Respondents – don't forget about mitigation evidence

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The scenario is not uncommon – the Claimant has been dismissed by the Respondent and has brought a claim in that regard, the trial is listed to decide liability *and* remedy, the bundle and witness statements have been prepared for trial, the Claimant has produced evidence of his or her unsuccessful searches for new employment – and there is no mitigation evidence from the Respondent.

Many Respondent employers proceed to trial on the mistaken assumption that it is for the Claimant to prove the financial loss they have suffered as a consequence of their dismissal and that it is for the Claimant to prove that they have taken reasonable steps to find another job. That is *not* what the law says. It is well established law that the onus of showing a failure to mitigate lies on the Respondent employer: see for example *Fyfe v Scientific Furnishings Ltd 1989 ICR 648, EAT* or *Cooper Contracting Ltd v Lindsey 2015 ICR D3, EAT*. This means that if the Respondent wants the question of mitigation to be considered by the tribunal, the Respondent has to raise it, and it is for the Respondent to prove that the Claimant has acted *unreasonably* (see *Cooper Contracting Ltd v Lindsey 2015 ICR D3, EAT*). Moreover, to discharge the burden of proving that the Claimant acted *unreasonably* it is not enough for a Respondent to show that there were other reasonable steps the Claimant could have taken to secure new employment which he or she did not take (e.g. apply for this vacancy or that). The Respondent must show that the Claimant acted *unreasonably* in not taking such steps (see *Wilding v British Telecommunications plc 2002 ICR 1079, CA* per Potter LJ). In *Singh v Glass Epress Midlands Ltd 2018 ICR D15, EAT* the Respondent submitted that it had discharged that burden through cross-examination of the Claimant, thus establishing that the Claimant had no valid reason why he was not working full-time. HHJ Eady held, at [27], that even if it were possible for a Respondent to discharge the burden in this way, the tribunal needed to be clear that the burden remained on the Respondent throughout, and its reasoning needed to demonstrate that it had not confused what might have been the failure to take reasonable steps by the Claimant with the establishment by the Respondent that the Claimant had acted unreasonably in mitigating his losses; the two questions are not automatically the same.

If a Respondent establishes, with evidence, that there were many other jobs available, the Respondent can ask the tribunal to find that the Claimant acted unreasonably in not having searched and applied for them. However, if the Respondent adduces no evidence at all on that question, it will be hard for the tribunal to conclude that the Claimant acted unreasonably, even if the employee's evidence of job searches appears to be sparse.

This means that Respondents will usually be well advised to start thinking about mitigation evidence as soon as they are put on notice of a dismissal claim. The risk in failing to do so is particularly high where the Claimant was a high earner, or in discrimination claims and claims for automatically unfair dismissal where damages are uncapped.

Many Respondent employers may have, internally, good knowledge of the job market in their sector. They will know where and how they advertise and recruit, and they may know about where and how other businesses in their sector in their area do or are likely to do so. They may know the principal websites where jobs in their sector and area are usually advertised or the main recruitment agencies for their area and sector. They may know if there is currently an employer's market or an employee's market, and why. Thus, they may be able to start collecting evidence at an early stage which is relevant to mitigation and would be well advised to do so. They may also be able to provide relevant witness evidence, though not necessarily from the same individuals they intend to call as witnesses in relation to the liability issues. Where Respondents do not have this sort of knowledge themselves, they should consider obtaining it from recruitment agencies or consultants who may also be able to provide evidence on typical remuneration packages within the Claimant's area of employment and geographical area. This type of evidence may also be relevant where the Claimant is claiming for future financial loss, going towards showing the likelihood of the Claimant being able to mitigate his or her losses in the future.

In summary, Respondents should not, in their focus on winning the case on liability, overlook the need for Respondent mitigation evidence if they should lose.

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