EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms F Bellini	v	London Borough of Hillingdon

Heard at: Watford **On**: 14 & 15 December 2017
20 December 2017 (in chambers)

Before: Employment Judge Bedeau
Members – Mr I Bone, Mr M Bhatti MBE

Appearances

For the Claimant: Mr A Smith – Counsel
For the Respondent: Mr N Porter, Counsel

JUDGMENT ON RECONSIDERATION

1. The remedy judgment promulgated to the parties on 10 February 2017, is varied to the extent that the claimant is permitted to argue future loss and that this judgment sets out the tribunal's findings and conclusions in that regard.

2. The remedy judgment is varied to the extent that the re-engagement order as set out in paragraphs 41 to 43, will now include the claimant's undertaking as set out in paragraph 16.1.

REASONS

1. The tribunal promulgated its judgment on remedy on 10 February 2017, in which we ordered that the claimant should be re-engaged either as Technical Support Officer or as Trainee Internal Auditor. We further ordered that the respondent should pay her compensation in the sum of £45,192.97 in respect of loss of earnings and the sum of £18,987.24 in respect of her injured feelings. In addition, the respondent should pay her expenses in the sum of £841.50.

2. On 24 February 2017, the claimant's legal representatives applied for the judgment to be reconsidered. They asserted that the tribunal had erred in

applying section 115(2)(d) Employment Rights Act 1996, in that the element of back pay was assessed up to the remedy hearing but not up to date when the claimant was due to be re-engaged by the respondent. The same applied in relation to the tribunal's calculation of loss of benefits as the tribunal made no award in respect of future loss. In addition, the claimant stated that she would like to be re-engaged in the position of Trainee Internal Auditor and invited the tribunal to vary the re-engagement order from that of Technical Support Officer to Trainee Internal Auditor.

3. The final issue raised being that the tribunal did not gross up the claimant's financial losses to reflect tax implications.

4. In the respondent's reply dated 2 March 2017, it did not dispute that the claimant's financial losses should be assessed up to the date of re-engagement, namely by 20 March 2017. It agreed with the statement made by the claimant's legal representatives in relation to the application of section 115(2)(d) ERA 1996. The claimant was in fact re-engaged on 9 January 2017. The award of compensation under section 115, does not attract interest. It invited the tribunal to make a determination that under section 115(2)(e) ERA 1996, the claimant's applicable pension rights are to be restored following her re-engagement but resisted the application by the claimant that future loss should be assessed on a career loss basis because the claimant sought re-engagement and was prepared to compromise in order to secure a return to work. It stated that having regard to the tribunal's judgment, it was unrealistic for her to be re-engaged at a level she was engaged at prior to her dismissal because she was prepared to accept, in that regard, a more junior role. It had the discretion to re-engage her either in the position of Technical Support Officer or as a Trainee Internal Auditor. She was offered and she accepted the former.

5. On 10 March 2017, the claimant's legal representatives made an application that the respondent should pay her costs on the basis that its response to her claim either had no reasonable prospect of success or alternatively, its failure to concede liability and/or its conduct of proceedings, was unreasonable. They attached a schedule of their costs totalling £69,644.28.

6. In the respondent's response dated 17 March 2017, it stated that it would vigorously resist the costs application.

7. The reconsideration hearing was first listed on 3 and 4 July 2017, but had to be postponed. Taking into account the parties' availability it was relisted for hearing on 14 and 15 December 2017 but not to determine the claimant's costs application.

The evidence

8. The tribunal did not hear any oral evidence but a statement was produced by the respondent by Mr Ken Chisholm, Corporate Pensions Manager.

9. The parties produced two bundles of documents which comprised of selected documents from both the liability and remedy bundles. In addition, the

claimant produced a document which was an email chain regarding her enquiry about management training in December 2017.

10. In respect of the application for the judgment to be reconsidered, the parties were able to resolve most of the matters raised by the claimant's solicitors in their application save for the issues in respect of future loss and the claimant's undertaking.

11. We agreed with the claimant's representatives that the tribunal should gross up the claimant's financial losses taking into the account the incidence of taxation.

Submissions

12. Mr Smith, counsel on behalf of the claimant, submitted that the tribunal should either vary or revoke its judgment in relation to remedy. He referred to paragraph 9 in relation to the issues, in particular, compensation for future loss of earnings that the tribunal had to consider "What ongoing loss of earnings will the claimant suffer, and for what period of time?" The tribunal did not make any findings in respect of the claimant's ongoing/future loss of earnings.

13. Further, in paragraph 10.1 of the remedy judgment, in relation to compensation for pension loss, the tribunal had to determine, "In light of the tribunal's conclusions: (a) the position that the claimant would have be in, but for the respondent's unlawful conduct; (b) the claimant's residual employment prospects/earning capacity; and (c) the substantial disparity between public and private sector pension schemes, what would be an appropriate award of compensation in respect of pension loss?" Mr Smith submitted that the tribunal did not make any findings in respect of the claimant's pension loss.

14. He submitted that in regard to rule 70 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, the tribunal has to consider whether it is in the interest of justice to either confirm, vary or revoke its judgment. Where, as in this case, the tribunal did not make findings in the two respects identified above, it is in the interests of justice that the judgment be reconsidered.

15. Mr Porter submitted that the tribunal made findings of fact with regard to re-engagement. No comparable position was available to which the claimant could be re-engaged in to. She was prepared to compromise by accepting a more junior role with commensurate pay benefits. As such, she did not seek pay and benefits commensurate with her substantive role. The tribunal took that into account and made the re-engagement order. It then made no order as to this claimant's future loss. There is, therefore, no basis upon which the tribunal should either vary or revoke the judgment.

Conclusion on the Reconsideration application

16. Rule 70 states,

> "A Tribunal may …on the application of a party, reconsider any judgment where it is in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."

17. We have taken into account rules 70 to 72 of the Employment Tribunals Rules of Procedure. At the first stage in the process, the claimant was allowed by the employment judge to argue before this tribunal that the judgment should either be varied or revoked as it is in the interests of justice to do so, rule 72(1).

18. Mr Smith in his written submissions presented at the remedy hearing in September, particularly paragraphs 25, 26, 30 and 31, invited the tribunal to consider future loss if the claimant was not re-engaged on equivalent terms to those she previously enjoyed in her substantive post. He submitted that the claimant is likely to suffer career-long loss as a consequence of the respondent's unlawful discriminatory conduct.

19. Having regard to our omission to determine the issues of future loss and pension loss as we were required to do having regard to the agreed list of issues presented at the remedy hearing, we have come to the conclusion that the tribunal's judgment on remedy should be varied to the extent that we would have to make findings of fact to enable the parties, at the first stage, to quantify the losses suffered by the claimant.

First stage Findings of Fact

20. The parties agreed a list of the issues they asked that the tribunal should make findings of fact to enable them to resolve the issue of compensation without the need for a further hearing. They have adopted the two-staged approach recommended in complex pension loss cases in the Employment Tribunals: Principles for Compensating Pensions Loss 4th Edition August 2017. They invited us to have regard to their submissions which we have read and have taken into account in our findings. We shall now deal with the agreed list of issues in turn with our findings of fact.

21. "1. Is it in the interest of justice for the tribunal to vary the remedy of judgment sent to the parties on 10 February 2017 (in particular, in respect of the issues identified by the tribunal in paragraphs 9.1 and 10.1 of the remedy judgment)?

    If so, and having regard to the parties' respective written and oral submissions, the tribunal is invited to consider the following issues of fact and/or principle at this stage."

22. We have already concluded that it is in the interests of justice for the remedy judgment to be varied.

23. "2. What is the effect of the tribunal's findings in paragraph 45 (read together with paragraph 46) of the remedy judgment and in particular the findings that: (a) *"Had the respondent considered its duty to make reasonable adjustment as the claimant was disabled, it was highly likely that the post of Principal Business Systems Analyst would have been offered to her if she was not required to work closely with Ms Vincent. If it was unlikely to have been offered we are satisfied that what she would have been looking for, initially, was a*

comparable post on more or less the same level of salary and benefits. Either way her losses would have been comparable to her losses as in her substantive post", and (b) "It is in our view reasonable to assume that redeploying [the claimant] would have taken after about 4 weeks, that is by 8 December 2014 [SIC]"?

24. The tribunal is asked by the parties whether we concluded that the claimant should and would have been redeployed by the respondent to an alternative position at the same grade as her substantive post. Although we considered that it was "highly likely" that the post of Principal Business Systems Analyst would have been offered to the claimant. It was not, in our view, a realistic possibility because of the deteriorating relationship between the claimant and Ms Vincent. As at December 2014, it was the only POC graded post but was unlikely to have been offered as they would be required to work together.

25. In paragraph 45 we stated that "either way her losses would have been comparable to her losses as in her substantive post." This has to be taken in context. We stated, initially, that the claimant would have been looking for a comparable position, but no such position was available. In paragraph 7.80 of the remedy judgment, we made the finding that she said that out of 42 vacancies only 3 were suitable but they were at much lower gradings. In paragraph 45, we focussed on the assessment of the claimant's financial losses as a result of not being redeployed. We did not look at a specific comparable post the claimant could have been redeployed in to as looking at the evidence at the time no such comparable position was available and we had already discounted the Principal Business Systems Analyst post. If the claimant was offered a comparable position on redeployment or was offered the Principal Business Systems Analyst post then "*Either way her losses would have been comparable to her losses as in her substantive post"* but we have to look at the reality of the situation at the time.

26. In paragraph 7.52 of our liability judgment, we wrote with reference to the claimant's solicitor's email dated 27 April 2015, the following:

> "We understand that currently there are only 7 available positions within the whole of the Borough and our client currently believes that none of them are suitable as there are no managerial posts and the most senior position is for four levels below our client's current position."

27. The respondent did not recruit to the Principal Business Systems Analyst role.

28. In relation to paragraph 3 of the remedy issues, the parties wrote:

> "In particular, did the tribunal conclude that the claimant should and would have been redeployed by the respondent to an alternative position at the same grade as her substantive post (i.e. a POC grade post) and, if so, to which post? (Having regard to the specific roles identified in the claimant's list of 39 redeployment positions headed "B2 suitable vacancies for the period November 2014 to April 2015"?)

29. We find that the claimant by 8 December 2014, was highly likely to have been redeployed but in a lower graded post with redeployment protection as there were no comparable positions available at the time.

30. In paragraph 4 the list of issues, we are asked the following:

> "4. If not, what are the tribunal's findings as regards the likelihood/chance (expressed in percentage terms) of the claimant being redeployed by the respondent from on or around 12 November 2014, and in respect of what role(s), type or grade of role(s), had the respondent complied with its duty to make reasonable adjustments for her (as found by the tribunal in paragraphs 39, 40 and 41 of the liability judgment)."

31. We have considered the claimant's schedule of 39 suitable vacancies during the period November 2014 to April 2015 (B2 remedy bundle). We find that although she would have been considered lower graded posts during the period in question, it was unlikely that she would have seriously considered positions at grades 3 to 5 and those where the grades in each post were between 4-6. The cut-off point being Financial Assessment Officer, 4-6 (B2 737-741). We, therefore, considered the positions in the list from Admissions and Allocations Officer, grade 6 to Business Manager, POD.

32. In relation to Admissions and Allocations Officer, the claimant lacked relevant experience and in our view, it was unlikely she would have been redeployed to that position. (B2 – 623 to 627).

33. As regards the Senior Accountant position, the claimant would not have been a suitable as she did not have AAT accountancy qualification and experience. (B2 – 118 to 124).

34. In relation to the Appeal's Complaint Officer position, the claimant did not have any experience in dealing with benefits. It was unlikely that this post would have been offered to her as a suitable redeployment position. (B2 – 974 to 978).

35. The Learning and Applications Officer post was at SO2 grade. The claimant did have prior experience as she worked as an ICT Learning Facilitator on grade SO1. She had experience in ICT Systems Analyst and was second in seniority to that of Mr Waller in Library Services. In our view, there was a high probability that the position would have been offered to her and she stood a 70% chance of being redeployed in to that post. (B2 1090-1096)

36. In relation to Performance Analyst role, SO2, we find that during her evidence, the claimant had no idea of cross-cutting, namely dealing with a range of services, as her focus was on Library Services. Without the relevant experience in "successfully managing a project involving a range of partners", she would have been at a disadvantage. We do not find that she would have been re-deployed in to this post. (B2 747-752)

37. With regard to the Web New Media Officer, SO2, the claimant had previous experience in web design although it was not part of her job description at her POC grade. Her web design knowledge and experience placed her in a good position to have been offered the post. We assess her chance at 50%.

38. In relation to the Business Systems Analyst, POA position, we have already made findings and take the view that the claimant would have been required to work with Ms Vincent with whom there was a relationship breakdown. (B2 444-450)

39. In relation to the Human Resources Resourcing and Workforce Co-ordinator, POA role, the claimant was required to have a degree but she was not educated to degree level. She had also raised concerns about those in Human Resources as part of her grievance. She had no experience in recruitment as she had not worked in human resources. It was, therefore, unlikely such a position would have been offered to her. (B2 1118-1122)

40. As regards the Procurement Executive position, POA, the claimant needed to be CIPS qualified or working towards such a qualification. We are satisfied from the evidence that she would not have been redeployed in to this role as she would have been unable to satisfy the requirements (B2 227 to 234).

41. The Schools and Academies Procurement Executive, POA post, required the successful candidate to have a driving licence which the claimant did not possess at the time. It was highly unlikely she would have been offered the post. (B2 – 595 to 600).

42. The Senior Performance Intelligence Officer, POB position, the claimant did not have relevant experience although, we acknowledge, that she had been interviewed recently for that position but was not offered to her. As regards essential experience, amongst other things, the successful candidate was required to demonstrate that they had experience in "successfully managing a project involving a range of partners"; "successfully involving stakeholders and service users in developing services or service strategies and plans"; "of working with senior managers and with outside organisations, including regulatory bodies to assess services in line with prescribed assessment frameworks and drive service improvement." We find that it was unlikely that this post would have been offered to the claimant as she did not possess the relevant experience. (B2 – 753 to 759).

43. The Principal Systems Analyst was not available. (B2 828 to 832).

44. With regard to the Business Manager, POD position, the claimant told us that this was not suitable. It was at a higher grade and she did not have the relevant experience. (B2 426 to 432).

45. Paragraph 5 of the list of issues reads:

> "5. Having regard to (4) above, what are the tribunal's findings in respect of the claimant's likely career trajectory, including the type/grade of role in which she would have been employed by the respondent going forwards, had the respondent complied with its duty to make reasonable adjustments for her (as found by the tribunal in paragraph 39, 40 and 41 of the liability judgment)?"

46. We conclude that had the claimant been offered a SO2 post either of Learning and Applications Officer or Web New Media Officer, she would have remained in that post until a Financial Management Trainee position was offered to her. During the remedy hearing she said that she did not want an IT position because she wanted career progression. She would have

accepted the Financial Management Trainee role as it allowed for that possibility.

47. Paragraph 6 of the List of Issues, states:

> "6. Further or alternatively, had the claimant been slotted in to the role of Financial Management Trainee ("FMT") ("see paragraph 43 of the liability judgment and paragraph 47 of the remedy judgment), what are the tribunal's findings in respect of her likely career trajectory, including:
>
> 6.1. The prospects/chance (expressed in percentage terms) that she would have completed the FMT training programme (including each of the particular parts/stages thereof), and when;
>
> 6.2 the prospect/chance (expressed in percentage terms) of the claimant securing a permanent POC grade position upon/following completion of the FMT training programme;"

48. In answering paragraph 6.1, we refer to the evidence given in the witness statement of the Ms Nancy Leroux, former Deputy Director, Strategic Finance. She managed the Financial Management Trainee Scheme since 2008 which was revised in 2015. Having regard to her evidence, we find that on appointment to FMT, the successful candidate would be at scale 6. After completing the Certificate Level that requires four examinations to be taken within the first year, the trainee would move to SO1. Two months after appointment and after passing two diploma examinations, they would move to SO2. Thirteen months after appointment as FMT, they would be required to complete a diploma whereupon they would move to POA grade. By the third year following appointment, it is expected that they would qualify as Financial Management Accountant but thereafter would be subjected to a recruitment and selection exercise for a qualified post whenever one becomes available. In that event the starting salary would be at POC grade.

49. In relation to the most recent intake of students on the scheme, they were taken on in September 2015 and were required to study at the Chartered Institute of Public Finance and Accountancy (CIPFA) Education and Training Centre, from January 2016. The period from September to December 2015 was used to get the new students to familiarise themselves with the respondent's procedures. Studies began in January 2016 leading to the first two examinations at the end of May 2016 and then the second two at the end of November 2016. The first increment to SO1 was payable from 1 December 2016. The next increment to SO2 was from 1 June 2017, the third to POA on 1 June 2018.

50. Prior to recruitment in 2015, the respondent recruited two trainees in early 2013 with college courses starting in August 2013. The previous intake of one trainee was in January 2009 and before that in January 2008. In each of these intakes, examinations success at each stage ensured that increments were paid in line with the scheme.

51. Ms Leroux set out in paragraph 6 of her statement, the salary that would have been paid to the claimant had she been recruited on to the scheme covering the period from 8 August 2015 to 1 June 2018. From 8 August

2015, she would have been on scale 6.28, the top of her scale on a salary of £26,277 with £4,000 pay protection. From 1 April 2016, she would have been on scale 6.28 plus 1% pay award, namely £26,541 plus £4,000 pay protection. Thereafter her salary would increase to finally POA point 35 from 1 June 2018 on £32,628.

52. We found in paragraph 7.1 of our liability judgment that the claimant made rapid progress through the salary scales to POC. She is intelligent and quite capable of expressing herself both verbally and in writing. In Library Services she managed a budget of around £600,000 per annum. Taking into account these facts, we have come to the conclusion that in the first year as a FMT, she would have passed the four examinations at Certificate Level. We, therefore, assess her chance passing at 100%.

53. In relation to the two examinations at diploma level, the examinations are likely to be much more difficult and we assess her chance of passing at 90%. As regards completion of the diploma in thirteen months, we assess her chance at 80%. In order to get to qualified status by then she would have been well into her studies and intent on qualifying. We assess her chance of achieving qualified status at 80%.

54. In response to paragraph 6.2 above, we are asked what is the prospect or chance of the claimant securing a POC Accountant's position within the respondent's undertaking upon completion of her FMT training? In response we do take into account the evidence given by Mr Ken Chisholm in his witness statement, in particular, paragraph 16, in which he wrote that since August 2014 the number of Council employees has reduced from 3336 to 2773, the loss of 563.

55. A qualifying POC position would be dependent upon the availability of the respondent's resources and its business needs. The claimant would be competing with other qualifying trainees. It is somewhat speculative what the likely position would be in June 2018, but we have come to the conclusion that competing with the other qualifying FMTs there was a 33% chance of her being offered a POC post within the Council. Outside of the Council, the position would be improved and we would assess that at 70%.

56. In relation to paragraphs 6.3 it states:

> "6.3. The type/grade of role in which the claimant would have been likely to be employed on the completion of the FMT training programme (or particular parts/stages thereof) and thereafter, and the likely dates thereof;".

57. Again, here we rely on the evidence given by Ms Leroux in paragraph 4 of her witness statement, namely "Once fully qualified the trainee would then be subject to recruitment for a qualified post when available, the starting salary would normally be POC." It is difficult here to make definitive findings, but we do take the view that the claimant had 66% chance of remaining in the position of a POA grade for some time working for the respondent following completion of the FMT training programme. After two years, that is by June 2020, she would have a 33% chance of being offered a POC post.

58. In paragraph 6.4 of the list of issues we are asked "Any discount factor(s)" that the tribunal considers ought to be applied".

59. Paragraph 7 states:

> "7. Having regard to the tribunal's findings in respect of the matters set out above, on the balance of probabilities, does the tribunal consider that the claimant will be able to fully mitigate her losses at some point in the future; and if so, by what date?"

60. Possessed of the same information, the claimant's earlier schedule of loss made reference to future loss for a period of up to five years. Thereafter there would be no future loss as she would have been in comparable employment.

61. Having regard to the cases of Wardle v Credit Agricole Corporate and Investment Bank [2011] EWCA 545 and Abbey National plc v Chagger [2010] ICR 397, judgments of the Court of Appeal, it was held that it would be exceptional to award compensation over a career lifetime or career loss. For the reasons given by Mr Porter, this is not a career-loss case. The claimant is already looking at management training, but having regard to her current position, she is not entitled to the benefit of such training. During the initial years of her employment with the respondent, she rapidly moved up the salary grades. She was born on 16 May 1973 and is 44 years of age and is quite ambitious, assertive, intelligent as well as industrious. She has already been successful in two competitive interviews for the Technical Support Officer role and now as a Direct Payments Officer. In our view she will continue to improve on her qualifications and would by applying for senior positions whenever they become available. It has not been demonstrated on the evidence that in pursuing a claim against the respondent she has been stigmatised in the labour market. On the balance of probabilities, we find that with her managerial experience, knowledge and skills, she is likely to get comparable employment by January 2021.

62. We accept the claimant's evidence that she saw her future with the respondent and has no intention of leaving but having regard to paragraph 66 of the Chagger judgment, namely what is the chance as opposed to a certainty that she may be dismissed by the respondent, we find, on the balance of probabilities, that it is likely that the respondent will engage in more redundancies due to pressures on its funding and budgets. Although we have not been provided with any specific details save what has already occurred, it is not immune from the experiences of other local authorities in the United Kingdom. We assess the likelihood of the claimant being made redundant at 20%.

63. In respect of paragraph 8 of list of issues, this is not relevant as we have answered paragraphs 7.

64. Finally, we asked in paragraph 9 of the list of issues the following:

> "9. Should the tribunal accede to the respondent's request in respect of the claimant's undertaking (recorded in paragraph 16.1 of the remedy judgment), as set out in paragraph 85 of Mr Porter's skeleton argument for the reconsideration hearing?"

65. Having reviewed the position, we have come to conclusion that the claimant having agreed that the undertaking be part of the re-engagement order, it will be included in the order. Accordingly, our judgment is varied to reflect this.

66. It is hope that our findings and conclusions will now enable the parities to conclude compensation.

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Employment Judge Bedeau

Date: 15 March 2018

Sent to the parties on: .....

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For the Tribunal Office