Case Number: 2301307/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss S Rahman	and	St Georges University Hospitals NHS Foundation Trust

Held at London South on 18th May 2017

Representation	**Claimant:**	Mr K Sonaike, counsel
	Respondent:	Mr C Edwards, counsel

Employment Judge J Pritchard

RESERVED JUDGMENT ON REMEDY

1. The Respondent is ordered to pay the Claimant a basic award in the sum of £10,687.50.
2. The Tribunal concludes that the Claimant could obtain employment in the NHS within 2 years of the date of this remedy hearing and future losses should be so limited to that period.
3. The compensatory award shall include £350.00 for loss of statutory rights.
4. The Respondent is ordered to pay to the Claimant damages for breach of contract the sum of £7,412.35.
5. It is just and equitable for the compensatory award and damages for breach of contract to be increased by 10% by reason of the Respondent's unreasonable failure to comply with the ACAS Code of Practice.
6. The Respondent is ordered to pay the Claimant costs in the sum of £1,200.00 by way of re-imbursement of her Tribunal fees.

REASONS

7. The hearing was listed to determine remedy. The Claimant confirmed that she was not seeking re-instatement or re-engagement. The Tribunal heard evidence from the Claimant and from Jason Bradley, Head of Information for the Respondent. The Tribunal was provided with a bundle of relevant documents which included the Claimant's schedule of loss. At the conclusion of the hearing the parties made brief oral submissions.

The issues

8. The parties had reached agreement in respect of compensation for the basic award and for loss of statutory rights. The parties had also reached agreement

as to the damages to be paid for breach of contract (notice pay). The Respondent agreed that if the Claimant had paid Tribunal fees then she was entitled to costs by way of re-imbursement. Those agreements are recorded in the Judgment above.

9. The Claimant obtained new employment with a broadly equivalent salary on 18 April 2016, shortly after the termination of her employment with the Respondent. However, the Claimant's new employment does not have the benefit of a final salary pension scheme of the kind provided by the Respondent; rather, she has the benefit of a less generous contributory money purchase scheme. The Claimant therefore claimed ongoing loss. She provided the Tribunal with an actuarial report and claimed loss in the sum of £175,916.00 which appears to reflect loss until retirement at the age of 67 years.

10. The parties asked the Tribunal to determine the following:

    10.1. How long would the Claimant's employment relationship have lasted with the Respondent had she not been constructively dismissed?

    10.2. On what date could the Claimant obtain comparable employment in the NHS or other equivalent employment?

    10.3. Should the Tribunal award an uplift to the compensatory award by reason of the Respondent's failure to comply with the ACAS Code of Practice, in particular the Respondent's unreasonable delay in dealing with the Claimant's grievance?

11. The parties assured the Tribunal that once it had made its findings in respect of the issues above, the parties would then be in a position calculate the pension loss and would reach agreement as to the compensatory award.

<u>Relevant findings of fact</u>

12. The Tribunal repeats paragraphs 24 – 27 of its Reserved Judgment dated 3 February 2017. The Claimant holds a degree in computer science. She is 49 years of age.

13. After the termination of her employment, the Claimant looked for jobs but could find no roles in her area of expertise, namely SLAM. However, she had no need to look further when she was approached by her current private sector employer which offered her employment working in her area of expertise. In other words, she was head-hunted because of her expertise in SLAM. She commenced employment with her current employer on 18 April 2016.

14. Although NHS Trusts will require specialists in SLAM, vacancies are relatively rare. Jason Bradley said it did not surprise him that such vacancies are rare given the niche nature of the role. The Claimant told the Tribunal that the last time she was aware of a requirement for a SLAM specialist was in 2013 at Kings. She also referred to a vacant SLAM role at St Helier but could not remember when it was.

15. If the Claimant were to apply for a vacant position within the NHS, whether within SLAM or otherwise, it is likely that there would be other applicants and it cannot be said with any certainty that she would be successful.

16. Nevertheless, although the Claimant's specialist knowledge relates to SLAM, and not in other clinical areas such as mental health or cancer, the Claimant possesses significant skills, in particular analytical skills and management skills. She also has significant experience working in the NHS.

17. The Tribunal repeats paragraphs 62 and 75.4 of its Reserved Judgment dated 3 February 2017 which illustrate the length of time taken by the Respondent to deal with the Claimant's grievance.

Applicable law

18. Section 118 of the Employment Rights Act 1996 provides that where a Tribunal makes an award for unfair dismissal the award shall consist of a basic award and a compensatory award.

19. Section 123 provides that the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal in so far as that loss is attributable to the action taken by the employer. The loss shall be taken to include any expenses reasonably incurred by the Claimant in consequence of the dismissal and the loss of any benefit which she might reasonably be expected to have had but for the dismissal

20. It is the employee's duty to provide evidence of her loss; see, for example, Adda International Ltd v Curcio 1976 IRLR 425 EAT.

21. Although neither party made reference to it in submissions, the Tribunal was provided with a copy of the judgment in Aegon UK Corp Services v Roberts [2009] IRLR 1042 which appears to be authority for the proposition that the Tribunal is not entitled to apply different principles of causation to different aspects of the remuneration package; in particular, the Tribunal cannot carve out pensions for special treatment.

22. In ascertaining the loss the Tribunal must apply the same rule concerning the duty of a person to mitigate his loss as applies to damages under the common law of England and Wales.

23. The Tribunal is under no duty to consider the question of mitigation unless the employer raises it and adduces some evidence of failure to mitigate; Fyfe v Scientific Furnishings 1989 ICR 648. When considering the question of mitigation, the Tribunal should:

    23.1. Identify what steps should have been taken by the Claimant to mitigate her loss;

    23.2. Find the date upon which such steps would have produced an alternative income;

    23.3. Thereafter reduce the amount of compensation by the amount of income which would have been earned

    See: Savage v Saxena 1998 ICR 357

24. In Cooper Contracting Ltd v Lindsey UKEAT/0184/15 Langstaff J reviewed the authorities relating to mitigation and his conclusion can be described as follows:

24.1. The burden of proof is on the wrongdoer; a Claimant does not have to prove that she has mitigated loss.

24.2. It is not some broad assessment on which the burden of proof is neutral.

24.3. What has to be proved is that the Claimant acted unreasonably; she does not have to show that what she did was reasonable.

24.4. There is a difference between acting reasonably and not acting unreasonably.

24.5. What is reasonable or unreasonable is a matter of fact.

24.6. It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.

24.7. The Tribunal is not to apply too demanding a standard to the victim; after all, she is the victim of a wrong. She is not to be put on trial as if the losses were her fault when the central cause is the act of the wrongdoer.

24.8. The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.

24.9. In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

25. Without evidence adduced by the employer upon which the Tribunal can be satisfied that, on the balance of probabilities, the Claimant has acted unreasonably in failing to mitigate, a claim of failure to mitigate will simply not succeed; see: Look Ahead Housing and Care Limited v Chetty and another UKEAT 0037/14.

26. The amount of the compensatory award shall not exceed the lower of £78,335 (the relevant figure at the time of the Claimant's dismissal) or 52 weeks' pay. A week's pay is calculated according to the rules in sections 221-229 but without applying the limit on a week's pay set out in section 227.

27. Section 124A of the Employment Rights Act 1996 together with 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer has unreasonably failed to comply with the Code of Practice, a Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the compensatory award and damages for breach of contract by up to 25%. Similarly, where an employee has unreasonably failed to comply with the Code, a Tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce the compensatory award and damages by up to 25%.

Conclusion and further relevant findings of fact

28. The Tribunal accepts the Claimant's evidence that she would not have left the Respondent's employment by reason of the "bad blood" between her and Andy Thomas, not least because Andy Thomas was no longer managing her. Further, the lack of support about which she had complained had been addressed by the Respondent. Although the Claimant considered resigning in about May/June 2015 because the Respondent sought to reduce her SLAM responsibilities, those responsibilities were promptly reinstated and, but for the breach of contract which has been identified, there was no credible evidence to suggest that the Respondent would again seek to reduce the Claimant's SLAM responsibilities. With 19 years' service, the Claimant was clearly a loyal employee; there was no evidence to suggest that she might become disloyal or seek a change in her employment which she appears to have valued. Regardless of the Tribunal's findings in paragraph 75 of its Reserved Judgment dated 3 February 2017, there was insufficient evidence before the Tribunal to suggest that had the Respondent had not breached the Claimant's contract of employment, in other words the Claimant had been permitted to return to her SLAM role, that the Claimant would have left the Respondent's employment in the near future as contended by the Respondent.

29. It certainly cannot be said, and the Respondent did not appear to be suggesting, that the Claimant acted unreasonably by taking up employment with her present employer.

30. The three vacant NHS positions referred to by Jason Bradley (two at pay band 8A and one at pay band 7) were said to be a snapshot of the vacancies taken from a job search undertaken shortly before the remedy hearing. Even disregarding the fact that those vacancies did not involve SLAM expertise and no credible evidence to suggest that the Claimant would have been successfully appointed, there was simply insufficient evidence before the Tribunal to conclude that there were vacancies of any other kind during the majority of the period following the termination of the Claimant's employment for which she unreasonably failed to apply. The Respondent has failed to show on the balance of probabilities that the Claimant has unreasonably failed to mitigate her loss.

31. There appeared to be a lack of clarity on the Claimant's part as to how the Tribunal should assess loss going forward. The Tribunal does not accept that looking forward the Respondent is required to show an unreasonable failure to mitigate on the Claimant's part. Rather, the Tribunal is required to determine what is just and equitable. It will be a rare case where the Tribunal will award a career-long loss; see Wardle v Credit Agricole Corporate and Investment Bank 2011 ICR 1290 CA. The Tribunal must determine on the evidence before it when the Claimant, acting reasonably, will obtain comparable employment. Deciding future loss will almost inevitably involve a consideration of uncertainties: see for example Thornett v Scope 2007 ICR 236 CA. Also see: Contract Bottling Ltd v Cave 2015 ICR 146.

32. This is not a case where there is no real prospect of the Claimant ever obtaining an equivalent job. As the Tribunal has found, she is a highly capable individual with a university degree, has significant experience in the NHS including management, with analytical skills and is a SLAM specialist. SLAM vacancies are

relatively rare. However, the evidence suggests that the Claimant could undertake a non-SLAM role. Thus, even if a SLAM vacancy were not to arise in the near future, it would be reasonable to expect the Claimant to apply for non-SLAM band 8A roles within the NHS. It has to be accepted that the Claimant might not be successful for a role for which she does not have specialist skills and knowledge (such as the mental health and cancer related roles referred to by Jason Bradley), but the Tribunal concludes that she would have a reasonable chance of being appointed to such roles. The Tribunal notes that the vacancies referred to were within a reasonable travelling distance of the Claimant's home. The Tribunal also takes judicial notice that there are other NHS Trust employers situated within a reasonable travelling distance from the Claimant's home. The Tribunal accepts Jason Bradley's evidence, not least because he has much experience recruiting in the NHS, that such roles are regularly advertised and that there are difficulties in finding experienced candidates. Taking all these factors into account the Tribunal concludes that, on the balance of probabilities, the Claimant would be appointed to a Band 8A grade in the NHS within a period of 2 years from the date of the remedy hearing and that future loss should be so limited.

33. There was no evidence before the Tribunal to suggest that there was any equivalent employment outside the NHS.

34. There was no evidence to show that upon appointment to a Band 8A role the Claimant would necessarily have the benefit of a final salary pension scheme which she enjoyed when working for the Respondent. That will be a matter for the parties to consider when seeking agreement as to the compensatory award.

35. Mr Edwards submitted that the question of uplift was an issue raised at the last minute and that the Respondent did not have the opportunity to give evidence as to the reasonableness of the Respondent's delay in dealing with the Claimant's grievance. In any event, Mr Edwards submitted that the obligations under the ACAS Code of Practice fall away after an employee leaves employment because the Code refers to "employees" and "employers". Dealing with those points in turn:

    35.1. The drafting of section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 does not appear to suggest that an issue relating to the compliance with the ACAS Code of Practice needs to be raised by a party. Rather, it gives the Tribunal the discretion to increase any relevant award where it appears that there has been an unreasonable failure to comply.

    35.2. The delay was clearly identified in paragraph 75.4 of the Tribunal's Reserved Judgment dated 3 February 2017 and the Respondent could have reasonably expected the Claimant to raise the question of uplift.

    35.3. Although the Code of Practice itself is silent as to whether ex-employees fall within its scope, the definition of employee and employer section 295 of the 1992 Act, under which the ACAS Code of Practice is issued, includes former employees and former employers.

36. The Tribunal concludes that the ACAS Code of Practice and section 207A of the 1992 Act are applicable. The Tribunal does not accept, as submitted by Mr Sonaike, that there was a total failure on the Respondent's part to deal with the Claimant's grievance. The requirement for an employer to arrange a grievance meeting without unreasonable delay is but one aspect of the Code's requirements. Nevertheless, the delay was significant and the Respondent has put forward no evidence as to why the delay might not be unreasonable. In the Tribunal's view, it would be just and equitable for the compensatory award and damages for breach of contract to be increased by 10%.

37. The agreed and quantified sums set out in this Judgment are subject to the provisions of Employment Tribunal's (Interest) Order 1990. Proceedings will be stayed for a period of 6 weeks so that the parties can calculate and agree the sum of remainder of the compensatory award.

38. The Tribunal's records show that the Claimant paid Tribunal fees totalling £1,200.00. She is entitled to be reimbursed.

Employment Judge Pritchard
30 May 2017