



EMPLOYMENT TRIBUNALS

Claimant: Professor Jeffrey Karp

Respondent: University of Exeter

Heard at: Exeter **On:** 10 July 2018

Before: Employment Judge Street

Representation

Claimant: in person

Respondent: Mr Midgeley, counsel

JUDGMENT having been sent to the parties on 26 July 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These Reasons are issued at the request of the Respondent.
2. This Judgment on remedy follows the earlier Judgment on the merits of Professor Karp's claims. In that Judgment, the claimant's claim for breach of contract succeeded. The notice period to which he was entitled was six months and 8 days. The respondent had paid six months notice. The respondent had not paid in respect of the additional 8 days.
3. By agreement, the sum of £1539.73 has been paid to the claimant in settlement of the claim for damages in respect of that element of salary.
4. Pension loss was the only head of damages outstanding. The issue for the Tribunal therefore was to calculate and award damages in respect of the failure by the respondent to pay or compensate Professor Karp for pension contributions during the period of notice.
5. The prima facie measure of damages for summary dismissal in breach of contract is the sum which the employer would have had to pay in order to bring the contract to an end lawfully. Damages include damages for the loss of pension rights that would have accrued if the employee had not been dismissed summarily in breach of contract (*Silvey v Pendragon plc* [2001] IRLR 685). In relation to pension loss, the intention is to put the claimant back in the position he should have been in but for the breach of contract.

6. In considering pension loss, the Tribunal took into account the Employment Tribunals Principles for Compensating Pension Loss, fourth edition, August 2017.
7. The Principles suggest that there is considerable merit in taking the broad brush approach in considering short periods of loss. That means basing the loss on the level of contributions the employer would have paid over that period. At paragraph 5.33, it is said that while the Principles do not set in stone the period short enough to justify the use of the contributions method, as a rule of thumb six months would very likely be a short period; twelve months would probably still be short.
8. There is no distinction between the definition of short in the case of wrongful dismissal and unfair dismissal. There are many cases of wrongful dismissal where the period of notice is a year or even longer. It is the case that most wrongful dismissals will fall into the short bracket.
9. The seven steps model at paragraph 5.54 – 5.61 pages 68 to 75 explains how tribunals should approach more complex pension loss cases. The guidance given is that that approach is not justified by a short period of loss.
10. This is a short period of loss. The only question arising before settling on the approach to take is whether there is an actual loss to the claimant in using the contributions method that is quantifiable in doing so. Given that using the approach for complex case can lead to discounts as well as to enhancements, I am not persuaded that there is any such quantifiable loss to Professor Karp.
11. Nor do I have the evidence on which to take the more complex approach.
12. Professor Karp was unhappy at the approach being on this basis and contended that six months was a long period. 90% of the contributions went into a defined benefit plan in his case, and he said the Principles were inadequate in the way that was addressed – to use a simple contributions basis for calculating losses was inappropriate given the losses arising from failure to contribute to the defined benefit plan. The contribution method, or broad brush method proposed by the Principles did not put him back in the position he would have been in but for the breach of contract. There was an investment element that was being excluded from consideration in the interests of simplicity, which wasn't fair. Equally there were other losses, such as sums payable on death or bereavement, which fell to be properly assessed.
13. He relies on expert advice in the letter from an actuarial service. It proposes that his losses are £10,200. He sought an award on the basis that that would require to be grossed up to mitigate the effects of taxation.
14. Sadly that letter is wholly unclear. It is not clear how the £10,200 proposed is calculated or whether it relates to the cost of providing equivalent benefits or the loss of value in the ultimate pension benefits on withdrawal. It is not clear why the figures cited were used. I do not find it helpful.
15. What he does not take into account is the time and complexity of making a more detailed assessment. There are many potential complexities, not least in the assessment of investment risks or performance. Insofar as he raised benefits payable on death or other contingencies, they had not arisen nor had he adduced evidence of the costs of covering them. He had not produced reliable evidence of his level of losses or of the costs of purchasing an annuity that would cover his losses. In fairness to him, he blames the University for non-co-operation.
16. I am satisfied that the approach in the Principles as regards short periods of loss is appropriate to be followed. That is because this is plainly a short period

in the context of such a calculation and also because it afforded a clear basis for a decision without further delay. Directions for this hearing were given on 5/03/18. The original Judgment and Reasons were issued on 9/10/17. It is not in the interests of justice to allow further delay to be incurred in respect of what is objectively a short period of loss.

17. I am not persuaded that a more complex approach to this short period will make any significant difference and it will add to delay and costs. The contributions method is suitable.
18. I find that the actual employer contributions were at 18%, a figure the respondent agreed. That means the actual contributions would have been £6011.98. That is the starting point for assessing losses.
19. That was based on the contributions that would have been payable by the employer at 18% of salary for the notice period of 6 months and 8 days, that is, 191 days (rounding up).
20. There is no deduction here for pension contributions by another employer during this period, to reduce the award.
21. There is no loss of enhancement here for accrued pension rights because the employment would not have continued beyond 6 months 8 days in any event. So there was no expectation of future salary increases to be factored in.
22. That sum is payable to the claimant as damages and so will be taxable in the claimant's hands. The calculation must then include compensation for the impact of taxation. Otherwise, the impact of taxation will be to reduce the sum that the claimant receives to a figure well below the level of his losses. That is called grossing up. The final sum is calculated to be the sum which will after taxation give the claimant compensation for the actual loss of pension rights as identified by the Tribunal.
23. There is provision in the Income Tax (Earnings and Pensions) Act 2003 in relation to tax. Section 403 deals with the impact of tax if and to the extent that a payment on termination of employment exceeds the £30,000 threshold. By section 404(4) that threshold can be seen not to be renewed in later tax years.
24. All of the sums now to be awarded will be taxable, given sums already paid to Professor Karp.
25. The next question is as to whether the marginal tax rate is that applicable at the date of dismissal or that applicable currently, when the award is made. In the year of dismissal, Professor Karp was on a lower rate of tax.
26. The relevant tax year is the tax year in which the payment is "received". That means when paid or when the recipient becomes entitled to require payment of it. The cause of action arose on dismissal, but the payment now being awarded is an award of damages and so it is taxable when received. That reflects a difference between sections 404 and 403.
27. That accords with the advice he has been given. He tells me HMRC will apply the current marginal tax rate.
28. On that basis, the tax rate is going to be 40% applying to the whole sum now awarded.
29. The approach to be taken is as follows:

$$\text{Grossed up sum} = (\text{true net loss}) / (1 - \text{marginal tax rate})$$

30. That is,

$$£6011.88 / 0.6 = £10,018.33.$$

31. The award made in respect of pension loss was £10,018.33.

Costs

32. There was an application for costs. The offer made in settlement fell short of the award now made. Earlier offers were made but contained additional clauses which he was entitled to reject.

33. It is right to say that Professor Karp has not been wholly helpful, there is plenty that points to delay on his part in engaging with the issues, including that he raised the question of grossing up only at the day of this hearing. But I do not find the level of unreasonableness one to merit an order for costs.

Publication of the Tribunal Judgment and Reasons

34. Professor Karp renewed his application that the Judgment and Reasons were not published on the Employment Tribunal website. That had been fully canvassed on the last day of the four day hearing. At that point, after the issue was explored with him, judgment was reserved and he was given the opportunity to consider his position over several days. That was on the basis that once Reasons were issued in writing, they would certainly be published. It gave him the opportunity to seek a negotiated settlement or to withdraw. He had not chosen to withdraw his claim and there was no settlement, so in due course, the Judgment and Reasons were issued.

35. He did not contend that he had any grounds that fell within Rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 and there is no other basis on which publication can be restricted.

36. The position remains as it was. There is no basis on which I can order that the Judgment and Reasons are not published.

Employment Judge Street

Date 6 September 2018