EMPLOYMENT TRIBUNALS

Claimant: Mr P Duffy

Respondent: University Hospitals Morecambe Bay NHS Foundation Trust

Heard at: Manchester **On:** 27 July 2018

Before: Employment Judge Franey
Mrs F Crane
Mr C S Williams

REPRESENTATION:

Claimant: Mr P Gorasia, Counsel
Respondent: Mr B Williams, Counsel

WRITTEN REASONS

These are the written reasons for the remedy judgment given orally with reasons at the conclusion of the remedy hearing on 27 July 2018, and sent to the parties in writing on 31 July 2018.

Introduction

1. By its liability judgment and reasons promulgated on 8 June 2018 ("the liability judgment") the Employment Tribunal found that the complaint of unlawful deductions from pay succeeded in relation to AAS sessions which the claimant had worked prior to the termination of his employment. It also concluded that he had been unfairly dismissed.

2. These reasons assume that the reader has already read the liability judgment. References in square brackets (e.g. [199]) are references to paragraphs from the liability judgment.

3. The issues to be determined at the remedy hearing can be summarised as follows.

Unlawful Deductions from Pay Issues

4. The first issue to be determined was whether the claimant was entitled to be paid at the rate of £500 for each AAS he worked, even where on paper that session was to last for only 3.5 hours.

5. The second issue related to six dates in August 2016 on which the respondent maintained the claimant had not worked any AAS sessions because he had only just returned from sick leave and had sent an email saying he did not want to do any AAS sessions.

6. The third issue related to six dates between November 2015 and February 2016 on which the respondent had been unable to find any record of the theatre or clinic sessions or validation work which the claimant said he had undertaken. The claimant accepted that his claim for payment for one of these dates (4 December 2015) was an error because he had been on annual leave, but maintained that he had worked on the other dates in question.

Unfair Dismissal Issues

7. It was not in dispute that the basic award for unfair dismissal was £10,298.50.

8. Nor was there any dispute over the award of £500 for loss of statutory rights. However, there were a number of other disputes affecting the compensatory award which can be summarised as follows:

(a) What figure should be used as the net loss of earnings from employment with the respondent: the actual figures paid to the claimant at the time he resigned, or a higher figure to reflect the fact that he would have undertaken additional AAS sessions (beyond the two per week in his job plan) in order to bring his employment up to the level of approximately £200,000 per annum?

(b) Had the claimant mitigated his losses in the period between 27 September 2016 and the start of his permanent employment in the Isle of Man in January 2017?

(c) Had the claimant failed to mitigate his losses by obtaining work in the Isle of Man with associated accommodation and travel costs rather than employment at the same level in the NHS?

(d) Was the claimant entitled to claim for pension loss not only in the period between leaving the respondent and starting his new job (if he had mitigated his loss in that period) but also for the first three months of his new employment when he was not a member of the pension scheme?

(e) Was the claimant entitled to deduct from his net income from his job in the Isle of Man the costs of accommodation and travel to and from his home in Lancaster?

(f) Was it just and equitable to award the claimant any compensation for loss of the private work which he had been undertaking whilst employed by the respondent?

(g) Should there be any uplift to the compensatory award because of an unreasonable failure by the respondent to comply with the ACAS Code of Practice on Discipline and Grievance Procedures 2015?

(h) For what period should any future loss be awarded?

Evidence

9. As well as the bundle of documents from the liability hearing the Tribunal had a further volume of documents added to the liability bundle as pages 2810-3149. Any reference to page numbers is a reference to the hearing bundles.

10. We heard further evidence from the claimant and from Mrs Nic Philib by way of supplementary statements about remedy.

Relevant Legal Framework

11. The remedy for a successful complaint of unlawful deductions from pay is for the employer to be ordered to repay the gross amount unlawfully deducted: section 24(1)(a) Employment Rights Act 1996.

12. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the same Act. Where re-employment is not appropriate, compensation is awarded through the basic award and compensatory award.

13. The basic award is a mathematical formula determined by section 119.

14. The compensatory award is primarily governed by section 123 as follows:

> **"(1) Subject to the provisions of this section and sections 124, 124A and 126, 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 complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer…."**

15. Section 123(4) applies the common law duty to mitigate loss to a claimant seeking a compensatory award. The burden lies on the respondent to prove that a claimant has failed to mitigate: **Wilding v British Telecommunications plc [2002] ICR 1079.** In paragraph 16 of **Cooper Contracting Limited v Lindsey [2016] ICR D3** the EAT summarised the principles as follows:

> **" (1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.**
>
> **(2) It is not some broad assessment on which the burden of proof is neutral. ….. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.**

> **(3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable …..**
>
> **(4) There is a difference between acting reasonably and not acting unreasonably (see Wilding).**
>
> **(5) What is reasonable or unreasonable is a matter of fact.**
>
> **(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.**
>
> **(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer ….**
>
> **(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.**
>
> **(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."**

16. An unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures by an employer can result in an increase of up to 25% in the compensatory award: section 207A Trade Union and Labour Relations (Consolidation) Act 1992.

17. There is a cap on the compensatory award. At the time of dismissal in this case it was £78,962.00.

Facts Relevant to Remedy

18. Following the termination of his employment with the respondent on 26 September 2016 the claimant was contacted by two former colleagues who were now working in the health service on the Isle of Man. They invited him to go and have a look at their hospital to see if he would be interested in working there. He spent a day there in or around October 2016 and decided that he would be interested in working there. His subsequent application was successful. Apart from a week of work prior to Christmas 2016, his employment began on 2 January 2017. He was on a bank basis initially for three months before being made permanent.

19. He did not obtain employment in the NHS before starting in the Isle of Man. He registered with three agencies for locum work but nothing came of that. He did not apply for potentially suitable permanent posts in the NHS (e.g. a post in Carlisle at page 3071).

20. An important part of the claimant's thinking was his strong feeling that he could not tolerate working for the NHS in England, even outside the North West region. The claimant said that this was a consequence of the way he had been treated by the respondent. This included the allegations of racism, bullying and abusive behaviour made against him as well as the imputations of fraudulent behaviour which he saw as being made by the Sharp/Elliston report in June 2016

(see [225] – [232]). His witness statement for this hearing (paragraph 24) highlighted concerns about the three ethnic minority colleagues who had raised complaints against him, and that he had been told that he was regarded as "unfinished business" by those colleagues.

21. Although his gross remuneration package in the Isle of Man came to exceed that which he would have enjoyed with the respondent, through what the claimant described as an "expansion of his clinical activities" once he had started there, he incurred a number of costs in having to stay there during the working week and (due to weekend working) only returning home once a fortnight. Those costs appeared in his Schedule of Loss. They included an initial period in hospital accommodation costing £343 per month until the end of April 2017, and then £750 per month renting a flat in Peel. That was cheaper than renting in the capital, Douglas. He had additional costs in respect of gas, electricity and water, together with telephone and internet bills. In addition, having an old convertible car he needed to rent a garage at a cost of £27 per week. The monthly average for travel to and from his family home in Lancaster fortnightly was £269.15, although it was anticipated this would become more expensive as in the winter months it was his intention to travel by air via Manchester Airport, rather than take a ferry between Heysham and the Isle of Man.

22. In addition to these costs, the claimant had also ceased the private work which he had been undertaking whilst employed by the respondent. There was simply not the same demand on the Isle of Man; such private work as existed was already undertaken by a colleague in any event.

23. The claimant joined the Career Average Revalued Earnings pension scheme in the Isle of Man after three months of employment. No-one told him that he could join at any earlier stage and he had not made any enquiries about it. It was accepted by the claimant that the pension scheme was broadly comparable to the NHS scheme and therefore there was no claim for loss of pension rights after the point when he joined that scheme.

24. The claimant has eight years to do before retirement age. Due to his family commitments he intends to work full-time for that period.

Submissions

25. At the conclusion of the evidence each representative made an oral submission. Mr Williams had also prepared a helpful written submission. We will deal with the points raised in the discussion and conclusions sections below.

Discussion and Conclusions – Unlawful Deductions

Rate of Pay

26. The first issue was the rate of pay for AAS sessions of 3.5 hours. The Tribunal found at [199] that the claimant was entitled to be paid £500 even for a session which on paper was only scheduled for three hours 30 minutes and therefore the claimant succeeded on that point.

August 2016

27. The second issue concerned the period after the claimant's return from sick leave in August 2016. The respondent relied on the claimant's email at page 1723 which said he would not be doing any AAS sessions "at the moment". The claimant said that this referred to extra AAS sessions beyond the two in his job plan. He relied on the notes of the return to work meeting on 2 August 2016 at page 1717(30) in which there was discussion about him doing clinics instead of theatres. The claimant's evidence to the remedy hearing was that upon his return to work he did a full working week, Monday to Friday.

28. We noted that there was no Occupational Health advice that he should do less than a full working week at any stage, and on balance we accepted the claimant's evidence that in his email at page 1723 he was referring to AAS sessions over and above the two that were part of his normal working week in the job plan. We found that the claimant was entitled to be paid at the rate of £500 for the six dates in August 2016.

Dates with No Records

29. The third issue concerned a series of dates between 6 November 2015 and 26 February 2016 where the respondent had been unable to find any records of the session the claimant claimed to have worked. These were sessions which were claimed at the time but not paid.

30. The absence of evidence for these sessions was drawn to the claimant's attention in the report in June 2016 and his response to that was in his comments on that report made in October 2016 at pages 1794-1809. He accepted that on one of those occasions, 4 December 2015, he had in fact been on annual leave.

31. Although he made claims for payment at the time, there was no investigation of these matters until June 2016, between four and seven months after the sessions were ostensibly worked (see [224]). The respondent could not say that no records had existed at the time, only that none could be found some months later. We were satisfied the claimant would not deliberately have claimed for an AAS that he had not worked. With the exception of one date when he was on annual leave, we were satisfied that he was working a full five day week in this period and he did his best in October 2016 to explain each date.

32. Accordingly, on the balance of probabilities we found that these AAS sessions were indeed worked by the claimant and he was entitled to be paid for them, save for 4 December 2015. That meant a further five dates in that period were sessions in respect of which there had been an unlawful deduction.

Discussion and Conclusions – Unfair Dismissal Remedy

33. The claimant did not seek re-employment and it would not have been appropriate. There was no challenge to the basic award of £10,298.50. There were a number of disputes about the compensatory award set out in paragraph 8 above which we addressed in turn. For convenience the issue will be set out before our conclusions.

(a) What figure should be used as the net loss of earnings from employment with the respondent: the actual figures paid to the claimant at the time he resigned, or a higher figure to reflect the fact that he would have undertaken additional AAS sessions (beyond the two per week in his job plan) in order to bring his employment up to the level of approximately £200,000 per annum?

34. This issue turned upon the question of whether the claimant would have carried out extra AAS sessions beyond those in his job plan from September 2016 onwards. That assessment, which was inherently speculative, had to be approached as if that the review of the job plan conducted in June 2016 had been handled properly, and that the contractual position in relation to the overall remuneration package had been fully explained to him so that he understood that he was not contractually entitled to be paid in the region of £200,000 gross for the work contained in the job plan alone. Mr Williams argued that there was insufficient evidence to support such a conclusion.

35. We noted that the claimant was a person to whom the remuneration is very important given his family commitments. The mention of an overall package of £200,000 was an important factor in his decision in early 2015 to stay with the respondent rather than move to Oban. We were also satisfied that additional AAS sessions would have been available had he been interested, based on the claimant's own evidence about levels of work, and on the email exchange at page 1723 in August 2016 where Ms Arrowsmith must have asked him if he could do extra AAS sessions (see paragraph 27 above).

36. Therefore, the Tribunal was satisfied that if he had not been dismissed the claimant would have taken steps to have raised his income from the respondent up to the level of £200,000 per annum, probably by working every other Saturday during the 46 weeks of his working year.

37. A further issue was raised by Mr Williams. There is no problem in principle in a Tribunal awarding compensation for future increases in earnings with the respondent which had not happened at the time of dismissal. That is commonly done, for example, in relation to pay rises or promotion, but Mr Williams argued that this was an attempt by the claimant to go behind the Tribunal's finding that he had no contractual entitlement to £200,000, and that it was a loss attributable not to the dismissal but to the (rejected) case that there had been a contractual entitlement to that figure.

38. The Tribunal rejected that argument. We were satisfied that the claimant would have generated these earnings if not forced into resigning, and an award in respect of those losses would not undermine our conclusion that he had no contractual right to be paid £200,000 per annum. Payment for voluntary additional AAS sessions beyond the job plan is akin to non-guaranteed earnings such as discretionary overtime.

39. In summary the Tribunal was satisfied that the claimant's net loss of earnings from the respondent was to be approached as per the claimant's Schedule of Loss at page 3139. It was just and equitable to treat his lost earnings after dismissal as the net equivalent of a gross annual remuneration package of £200,000 per annum, and we accepted the claimant's figure of £9,714 as a net monthly loss.

(b) Had the claimant mitigated his losses in the period between 27 September 2016 and the start of his permanent employment in the Isle of Man in January 2017?

40. After his resignation took effect the claimant had no employment between 27 September 2016 and 1 January 2017, save for a week of work in the Isle of Man around Christmas. He did register with three agencies expressing an interest in locum work in the NHS, but heard nothing back.

41. We were satisfied the respondent failed to prove the claimant acted unreasonably in this period of 13 weeks or so. He was affected by the circumstances which forced him into resigning. He had been off sick in the period around the time of his resignation, and of course his resignation had a serious financial impact on him and his family. He was leaving a job he had been in for some 16 years. His confidence in the NHS had been seriously undermined, so that he could contemplate only locum work in the NHS not a permanent role, but even if that were not the case a permanent NHS job at the same level would not be obtained easily or quickly.

42. In those circumstances he did not act unreasonably in focussing on pursuing the opportunity in the Isle of Man. He started there reasonably quickly in early January 2017.

43. We concluded that the claimant was entitled to compensation for the losses incurred in the period before he began his employment in the Isle of Man.

(c) Had the claimant failed to mitigate his losses by obtaining work in the Isle of Man with associated accommodation and travel costs rather than employment at the same level in the NHS?

44. The Tribunal then turned to a core issue in relation to remedy in this case, namely whether by taking a job in the Isle of Man the claimant had failed to mitigate his losses. As the **Cooper** case illustrates, the burden is on the respondent to prove that the claimant acted unreasonably in taking up the Isle of Man role. If that was a reasonable step on his part then it would not be sufficient for the respondent to show that it would have equally have been reasonable to have taken up NHS employment although, as Mr Williams pointed out, the claimant considered employment on the Isle of Man only because he had ruled out NHS work in England.

45. The net monthly income from the new role was broadly comparable to the old, although it fluctuated month by month according to the payslips. The claimant's Schedule of Loss recognised that in practical terms his salary loss was mitigated from January 2017. However he claimed to be worse off financially through doing that job than if he had stayed with the respondent, because the costs to him of carrying out that work in terms of accommodation, travel and other costs exceeded £1,125 per month.

46. We noted, however, that many of these expenses were inevitable expenses of working away from home during the working week. Any NHS job in England which was outside a daily commuting range from his home in Lancaster would have given rise to comparable costs. Indeed, a job in the South East, for example, might have resulted in costs at a higher level.

47. We accepted that the claimant had genuinely lost confidence in the NHS. It had been his ambition since early adulthood to be a consultant in the NHS in the North West and we accepted that he was deeply affected by the events in the last couple of years of his employment. The reasonableness of the actions he then took should be assessed in the light of all the circumstances at the time he was dismissed and, as paragraph 37 of the **Wilding** decision illustrates, can take account of factors unrelated to the dismissal and even unrelated to the respondent itself. On that basis we were satisfied that his decision not to uproot his family and move to the Isle of Man was a reasonable one.

48. Putting these matters together overall the Tribunal was satisfied that the respondent had failed to prove the claimant acted unreasonably. He took an equivalent consultant role within about three months of his dismissal on a remuneration package which was broadly comparable to that he was receiving with the respondent. The Tribunal was satisfied that his decision not to look for NHS employment, insofar as that was in the North West in a commutable distance from Lancaster, was a reasonable one. Even if the claimant could reasonably have looked for NHS employment in other parts of the country, the accommodation and travel costs would have been incurred anyway. It was just and equitable to compensate the claimant for losses resulting from his decision to take up a post in the Isle of Man rather than in the NHS.

> **(d) Was the claimant entitled to claim for pension loss not only in the period between leaving the respondent and starting his new job (if he had mitigated his loss in that period) but also for the first three months of his new employment when he was not a member of the pension scheme?**

49. For reasons set out above we found that the claimant had not failed to mitigate his losses in the first three months after termination (broadly, October – December 2016). He was entitled to compensation for pension loss in that period.

50. For the next three months (January – March 2017) during which he was a bank employee, it was not clear whether the claimant could have joined the pension scheme for his Isle of Man employment. Nevertheless, the burden was on the respondent to show that the claimant had acted unreasonably by not securing entry to the pension scheme in that period. The claimant's evidence was that no-one approached him about it and he did not make enquiries. We had no information in the evidence before us as to whether there would be waiting period in that employment before pension scheme membership became possible, or whether bank employees (who may or may not be recognised as employees for the purposes of employment law in the Isle of Man) would have an entitlement to join the pension scheme. We concluded that the respondent had failed to show the claimant had acted unreasonably on this point.

> **(e) Was the claimant entitled to deduct from his net income from his job in the Isle of Man the costs of accommodation and travel to and from his home in Lancaster?**

51. There was no challenge to or cross examination about the amounts or the specific items summarised in paragraph 21 above. The challenge to this approach from the respondent flowed from the general point which we rejected for the reasons set out in paragraphs 44-48 above. The Tribunal concluded that it would be just and

equitable to take these matters into account in assessing the real net benefit to the claimant of his income from his employment in the Isle of Man.

52. For the avoidance of doubt that included the costs of garaging his car for part of the year. The claimant could have chosen to rent a property with a garage, which would have been a significantly higher monthly cost, or he could have chosen to rent in Douglas and avoid the need for a car, in which case we accepted his evidence that the rent would have been higher as well.

(f) Was it just and equitable to award the claimant any compensation for loss of the private work which he had been undertaking whilst employed by the respondent?

53. The Tribunal accepted that the loss of private work was a consequence of the claimant's decision to take up employment in the Isle of Man rather than with the NHS in England, which in turn was a consequence of his dismissal.

54. However, we were satisfied it would not be just and equitable to make any award in respect of such losses: those earnings did not come from the respondent, even though the respondent facilitated the claimant in generating those other earnings by agreeing to a job plan which in practice left him free to do private work.

(g) Should there be any uplift to the compensatory award because of an unreasonable failure by the respondent to comply with the ACAS Code of Practice on Discipline and Grievance Procedures 2015?

55. The grievance was handled in an unorthodox way. There was no formal acknowledgement of it, and the correspondence about the review of his job plan, as it was called, did not expressly link it to the grievance he had lodged. There was no single document which amounted to a proper invitation to a grievance meeting, and therefore in strict terms the respondent was in breach of paragraph 33 of the ACAS Code of Practice.

56. However, we concluded that was not an unreasonable failure to follow the Code. This was an unusual situation and the respondent engaged with the substantive content of the claimant’s grievance. It did, in the covering email, invite him to a meeting to discuss the views recorded in the report in June 2016. As Mr Gorasia recognised, those were provisional views and there was the opportunity for the claimant to meet to discuss them before any formal decision was taken on his grievance. In those circumstances we were satisfied that it would not be appropriate to award any uplift in respect of a failure to follow the ACAS Code of Practice.

(h) For what period should any future loss be awarded?

57. The Tribunal noted that the claimant is now in stable employment. The only way in which he would be in a better position financially would be if he moved to an NHS consultant role in the North West where he could live at home and commute daily; a post elsewhere in the country would raise comparable issues about accommodation and travel costs, and of course it would not be reasonable to return for a locum position alone, the claimant being in a permanent position in the Isle of Man.

58. We took account of the claimant's age: he has about eight years to retirement.

59. We concluded that it would be reasonable for him to consider this his last consultant job, and therefore we were satisfied that it was just and equitable to regard this as one of those exceptional cases where there is career long loss.

60. That is a period of broadly eight years. In the absence of any submission to the contrary the Tribunal would adopt the current statutory discount rate in personal injury cases of -0.5%, and using Ogden table 28 to identify the appropriate multiplier, would apply a multiplier of 8.16 to the net annual loss (the multiplicand).

Amounts Awarded

61. Following our oral judgment setting out the above, there was a short adjournment whilst the parties considered the figures.

62. When the hearing resumed it was agreed that the award for unlawful deductions from pay should be £12,950.00.

63. The basic award for unfair dismissal was £10,298.50 and the compensatory award would significant exceed the statutory cap. The net figure for loss of earnings, taking account of the expenses incurred in working in the Isle of Man, up to the date of the hearing was just over £56,000. There was pension loss of £8,000 or so to be added. The ongoing losses were £11,641.68 per annum, and the Tribunal was proposing to award more than eight times that figure in respect of career long future loss.

64. The Tribunal therefore made the maximum compensatory award of £78,962.00.

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Employment Judge Franey

23 August 2018

REASONS SENT TO THE PARTIES ON

28 August 2018

FOR THE TRIBUNAL OFFICE

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