RM

EMPLOYMENT TRIBUNALS

Claimant:	**Mr SGA Weerasinghe**
Respondent:	**Basildon and Thurrock NHS Foundation Trust**
Heard at:	**East London Hearing Centre**
On:	**25 September 2018**
Before:	**Employment Judge Russell**
Members:	**Mr G Tomey** **Mrs E Colvill**
Representation:	
Claimant:	**Mr A Hogarth, QC**
Respondent:	**Ms N Ellenbogen, QC** **Mr T Sheppard, Counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **There is one deduction of 35% to reflect all contingencies**

2. **The injury to feelings award is not taxable. If, however, the HMRC raise a tax liability the Respondent shall pay within 28 days upon demand.**

3. **The statutory maximum for compensation for unfair dismissal applies after application of the Section 207A ACAS uplift. The uplift does not apply to the basic award.**

4. **The Claimant's pension loss is £352,000 of which £13,600 is tax free and the balance is to be grossed up.**

5. **The sum which would have been earned by the Claimant in private practice is £25,870 per annum.**

6. **The previous Remedy Judgment did not include an Order for interest. Interest shall run on the figures once assessed at the rate of 8% from the date of injury to feelings, personal injury and aggravated damages and from the**

mid-point for financial loss.

7. **The multiplier for residual earnings is 11.15.**

8. **The Claimant has given an indemnity to the Respondent in respect of tax and national insurance as set out herein.**

REASONS

1 This is a long running Employment Tribunal case in which the Claimant succeeded on liability. Due to the complexity of the issues raised in determining remedy it was agreed that the Tribunal would adopt a two stage process. Judgment deciding issues of principle was sent to the parties on 12 October 2017. The parties have made considerable progress in translating those conclusions in principle into the sums to which the Claimant is due. There are, however, a small number of disputes which the parties have not been able to resolve.

Deduction for contingencies

2 Before issuing the first stage Remedy Judgment, a draft was sent to Counsel on 5 June 2017 for comments. At paragraph 48 of the Reasons in the draft Judgment, dealing with question 2A, the Tribunal concluded that the Respondent's conduct was the main cause of the Claimant's decision not to return to work when physically fit to do so. That cause was assessed at 65% with the balance of 35% to reflect the possibility that the Claimant's concern about possible recurrence of ill health and his desire to develop his career in a different direction would have caused him not to return to work in any event. We held:

> "**It follows that any financial loss after 1 January 2014 must be reduced by 35% to reflect loss not caused by the Respondent's unlawful conduct."**

3 Both Counsel provided comments and further representations as intended. Mr Hogarth addressed the paragraphs dealing with question 2A at length. As a result the final Judgment and Reasons were amended. Paragraph 50 of the Reasons repeated the conclusion set out at paragraph 48 of the draft. At paragraphs 51 to 53 of the Reasons, the Tribunal recorded and considered the further competing submissions of Mr Hogarth and Ms Ellenbogen. At paragraph 53, the Tribunal preferred the submissions of Ms Ellenbogen that the existing findings were sufficient and that calculation of earning capacity in an alternative career path was for the second stage of the Remedy process. We then concluded:

> "**In summary, we have found that the alternative career which the Claimant had a 35% chance of following (absent the discrimination) would start from January 2014, would not involve any clinical environment but would be academic or research work. The Claimant's current residual earning capacity is £30,000 per annum (see question 7 below); it does not include work as a medical lecturer for which a licence to practise is required but may include lecturing in medico-legal and medical ethics and/or pharmaceutical research.**"

4 In her submissions on behalf of the Respondent today, Ms Ellenbogen asserts that in paragraphs 50 and 53 the Tribunal made two separate findings, each of which

needs to be reflected in the calculation of the Claimant's loss. First, she submits, there should be a 35% reduction to reflect the chance that the Claimant would have pursued a non-clinical career path (paragraph 53) and then a further reduction of 35% to reflect loss not caused by the Respondent's unlawful conduct (paragraph 50).

5 Mr Hogarth submits that there is only one 35% reduction to be applied. He says that the Judgment and Reasons must be read as a whole: the Tribunal accepted the expert medical evidence that the Claimant could no longer work as a surgeon and then made decisions as to the Claimant's career choices. The conclusions at paragraphs 48 to 50 reflecting the 65% chance that he would have returned to work as a surgeon absent the discrimination. Mr Hogarth submits that paragraph 53 then addresses the issue of residual earning capacity by reference to the conclusions under question 7 as to the alternative career paths which the Claimant had had a 35% chance of following but which were also closed to the Claimant as a result of the psychiatric injuries caused by the Respondent.

6 The Tribunal has considered the submissions of both parties, the Reasons in the draft Judgment and those in the final Judgment. The conclusion of the Tribunal then, and again now, is that there is only one reduction of 35% to be applied. It is regrettable that the Tribunal's additional paragraphs addressing the further submissions following the draft Judgment has led to such confusion. That reduction and the reasons for it is set out at paragraph 50. The reference at paragraph 53 to a 35% reduction is, as it says, a summary of what has already been set out, namely that there was a 35% chance that the Claimant would not have returned to clinical work in any event. We therefore prefer the submissions of the Claimant and confirmed that there is only one 35% reduction to be applied. The reference to question 7 and the alternative career which may have been followed absent the discrimination is the same as found at paragraph 50, namely the 35% chance that the Claimant may not have returned to work in January 2014 for reasons not relating to the Respondent's discriminatory conduct.

Taxation of the Award for Injury to Feelings

7 The first stage Remedy Judgment awarded the Claimant £32,000 for injury to feelings. The issue is whether or not that sum needs to be grossed up to reflect liability to tax. In **Moorthy v HMRC** [2018] EWCA Civ 847 the Court of Appeal held that awards for injury to feelings were not taxable. The Finance (No. 2) Act 2017 amended section 406 of the Income Tax (Earnings and Pensions) Act 2003 to provide that with effect from the tax year commencing on 6 April 2018, the previous tax exemption for payments provided on account of "injury" does not include injured feelings. Therefore, with effect from 6 April 2018 awards for injury to feelings are taxable. The dispute between the parties arises from the fact that our first stage Remedy Judgment pre-dates the amendment of ITEPA.

8 Ms Ellenbogen submits that section 403(3)(a) ITEPA provides that a cash benefit is treated as received (1) when it is paid or a payment is made on account of it or (2) when the recipient becomes entitled to require payment of or on account of it. As the Judgment setting out the Claimant's entitlement to the payment of injury to feelings was sent to the parties on 12 October 2017, it falls within the tax year before the amended s.406 came into force. In other words, the position under **Moorthy** applies and the award is not liable to tax whether or not payment had in fact been made.

9 Mr Hogarth submits however that as the award had not been paid prior to the start

of the tax year commencing on 6 April 2018, there is a risk that the award will be liable to tax and that failure to gross up the award may deprive the Claimant of the full benefit of the sums ordered.

10 On balance, the Tribunal preferred the submissions of Ms Ellenbogen. Section 403(3) ITEPA does not deal only with dates of actual payment but also anticipates situations where a sum is "treated" as received where there is an entitlement to require payment. The Judgment sent to the parties on 12 October 2017 sets out the Claimant's entitlement to an award of £30,000 for injury to feelings. The Claimant could have required payment by enforcing the Judgment even where the figures for financial loss were not yet quantified. As such, the relevant tax year in which the award is treated as received is that commencing on 6 April 2017. We accept, however, that the Claimant would be unduly penalised if the Revenue were to take a different view. In the circumstances, and given the indemnity provided by the Claimant in respect of other payments, we consider it appropriate that the Respondent shall indemnify the Claimant for any tax liability on the award for injury to feelings.

Pension loss and grossing up

11 The Claimant and Respondent have each instructed an expert to value the Claimant's pension loss in line with the conclusions in the first stage Remedy Judgment. Unusually, each accepts and seeks to rely on the other's expert valuation as the Claimant's expert has valued the pension loss at £338,770 whereas the Respondent's expert has valued the loss at the higher sum of £365,283.

12 Mr Hogarth submits that the difference arises from marginally differing assumptions which reflect the permissible range of opinion between experts within the field and that each is therefore correct. Ms Ellenbogen submits that it is the Claimant who bears the burden of proving his loss in respect of pension loss. If required to call evidence to do so, he would have to call his own expert and could not rely upon the report of the Respondent. Mr Hogarth disagrees he says that the Respondent's report was disclosed in the ordinary course of preparation for the hearing and would be evidence which the Tribunal could properly take into account even if the Respondent chose not to call its expert to give evidence.

13 In valuing pension loss, the Tribunal is seeking to put the Claimant in the position he would have been in had the discrimination not occurred. Both experts' report has been disclosed in the ongoing proceedings. We prefer Mr Hogarth's submission and find that the Claimant is entitled to rely upon the more favourable report of the Respondent's expert (just as the Respondent can rely upon the lower figure advanced by the Claimant's expert). The Tribunal must then decide what figure to award in light of the discrepancy. Both experts are well respected and have reached their valuation for rational and defensible reasons. The difference is £30,000 and we agree with Mr Hogarth that both figures fall within a range of reasonable expert opinion and, therefore, it is appropriate to take the average figure, namely £352,000.

14 There is also a dispute as to the appropriate approach to grossing up the pension loss. It is agreed that £13,600 of the pension loss award will be tax free by reason of the Claimant's ability to use his current tax free allowances. Ms Ellenbogen says that in considering grossing up the balance of the award, the Tribunal must take into account the tax efficiencies which would be achieved if the Claimant were to pay the full amount of his

annual allowance into a pension fund or, alternatively, if the Respondent were ordered to pay the full amount of the pension award into the pension fund. The Claimant is currently able to pay £10,000 per annum into his pension fund tax free. Ms Ellenbogen submits that the Claimant can use this annual allowance each year until he reaches the age of 67 and thereby obtain tax relief on the sums ordered such that grossing up the full amount is not necessary.

15 By contrast, Mr Hogarth submits that the £10,000 annual allowance may not continue to apply as it is dependent upon the persons earnings within a given tax year and the Claimant's earnings are hard to predict. Mr Hogarth submits that it would be a radical step for the Tribunal effectively to order the Claimant to spend his compensation in a particular way (by ordering direct payment of the full pension loss into the pension fund) which he may or not want to do and may not even be able to do.

16 On balance, we prefer the submissions of Mr Hogarth. Ms Ellenbogen's tax efficiencies depend upon the Claimant having a notional £10,000 per annum tax free allowance for the next 12 years which would generate a saving. However, unless the full sum were to be paid directly into the pension, the Claimant's liability to tax will arise immediately with any possible reliefs extending a long way into the future. It is not clear that the full amount could be paid directly into the pension fund but, even if it could, we prefer Mr Hogarth's submission that it is not for the Tribunal to compel the Claimant to do so. The Claimant is entitled to be compensated for his pension loss and that loss is £352,000, with the exception of the agreed £13,600 allowance, the full amount is to be grossed up.

Earnings in Private Practice

17 At paragraph 82 of the Reasons in the first stage remedy Judgment, we found that in 2009 the Claimant generated a net profit of £25,870 from 16 operations and that, in 2011, the anticipated profit from 16 operations would be £24,564. When calculating this head of loss, Ms Ellenbogen contends for the 2011 figure as it is the most recent whereas Mr Hogarth suggests the average figure of £25,000 per annum.

18 The Tribunal found that absent the discrimination, the Claimant would have started his private practice from March 2015 and gradually built up to a maximum of 16 operations a year from March 2018. In the circumstances, we consider that little if any greater weight can be attached to figures which are seven years old rather nine years old. Rather we consider that the 2009 figures are more reliable as these reflect a full year of actual earnings whereas the 2011 figures are only an extrapolation of a lesser number of operations undertaken before illness. The figure to be used is £25,870.

Interest

19 The Claimant contends that there was an Order for the payment of interest in the first stage remedy Judgment. Mr Hogarth relies upon a notice attached to the Judgment setting out the provisions of the Employment Tribunal Interest Order 1990 and stating the relevant decision day as 12 October 2017, the calculation day as 13 October 2017 and the stipulated rate of interest as 8%. Ms Ellenbogen disagrees, submitting that until all figures are determined as part of second stage of the remedy process there can be no Order for interest and, in any event, the standard notice is not an Order of the Tribunal. We prefer the submissions of Ms Ellenbogen. The Tribunal's Judgment does not refer to interest

and it is not dealt addressed in the Reasons. The notice attached to the Judgment is administrative and does not form part of the Judgment. Interest will be payable in due course but not until the financial losses have been quantified.

ACAS uplift and the statutory cap

20 At paragraph 13 of the Judgment sent on 12 October 2017, the Tribunal held that the basic award and loss of earnings for unfair dismissal should be uplifted by 7.5% because of the Respondent's unreasonable failure to adhere to the ACAS Code. The parties have agreed that the basic award should not have been included in the uplift. The Judgment is varied to the extent that the uplift will apply only to loss of earnings for unfair dismissal.

21 Section 124(1)(z)(a) Employment Rights Act 1996 specifies the maximum amount of any compensatory award either in monetary terms or a year's pay whichever is the lower. Mr Hogarth submits that the statutory cap does not apply to an ACAS uplift. Section 207A TULR(C)A provides that a Tribunal may, if it considers it just and equitable in all the circumstances of to do so, increase any award it makes to the employee by no more than 25%. Mr Hogarth submits that the reference to "any award" in s.207A imposes no limitation and that the uplift is a free-standing right unconnected with s.123 and intended to be a deterrent. If the cap were intended to apply to an ACAS uplift, it would be clearly stated. Accordingly, the Tribunal should calculate loss of earnings, apply **Polkey,** make any reductions for contributory fault up to the point of the statutory cap and then apply the ACAS uplift.

22 Ms Ellenbogen disagrees. The Tribunal's power to award compensation for unfair dismissal is set out in the Employment Rights Act 1996. Section 118 makes clear that the compensatory award must be calculated in accordance with sections 123, 124, 124A and 126. Section 123 provides that a compensatory award is such amount as the tribunal considers just and equitable in all the circumstances subject to the provisions of section 124 (the statutory cap) and s.124A (ACAS uplift). Section 124A provides that the ACAS uplift is made immediately before any reduction for contributory fault. As such, Ms Ellenbogen submitted that the correct order is to calculate loss of earnings, apply **Polkey**, calculate the ACAS uplift, make any deductions for contributory fault and then apply the statutory cap.

23 On balance, the Tribunal prefers the submissions of Ms Ellenbogen. It is settled law that the statutory cap is applied after a deduction for contributory fault under s.123(6). Section 124A expressly provides that the ACAS uplift is made *before* the contributory fault deduction. It follows therefore that the statutory cap is applied after the ACAS uplift.

Multiplier for Residual Earning Capacity

24 The parties have agreed that the period from the Claimant's notional return to work in new employment until retirement at age 67 is 11.15 years. Mr Hogarth submits that just as the Tribunal applied the relevant Ogden tables to find a multiplier of 12.5 which was then rounded down to 12 to reflect the evidence of Professor Wass, so should this 'multiplier' for notional earnings in new employment. Ms Ellenbogen submits that as the period for 'new job' earnings is shorter than the proposed multiplier of 12 and as the same chance of early retirement as a surgeon does not apply to the 'new job', no such adjustment is required.

25 At paragraphs 96 to 105 of the Reasons, the Tribunal set out its reasons for deciding a multiplier of 12 for future loss of earnings to take account of the possibility of sickness and unemployment prior to retirement. At paragraph 99, we applied tables 9 and 11 as our starting point as these reflected retirement at age 65 and at age 70. As set out, we did not apply the tables slavishly nor did we simply take a mid-point. There was no 'rounding down' from 12.5 (a figure which does not appear in our Reasons) and there is no need to 'round down' the new job earnings either. The correct figure is 11.15.

Re-training costs

26 The Claimant is entitled to the sum of £2,000 plus VAT in respect of the cost of retraining. Mr Hogarth submits that the full amount of £2,400 should be grossed up as the Claimant is not entitled to recover the VAT element. By contrast, Ms Ellenbogen submits that the VAT element is not a taxable benefit and as such the Claimant will not be taxed on it. Given the size of the overall award, the possible additional amount of about £266 arising from this particular dispute may appear de minimis, nevertheless we are asked to resolve the issue. We prefer the submissions of Mr Hogarth that HMRC will tax the award as received in the hands of the Claimant, namely £2,400 and we are not confident that HMRC will make the detailed distinction urged upon us by Ms Ellenbogen.

EAT fees

27 The Claimant was ordered to pay the Respondent its fees of £1,600 in the Employment Appeal Tribunal proceedings. The Judgment sent to the parties on 12 October 2017 was silent as to fees although at paragraph 120 of the Reasons we recorded that the EAT fees should be set off against the award due to the Claimant. In July 2017, the Supreme Court held that the fees regime in the Tribunal and in the Employment Appeal Tribunal was unlawful and HMCTS is reimbursing fees which were unnecessarily paid. The Respondent has applied for reimbursement of the EAT fees. If these are reimbursed, there will be no sum due from the Claimant. If the fees are not reimbursed, then the Claimant will still be required to pay the £1,600 in fees as ordered by the EAT.

Tax indemnity

28 The parties have agreed the wording of a tax indemnity in favour of the Respondent in respect of any tax and national insurance charge liabilities incurred by it arising from payments received by the Claimant in connection with the termination of his employment and/or otherwise by reason of the Tribunal's award. The agreed wording of that indemnity (which we agree and adopt) is as follows.

> "**It is recorded that the Claimant has agreed to be responsible for the payment of any further income tax and any employee's National Insurance contributions in respect of payments received in connection with the termination of his employment and/or otherwise by reason of and/or in connection with the Tribunal's award in these proceedings and has agreed fully to indemnify the Respondent (and any successor Trust) and to keep the Respondent (and any successor Trust) fully indemnified against all and any liabilities to taxation and employee National Insurance contributions (including, in each case, any associated penalties and interest, together with any reasonable costs and expenses) which the Respondent (and/or any successor Trust) may incur in respect of or by reason of such termination of employment and/or any payment made pursuant to the Tribunal's award in these proceedings**

PROVIDED THAT:

(1) The Claimant will not be liable to pay any penalty interest at reasonable costs or expense which is incurred by reason of any unreasonable delay or negligent conduct, on the part of the Respondent and/or any success trust, that takes place subsequent to the date of this judgment; and

(2) **Prior to making any payment of any further tax and/or employee National Insurance contributions in respect of any such sum, the Respondent (and/or any successor Trust) will forward to the Claimant particulars of the demand made by HM Revenue & Customs and, before responding to HM Revenue & Customs, allow the Claimant 14 days (or such shorter period as is necessitated by HM Revenue & Customs deadline for a response), in which to make any written comments, which the Trust and/or any successor Trust will then take into account for responding to HM Revenue & Customs. For the avoidance of doubt, the Respondent and/or any successor Trust will not be obliged to take into account any written comment made by the Claimant outside the specified time limit.**"

Employment Judge Russell

15 December 2018