EMPLOYMENT TRIBUNALS

Claimant: **Mr P J Grosset**

Respondent: **City of York Council**

Heard at: **Hull** **On:** **9 December 2016**

Before: **Employment Judge Forrest**
Mr I Williamson
Mrs S Richards

Representation

Claimant: Miss A Davies, Counsel

Respondent: Mr S Healy, Counsel

JUDGMENT ON REMEDY (2)

Compensation for loss of pension rights

1. The respondent is ordered to pay Mr Grosset compensation for loss of his pension rights: £82,597.00

2. The respondent is ordered to pay Mr Grosset compensation for loss of his spouse's pension rights £94,339.00

3. The respondent is ordered to pay Mr Grosset compensation for loss of death in service benefits £32,487.00

Grossing up for tax

4. The hearing is further adjourned to allow the parties time to calculate, and it may be agree, the amount due in respect of tax Mr Grosset will have to pay on receipt of his compensation.

REASONS

Background

1. This is our second judgment on remedy. It should be read with our first judgement on remedy which, following a hearing on 25 and 26 July 2016, was delivered on 27 September 2016. In that first judgement, we made awards of compensation to Mr Grosset on various points, but were unable

to complete our decision on 2 points without further consideration. Point 9 of the Judgment set out the 2 points:

> 9. The calculation of compensation for loss of pension rights, and for grossing up the amounts awarded for tax is adjourned for further consideration.

2. This judgement, dealing with those points only, follows this hearing on 9 December 2016. At this hearing, neither of the parties sought to call any witnesses. In addition to documents already before us at the previous hearing in relation to remedy, we were supplied with a further report from the consultant actuary, Mr Auld of 18 October 2016; a list of questions submitted by the Respondent to Mr Auld, 2 November 2016; Mr Auld's response to those questions with a covering letter, 11 November 2016; a further question of 1 December 2016; and a further response to that question from Mr Auld of 6 December 2016. In addition, both representatives submitted further written submissions on the disputed points. Mr Healy made oral submissions to us on the disputed points; Miss Davies replied. We are grateful to the advocates for their assistance. We regret the time taken to resolve these issues of compensation, but the sums involved are large and take us into unfamiliar territory.

Compensation for loss of pension rights

3. The bulk of this was dealt with in our previous Judgement on Remedy: see paragraphs 55 to 75. The points we left open for further consideration at this hearing are considered at 68 to 75. The parties raised three points for us to decide:

(a) Calculation of pension loss: salary increase?

4. In his previous reports Mr Auld had not spelt out clearly the precise basis of his detailed calculations. Clarification is now provided by his further reports. It is clear that he has used the 2.5% interest rate specified in the Damages Act for the rate of return in the future on the sums awarded. Thus far both parties agreed with that approach. However, in addition Mr Auld had also taken into account a probable future increase on current salary of 1% a year. He argues that this is justifiable on the approach set out in the Booklet on Pension Loss prepared by ET Chairmen which "allowed for 1% real salary growth" (i.e. 1% growth above the rate of inflation, whatever that may be at the time). In his letter of 18 October, Mr Ogden explains that "this is justifiable in the case of profession occupations where one might reasonably expect promotional salary increases in addition to cost of living increases. It is less justifiable in cases where the claimant has a manual job, where cost of living increases might be expected to be the norm."

5. Mr Healey disputed this approach, arguing that where the Ogden tables were used to calculate the losses then current salary figures should be used, with no allowance for future increase, since an increase was originally factored into the Ogden table. He referred the Tribunal to cases where claimants had disputed the use of the 2.5% discount figure for the rate of return on investments for the sum awarded (the rate set by the Lord Chancellor under the Damages Act): Cooke v United Bristol Healthcare NHS Trust [2003]EWCA Civ 1370, and Warriner v Warriner [2002] EWCA Civ 181. Those cases were decided at a time when the actual rates of return that could be achieved were lower than 2.5% and the claimants

argued that the effect was therefore to reduce their awards unfairly. Those cases emphasised the importance when considering how future inflation should be taken into account in calculations of sticking to the 2.5% rate stipulated. Mr Healy argued that including an element for salary inflation over and above the 2.5% rate was in effect a way of improperly adjusting the discount rate.

6. In answer, Ms Davies supports Mr Auld's position arguing that while normally no additional increase for salary inflation should be provided, where there is specific evidence that an increase over and beyond inflation was to be expected, then such an increase should be included. She referred us to Kemp and Kemp:

Kemp and Kemp, Chapter 11: Damages for Loss of Future Pension Benefits, October 2015

11-001 *The final salary pension scheme involves the future receipt of deferred earnings from an accumulated fund. … The future periodical payments following the selected date of retirement, and the comminuted lump sum or gratuity, are likely to be prejudicially affected by a shortened length of service or by a reduced qualifying income where the claimant has been injured and is unable to maintain his former earnings. The court has the task of assessing the current value of the claimant's prospective pension loss in these circumstances. The calculation is made on a traditional multiplicand/multiplier basis in order to achieve a lump sum award at the date of trial or settlement. Just as claims for future loss of earnings are based on multiplicands that are assessed on the level of earnings current at the date of trial, without reference to any likely future wage or salary inflation, pension multiplicands are determined in the same way, using the claimant's appropriate level of earnings current at the date of trial.*

However, if the claimant is able to establish a real prospect of future promotion with concomitantly enhanced earnings at the date of retirement, the enhanced current net earnings (discounted for the chance of the promotion not being achieved) may be used in the pension loss calculation.

Accepted judicial practice for the calculation of pension loss therefore uses contemporary money values at current earnings. No specific allowance is made for future inflation, save for the allowance that is built into the assessment of the multiplier which is derived from the Ogden tables and the current rate of return to be used in connection with the tables. No adjustment is made for a claim of preferred form of investment".

Later in the chapter, at paragraph 11-007, Kemp states:

"*Early retirement due to injury or illness may mean that the claimant's pensionable salary is lower than would otherwise have been the case. The court may allow for the prospect of future promotion or re-grading when quantifying the pensionable salary. If a court finds that had the claimant continued in employment the pensionable salary would have increased over and above the effect of future wage inflation, which is ignored, the claimant should be compensated for the loss of the enhanced annual pension that would have been received based on future promotion or re-grading*".

7. On balance, we are persuaded that it can be appropriate to factor in an anticipated increase in salary where "*the claimant is able to establish a real prospect of future promotion with concomitantly enhanced earnings at the date of retirement".* We do not accept that by doing this, in adjusting the multiplicand to take account of salary rises over and above rises due to inflation, we are subverting the use of the 2.5% discount rate. Where on the facts, a claimant would have received a real increase in salary, over and beyond inflation, including the prospect of such a rise in the calculation simply reflects the position the claimant would have been in had he not been discriminated against.

8. We turn therefore to consider this as a matter of fact on the evidence before us, evidence given both at the liability hearing and in the previous remedy hearing. Our previous findings at the first remedy hearing included:

   37. ……, we find that this is one of those rare, exceptional cases where it is appropriate to award career loss earnings, through to retirement, aged 53 (the age predicted in Professor Knox's agreed report) in the light of the agreed medical evidence. Mr Grosset had made a deliberate career choice back in 2002 to re-train as a teacher. He found he enjoyed the job, despite a cut in earnings at the time; he had found his vocation. He progressed rapidly within the profession, applying for assistant headships in 2010 and 2011. He was advised he needed experience as head of a larger department to better his CV. He moved to Joseph Rowntree, in 2011, to head up such a larger department; and successfully turned the department round. At that stage, and not for the first time, the government and Ofsted moved the goal posts, placing more stress on progress targets for individual pupils, rather than the cruder measure of overall exam success. But for Mr Grosset's disability, and the failure to make adjustments, there is no evidence to suggest that Mr Grosset would not have continued his successful career.

   We find that his career is likely to have ended in any event in 2025, at aged 55 through ill health. Given that shortened timescale, it is most unlikely he would have sought to change careers at any time before retirement; though he may well have wished to change schools in order to further his career.

9. In paragraphs 85 to 95 we made findings to calculate Mr Grosset's prospective loss of earnings, following loss of his teacher's job. We found at the end of paragraph 86: *"On the other hand, Mr Grosset has a reasonable expectation of gaining promotion, thus increasing his salary, in the next year or two, as we described above". 87 "In our view, an increase of 1% a year is a more realistic estimate of future salary increases"*; and we then calculated his future salary loss on that basis, (going on to discount for the possibility of salary increase or redundancy in his new job).

10. It seems to us that consistent with that finding of a likelihood of a 1% future increase in earnings over and beyond inflation in our previous Judgment, when we calculated Mr Grosset's future loss of earnings, we should make the same finding when we come to consider the essentially similar question of compensation for loss of future pension rights. Such an increase in earnings is by no means uncommon for teachers. Mr Grosset had had a rapid rise to get to his present position as head of department of

a large secondary school. He had already begun the process of applying for the next step up the ladder; it is likely on a balance of probability that had he not been discriminated against he would have been able to accommodate the changes introduced at the school in the autumn of 2014 and would have continued his successful upwards career, attracting an increase in salary, over and beyond increases to account for inflation.

11. Moreover we are aware that the pay scales for teachers cover a range of points. We do not know whereabouts on the scale Mr Grosset had reached, but it may be that scale progression in itself would form a sound factual basis for Mr Auld's prediction. On the facts, this case falls squarely within the exception where an allowance should be made for salary rises over and above inflation.

12. Estimating the size of such an allowance inevitably involves an element of speculation: we set out above our reasons for finding such an increase was probable. On the other hand, there is always a chance the salary increase may never have happened, either through external factors, such as government policy on teachers pay and the impact of austerity; or internal factors: Mr Grosset may never have achieved promotion in a competitive market: for example, the blip on his record identified in the results in 2013 may have held him back. Doing the best we can, and noting Mr Auld's estimate, an increase of 1% a year seems appropriate.

13. In relation to calculation of the loss, Miss Davies made a concession. In Mr Auld's responses, 11 November 2016, to Mr Healy's questions he provided a table showing his detailed calculations for pension loss on 3 alternative bases:

    a. on salary at date of dismissal with no account taken for future salary increases;

    b. 1% salary increases per annum until retirement.

    c. Original results: based on interest of 5%, salary inflation of 3.5%, and inflation of 2.5%

    The net value of pension loss was: (a) £72,743; (b) £82,597 and (c) £85, 213.

14. Ms Davies accepted that rather than seeking the net figure given in Mr Auld's previous report, she would accept the figure given at (b): £82, 597; and we therefore order that amount.

(b) Calculation of dependents benefit: salary increase?

15. The second area of dispute involved the calculation of dependents pension benefits. Essentially the same point arose. So far as the spouse's pension is concerned, Mr Healy argued that Mr Auld had wrongly included a salary increase of 1%; for the reasons given above, we find Mr Auld was correct to do so. Mr Auld's calculation is not otherwise challenged, and we accept it: £94339. We note that the calculation incorporates, in effect, a discount for early receipt.

(c) Death in service benefit: accelerated receipt

16. Thirdly there was a dispute between the parties over the calculation of compensation of loss of the death in service benefits given that the sum to be awarded would be received now, whereas in practice, if it did ever materialise, it was likely to do so some years into the future. Mr Healy

argued that in that case following normal principles we should make a reduction for accelerated receipt. Miss Davies, following Mr Auld, argued that the benefits were really too small to be taken into account, given that interest rates are so low: the benefit of accelerated receipt are likely to be very small. We are with Mr Healy on this point. There is a clear benefit from accelerated receipt in the circumstances, accepting that it may be difficult to calculate.

17. In those circumstances we accept Mr Healy's approach of calculating the mid point of the period which the award is supposed to cover and calculating the chance of an earlier death occurring within that period from the appropriate Ogden table as 9%. If we are compensating for accelerated receipts from halfway through that period three and a half years and reduce the amount by 0.91, the figure suggested from the Ogden tables, for 3 1/2 years it reduces the compensation awarded to £32,487; and we award that amount.

Grossing up for tax

18. The two remaining points relate to grossing up. The mathematics remain complicated and there are two specific areas in dispute.

19. Firstly, should the loss of the personal allowance, currently £11,000, be compensated for? This loss arises because once income in a tax year crosses the £150000 threshold, the personal allowance is withdrawn. The revenue treats the bulk of the compensation awarded to Mr Grosset as income, and he will therefore lose the benefit of his personal allowance in the tax year of receipt.

20. Mr Healy argues that this is too remote a consequence of the act of discrimination to attract compensation. It is a loss caused by the vagaries of the tax system rather than by any action of the Respondent and that therefore we should let the loss lie where it falls and not compensate for the loss.

21. Miss Davies disagrees and so do we. Had the Respondent not dismissed Mr Grosset he would have been entitled to the first £11,000 of his salary in the current tax year free of tax. Because of the discrimination he experienced, instead of receiving salary in the normal way and paying tax in the normal way, he will be compensated for several years loss of earnings in a lump sum payment in one tax year and so pay higher tax as a result, including the loss of the personal allowance That loss arises through a direct chain of causation leading back to the Respondent's discriminatory actions. Had it not been for their discrimination, Mr Grossett would have been entitled to £11,000 of his income in that tax year tax free. We therefore award him the additional amount of tax he will have to pay as a result of loss of his personal allowance.

22. Secondly there remains an issue about the taxable aspect of awards of injury to feelings. In our previous Judgment we gave the parties liberty to apply if the amount awarded for injury to feelings turned out to be taxable. We did not address that issue in connection with the award of interest on the injury to feelings. It seems to us the same principles should apply and both representatives agree with that approach. We award the net figure making no element of enlargement to account for the impact of taxation. However if it turns out that either in the hands of City of York or of Mr

Grosset the revenue do require taxation to be paid on that element, Mr Grosset is given leave to apply to the Tribunal to reconsider this aspect of compensation: see paragraph 103 of our early Judgment.

Final calculations:

23. Having announced our decision in principle on the disputed points, as above, the Tribunal adjourned, inviting the representatives to reach agreement on the appropriate amounts of compensation due; and on the figures grossed up for tax. After an adjournment of one hour, the representatives informed the Tribunal that they had been unable to make progress in the time available. The difficulty lay in the quantity of calculation required. Rather than attempt the calculations themselves in the limited time by now available, the Tribunal therefore adjourned the hearing to afford the representatives more time to complete their calculations, particularly as this would allow them to employ the fuller resources available to them in chambers. Both representatives anticipated that agreement should easily be achieved.

24. The Tribunal therefore adjourned the hearing to Friday 27 January 2017 at the Hull Employment Tribunal with a time estimate of half a day. The representatives are asked to inform the Tribunal if they have reached agreement by no later than Monday 16 January 2017. If they have not reached agreement they should at least inform the Tribunal of which issues have been settled, and which remain in dispute, with each representative submitting their detailed calculations for each disputed issue.

Employment Judge Forrest

Date 6 March 2017

Date sent 6 March 2017

Note of subsequent events

The parties subsequently informed the tribunal on 16 January 2017 that they had agreed “the final remedy figure” of £646,663.90; and the hearing of 27 January was therefore cancelled.