled under the Disability Discrimination Act 1995 and that as a medical retirement certificate had to be signed by Dr Sinha in order to satisfy the company's procedures, he needed to have a notification of Mr Wilding's capabilities within the confines of this disability. She pointed out that Mr Wilding anticipated being back to work within the next month.

20. In reply to Ingrid Simmons, Dr Sinha replied on the same day by e-mail that he would not foresee Mr Wilding giving a regular and effective service at his or any other position in the future.

21. On 30 January the applicant had a meeting with Mr Townsend regarding the situation. [following receipt of a letter of 26 January in which Mr Townsend stated]..

I am now giving serious consideration to processing medical treatment but before I can take any decision I would like to suggest that you and I meet to discuss your situation in order to address any issues you may wish to be taken into consideration"...

22. On 30 January, a meeting took place. Mr Wilding informed Mr Townsend that he did not wish to leave British Telecom but felt that it was a 'fait accompli' but he wanted the best financial package to support his family. He was offered either voluntary redundancy called 'Work-wise' in the respondent's policy or medical retirement. He was given one week to consider the position and let Mr Townsend know how he wished to proceed.

23. The applicant telephoned Mr Townsend on 5 February and informed him that he would not accept voluntary redundancy as this would exclude him from other benefits and he waiting for the union to give advice. He also informed Mr Townsend on 10 February that he was appealing against the refusal of benefits under the ICS Scheme.

24. On 12 February 1998 the applicant still not having returned to work, he was advised by letter by Mr Townsend that after consultation with the Occupational Health Service, retirement on medical grounds was being considered and he was invited within 5 days to make representations before any decision was taken to address any issues that Mr Wilding might wish to be taken into consideration. The applicant did not submit any views on the matter and in evidence stated that the letter was shown to his union representative and he thought that his union representative was dealing with the matter. On 25 February Dr Sinha signed the Medical Retirement Certificate.

> 25. We heard from Mr Kurer, who was the specialist who had been treating the applicant since 1994. He made a report to the union in January 1998 on the applicant's condition, but this report was not seen by Mr Townsend, prior to making his decision to dismiss, neither did it address the long term effects. This report was addressing the origin of the applicant's injury and had been requested by the applicant's union to further his appeal against the refusal to award compensation under the Industrial Injuries Compensation Claim. He was not asked about Mr Wilding's capabilities nor informed of or asked about his adjustments. He was asked to comment whether there were any further steps to elevate the symptoms and whether anything further could be done. Mr Kurer felt that the applicant could not work a full day, but in evidence he appeared to say to us that in his opinion he could continue to work until he was 60 or so and work a 20-hour [week]. A further report by Mr Kurer was submitted to us which was on an examination which took place in December 1998. It was clear from the evidence that Mr Kurer had not been informed that the applicant had already been working at home, working flexible hours and that many adjustments had been made to enable the applicant to continue working from 1994 until 1997. We do not therefore consider that Mr Kurer's oral evidence is of assistance in reaching our decision.
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> 26. After Dr Sinha had signed the Certificate of Medical Retirement on 25 February 1998, Mr Townsend processed the matter. On 20 March a letter of termination was sent to the applicant, setting out his right of appeal, which he did. At the same time the applicant's union was appealing against the refusal to pay injury compensation."

10. The internal appeal by Mr Wilding was unsuccessful.

11. It was Mr Townsend who had made the decision to dismiss Mr Wilding. At the time of the dismissal, he was of the view that, if Mr Wilding wished to continue to work part-time, a work pattern could be arranged to accommodate such employment. However, because of his misunderstanding of the medical position, because he believed that Dr Sinha considered that medical retirement was advisable, and because he was not aware of Mr Kurer's views that Mr Wilding might be able to work a 20 hour-week, Mr Townsend did not consider that it was for him to consider that aspect further. It was essentially because of Mr Townsend's failures in that respect that the Tribunal came to its decision on liability. Its relevant findings were set out at paragraphs 52-61 of the Tribunal's Extended Reasons as follows:

> "52. We find that he was within Section 5(1)(a) in that the respondents dismissed him for reasons relating to his capability to do the job which he was contracted to do and in

coming to that conclusion they did not follow the procedures and make the enquiries that we consider they would have done if the capability question had not arisen because of this man's disability and the history of his employment up to that time.

53. The respondents are under a duty to make adjustments to accommodate the [applicant] and it is clear that the respondents had made many adjustments to enable the applicant to consider from 1994. Section 6(1) states:

"... It is the duty of the [employer] to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect".

54. We are satisfied that many adjustments had been [considered] but at the time when the applicant's dismissal was being considered, no further adjustments were considered and the extent to which a further adjustment would or could prevent the dismissal and this is confirmed in the fact that they did not consider part-time work for the applicant.

55. Whether this matter can be justified was the subject of the evidence of the respondent's witnesses, but we are satisfied with the evidence that [Mr Townsend's] mind was not directed to making a further adjustment to prevent the medical retirement of the applicant. He felt that he was constrained because the doctor had already decided that medical retirement was the only option and he confirmed that if he had thought about it, that he would have arranged for part-time work to be available to the applicant. Whether in all the circumstances the applicant would have agreed to a change in his contract and a reduction of pay is another matter.

56. We considered the code of practice relating to the Disability Discrimination Act 1996 and the direction that the employer must be flexible and consider whether there should be further advice given before dealing with a dismissal of a disabled person ... the important thing about the code is that an employer should not treat a disabled employee less favourably by reason of his disability and therefore when it came to the dismissal, we looked objectively at the manner he was dismissed and compared him to a non-disabled employee who had been absent from work and was dismissed because of capability.

57. We do not accept the adjustments that had been made since 1994 to accommodate the applicant were conclusive, the respondents had a duty to look at further adjustments

before deciding whether to dismiss .... We are satisfied that it was reasonable for the employer to make a further adjustment in this particular case.

58. The discrimination relates to the manner of the dismissal which we consider would have been unfair because of the procedures that were followed, if the applicant had not been disabled ...

59. It is clear that a reasonable employer dealing with a capability dismissal would at the time of the dismissal have consulted with the employee to ascertain the employee's views on the matter and also obtained an independent new medical report so that at the time of making the decision to dismiss, updated evidence was available to decide not only on the cause of the ill-health and the incapability but also on the prognosis for the future. In this case the respondents relied on the original diagnosis of Dr Sinha in 1994 and the Medical Report Dr Sinha requested of Mr Wilding's GP and the history of the employment and the adjustments that had been made including the applicant's absences from work during the period of his employment from 1994. His absences from work during that time were not substantial and following his absence from work, in July 1997, it is clear that Dr Sinha took the view that medical retirement was the only option because it was clear to him at that stage that there was no further treatment for the applicant which could alleviate his condition. We are satisfied that a reasonable employer dealing with a non-disabled manager with such long service and experience would have arranged for a consultant to independently examine the employee to ascertain the capabilities of the employee and the prognosis as to whether that employee would be able to work different hours, at what level and in addition the manager would have consulted the employee having received the information, to ascertain whether the employee would be willing to change his contract of employment in order to remain in work.

60. In addition, although the respondent's procedures are quite explicit as to how these matters should be dealt with, these were ignored, which leads this Tribunal to infer that the respondents have decided in November that medical retirement was the convenient option and they were more concerned with the applicant's claim for compensation under the Industrial Injuries Compensation Scheme than with his medical retirement. It appears that at the time, the applicant also was concerned with his claim under the Industrial Compensation Injuries Scheme and appears to have acquiesced in Dr Sinha's opinion that medical retirement was the only option. The respondents based their decisions solely on notes and reports from the Occupational Health Service and from the General Practitioner's Certificate. No opinion had been sought from the General Practitioner when he gave his Certificate as to whether it was likely that the applicant

would be able to attend work in the near future. For those reasons we find the respondents acted unreasonably in dismissing the applicant for his incapability and therefore that dismissal was unfair.

61. Bearing in mind that the incapability and the failure to deal with these matters probably arose from the fact that the applicant had been treated as being disabled and the matters arose because of his disability, we find that the applicant was discriminated against because of his disability ...."

12. It is to be noted that, in giving its Liability decision, the Tribunal did not purport to consider whether, on the basis of the adjustments that had been made in the past to accommodate Mr Wilding's physical needs, or on the basis of the further adjustments to be made, Mr Wilding would in fact, or would probably, have been able to work part-time. The conclusion of the Tribunal was simply that BT had a duty to look at further adjustments before deciding to dismiss. In that context, the Tribunal did not refer further to the fact that Mr Wilding had been seeing his consultant, Mr Kurer since 1994 or that Mr Kurer had written a Report about him in January 1998 (earlier referred to in paragraph 25 of the Tribunal's decision). Nor did the Tribunal express any view as to what the likely results of a further examination of Mr Wilding by a consultant would have been. In that respect, the Tribunal's decision amounted, no more and no less, to a decision that a reasonable employer would have caused such a further examination to be carried out and that, having regard to the results of that examination and any prognosis given, would have discussed with Mr Wilding whether he would be prepared to change his contract of employment in order to stay in part-time work. (Paragraph 59 of the Liability decision).

The Offer of Part-time Employment

13. Following delivery of the Liability decision on 21 January 1999, the Remedies hearing was listed for 17 and 18 February. By letter of 11 February, Mr Wilding's solicitors wrote:

"In relation to re-employment, the Applicant is prepared to consider proposals by the Respondent for a return to work. However, bearing in mind the way he has been treated in this case throughout, he had grave doubts over whether the Respondent could make an offer of a job with suitable terms and conditions and assurances in relation to his future treatment which would be reasonable for him to accept. If the Respondent wishes the Applicant to consider re-employment, then it will be essential for the Respondent to set out precise details of the nature of any job proposals, together with full terms and conditions, salary, hours of work, duties, place of work, promotion prospects and supervisory officer".

14. On 15 February 1999 BT replied, saying:

> *"In the interests of reaching a compromise prior to the hearing and in the absence of definite confirmation from yourselves as to the remedy being sought before the Tribunal, I can confirm, that the Respondent is prepared to offer re-engagement to your client. This offer will be based upon the basis of the 20 hour working week as advised by Mr Kurer, your own medical expert. This will be subject, of course, to medical confirmation that this is still the position."*

15. The Remedies hearing was then postponed and, on 3 March 1999, BT lodged a Notice of Appeal against the Tribunal's findings in respect of its finding of disability discrimination. However, by letter of the same date, BT stated:-

> *"This has been done in order to protect the Respondent's position, given the time-scales imposed by the E.A.T, I would like to assure you that this appeal in no way detracts from the genuineness of the open offer made to your client in my letter dated 15 February 1999".*

16. On 9 March 1999, Mr Wilding issued a Writ against BT claiming damages for their failure to make payment to him under their Injury Compensation Scheme and a defence was served by BT on 8 April 1999. Its outcome was not known at the time of the Tribunal hearing. It has apparently been compromised since but we have not been informed of the terms of such compromise.

17. On 10 March 1999, BT provided particulars of its offer of re-engagement and by letter of 29 April 1999, BT set out at length details of that offer. BT also made clear that back-pay from the date of medical retirement to the date of re-engagement would be paid under the terms of an offer of settlement and it set out the hours that Mr Wilding would be expected to work, his pay, his bonus and his company car and health care arrangements. It also included the words:

> *"The 20-hour part-time job would include a pro-rata amount of lunchtime, break time, namely 2\1//2 hours out of the 20 would be allocated lunch-break".*

18. By letter of 13 May 1999, Mr Wilding's solicitors replied rejecting the conditional offer of re-employment in the following terms:

"Mr Wilding simply does not have trust and confidence in the Respondent as a future employer. He has little faith in the offer as anything more than a device to seek to reduce your potential liabilities to him. Frankly it seems to us and leading counsel a wholly reasonable position on his part.

The applicant will provide full details for his position in the Remedies Hearing. However, we thought it would assist if we summarised the principle reasons for him reaching this conclusion:

"i) your client is currently maintaining a position before the EAT that it is 'perverse' for the Employment Tribunal to consider both that Mr Wilding is capable of part-time work and that providing such part-time work is a reasonable adjustment for you to make. This position is in the teeth of the clear evidence of Mr Wilding's own line manager that part-time working could easily be accommodated and from his Consultant Orthopaedic Surgeon that he was clearly capable of doing it. If this is your position before the court, Mr Wilding has no confidence that it is not your position in the work place.

ii) the manner in which his employment was terminated by the Respondent (see his full statement to the original Tribunal Hearing for further particulars);

iii) the considerable injury to feelings he has suffered as a result of his discriminatory treatment;

iv) the way in which his appeal against medical retirement was conducted by the Respondent and the decision to dismiss the appeal;

v) the considerable delay in making an offer of re-employment in this matter;

vi) the way in which he felt the Tribunal case was defended by the Respondent over the five-day hearing in a vigorous and uncompromising manner;

vii) the manner in which the initial offer of employment was made on 15 February and

the further offer on 10 March, without any adequate particulars on fundamental issues;

viii) the fact that the latest offer of employment still fails to set out key particulars of the proposed job, including the precise duties proposed; the supervisors and the specific job description (this is notwithstanding that Mr Townsend had clear and definite ideas about how Mr Wilding could have been deployed in his evidence before the Tribunal);

*ix) the way in which the Applicant's **BT** Injury Compensation Scheme application has been refused and dealt with thereafter;*

x) employment by the respondent would depend on a conscientious application of the ongoing duty to make reasonable adjustments, yet the Employment Tribunal have already found you have not been prepared to do. The Applicant believes that the substantial trust and confidence required from a senior employee such as the Applicant to return to work at the employer in such circumstances, in truth, has been damaged irretrievably."

Accordingly, the Respondent's job offer is rejected and the Applicant will be seeking damages at the Remedies Hearing on 18 and 19 May 1999 in accordance with the Schedule of Loss as served".

The Remedies Decision.

19. In its decision upon the issue of mitigation, between 4(14) and 4(21) of the Extended Reasons for the Remedies Decision, the tribunal referred to the evidence of Mr Wilding in developing the ten factors set out in his solicitor's letter of 13 May, and that, when BT had decided that medical retirement was the only option as well as refusing his claim under the Injury Compensation Scheme, his feelings of hurt and his feeling that he had no real confidence in BT's re-engagement offer. He said he had also been upset that the hearing of his appeal against the decision to dismiss him had taken so long. He felt the offer of re-engagement originally made on 15 February had been a 'sham' and that the details sent were not specific enough to enable him to make a decision at the time. In any event, having learned on 4 March that BT were appealing against the Tribunal's earlier findings on liability, his faith and trust in BT were destroyed.

20. So far as his future employment was concerned, Mr Wilding stated that, at 51, he had little prospect of obtaining other work and therefore had not applied for other jobs (It was accepted by

BT that Mr Wilding was a highly specialised communications expert and he should not be expected to apply for other jobs outside BT). He stated that he would like to work again but was not prepared to work again for BT. He said he felt that BT did not trust him, although he accepted that there was no particular evidence to show that that was so. He said he had come to that conclusion when there was an exchange of schedules of loss, the rejection of his schedule being the 'final straw'.

21. At paragraph 4(22), the tribunal stated as follows:

> *".. it is clear that the burden of proof is on the Respondent to show that the Applicant ought reasonably to take the mitigating step i.e. to have accepted the offer of re-engagement. The Respondents have to show to the Tribunal the facts i.e. though evidence or otherwise on which they seek to persuade the Tribunal that the Applicant acted unreasonably.*
>
> *(23) ... the evidence relevant to this matter was before the Tribunal and it was not necessary for the Respondents to bring extra evidence to show the position. We had heard the Applicant, both at the original hearing and at this hearing, and there is sufficient evidence for this tribunal to reach a conclusion."*

22. At paragraphs 24 to 29 of the Remedies Decision, the Tribunal carefully considered the relevant law relating to mitigation. It cited *Fyfe -v- Scientific Furnishings* [1989] ICR 648, EAT ("the plaintiff must take all reasonable steps to mitigate the loss ... and cannot recover damages or any ... loss which he could have ... avoided but has failed through unreasonable action or inaction to avoid. It is important to emphasise that the duty is only to act reasonable and the standard reasonableness is not high in view of the fact that the defendant was the wrong-doer"); *Banco de Portugal -v- Waterlows* [1932] AC 452 at 506 HL ("the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty"). Reference was also made to *Ministry of Defence -v- Hunt* [1996] ICR 554 for the proposition that those charged with the duty of finding the facts in relation to an assertion of failure to mitigate must not be too stringent in their expectations of the injured party, and to *Woods -v- W.M. Car Services (Peterborough) Ltd.* [1981] ICR 666 and in particular the observation of Browne-Wilkinson *LJ* at 670G-671 A:

> *"that there is implied in a contract of employment that there is a term that the employers will not, without reasonable or proper cause, conduct themselves in the manner calculated or likely to destroy or seriously damage the relationship of competence and trust between employer and employee ... the Tribunal's function is to look at the employer's conduct as a whole to determine whether it is such that its effect,*

judged reasonably and sensibly, is such that the employee cannot expect to put up with it"

23. Finally, reference was made to a case relied upon by Mr Wilding, *Emblem -v- Ingram Cactus Ltd.* CA (Unreported), 5 November 1997 in which Simon Brown LJ observed, in relation to the refusal by an employee of an offer by his former employer to re-employ him in a case where he had been injured at work:

"the plaintiff could perfectly reasonably be influenced in the decision to refuse an offer of re-employment by the defendants, by the consideration that it was still, at that time, denying liability towards him".

24. That reference immediately preceded paragraphs 4(30) to 4(36) of the Remedy Decision in which the Tribunal proceeded to apply the relevant principles to the facts of Mr Wilding's case. Those paragraphs read as follows:-

30. It appears from the judgment, however, that each case must be decided on the facts by the court or by the Tribunal that is hearing them. We concluded that the Applicant had acted unreasonably in not accepting the offer of re-employment that was put to him by the Respondent, and the reasons by which we came to that conclusion, from the evidence before us can be stated as follows:

i) the applicant, at all times, had stated that he wanted to go back to work.

ii) the applicant, at all times, at the original hearing and at the time that his representatives wrote to the respondents saying that he was willing to seek re-engagement, was obviously anxious to return to work on a part-time basis.

iii) his manager at the time and his doctor had both stated that he would be able to work part-time for some considerable time.

iv) we considered what had happened to change the Applicant's mind between the offer of the job in March and the refusal in May. From the evidence the only thing that happened in that period was the exchange of schedules of loss which had to be prepared by the representatives in the normal course of event to enable that to attend the hearing,

and the fact the respondents had put in an appeal against the decision of the Industrial Tribunal.

31. We considered the contents of the letter of 3 March which first offered the further employment and informing the applicant's representatives that they were putting in an appeal. They state in that letter:

"I would like to assure you that this appeal in no way detracts from the genuineness of the open offer made to your client in my letter dated 15 February 1999".

32. It's quite dear that in view of the nature of the claim, that the Respondents were perfectly entitled to question the Tribunal decision and appeal if they were so minded; and they were constrained by the time limits laid down by the Employment Appeal Tribunal. They had to put in their appeal within 42 days and this matter should have been apparently to the applicant at the time. In any event there was a long delay between him learning of this appeal and his refusal of the offer of employment.

33. We considered all the reasons that the applicant had given for this refusal, and stating that the exchange of schedules rejecting the Applicant's Schedule of Loss, together with the appeal, was the last straw which broke his trust and confidence in the Respondents.

34. The fact that there is ongoing litigation between the Applicant and the Respondent and he is claiming injury compensation in the High Court also, in our opinion should not detract from this offer of employment. The actual managers with whom the applicant was working do not supervise or have control of the Injury Compensation Scheme. Their refusal was based on the interpretation of the scheme to whom and to what injury it applies. There is no bearing on the way that the Applicant worked or with whom the Applicant had to work. We can compare such a claim with a personal injuries claim against an insurance company when there has been an accident and that does not necessarily destroy the trust and confidence between the parties involved.

35. The Applicant claims in evidence that he felt let down by the treatment that the Respondents had meted out to him from the time that they dealt with his medical retirement and their failture to apologise for the wrong, does not allow our opinion to give the Applicant adequate reason to fail the mitigated loss. (sic)

> 36. The Applicant has to mitigate his loss. He was unable to obtain a job from any other employer except [BT] he is willing to work, they have offered him a post which is suitable for his capabilities and we find that it was not reasonable for the Applicant to refuse that offer of re-engagement and therefore we find that the Applicant did not mitigate his loss and therefore is not entitled to certain damages."

[NB The parties are agreed that the true sense of the words which I have emphasised in sub-paragraph 35 above is 'does not in our opinion give the Applicant adequate reason to fail to mitigate his loss']

The EAT Decision

25. Mr Wilding appealed to the EAT on five grounds, each of which failed before the EAT and has been re-asserted before this court.

26. Ground 1 asserted that the Tribunal erred in law in that, although the Tribunal set out the correct test or approach in paragraphs 24 to 29 of the Extended Reasons, they failed to apply 'an objective test' to the reasons advanced by Mr Wilding for refusal of BT's job offer. It is said that paragraphs 4(30)(i), (ii), (iv), 32, 33 and 35 of the Extended Reasons, demonstrate that the Tribunal adopted a subjective approach in that it looked at the actual thought processes going on in the mind of Mr Wilding and speculated as to the actual reason he may have had for refusing the job offer, rather than deciding whether the reasons which he advanced at the hearing were objectively justified.

27. Ground 2 asserted that the Tribunal erred in law in that, when considering whether Mr Wilding had failed to mitigate his loss, it failed to consider or give proper weight to matters which had occurred (a) before BT had made the job offer and (b) at a time when Mr Wilding was in fact prepared to return to work for BT. The relevant matters were said to be: the manner in which Mr Wilding's employment was terminated, particularly given his seniority and length of service; the injury caused to his feelings for a reason related to his disability; the way in which BT had conducted Mr Wilding's appeal against his medical retirement; BT's delay in making an offer of re-employment; the way in which BT had conducted the hotly contested liability hearing before the Tribunal, in particular by extensive cross-examination of Mr Wilding; the fact that full particulars had not initially been provided of BT's job offer; the fact that BT had refused Mr Wilding's application under the Injury Compensation Scheme; and the fact that Mr Wilding had an objectively justifiable lack of confidence in BT's commitment to making the reasonable adjustments which were required for Mr Wilding to return to work.

28. Ground 3 asserted that the Tribunal erred in law by taking into account irrelevant

considerations, namely (i) the time at which Mr Wilding had decided to reject BT's job offer and their findings as to the particular factors which had made him reach that decision, (ii) the delay between BT's appeal to the Tribunal's decision on liability and Mr Wilding communicating his rejection of BT's job offer.

29. Ground 4 asserted that the Tribunal erred in law in finding that BT's job offer was made in good faith and not simply with a view to reducing its liabilities, when no evidence had been called from BT as to the reasons for making the offer or as to its genuineness. It was asserted that the Tribunal had wrongly failed to place the burden of proof on BT and that the finding that the offer was made in good faith was perverse.

30. Ground 5 asserted that the Tribunal erred in law by determining that Mr Wilding had unreasonably refused BT's job offer in that the Tribunal 'manifestly applied an unduly onerous standard of conduct to the Appellant in respect of mitigation' and made a finding which was perverse in that respect. The findings of fact of the Tribunal and/or the undisputed facts relied on as justifying that assertion were (i) the unfair and discriminatory dismissal and Mr Wilding's consequent injured feelings; (ii) BT's resistance of his claims over a 5-day liability hearing on the basis that he was unfit for work and/or that it was unreasonable to expect BT to accommodate him by adjusting his job so that he could work part-time; (iv) the absence of any apology or acknowledgement of wrong-doing; (v) the fact that BT had appealed to the EAT; (vi) the fact that BT had not offered Mr Wilding a part-time job until after the Tribunal's decision on liability and that when they had done so, they had required him to withdraw his allegations in the proceedings as a condition of their offer, (vii) the fact that BT would have to continue to make reasonable adjustment in order to accommodate Mr Wilding, (ix) the fact that BT had contested Mr Wilding's entitlement to the Injury Compensation Award under their scheme and was defending High Court proceedings in that respect.

31. The EAT, having set out the position at length and having clarified a number of issues which appear not to be in dispute on this appeal, dealt with the various grounds quite briefly. In relation to Ground 1 the EAT stated that in applying the correct objective test, it was both necessary and appropriate for the tribunal to look at the reasons for refusing the offer advanced by or on behalf of Mr Wilding. The approach of asking what happened to change Mr Wilding's mind between the offer of the job and his refusal was a permissible one, bearing in mind that the tribunal was very familiar with the history including the history of Mr Wilding's back problems, the way in which they had been dealt with by BT over the years, the circumstances in which he was dismissed and the manner in which the proceedings had been conducted prior to the Remedy hearing. A fair reading of the Extended Reasons showed that, having regard to all the circumstances up to making the offer of re-employment, the Tribunal was satisfied that, judged objectively, Mr Wilding ought reasonably to have accepted the offer.

32. In this last respect, the EAT noted that in paragraph 4(12), the Tribunal had, by lengthy reference to the letter of 13 May 1999, made specific reference to the parts of the history highlighted by Mr Wilding in support of his argument that, assessed objectively, he acted reasonably. That letter had expressly referred to 'the manner in which his employment was terminated by the Respondent (see his full statement for the original tribunal hearing for further particulars)'. Further, at paragraph 4(23) the Tribunal expressly stated that, having heard all the evidence from BT and the applicant at the Liability hearing, it was not necessary for BT to bring extra evidence for the Tribunal to reach its conclusion. Immediately following that statement the Tribunal moved to its brief consideration of the authorities before stating its conclusions at paragraphs 4(30)-(36) already quoted *in extenso*.

33. As to Ground 2 the EAT rejected the suggestion that, because various of the considerations listed by Mr Wilding were not mentioned expressly in the course of its reasoning it was proper to assume, or treat them as if, they had been overlooked.

34. As to Ground 3, the EAT made the point that the fact that the Tribunal took into account (or gave too much weight to) the period of time between BT's appeal against the Liability decision and the refusal of the offer was not sufficient to establish an error in law. Nor did it appear that the Tribunal attached much weight to the point in any event. What the Tribunal was doing at paragraphs 4(32) and 4(33) was (legitimately) examining the reasonableness of the assertion of Mr Wilding that BT's appeal and their rejection of Mr Wilding's schedule of loss were collectively the last straw which broke his trust and confidence in BT.

35. So far as Grounds 4 and 5 were concerned the EAT considered that, as free-standing grounds, they were no more than an attempt on behalf of Mr Wilding to re-argue the merits of the mitigation argument and the conclusion reached by the tribunal on the facts. They were thus not permissible grounds of appeal.

THE ARGUMENT BEFORE THIS COURT

36. Before turning to the heads of appeal as re-argued before this court, it is appropriate to mention the argument of Mr Bean QC for BT to the effect that the question of whether a claimant or applicant has taken reasonable steps to mitigate his loss is a question of fact and not of law, see *Payzu Limited -v- Saunders* [1919] 2 KB 581, CA per Bankes LJ at 588-9 and that that proposition effectively disposes of this appeal. I accept the premise but not the conclusion; at any rate without analysis of the grounds of appeal advanced. That is because the primary argument on this appeal is whether the Tribunal properly applied the correct legal test or (as it has been put by Ms Cox QC on behalf of Mr Wilding) asked itself the right question in coming to its conclusion. If it did not do so,

or if in applying the legal test it took into account irrelevant factors, or left out of account relevant factors or, if having made its findings of primary fact, it drew a wrong inference or inferences or gave wholly inappropriate weight to a particular factor or factors, the Tribunal may be treated as having erred in law in coming to its decision. Further, a finding or decision on an issue of fact may be appealed on the grounds that it was perverse. Mr Wilding's grounds of appeal have plainly been drafted with those principles in mind. Although, in the field of employment law, an employment tribunal is treated in effect as an 'industrial jury', it is generally the position that if, on appeal, it is asserted that a tribunal has failed to apply a correct test or has erred in law in its approach, it will not be regarded as an answer simply to assert that the issue is one of fact: see for instance *Hutchinson -v- West* [1977] ICR 279 at 282E-F, *R -v- Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd* [1993] 1WLR 23 at 29E and 32C-H and *Fyfe -v- Scientific Limited* (see paragraph 21 above), in which an appeal on the issue of mitigation was successful.

Ground 1: Failure to apply the objective test

37. As was made clear in the judgment of the EAT, (at paragraph 64) the various authorities referred to by the Tribunal (see paragraph 22 and 23 above) and *Payzu -v- Saunders* are apt to establish the following principles which (in a form which I have somewhat recast) were accepted as common ground between the parties. (i) It was the duty of Mr Wilding to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer; (ii) the onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying that test, the circumstances in which the offer was made and refused, the attitude of BT, the way in which Mr Wilding had been treated and all the surrounding circumstances should be taken into account; and (v) the court or tribunal deciding the issue must not be too stringent in its expectations of the injured party. I would add under (iv) that the circumstances to be taken into account included the state of mind of Mr Wilding.

38. On this appeal Mr Bean has cavilled at the assertion of Ms Cox that it was agreed before the tribunal that the test of mitigation should be 'objective rather than subjective'. He prefers, and in this respect I agree with him, to eschew shorthand and to approach the matter on the traditional basis that, in seeking to recover damages for loss resulting from the actions of a wrongdoer, the claimant must take reasonable steps to mitigate his loss. Put another way (see *Fyfe -v- Scientific Furnishings*) a claimant cannot recover damages for any loss which he could have avoided by taking reasonable steps to do so. Reference to objectivity does no more than emphasise that the duty is to act reasonably. But, at the same time, the tribunal must also consider 'all the circumstances'. These must inevitably be related to the individual conduct and circumstances of the particular claimant when faced with a choice as to whether or not accept an offer of re-employment. If an offer is made which is, on the face of it, suitable to a claimant who has expressed himself anxious to return to work as a

means of mitigating his loss, and the offer is then rejected for reasons peculiar to the particular claimant, that is bound to involve investigation by the tribunal of whether, in the context of the claimant's circumstances and abilities, his refusal of that offer was reasonable or unreasonable. To this extent at least, the (subjective) reasons of the plaintiff in refusing the offer will fall to be examined in the light of the explanations which he gives. Indeed, in an appropriate case, they may critically affect the reasonableness or unreasonableness of his decision.

39. In this appeal much weight has been placed by Ms Cox on the unreported decision in *Emblem -v- Ingram Cactus*, in which the plaintiff, after suffering a severe accident at work, refused offers of re-employment by the same employer in favour of less remunerative and attractive employment. The plaintiff denied that the defendants had offered to re-employ him at all. However, the judge was quite satisfied that such an offer had been made, and was thus left without any specific explanation as to why the plaintiff had refused the job. In those circumstances, he undertook a survey of the various reasons which 'would have been available to [the plaintiff] as justifying the refusal which I found took place'. He found five reasons which, in combination, he regarded as sufficient to show that the defendant, who bore the burden of proving unreasonableness in relation to the plaintiff's refusal of their offer, had failed to discharge that burden. In the course of his judgment in the Court of Appeal, Simon Brown LJ stated:

> "I do not understand [counsel for the defendant] to dissent from the proposition that it was appropriate for the judge to consider as a question of objective fact whether or not the plaintiff could reasonably have refused this offer of employment."

40. However, in that context he was doing no more than refer back to what he said the trial judge had rightly regarded as the critical question in the case 'did the plaintiff act unreasonably in refusing the [the employer's] second offer of employment, that made in September 1993?'

41. Later in his judgment Simon Brown LJ asked:

> "Had the defendants discharged the burden upon them of showing that, objectively speaking, on the evidence before the court the plaintiff could not reasonably have refused this offer?"

42. Ward LJ in his judgment also referred to the fact that:

> "Reasonableness is to be judged by such objective factors as are capable of being

derived from a totality of the evidence."

43. In this context, however, it seems to me clear that both judges were reflecting and emphasising the particular situation in that case where in the absence of any explanation from the plaintiff, it was necessary for the judge below to derive (as he had done) from all the evidence before the court those matters which would have been likely to affect the decision of the plaintiff when refusing the offer of employment. It does not mean that, had the court been apprised of the reasoning and explanation of the plaintiff in respect of his refusal, it would not have submitted those explanations to careful scrutiny and made an appropriate judgment both as to the credibility and reasonableness of the plaintiff in relation to the reasons which he had advanced. In my view where (as in this case) the applicant has given a clear account of his state of mind from time to time and the reasons for his eventual decision, the question whether or not his response was an unreasonable one falls to be judged in the light of those explanations and all the surrounding circumstances.

44. Ms Cox has sought to argue that it is significant that, in referring to the decision in *Emblem -v- Ingram Cactus*, the Tribunal did not quote (and she submits it must have overlooked) the way in which the question was posed by Simon Brown LJ ('whether or not the plaintiff *could* reasonably have refused the offer'). She suggests that the structure of paragraphs 4(30)-(36) indicates that, in moving at once to answer the question 'was it unreasonable for the claimant to refuse the offer', the Tribunal overlooked the fact that it should take into account the long history preceding the offer which might well (as Mr Wilding asserted) have inspired in him an overall lack of trust in the genuineness of the offer made and/or his likely treatment in the future which rendered it reasonable for him to reject the offer.

45. So far as the words of Simon Brown LJ are concerned, it does not follow from them that the question for a tribunal to ask itself in a case of this kind is whether the defendant/respondent has proved that the claimant/applicant *could* not reasonably have refused the particular offer of re-employment. Where (as here) the claimant has given chapter and verse as to his reasons for turning down such offer, the ultimate question for the Tribunal is whether it has been shown that he *did* act unreasonably in turning down the offer, taking into account the history and all the circumstances of the case, including his state of mind, bearing in mind the burden of proof and that the standard of reasonableness to be applied is not high. That appears to me to have been the approach of the Tribunal in this case

46. I do not think that Ms Cox has made good her submission that the Tribunal overlooked a proper consideration of the history in coming to its conclusion. At paragraph 4(12) the Tribunal set out all the reasons advanced in Mr Wilding's solicitor's letter of 13 May. Under the heading 'The issue of mitigation', at paragraphs 4(14) to 4(20) the Tribunal rehearsed the evidence of Mr Wilding directed to those reasons. At paragraph 4(22) it correctly set out the burden of proof and that BT 'had to

show to the Tribunal the facts, i.e. through evidence or otherwise, on which they seek to persuade the Tribunal that the Applicant acted unreasonably'. At paragraph 4(23) it was stated that, having heard the applicant both at the Liability hearing and at the Remedies hearing, there was sufficient evidence to reach a conclusion. I do not consider that, read as a whole, paragraphs 4(30)(i),(ii),(iv), (32), (33) and (34) demonstrate that the Tribunal failed to apply the correct test or overlooked the significance of the early history when setting out its conclusion in paragraph 4(36).

Ground 2: failure to consider or give weight to relevant considerations.

47. Ms Cox has submitted that the terms of paragraph 4(30)(iv) of the Tribunal's decision make clear the Tribunal failed to consider or give weight to any matter which occurred before the company had made the offer of the job and/or at a time when the employee was, in fact, prepared to work for the company. I do not consider that is so. In that paragraph, the Tribunal did not purport to list comprehensively the reasons by which it came to its conclusion; it highlighted the reasons why it concluded that Mr Wilding had acted unreasonably in eventually rejecting the offer which was made, having in the past consistently indicated his desire to continue to work for BT. In the sub-paragraphs which followed the Tribunal made clear that, in arriving at its conclusion, it also considered the previous overall history up to, and including, Mr Wilding's final decision. In paragraph 4(33) it expressly stated that it had considered all the reasons which Mr Wilding had given for his refusal (a reference back to the solicitor's letter of 13 May) as well as his statement that the exchange of schedules rejecting his schedule of loss, together with BT's appeal, was the last straw which broke his trust and confidence in the respondents. In paragraphs 4(34) and (35) the Tribunal dealt with two of Mr Wilding's principal complaints. While the Tribunal did not specifically identify every matter listed by Ms Cox under ground 2, that is plainly insufficient in itself to impugn the Tribunal's decision.

Ground 3: taking into account irrelevant considerations

48. This ground overlaps with the previous ground. Ms Cox has submitted that the time at which Mr Wilding decided that he would reject BT's offer, and the delay between BT's appeal from the Tribunal's decision on liability and Mr Wilding's communicating his rejection of the job offer were irrelevant considerations. I do not think that is correct. The timing was a factor which the tribunal considered relevant because it had found at paragraphs 4(30)(i) and (ii) that Mr Wilding had, throughout the hearing on liability and in correspondence to BT, maintained that he was very keen to go back to work on a part-time basis. Further, at paragraph 4(30)(iii) the tribunal recorded that both Mr Wilding's manager and his doctor had, for some time, stated that he would be able to work part-time. It was therefore a matter for enquiry why, once such an offer was made by BT, Mr Wilding apparently changed his mind. The Tribunal was entitled to consider at paragraph 4(30)(iv) what had occurred subsequent to the liability hearing which might have caused Mr Wilding to

change his mind. As to the delay between BT's appeal and Mr Wilding's communication of his decision, Mr Wilding was expressly relying upon the fact that the lodging of the appeal justified him in turning down BT's job offer. The fact that there was a long delay between Mr Wilding's learning of the appeal and his refusal of the offer of employment was a relevant consideration when considering whether his reliance upon this reason was both genuine and reasonable.

Ground 4; perversity/burden of proof

49. The principal point made by Ms Cox under this head is that, bearing in mind that the burden of proof of unreasonableness was firmly on BT and that Mr Wilding had stated that he felt the offer of re-engagement on 15 February was a 'sham' (see paragraph 4(17) of the Extended Reasons) it was not open to the Tribunal to treat the offer as genuine without hearing evidence to that effect from a representative of BT. I do not accept that submission. The Tribunal had before it all the relevant correspondence and the written offer documentation and was entitled to accept it at face value if it thought fit. The mere assertion by Mr Wilding that he regarded the offer as a sham did not, in itself, oblige the Tribunal to require evidence that the offer was made in good faith, if it saw no reason to doubt it.

Ground 5: applying an unduly onerous standard to the conduct of the appellant

50. Under this head, the skeleton argument of Ms Cox has simply re-canvassed the various factors relied upon by Mr Wilding before the Tribunal. It is in essence, simply a redeployment of the merits of the Tribunal decision. In dealing with this ground, the judgment of the EAT stated:

> "75. Although we acknowledge that there was the potential in this case for an Employment Tribunal to reach the opposite conclusion on the issue of mitigation, in our judgment the conclusion they reached was clearly open to the Employment Tribunal and was a 'permissible option' and one that was well within the 'range of decisions' open to the Employment Tribunal.
>
> 76. In this context we add that in our judgment the Employment Tribunal was in a unique position to assess the points made by Mr Wilding as to the conduct of the hearing on liability and as a result of that hearing had heard evidence upon which they could base properly informed decisions on (i) Mr Wilding's evidence as to his perception of the history and his reaction thereto, and (ii) the reasonableness of his decision to refuse the offer of re-employment assessed in the manner set out in paragraph 64 hereof."

[The reference to paragraph 64 of the EAT decision is a reference to the considerations which I have set out at paragraph 37 above.]

CONCLUSION

51. I endorse the remarks of the EAT which I have just quoted and would dismiss this appeal.

Lord Justice Brooke:

52. I agree.

Lord Justice Sedley:

53. The Employment Tribunal recorded the agreed approach to the issue of mitigation of loss in this way:

> "From the submissions of Mrs Cox and Mr Bean it is clear that the burden of proof is on the Respondent to show that the Applicant ought reasonably to take the mitigating step ... i.e. through evidence or otherwise ... to persuade the Tribunal that the Applicant acted unreasonably"

But within this area of agreement a dispute lurks. Mr Bean articulated it when he submitted that you act unreasonably if you do not act reasonably. In this field of law, at least, there is a very real difference between the two things.

54. Take a not uncommon case: an employee who has been subjected to harassment at work is offered his job back with the same colleagues but with promised safeguards against repetition. He refuses it in circumstances in which the Employment Tribunal consider that it would have been reasonable to accept it; but they accept, too, that his decision to refuse was in all the circumstances not an unreasonable one. If Mr Bean's proposition is right the Employment Tribunal will not know whether the applicant has won or lost.

55. Lord Justice Simon Brown's formulation in *Emblem v Ingram Cactus Ltd* (CA, unreported, 5

November 1997), although it cites no authority and is addressed to the facts of that case, a restatement of the principle set out by Lord Macmillan in *Banco de Portugal v Waterlow and Sons Ltd* [1932] AC 452, 506:

> "The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

In other words, it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed.

56. The circumstances to be objectively considered will importantly include, though they will not be confined to, the applicant's own state of mind. This both parties now accept. So long as the tribunal applies the legally correct question to these facts, its conclusion will not - barring perversity - be appealable.

57. My concern in this appeal has been whether the Employment Tribunal, having identified the right legal test, applied it or some less appropriate test to the facts. As Mr Bean has been able to demonstrate, the first part of the extended reasons sets out the law irreproachably, and the later part sufficiently marshals the key facts. But the tribunal's critical reasoning is in paragraph 35, the text of which is garbled. What I understand it to be saying is that BT's attitude did not in the tribunal's opinion afford an adequate reason for Mr Wilding's failure to mitigate his loss by accepting re-employment. This formulation does not tell the reader whether the tribunal think that he was acting unreasonably in refusing re-employment (which is the right test) or whether they consider (inappropriately) that it would have been more reasonable to accept it. Exactly the same opacity is present in the following paragraph: "... we find that it was not reasonable for the Applicant to refuse that offer".

58. It is only in paragraph 30, which introduces the Employment Tribunal's conclusions, that one finds an unambiguous formulation:

> "We concluded that the Applicant had acted unreasonably in not accepting the offer of re-employment."

These are not merely semantic differences: they reflect an important legal distinction.

59. This was a decision which, as the Employment Appeal Tribunal pointed out, could quite well have gone the other way. But I am constrained to agree that it is not shown to have been arrived at either by a misunderstanding of the law or by a misapplication of it to the material facts. It ought not to be so difficult to follow through a tribunal's reasoning. These extended reasons would have benefited markedly by some proofreading and editing. They are garbled in several places and not coherently ordered. One knows what the pressure of work is, but presentation and clarity do matter.