EMPLOYMENT TRIBUNALS

Claimant: Mrs L MacInnes

Respondent: Telecare services Association

HELD AT: Manchester **ON:** 8 November 2017

BEFORE: Employment Judge Ross
Ms C S Jammeh
Mr T A Henry

REPRESENTATION:

Claimant: Mr J S MacInnes
Respondent: Mr P Warnes

JUDGMENT ON REMEDY RECONSIDERATION

The judgment of the Tribunal is that the claimant's application for reconsideration of the remedy judgment is not well-founded and fails.

REASONS

1. The Tribunal found that the claimant succeeded in one part of one allegation of her claims against the respondent (see our Reserved Judgment sent to the parties in June 2016). We found that an allegation that the respondent has failed to provide the claimant with access to the contractual pension scheme succeeded in part. We were satisfied that the failure to admit the claimant to the pension scheme itself was not discriminatory (see paragraphs 180 and 182). However, we found that although the respondent allowed the claimant to access the pension scheme and permitted her to backdate employer's contributions she was only permitted to backdate contributions to March 2014 rather than to April 2011.We found that failure to permit her to backdate contributions from March 2014 to the start of employment in April 2011 was discriminatory.

2. In a remedy judgment sent to the parties on 17 May 2017 we awarded compensation.

3. The claimant, by email of 21 May 2017, requested a reconsideration of the remedy judgment. At the outset of the hearing the claimant submitted a 44 page submissions document. We also received a three page submissions document from the respondent.

The Law

4. The Tribunal reminded itself of rule 70 schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The test for reconsideration under the 2013 rules is whether such a reconsideration is in the interests of justice.

5. We remind ourselves of the case law in **Outasight VB Limited v Brown [2014] UKEAT 0253.14**. This case confirms that the previous cases dealing with review under the earlier Tribunal rules remain applicable. The 2013 rules do not change the position. Accordingly the "interests of justice" must be seen from both sides (**Redding v EMI Leisure Ltd EAT 262/81**). It is not an opportunity for a "second bite of the cherry".

6. Where a party argues that new evidence has become available, it must be shown not to have been reasonably known or foreseen at the time of the original hearing.

7. We turn to the grounds relied upon by the claimant.

New Evidence

8. The claimant relied on a letter which states it was typed on 27 March 2017 to Dr S M Winter (which appears to be incomplete); a letter to Dr Winter typed on 22 September 2017 and a letter from Department for Work and Pensions concerning industrial injuries disablement benefit dated 5 June 2017.

9. The Tribunal notes that the remedy hearing was heard on 29 March 2017 (the liability hearing was in April and May 2016 over ten days).

10. The Tribunal is not satisfied that the letter typed on 27 March 2017 could not have been produced at the original remedy hearing.

11. The Tribunal is not satisfied that either the letter dated 27 September 2017 or the industrial injuries letter of 5 June 2017 is relevant for reasons explained below.

12. The last document produced by the claimant's representative was a further calculation of pension loss and a pension calculation document from Friends Provident which was sent into the Tribunal after the remedy hearing had concluded on the last occasion. The Tribunal is not satisfied that this information could not have been produced in time for the remedy hearing. There is a period of almost a year between the liability hearing and remedy hearing. In addition the Tribunal is not satisfied that the information is relevant for the reasons given below in this judgment.

Apportionment of Compensation

13. The claimant is critical of the way the Tribunal has awarded compensation to the claimant for psychological injury, physical injury, loss of earnings and for medical expenses.

14. When awarding compensation the Tribunal, under section 124 of the Equality Act 2010 may –

(a) make a declaration as to the rights of the complainant and the respondent;

(b) order the respondent to pay compensation to the complainant.

15. The principles used are those relevant to calculate the amount of compensation corresponding to damages that could be ordered by a County Court in England and Wales for a claim in tort.

16. The Tribunal relies on its findings in the remedy judgment that it exercised its discretion appropriately when awarding compensation to the claimant and apportioning it. The Tribunal had regard to the particular circumstances of this case, the medical evidence and the fact that the claimant only succeeded in one part of one allegation in her claim of discrimination against the respondent. The claimant seeks to argue that the claimant should recover in full for her present illness and that she has continued to deteriorate and so should be awarded further compensation.

17. The Tribunal relies on its findings at the remedy hearing that only a small part of the claimant's illness can be attributed to the part of one allegation of discrimination which was upheld, namely the failure to backdate pensions contributions sufficiently.

18. Furthermore, the new evidence supplied by the claimant does not state that the ongoing problems suffered by the claimant are attributable to the failure of the respondent to backdate the claimant's pension contributions for a period before March 2014. The claimant relies on **Dickins v O2 PLC [2008] EWCA Civ 1144** to suggest that it is inappropriate to apportion damages. The Tribunal is not satisfied that this case is authority for that proposition. The Tribunal relies on **Thane v London School of Economics [2010] ICR 422 EAT** as quoted in the remedy judgment, which is authority to reflect the fact that where there were a number of concurrent causes of the claimant's psychiatric ill health apportionment of the award was appropriate. The Tribunal also relies on **BAE Systems Operations Limited v Konczak [2017] EWCA Civ 1188** at the Court of Appeal which held that an Employment Tribunal had erred by failing to consider whether the claimant's psychiatric illness had other divisible causes, namely conduct, that was not found to constitute unlawful discrimination, and if so whether the compensation fell to be apportioned on this basis.

19. The claimant also relies on **HM Prison Service v Salmon 2001 IRLR** to argue that the claimant should recover damages on a 100% basis .

20. The Tribunal did not find that the action of the respondent in failing to backdate the pension contribution made a material contribution to the claimant's suffering. In this case, having considered the medical evidence we found that only a small

part of the claimant's illness was directly attributable to the one allegation of discrimination we found.

Level of Award

21. The claimant raised concerns about the level of the injury to feelings award. We find that this is an attempt to re-litigate the remedy hearing. The Tribunal relies on its findings in the remedy judgment.

Date of Discriminatory Act

22. The claimant raised a concern that she did not understand why the date of the discriminatory act was November 2014. The date of the discriminatory act is clearly identified in the liability judgment. It was the date when the respondent permitted the claimant to join the pension scheme and backdate her contributions to March 2014 rather than the start of her employment.

23. There is a fundamental misunderstanding on the part of the claimant when she suggests that the tort arose from 1 April 2011, which is the date the claimant commenced the relevant role. The Tribunal did not find that the respondent discriminated against her by failing to allow her to join the pension scheme on 1 April 2011.

Factual findings

24. In other places throughout the submissions document the claimant attempts to re-litigate either the remedy hearing or the liability hearing. The claimant alleges that there were incorrect factual findings. It is not appropriate for the Tribunal to revisit those in the absence of any new evidence which was not available to the original hearing. There has already been a reconsideration of the liability judgment.

Incorrect JSB Guidelines

25. The Tribunal does not understand the suggestion that the claimant should apply the judicial studies board level of compensation for Northern Ireland. This claim is litigated in the legal system in England and Wales and accordingly we have relied on the appropriate precedents and guidance for England and Wales.

26. The Tribunal found in its liability judgment that there was a delay between the claimant commencing employment and joining the pension scheme. We found that was not a discriminatory act (see paragraphs 177-182). We concluded:

> "We find the allegation of failing to access to the contractual scheme in the sense of the delay in permitting the claimant to access the scheme fails."

Accordingly the claimant cannot recover compensation for that.

Incorrect award for pension

27. Where the claimant succeeded was that she was permitted to join the scheme in November 2014 but her contributions were backdated only to March 2014 rather than to the start of her employment (April 2011).

28. The Tribunal therefore allowed the claimant her loss by calculating the loss of her contributions for the period April 2011 to March 2014 and allowing interest upon them. That was the sum the Tribunal ordered as compensation.

29. The claimant raised an issue about the amount awarded for failure to backdate pension contributions. The claimant raised an issue about growth to the fund.

30. There is a potential loss as to the pension fund at retirement if there was evidence to show a loss in growth of the fund due to the difference in time the backdated contributions were paid into the fund for the period April 2011-March 2014. There is no dispute the claimant was permitted to join the pension scheme and was permitted to backdate her contributions to March 2014.We found no discrimination in relation to that. Neither was there an allegation of discrimination in relation to late payment of the backdated contributions March to Nov 2014. Accordingly any loss in the growth of the fund could only be in comparison of the timing of payment into the fund of the Apr 11-March 14 contributions and the timing of payment into the fund of the March 14-November contributions.

31. If the timing of the payment of the earlier contributions(April 11-March 2014) ordered following the the remedy judgement(instead of at the time of the March-Nov 14 backdated contributions) made a difference to the growth of the fund at retirement age, in theory that is recoverable.

32. However, these figures have never been provided. Instead the claimant has produced calculations from Friends Life which show the difference in value if the claimant had joined the pension scheme on 1 April 2011. This is not appropriate.

33. There is no finding anywhere in the liability judgment that the respondent discriminated against the claimant by failing to allow her to join the pension scheme on 1 April 2011. Indeed we expressly found that the allegation of failing to allow access to the contractual scheme failed.

34. The Tribunal reminds itself that the basis on which it has awarded loss of pension is very much in accordance with the pensions principles guidance for Employment Tribunals. This was a defined contributions scheme. The Tribunal ordered the contributions for Apr 20111 to March 2014 to be paid and awarded interest on those. The Tribunal finds no basis to reconsider that award.

Aggravated damages

35. The claimant disagrees with the lack of an award for aggravated damages. The claimant's submission is an attempt to re-litigate the remedy judgment. There is no ground for reconsideration. The claimant makes other allegations about false statements made by witnesses. We find that this is an attempt to re-litigate the liability and/or remedy hearing.

36. The claimant also makes allegations about Ms Clarke, the respondent's representative. We have already dealt with Ms Clarke's professional and courteous behaviour throughout this case in the decision in relation to costs and the allegations made by the claimant have no place in a reconsideration of a remedy judgment.

37. Likewise, the claimant's concerns about the respondent's alleged failure to comply with court orders and to meet timelines are not relevant to a reconsideration on remedy.

Lack of apology

38. The claimant complains about a lack of apology. There is no obligation on the respondent to apologise and we did not order them to do so. We found that the claimant succeeded only in one part of one allegation, where we found the burden of proof had shifted and the respondent could not discharge it because it did not have an explanation for the treatment as to why the claimant was not permitted to backdate her contributions to the start of her employment instead of only to March 2014. Again the claimant is trying to re-litigate the remedy hearing.

Loss of earning calculation

39. The claimant says that the figures used by the Employment Tribunal in the remedy judgment for loss of earnings are not understood. The Tribunal accepted the figures of the respondent for the following reasons.

40. Both parties agreed that the claimant was absent from work from April 2014 to 30 October 2014 and received pay. Accordingly she had no loss of earnings (see page 14A remedy bundle). The claimant was absent from work from 1 November 2014 to 30 April 2015, a period of 26 weeks. Using a weekly figure of £653 based on the agreed net earnings figure of £33,948 per year, £2,829 per month and £653 per week, the loss to the claimant was 26 weeks x £653 = £16,978 but the claimant had received half pay of £8,489 making a loss of £8,489.

41. For the final period 1 May 2015 until 13 April 2016 (a period of 48 weeks) the claimant suffered a loss of £653 x 48. We find that the claimant returned to work on 13 April 2016 because she told us at the outset of the remedy hearing that she returned to work a week before the last hearing, and that took place in March and April 2017. Therefore the total loss to the claimant was £8,489 plus £31,344 which totals £39,833. It is not disputed that the claimant received a payment from Unum Insurance in settlement of any claims that she had against them for full pay of salary during period of incapacity. The claimant must give credit for this sum. So the loss to the claimant was £9,833. We then went on to apportion that figure in accordance with the principles set out in our remedy judgment.

42. The only potential error the Tribunal can see in this calculation was that there was no dispute the claimant, when in employment, did earn a bonus and while she was absent from work on sick leave she did not earn a bonus. However, at the remedy hearing we heard no detailed evidence on bonus and neither did we hear detailed evidence on bonus at the liability hearing (see paragraph 212):

43. "We heard no detailed evidence as to how the bonus was calculated or how corporate KPIs impacted on the bonus". In these circumstances the Tribunal is not satisfied there are any grounds to revisit the calculation for loss of earnings.

44. Finally, the claimant appears to be under the misapprehension that calculations for loss in a discrimination case should be based on gross earnings. This is incorrect. Loss of earnings in a discrimination case are based on tortious

principles and therefore the Tribunal uses the net sum received by the claimant in the loss of earnings calculation as that is the amount that she would have received.

Redundancy and further loss.

45. The claimant disputes that the redundancy broke the chain of causation. Tortious principles state that if there has been a break in the chain of causation then that means the loss is no longer flowing from the discriminatory act. The claimant was made redundant. There is no suggestion from the evidence before the Tribunal that the redundancy was in any way related to the failure to backdate the pension contributions to the start of the claimant's employment. Accordingly, any losses the claimant has as a result of her redundancy are not recoverable.

46. In conclusion, the claimant has not presented any grounds which cause us to reconsider our remedy judgment and the application fails.

Employment Judge Ross

Date 16 November 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

20 November 2017

FOR THE TRIBUNAL OFFICE