EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105093/2016

Held in Glasgow on 11 October 2018

Employment Judge: Laura Doherty

Mr G Carroll	**Claimant** **Represented by:** **Ms S Shiels - Solicitor**
Dumfries & Galloway Council	**Respondent** **Represented by:** **Mr S Miller - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Order of the Tribunal is that the original decision is confirmed under **Rule 70** of The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

REASONS

1. The claimant presented a claim of breach of contract and unfair dismissal on 20 September 2016. A Final Hearing took place over eight days in 2017 /18, and the Tribunal promulgated its decision on 27 March 2018. The claimant was successful, and the Tribunal made an award in respect of damages for breach of contract, and an award in respect of the unfair dismissal element of the claim.

2. An application for reconsideration of the Judgment was made by the respondents on 10 April 2018, under Rule **71** of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). The application was not refused under Rule **72 (1)** of the Rules. The application

was opposed, and the Tribunal fixed this hearing under Rule **72 (2)** of the Rules.

3. Mr Miller attended that hearing for the respondents, and Ms Shiels attended for the claimant.

4. The Tribunal heard oral submissions from both parties, but no evidence was heard.

Respondent's submissions

5. Mr Miller began by outlining the three outcomes which are open to a Tribunal on reconsideration. That is to confirm, to vary, or revoke the Judgment.

6. In support of his application Mr Miller relied on two points. Firstly, he submitted that the Tribunal did not appear to have taken into account a submission made on behalf of the respondents to the effect that in the event the claimant succeeded in his claims of unfair dismissal and breach of contract, the calculation of compensation should reflect the fact that, had he not been dismissed, and had he been on long term absence, then he would have received contractual sick pay. Mr Miller accepted that his primary submission at the Final Hearing (the Hearing) was to the effect that the claimant's loss was self-evidently attributable to his ill health which amounted to a supervening incapacity. The Tribunal had not been with the respondents on that point, but it had not dealt with the alternative argument made orally, to the effect that in the event the claimant succeeded in his claim of unfair dismissal and breach of contract, the calculation of compensation should reflect the fact that had he not been dismissed and had he been on long term absence, then he would have received contractual sick pay. Mr Miller referred to the case of *Wood v Mitchell SA Limited UK EAT/18/10* at paragraph 20.

7. Mr Miller's submitted that the calculation for compensation for the claimant had been made by the Tribunal on the basis that he would have received full pay for the period ending in early September 2018. The claimant however

had not established in evidence a contractual right to full pay indefinitely while absent on long term sick leave, and the consequence of this was that the claimant had been overcompensated. In this connection, Mr Miller drew the Tribunal's attention to the findings at paragraph 234 of the Reasons, to the effect that the claimant had not felt fit enough to make any applications for employment.

8. Mr Miller submitted that while there could be an attempt to determine this point on the onus of proof, on the basis that the claimant had led no evidence as to the his entitlement to contractual sick pay, it would be appropriate for the Tribunal to simply continue the reconsideration hearing so the parties could agree the claimant's contractual entitlement to sick pay during the relevant period, or alternatively the Tribunal could revoke it's the decision and take it again at a hearing under Rule 70.

9. The second part of Mr Miller's application for review related to the Tribunal's pension loss calculation (paragraph 378 of the Reasons). This was calculated on the basis that the claimant will suffer pension loss until the age of 65. A period of loss is however identified by the Tribunal at paragraph 373, of six months from the date of the Hearing. Mr Miller's submitted the Tribunal had determined that the claimant would have remained in employment until early September 2018, at which point he would have been aged 57. The pension loss should have correspondingly been reduced. Mr Miller produced figures in advance of the PH as to how he submitted that pension loss should be calculated on the basis that this loss would cut off in September 2018, six months from the date of the Hearing These were not agreed, and it was Mr Miller's position in the first instance that the Tribunal should continue the reconsideration hearing to allow the parties to have an opportunity to ascertain if the pension loss could be agreed on the basis that the claimant 's pension loss crystallised after six months. If they could not, then a hearing would need to be fixed to determine the pension loss calculation till September 2018.

10. In support of his argument Mr Miller referred to the case of *Aegon UK Corp Services Limited v Roberts 2009 ECWA 932,* and the Judgment of Lord Justice Elias in the Court of Appeal, in particular paragraph 18 of the Judgment.

11. In response to Ms Shiels argument that it was not consistent with the overriding objective, nor in line with the Pension Guidance, for the Tribunal to conduct the exercise suggested by him, Mr Miller submitted the Tribunal should take into account that the claimant has raised a personal injury claim against the respondents, where pension loss will be an issue. There will be arguments about double counting and *res judicata* and there would be an expectation that the Tribunal would have assessed the claimant's pension loss in these proceedings.

12. Mr Miller also referred to that the case of *Griffin v Plymouth Hospital NHS Trust (2014) IRLR 962 CA,* referred to by Ms Shiels, and his position was that this dealt with the old Pension Guidance, which should now be disregarded.

13. Mr Miller disputed that the *Estorffe v Smith* case, referred to by Ms Shiels, was authority for the proposition that the Tribunal could at large revisit a Judgment on reconsideration, absent fair notice.

Claimant's submissions

14. Miss Shiels opposed the application for reconsideration on both grounds. She began by referring to the case of *Outasight VB Limited v Brown UK EAT/253/14,* in support of the proposition that much of the case law generated under the old Tribunals Rules remains relevant. There was no more discretion under the new Rules to admit fresh evidence, than there had been under the previous rules.

15. The second case which Miss Shiels referred to was *Estorffe v Smith 1973* ICR 542, and she relied on this as an authority for the proposition that a litigant who asked the Tribunal to review its decision cannot pick and choose which

part of the decision he wishes to have reviewed. If an application is made for review and has succeeded, then the Tribunal is free to review the whole of the decision.

16. In relation to the first part of the respondent's application for reconsideration, Miss Shiels submitted that the argument presented by the respondents was presented as an *esto* position and their primary position that the claimant's illness was a supervening event. It was only if the Tribunal had found that the claimant's illness was a supervening event that this argument became relevant. *Wood v Mitchell* dealt with a supervening event; there the claimant had become ill for a reason entirely unconnected to his employment or his dismissal from it. The Tribunal had not found the claimant's illness to be a supervening event in this case. The argument Mr Miller now presents is akin to a *Polkey* type argument, to the effect that the claimant would have been dismissed at some later date because of ill health, however that argument was not made at the time.

17. The claimant's ill health was found to be because of the actions taken by the respondents related to his dismissal process, and his dismissal. The Tribunal concluded at paragraph 367 that the claimant's ill health was a result of actions taken by his employer; it was not incumbent upon the claimants to lead evidence as to his sick pay entitlement.

18. There had been an extensive exchange of information in relation to the quantification of the claim, which the respondents had the opportunity to respond to, and the point had never been taken until now. Miss Shiels speculated that the reason why Mr Miller was suggesting the parties could agree figures was in order to avoid a further hearing which would result in the Tribunal assessing compensation as at date of that hearing.

19. In relation to the second part of the reconsideration application, Ms Shiels submitted that the Tribunal had determined that the claimant might obtain new employment by December 2018. That was on the basis that the resolution

of this case would assist, but that in fact has not come to pass. The case remains ongoing and the claimant remains unemployed.

20. The claimant had benefited from a final salary scheme while employed by the respondents. Given the current state of his GTC referral, it was unlikely that the claimant will ever return to work as a teacher. Even if he obtained work in the public service, this would not be on the basis of a final salary scheme.

21. The Tribunal had accepted the claimant's evidence that he would have worked until the age of 65. The Tribunal did not make a finding that the claimant would have remained in the respondents' employment until September 2018. Rather it concluded he would have found another another job.

22. The Tribunal is entitled to take a broad-brush approach towards the assessment of pension loss, particularly in the circumstances where it has to apply the statutory cap, as was the case here. Such an approach is consistent with the overriding objective in the Rules, and the with the 2017 Pension Guidance.

23. Miss Shields referred to the case of *Griffin v Plymouth Hospital NHS Trust 2014 IRLR* in particular paragraph 61, 63 and 64 of that Judgment. The effect of that is that if the claimant loses a job with a final salary pension scheme and obtains one with a money purchase scheme, the pension loss is valued at the value of the perspective final pension up until normal retirement age in former employment, less the value of the accrued final salary pension rights to date of dismissal from the former employment (i.e. the deferred pension). The figures which were presented to the Tribunal at the hearing were assessed on that basis. There is therefore no need to factor in or subtract from that the value of the prospective final pension rights in the new employment.

24. Miss Shields did not agree with the figures produced by Mr Miller. She submitted it was disproportionate and inconsistent with the overriding

objective in the Rules and the Pension Guidance that a further hearing is fixed to assess pension loss, and she referred to paragraph 5.35 of the 2017 guidance and paragraph 5.6.1.

25. In that connection, she submitted it would be relevant to consider the effect of the withdrawal factor, and how that interacted with the *Polkey* deduction and the requirement to gross up figures in relation of pension loss, none of which had been dealt with to date.

26. In connection with *Aegon* case, Miss Shiels submitted that this dealt with a *novus actus*. In the *Aegon* case, the claimant's package with her new employer in fact provided her with greater remuneration than she had received with Aegon. It was that which crystallised the respondent's losses.

27. Miss Shiels submitted that the fact that proceedings had been raised elsewhere is irrelevant to the Tribunal's consideration of pension loss.

28. Miss Shiels asked the Tribunal to deal with her application for expenses in relation to the reconsideration hearing, in the event the application was not successful.

Consideration

29. Rule **70** of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules) provides;

"*A Tribunal may, either on his own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgement where it is necessary 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."*

30. Under Rule **72 (1)** the Tribunal may refuse an application for reconsideration on the grounds that it has no reasonable prospects of success. If the application is not refused, then under Rule **72 (2)** the original decision shall be considered at a hearing unless the Employment Judge considers, having

regard to any response from the parties, that a hearing is not necessary in the interests of justice.

31. The respondent's application for reconsideration was not refused under Rule **71**, and this hearing was fixed.

32. Under Rule **70** it is open to the Tribunal to confirm vary or revoke its decision on reconsideration.

33. There is an outstanding Appeal to the Employment Appeal Tribunal (EAT), which is currently sisted. The Tribunal understands that the points taken on reconsideration also form the basis of part of the appeal to the EAT.

First Reconsideration Point

34. The Tribunal began by considering the first point upon which reconsideration is sought. That is that the Tribunal did not deal with the argument, that in the event the claimant succeeded in his claim for unfair dismissal, the calculation of compensation should reflect the fact that had he not been dismissed and had he been a long-term absence, then he would only have received contractual sick pay. This was presented as alternative to the primary submission on behalf of the respondents, which was to the effect that the respondents were not responsible for the claimant's ill-health.

35. The relevant parts of the Tribunal's Reasons are found in Paragraphs 353 to 373 which set out the Tribunal's conclusions on wage loss to the date to the date of the Hearing, and future loss elements of the Compensatory Award.

36. The Tribunal concluded at paragraph 367;

"*The Tribunal was satisfied that taking these elements together it had sufficient evidence on which to conclude that the claimant's ill-health was as a result of actions taken by the employer, and therefore it did not conclude that there should be a reduction, or failure to make an award under Section*

123 (1) on the basis that the claimant's loss was occasioned by a supervening event."

37. The Tribunal therefore rejected the respondent's submission to the effect that the claimant's ill health was a supervening event.

38. At the original hearing, in his submissions, Mr Miller did refer to the case of *Wood*. In particular he referred the Tribunal to paragraph 18 of the judgment which states;

'*In this case the Claimant's main argument was that his ill-health declined by reason of his dismissal and that his inability to work, hence his financial loss, was directly attributable to his dismissal. The Tribunal rejected that argument; as we have seen, there is no appeal against that finding'.*

39. At the original hearing Mr Miller submitted that *Wood* was relevant because if the claimant did not prove that his employer caused all of his ill-health that caused his wage loss, then that was not the end of it, and the Tribunal could still look at the claimant's sick pay entitlement. He made submissions to the effect that even if that was the case, there was no evidence before the Tribunal as to what that sick pay entitlement was, and therefore this was potentially a dead end for the claimant.

40. At the original hearing therefore Mr Miller submitted that as the claimant had not led evidence about the elements which a Tribunal should consider applying *Wood*, then if it was open to the Tribunal to consider the claimant's losses on the basis that his illness was a supervening event, it could not do so because there was no evidence to allow it to do so.

41. The case of *Wood* deals with the assessment of loss in circumstances where the claimant's ill-health absence was found to be unconnected to his employment.

42. At paragraph 19 to 21, His Honour Judge Richardson presiding in the EAT stated;

> "19. *The Tribunal then awarded the claimant, in effect what he would have lost until the time became fit for work by reason of psychiatric problems associated with the breakdown of his marriage. As we read paragraphs 13 and 14, the Tribunal concluded that any loss after that time was not attributable to actions taken by the Respondents.*
>
> *20. We think this is too narrow a view. At contract of employment provides an employee with rights which are of benefit to him even if he becomes ill for reasons which are not connected to his employment. He may be entitled to sick pay; generally he will be entitled to statutory sick pay; he can expect his employers to investigate when he will be fit for work and he may be able to return to work before the time comes when he would or could be fairly dismissed; if his employers are to dismiss them, it will be was notice or a payment in lieu of notice. If an employee is unfairly dismissed, he loses these rights. In some circumstances these may be valuable rights.*
>
> *21. Accordingly, in estimating what loss a complaint has sustained in consequence of the dismissal a Tribunal ought generally to take account of these matters and estimate their financial value and light of the evidence before them. The date at which the ill-health supervened will not generally be the cut-off point. It is right to estimate; for how long with the employee have been employed? What pay or benefits would have accrued to him during that employment even granted that he would have been ill? Would he have returned to work?"*

43. The Tribunal however, in this case, did not conclude that the claimants illness was a supervening event. Had it done so it would have been obliged to consider the issues raised in *Wood*. Rather it concluded at paragraph 367 that the claimant's ill health was as a result of actions taken by the employer, (for the reasons set out at paragraphs 357 to 366).

44. In light of the Tribunal's conclusion to the effect that the claimant's ill-health was not a supervening event but was as a result of actions taken by his employer, the guidance in *Wood* has no application in this case, and it was unnecessary for the Tribunal to consider the claimant's entitlement to sick pay.

45. The Tribunal therefore concluded that it was not in the interests of justice to vary or revoke this part of its decision, which is confirmed.

Second Reconsideration Point

46. The second the basis for the application for reconsideration was that the pension loss figure adopted by the Tribunal was calculated on the premise that the Claimant suffered pension loss until the age of 65, but the loss period identified in paragraph 373 of the Reasons, was 6 months from the date of the last hearing. Mr Miller argued that the Tribunal had determined that the claimant would have remained in employment until early September 2018 at which point his pension age would be 57, and pension loss should correspondingly be reduced.

47. In the course of the Reconsideration hearing Mr Miller accepted that there had been no positive finding by the Tribunal to the effect that but for the dismissal, the claimant would have remained in employment until early September 2018.

48. Mr Miller's position, as the Tribunal understands it, is that that pension loss should be calculated in line with the Tribunal's conclusion at paragraph 373.

49. However, the position which he contends for (that pension loss should crystallise 6 months from the date of the final Hearing), presupposes that the claimant is in alternative employment where he enjoys the same pension benefit as he did with the respondents. The Tribunal was not in a position to make such a finding, and it did not do so.

50. The Tribunal found at paragraph 373;

'*Balancing these elements, the Tribunal was prepared to assess that it was likely that the claimant would obtain employment within 6 months and made an award of future loss on that basis. The Tribunal therefore made an award for future loss of* ***26x £628.94=£16, 352.***

51. The calculation in paragraph 373 is of net wages, and it therefore apparent that the Tribunal concluded that the claimant was likely to sustain a loss of net wages for a further six months after the Hearing. It reached no such conclusion on the claimant's loss of pension entitlement.

52. In its assessment of pension loss (paragraphs 375/377) the Tribunal narrated that there was no agreement in relation to pension loss. This was on the basis that the claimant's position was he would have remained in employment as a teacher until he was 65, and the respondents argued that pension loss should be assessed on the basis that the claimant would have retired at 60 years of age.

53. There was however agreement as to the figures in respect of the value of the prospective final salary pension rights up to normal retirement age, and the value of the accrued final salary pension rights at the date of dismissal.

54. For the reasons given in paragraph 377 of the decision, the Tribunal preferred the claimant's submission and assessed pension loss on the basis that the claimant might have worked as a teacher until he was 65 years old.

55. Mr Miller argued that there is no reason to separate pension loss from loss of earnings. In support of this proposition he relied on the case of *Aegon.*

56. In *Aegon* case the claimant had found new employment prior to the date of the Tribunal Hearing*,* where she enjoyed salary and pension benefits (but not a final salary scheme). The Tribunal found that the claimant was unlikely ever again to enjoy membership of a final salary pension scheme such as she had enjoyed with Aegon. It also found that even taking into account her pension

loss, the remuneration package she received in her new job was more favourable than that which she had enjoyed with Aegon. The Tribunal in that case found that upon the claimant's gaining new employment, the chain of causation been broken in respect of loss of earnings but awarded a sum to reflect loss of final salary pension.

57. The Tribunal's decision was upheld the EAT but was overturned at the Court of Appeal. In his judgement at paragraphs 17/18 Lord Justice Elias stated;

"17. '*The starting point for tribunal when assessing what compensation should be awarded under S123 is to determine what financial loss falls from the dismissal. In the context of this case, this required the tribunal to determine whether Aegon should continue to be liable for losses occurring after the dismissal by Just Retirement. After carefully considering the facts in light of the Dench decision, they concluded that the new employment had broken the chain of causation. They accepted that the consequence was that as far as all aspects of remuneration other than pension were concerned, Aegon's liability was crystallised at that stage. Of course, Aegon will have remained liable for any shortfall in Ms Roberts remuneration package with Just Retirement when compared with the Aegon past package and that would have continued until the age of 50, which is when the tribunal found she would have left Aegon in any event. But in this case there was no shortfall and therefore no loss. The tribunal's finding on causation meant that Aegon were not liable for the loss of remuneration containing after the contract with Just Retirement came to an end.*

18. The tribunal chose not to apply this same principle to the pension loss. I do not think they could legitimately fail to do so by carving out pension loss for this special treatment. With all due respect to the employment tribunal and the EAT, I do not accept that pensions have some special status in this calculation. The pension is simply part of the overall remuneration package-in essence deferred remuneration -albeit an important part and must be assessed accordingly. Nor do accept the

observation of the EAT that having the benefit of final salary pension scheme is an unquantifiable benefit which justified pension loss been treated differently. The tribunal cannot avoid translating pension values into money terms. It is not possible to make any assessment of loss otherwise. That is admittedly often a difficult and highly speculative exercise, but it is one that must be undertaken nonetheless."

58. *Aegon* therefore deals with causation and makes clear that a Tribunal cannot apply different standards of causation to pension loss and loss of earnings.

59. That, however, does not mean that the tribunal is bound to find that both types of loss will end at the same time.

60. It appeared to the Tribunal that there is at its distinction to be drawn between the present case, and *Aegon*. In the *Aegon* case the Tribunal was in a position to make findings, and made findings, as to the remuneration package, to include pension, which the claimant enjoyed in her the new employment, after her employment with the *Aegon* came to an end. It was the *novus actus* of getting a new job where the claimant enjoyed salary and pension benefits, which broke the chain of causation.

61. In this case the Tribunal's findings about the claimant's future employment are confined to what is said in paragraph 373, and that is that balancing all the elements the tribunal was prepared to assess that the claimant would obtain employment within 6 months and will suffer a loss of £16,352.42 as a result.

62. That conclusion reflects the evidence which the Tribunal had before it at the hearing. There was no evidence upon which the Tribunal could reach a conclusion as to the likelihood of the claimant securing employment within 6 months where he would enjoy the same pension benefits as he had enjoyed with the respondents, or a more or less favourable pension entitlement, or if less favourable, what the differential might be between the pension he

enjoyed with the respondents and any new pension entitlement he might enjoy.

63. In order now to make findings on these matters, the Tribunal would have to hear new evidence on these points, and it did not understand it to be the position of either party that it was appropriate to do so. Mr Miller's position was that the Tribunal would have to hear evidence about how the parties assessed pension loss calculated to the age of 57, not about what kind of pension package the claimant might have enjoyed in any new employment which he found.

64. In this connection the Tribunal had regard to Ms Shiels submission as to the overriding objective in the Rules which includes dealing with cases in ways which are proportionate to the complexity and importance of the issue and saving expense.

65. Ms Shiels referred the Tribunal to the Employment Tribunals; Principles for Compensating Pension Loss 2017 (the Principles). The Introduction to those Principles outlines 5 concepts to the approach to compensating loss, which include simplicity, and proportionality.

66. Those include that more complex approaches to the assessment of pension loss should only be adopted when unavoidable, and as a matter of proportionality parties should only bear the cost associated with obtaining expert evidence when it is justified by the pension loss at stake, and this is more likely to be the case where the statutory cap on unfair dismissal does not apply.

67. Ms Shiels made it clear to the Tribunal that there is no prospect of her agreeing with Mr Miller's quantification of the claimant's pension loss on the basis that he would have remained in employment until he was aged 57 years, aside from the fact that she did not agree with his argument that pension loss should be cut off 6 months from the date of the Hearing.

68. That being the case in the event the Tribunal revoked the judgement it would of necessity, as contended for by Mr Miller, require to hear evidence and submissions from the parties on their competing assertions of pension loss in the event that that loss crystallised 6 months after the date of the final Hearing. This would no doubt be a costly exercise and proceeding along the route may well raise issues of proportionality in circumstances where the statutory cap applies to any award of compensation in this case.

69. That of itself, however, would not be a reason for the Tribunal to confirm its judgement in this case. Rather it takes into account that it was not in a position to conclude, and therefore did not reach a conclusion on what type of pension benefit the claimant was likely to secure in any future employment. No submission was made by the respondents to the effect that in the event the Tribunal found it was likely that the claimant would secure alternative employment prior to his retirement age, pension loss should be reduced, or no award, made to reflect that.

70. The position which the respondents took at the Hearing was that pension loss should be assessed on the basis that the claimant would have retired at 60, as opposed to 65 as contended for by the claimant.

71. The Tribunal did fail to consider a submission made by the respondents in relation to how it should approach the issue of calculation of pension loss or fail to take into account evidence about the prospects of the claimant obtaining alternative employment where he would have enjoyed a pension benefit commensurate, or less or greater than that which he enjoyed with the respondents.

72. There had been an extensive exchange of information between the claimant and respondents in relation to the quantification of this claim, which included details of what was said to be the pension loss, and the issue of pension loss was canvassed and ventilated in the course of the Hearing.

73. In considering whether to vary or revoke a decision on the grounds that the interests of justice require it, is relevant to take into account whether the matter had been ventilated and properly argued. If it has, and there is an error of law in the judgement then that falls to be corrected on appeal, and not by reconsideration.

74. For these reasons the Tribunal was not persuaded that it was in the interests of Justice to revoke or vary the decision, which is confirmed.

75. Miss Shiels asked the Tribunal to consider her application for expenses in relation to the reconsideration application in the event the respondents did not succeed. The Tribunal did not consider it was appropriate to deal with this at this stage pending the EAT appeal, and all issues of expenses are deferred pending the conclusion of the appeal process.

Employment Judge: L Doherty
Date of Judgment: 24 October 2018
Entered in register : 06 November 2018
and copied to parties