THE EMPLOYMENT TRIBUNAL

Claimant: Ms Anaar Sajoo

Respondent: Guy's and St Thomas; NHS Foundation Trust

Heard at: **London South (Croydon)**

On: **9 April 2019**

Before: **Employment Judge John Crosfill**

Representation

Claimant: Mr E Walker of Counsel

Respondent: Mr W Young of Counsel

Judgment

1. The Claimant is entitled to a basic award of **£7185.00.**
2. The Respondent is ordered to pay the Claimant that sum.
3. The Claimant is not entitled to any further compensatory award.

Reasons

1. By my judgment dated 31 October 2018 I found that the Claimant's claim of unfair dismissal was well founded. My judgment on liability expressly avoided making any findings in respect of the possibility that the Claimant might have been fairly dismissed. That said, this judgment must be read alongside my findings on liability as I found the dismissal to be unfair on a limited basis.

2. The parties had provided an agreed bundle for the remedy hearing. One further job

description was added to that bundle at the outset of the hearing. In addition the Claimant and Dr Mohammed had each prepared witness statements for the hearing.

3. The Claimant had prepared a schedule of loss. The principle remedy sought in that schedule was re-engagement although the possibility of reinstatement was left open. If not granted reinstatement or re-engagement the Claimant sought compensation as an alternative.

4. The parties sought and were granted some time to see whether they could resolve their differences. When that proved not to be possible I heard from the Claimant and from Dr Mohammed and each was cross examined by the opposing party. I then had submissions from the advocates with Mr Young providing me with additional submissions in writing. I shall not set out those submissions in full but refer to the central arguments below in my discussions and conclusions.

5. The Claimant had raised the issue of costs in her schedule of loss. Mr Edwards accepted that that issue could not be determined until I had reached a conclusion on remedy. I leave it to the parties in the light of this judgment ot make any further application if they see fit to do so.

The legal framework

1. Where an employee succeeds in a claim of unfair dismissal the proper approach to the issue of remedy is set out in Section 112 of the Employment Rights Act 1996 ('ERA 1996'). The first step is to ask the employee whether she wants an order for reinstatement or re-engagement made under Section 113 of the ERA 1996 and, if she does, consider whether to make such an order. If no such order is made then the Tribunal must consider making an award of compensation under Section 118 of the ERA 1996. Such an award will include a basic award under Section 119 of the ERA 1996 and a compensatory award under section 123 ERA 1996.

2. An order for re-instatement is defined in Section 114 of the ERA 1996 as follows:

114 Order for reinstatement.

(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—

> *(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,*
>
> *(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and*
>
> *(c) the date by which the order must be complied with.*

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

3. An order for re-engagement is defined in Section 115 ERA 1996 as follows:

115 Order for re-engagement

(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—

(a) the identity of the employer,

(b) the nature of the employment,

(c) the remuneration for the employment,

(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,

(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(f) the date by which the order must be complied with.

(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

(4) …

4. Section 116 ERA sets out the matters that a tribunal must take into account when deciding whether or not to make an order of re-instatement or re-engagement. The material parts of that section are as follows:

116 Choice of order and its terms

(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account—

(a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.

(5….(6)

5. ***Arriva London Ltd v Eleftheriou*** **UKEAT/0272/12** is authority for the proposition that, Where a tribunal makes an order for re-engagement, then it may not make a reduction to the amount of 'back pay' ordered under Section 115(2)(d) to reflect the fact that had the employer acted fairly the employee might or would have been dismissed in any event (a 'Polkey' reduction)**.** However, Langstaff P also stated that it is not necessarily an error for the tribunal to take into account in exercise of its

discretion (as to whether or not to make an order of reinstatement) matters which cause it to reach a conclusion that there might or would have been a dismissal in any event.

6. Where a tribunal makes no order under Section 113 ERA 1996 it must consider making a basic and compensatory award. A basic award is calculated in accordance with Section 119 of the ERA 1996. That section provides:

119 Basic award

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) 'the appropriate amount' means—

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for a year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

7. A basic award can be reduced in the circumstances set out in section 122 ERA 1996 the material parts of which are as follows:

122 Basic award: reductions

(1) …..

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

(3) – (5)

8. A compensatory award is made under Section 123 of the ERA 1996. The material parts of that section say:

> *123 Compensatory award*
>
> *(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.*
>
> *(2) The loss referred to in subsection (1) shall be taken to include—*
>
> *(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and*
>
> *(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*
>
> *(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—*
>
> *(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or*
>
> *(b) any expectation of such a payment,*
>
> *only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal*
>
> *(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.*
>
> *(5)*
>
> *(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*
>
> *(7) - (8)*

9. ***Polkey v A E Dayton Services Ltd*** **[1987] IRLR 503** is authority for the proposition that in assessing what compensation is 'just and equitable' an employment tribunal are entitled to have regard to the possibility that had the employer acted fairly there might or would have been a dismissal in any event. As the proper approach to the assessment of the relevant facts was a matter of debate before me I set out my

conclusions as to the proper approach in my discussions and conclusions below.

The findings of fact

10. Having heard the evidence, I made the findings of fact set out below. I have endeavoured to deal with matters in a chronological order.

11. Prior to the dismissal and during the performance review process Dr Patch raised the possibility of the Claimant working in an alternative role. This was a matter raised by the Claimant in her grievance. At that stage the Claimant expressed no interest in doing any other job. She saw this as an act of bullying.

12. Dr Mohammed's evidence was focused on jobs available during the 12 weeks when the Claimant was under notice of her dismissal. This would have been the period during which redeployment would have been considered under the Respondent's policy had it been followed. As such her evidence was more focused on 'Polkey' issues than it was in respect of any order under S113 ERA 1996.

13. Dr Mohammed had searched for vacancies that she considered were prima facia 'suitable'. She looked at all of the vacancies. Whilst there full vacancy lists were very long indeed Dr Mohammed told me and I accept that some were illusory as they either had no funding or they were not active. Dr Mohammed then looked for all vacancies of band 4 and above that she thought potentially the Claimant might apply for. She identified 25 jobs which potentially the Claimant might have applied for using these criteria. She disregarded any role that required a formal clinical qualification not held by the Claimant.

14. Dr Mohammed's evidence was that having looked at the job description for each of those roles none were actually suitable for a variety of reasons. This was not accepted by the Claimant and it is it is necessary for me to make findings about these jobs. In the remedy hearing bundle I had been provided with most of the job descriptions.

15. When Mr Young cross examined the Claimant she was prepared to concede that a number of the available jobs were unsuitable. For example roles 16, 17 and 21 required registration with the Nursing and Midwifery Council and job 7 which required a law degree. However in respect of others she took a different approach. When it was suggested that she could not meet some of the essential criteria she said that she could 'stretch' her experience and might have considered putting in an application. I find that she was failing to distinguish between making an application and making a realistic application. An example of this was role 13, A Staff Engagement Manager. The Claimant accepted that she could not have met 5 or 6 of the essential criteria. A further example is role 3 that of a Project Manager which has as an essential skill 'extensive project management experience' The Claimant responded by saying that she has 'some' project management experience. In respect of these roles I believe that Dr Mohammed has quite rightly come to the conclusion that they were 'unsuitable' in the sense that there was no realistic prospect of the Claimant being offered the job had she applied. This conclusion applies to all of the roles at band 7 and above. I find that at these levels the Respondent is unsurprisingly looking for a specialist skill set. Each required a track record of using those specialist skills.

16. My Young took a more broad brush approach to asking the Claimant about the remaining roles at band 6 and below. He suggested that each was a far more junior role than the Claimant previously held and that each role was in an area where the Claimant had no specific experience. The Claimant disagreed. She said that the roles were varied and that there were some where she did have sufficient skills to apply. I accept that some of the more junior roles had more generic skill sets where there was substantial cross over between the role and what the Claimant's previous experience. An example of this was role 14 a Clinical Trials Co-ordinator. There was nothing in the essential requirements of that job which would automatically have meant that the role was unsuitable per-se. This was a job that Dr Mohammed had not specifically commented upon in her witness statement as the job description had not been available to her at the time she wrote her statement. In her evidence Dr Mohammed said that she considered that the role would be unsuitable because it reported in to a clinician and required patient contact. It was unsuitable because of the concerns about the Claimant's clinical skills.

17. When Mr Walker cross examined Dr Mohammed she confirmed that she had not looked at any roles a band 3 or below as she did not consider them suitable.

18. I asked Dr Mohammed whether the Respondent's concerns about poor record keeping and poor administration has any bearing on the roles that she had identified. Dr Mohammed told me, and I accept that these concerns were important beyond the Claimant's original role as a geneticist and those skills were likely to be important in many if not all of the roles that she had looked at.

19. Having regard to all of the evidence I conclude that there was a small number of band 4 and up roles available that did not have as an essential criteria some experience or qualification that the Claimant did not have. However in each of the remaining roles the role either required patient contact i.e. clinical skills OR it required good administrative skills. It was the Claimant's shortcomings in these areas that had led to her dismissal from her role as a Genetics Counsellor. An example of this was the band 5 role as a Clinical Trials Coordinator. The Job description makes it clear that there is a strong emphasis on accurate and detailed record keeping. This is exactly the area where the Claimant had fallen down in her previous role.

20. I do find as a matter of fact that there would have been roles at band 3 or below where any shortfall in skills would not have been a bar to appointment. The more junior a role the greater the level of supervision. I did not understand Dr Mohammed to say otherwise. Indeed Dr Patch had suggested a more junior non clinical role as an alternative to the performance review process. Dr Mohammed had simply ruled out those roles because they were so far below the level that the Claimant had been used to work that she considered it unlikely that the Claimant would accept them if offered.

21. Dr Mohammed gave evidence, which I accept, that had the Claimant looked on the Respondent's website she could have found any of these junior roles for herself and applied for them.

22. The Claimant in her evidence said that during her notice period she was focused

on the appeal against her dismissal. I accept that this was her position and that she was intent upon overturning what she considered an unjust decision and return to a role in the Genetics Department. The appeal was not finally concluded until 20 January 2017.

23. It is necessary that I make findings of fact about what the Claimant has done to seek alternative employment. That goes to two issues firstly whether she has failed to mitigate any loss but it may also cast light on the question of whether the Claimant would have accepted any more junior role had it been offered.

24. The Claimant had not included any job applications in the bundle. She had included details of jobs she had applied for in her witness statement. I accept that the Claimant is telling the truth about those job applications as she gives a detailed account of each role. In her oral evidence she said that she had in fact applied for more jobs than she had mentioned. She claimed to have applied for over 20 jobs. Given that the Claimant was dismissed in August 2016 (albeit on notice) it strikes me that the Claimant has applied for very few jobs in the time between her dismissal and the remedy hearing.

25. The Claimant had been referred to her professional body by the Respondent. This resulted in interim suspension. The suspension was lifted in October 2018. Registration with the Genetic Counsellor Registration Board is not mandatory for all Genetic Counsellor but is expected for many. The Claimant describes applying for a job at Great Ormond Street hospital as a Genetic Counsellor where an offer of a job was removed when her suspension came to light. A job application at Barts NHS Trust was not progressed probably for the same reason.

26. The Claimant told me, and I accept, that she has kept up with all of the CPD requirements to practice as a Genetic Counsellor. She explained in her witness statement and in her oral evidence that she remains committed to a career as a Genetic Counsellor and that she saw alternative work as a means to restarting that career as well as providing short term work.

27. The Claimant described applying for other roles in the NHS outside of Genetic Counselling. She had applied for a Band 8A role as an Improvement Advisor, a Band 7 role as a Transformational Project Manager and a further Band 7 role as a Clinical Trials Manager. She attributes her lack of success in these applications to the fact that she has no reference from the Respondent. In fact the Claimant has not actually sought a reference and any lack of success is not attributable to any refusal provide a reference as such. She says that she was asked to declare the reason for leaving her last position and revealed her dismissal. I find that the difficulties in securing a post at band 7 and above were twofold. Firstly as I have noted these are senior roles that generally require specialist skills usually obtained by undertaking similar roles at a more junior level. In other words a track record of similar specialist skills is the usual requirement. The second issue is the one that the Claimant has identified. A dismissal for capability is very likely to be an impediment to finding another job at a similar level. That is a matter a reasonable recruiter would be entitled to take into account.

28. The Claimant had applied for one Band 5 role as a Database Manager at NHS

Screening. She did not secure that role either. I find it more likely than not that the same difficulties I have identified above also applied to this role despite the fact that it was more junior. Whilst some of the Claimants skills as a Genetic Counsellor might in theory have been transferrable into such a role her skillset was not an obvious match.

29. The Claimant has applied for at least one job outside the NHS as a Policy Analyst at the Royal Society. Again this is a significant departure from the Claimant's previous career and she was likely to be competing with people who had gained specific experience in the area of Policy.

30. The Claimant has found some work. Her schedule of loss discloses that she started work coding medical documents at GP surgeries in June 2018. This work is not well paid at £10 per hour. That would equate to a low banded job in the NHS. She has also been teaching at KCL Medical School but has only earned a few hundred pounds. From August 2018 she has been doing regular work for CHCH Trust GC. Again this is modestly paid.

Discussion and conclusions

31. As noted above the Claimant's schedule sought re-engagement not re-instatement. However for completeness I will deal with the issue of reinstatement. In the liability judgment I have concluded that the Respondent had genuine and reasonable concerns about the Claimant's skills. I concluded that, after a reasonable opportunity to meet the Respondent's standards, the Respondent had reasonably concluded that the Claimant should be dismissed from her post. I found the dismissal unfair because, and only because, the Respondent had failed to follow its own policy in respect of redeployment. In those circumstances it is quite clear and I have not hesitation in concluding that it would not be reasonably practicable to re-instate the Claimant. I consider that some, but not all, of those considerations are relevant to the question of re-engagement.

32. In exercising the discretion whether or not to make an order for re-engagement I must have regard to the three matters set out in Subsection 115(3). The Claimant has expressed a desire to be re-engaged. That is a matter set out in Sub-section 115(3)(a) and is something to which I have regard.

33. In my liability judgment I dealt with the question of 'contributory fault'. I found that the failure of the Claimant to meet the standards of the Respondent was not wilful and that it did not meet the threshold of 'culpable or blameworthy conduct'. The test in Sub-section 115(3)(c) is the same as that applied for the purposes of Section 122(2) and 123(6). Simple incompetence will not usually be culpable or blameworthy.

34. Is re-engagement reasonably practicable? Mr Young suggested that a material fact that I should take into account in the exercise of my discretion was the fact that if I made an order for re-engagement the Claimant would be entitled as of right to arrears of pay at the salary that she was paid before her dismissal. He referred to ***Electronic Data Processing Limited v Wright*** **[1986] 76** as being binding authority for that proposition (whilst reserving the right to say that it was not correctly decided). I agree with Mr Young that that is the effect of Section 115(2)(d)

ERA 1996. At tribunal must award arrears of pay calculated 'but for the dismissal'. No distinction is made between a dismissal that is unfair only by reason of procedural failings and one which could never been fair. Mr Young then went on to say that in circumstances where I had accepted that the Respondent's decision to remove the Claimant from her position was reasonable and had only left open the possibility of redeployment probably into a much more junior role awarding arrears of pay, for over 2 years, would amount to a substantial windfall and would be unjust. He asked me to bear in mind that the money would come out of the NHS budget.

35. Mr Edwards did not accept that the 'windfall' argument was made out. He argued that if I ordered re-engagement, which he said I should, I would then have to follow the legislation. He dismissed the suggestion that the source of the payment was relevant.

36. I agree with Mr Edwards that the simple fact that the Respondent is an NHS trust and performs a valuable service can have no bearing on the remedy that is available.

37. I accept Mr Young's basic proposition that if the Respondent's acted reasonably in removing the Claimant from her post it gives rise to a windfall to pay her the salary attributable to that post when if it had acted fairly it was only required to consider redeployment probably into a more junior role. That said I find that it would thwart the purposes of Section 115 ERA 1996 if a tribunal were entitled regard the effect of sub-section115(2)(d) as giving a reason not to order re-engagement.

38. I was not provided with vacancy lists at the date of the hearing before me. That is the point at which I am obliged to consider whether an order for re-engagement is reasonably practical. Either party could have provided me with that information as it is publicly available. There are plainly a large number of vacancies at any given time. I am prepared to assume that there are just as many vacancies now as there were for the 3 month snapshot for which I have been provided with vacancies.

39. As the Respondent would have a later possibility of arguing that re-engagement into a particular role was 'not reasonably practical' under Sub-section 117(4)(a) of the ERA 1996 I am entitled to take a fairly broad approach as to the order for re-engagement and form a provisional view as to the question of reasonable practicality see ***Port of London Authority v Payne*** **[1994] IRLR 9.**

40. I have come to the conclusion that it is not reasonably practical to order re-engagement. My reasons are as follows:

    40.1. I find that the Claimant remains committed to a career as a Genetics Counsellor. She holds the Respondent entirely to blame for the interruption in her career and considers it entirely unjustified. I consider that the Claimant did and does lack insight into her own shortcomings and blames others for the events that led to her dismissal. I consider that if she actually accepted a low banded post her resentment of the circumstances would be so great that it would inevitably seriously impact upon the employment relationship. I find that this makes it not reasonably practicable to order re-engagement into a low banded role.

40.2. I do not consider that it would be reasonably practical for this employer to engage the Claimant in any Genetics Counsellor role or indeed any role where good administrative skills and record keeping was important. I find that the Respondent's honest subjective belief is that the Claimant does not have sufficient skills in these areas to be safe. I have found that the Respondent's opinions are reasonable. In a healthcare setting it would be intolerable for the Tribunal to instruct the Respondent to re-engage the Claimant into any role where there were genuine concerns about safe and competent working practices.

40.3. I have concluded that there is no suitable senior roles for the Claimant to be offered. I have come to this conclusion because I broadly accept the analysis of Dr Mohammed and agree with her genuinely held view of the Claimant's abilities. I have set out above my conclusions that more senior roles will require either clinical skills, specialist qualifications or a track record of experience. I do not agree that the Claimant's suggestion that she could 'stretch herself' to be the proper approach. In addition the Claimant's administrative and record keeping skills would reasonably disqualify her from a large number of positions. I have had regard to the fact that the Claimant has applied for a significant number of band 7 and 8 jobs and one band 5 job in other NHS trusts in areas outside Genetics Counselling. The Claimant has not had any success. This would tend to show that experienced recruiters in other trusts believe that she is not suitable for those roles. Whilst the Claimant blames the fact of her dismissal or a lack of reference for this I do not believe that this is irrelevant when considering the suitability of any role. I do not thing it is reasonably practical to order the Respondent to lower its usual expectations as to skills, qualifications and abilities to accommodate the Claimant.

41. Even if I had found that it was reasonably practical to order re-engagement I would not have done so in this case. I do not accept that the Claimant would actually accept or remain for any period of time in a very junior role (where I accept any shortcomings could be accommodated). She is simply too convinced that she should remain a Genetics Counsellor and that the Respondent is responsible for the fact that she is unable to practice as such. As such, I do not consider that the employment relationship would last in any event. I do not consider that the remedy of re-engagement would be appropriate in such circumstances.

42. Accordingly I decline to order re-engagement and must therefore consider making an award of compensation.

43. The Claimant is entitled to a basic award. It was common ground that the Claimant had 12 years continuous service at the date of dismissal and that she was born on 12 December 1968. She was therefore 47 at the effective date of termination. She had been over the age of 41 for 6 of those years and between 22 and 41 for the other 6. Her weekly gross pay was £1046.00 and so in excess of the statutory cap in force at the time which was £479. The basic award is therefore ((6x1.5) + 6) x £479 = £7185.00. In the Claimant's schedule there were two errors first the Claimant had arrived at a multiplier of 15.5 weeks pay. That is incorrect it is 15. Secondly the statutory cap in place from April 2017 had been used. Again that is

incorrect.

44. As I indicated above a matter that was raised before me was the proper approach to assessing whether some event would have occurred in the hypothetical situation of the Respondent having acted fairly. The issue this was said to go to was the possibility of the Claimant accepting a role at band 3 or below. Mr Young contended that the proper approach was for the Tribunal to make findings of fact as to what would have happened applying the civil standard, the balance of probabilities. He said that it was more likely than not that the Claimant would not have applied for a job at that level. He directed me to ***Hotson v East Berkshire*** **HA [1987] 3 WLR 232** in support of that proposition. Mr Edwards did not disagree but said that the balance of probability test would favour the Claimant.

45. I disagree with both Counsel. I find that the proper approach to hypothetical as opposed to real events is that set out in ***Software 2000 Ltd v And*****rews [2007] IRLR 569** although that now needs to be understood in the light of the repeal of the statutory dismissal procedures (see the references to Section 98A(2)). Elias J (P) (as he then was) gave the following guidance:

> *"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*
>
> *(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).*
>
> *(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.*
>
> *(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.*
>
> *(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.*

(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the tribunal may determine:

(a) That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely."

46. Following the repeal of the statutory dismissal procedure in ***Ministry of Justice v Parry*** **[2013] ICR 311** it was said (by Langstaff J (P)):

"We should add that some of the way in which this subject is dealt with in Harvey has the capacity to be misleading. At para 2558 (Vol 1, D1) it cites Software 2000 Ltd v Andrews [2007] IRLR 568, [2007] ICR 825, and accurately quotes a lengthy passage from the judgment of the EAT given by Elias P. Under para 54, at point (7) under in his distillation of the effect of the authorities he says:

"(7) Having considered the evidence, the tribunal may determine: (a) that if fair procedures had been complied with, the employer has satisfied it- the onus being firmly on the employer-that on the balance of probabilities the dismissal would have occurred when it did in any event: the dismissal is then fair by virtue of section 98A(2); (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly . . . ."

Unfortunately, it is not made clear in the text of Harvey that this part of the decision is no longer appropriate guidance, since s 98A(2) was in force at the time it was delivered, and has been repealed since. When it was in force the range of chance of dismissal met a watershed at 50% above which – by however little or however much – a completely fair hypothetical dismissal was

to be assumed for the purposes of compensation to be awarded for an actual one already held unfair. It is not in force any more. Chance of dismissal now runs across the whole spectrum from zero to 100%, as assessed by the tribunal. It would therefore be best if this part of the otherwise very helpful guidance were no longer put forward as if it might be relied upon.

47. I therefore consider that it is open to me to reach an assessment of the chance that a dismissal could have been avoided had the Respondent followed its own procedure.

48. Dr Mohammed very frankly accepted that if it had been pointed out to her that the Respondent had a policy of considering redeployment as an alternative for dismissal in capability cases than this was a matter that would have been considered. This would have meant that the Claimant would have been informed that she was in the redeployment pool for 12 weeks which was the same as her notice period. Not a great deal is required of the Respondent by its own policy. It is required to provide 'appropriate assistance' and to bring to the attention of the employee 'suitable vacancies'.

49. The parties focused on whether a job was 'suitable'. The focus of the Claimant was on whether she could apply for any particular role. My focus is whether if the vacancy list had been specifically brought to the Claimant's attention and she was encouraged to apply whether or not she would or might have secured and accepted some employment.

50. I do not find that in order to act fairly the Respondent was obliged to, or would have, lowered its ordinary standards or to give the Claimant any preference over any other candidate.

51. As I have set out above I do not think that there was any vacancy identified by Dr Mohammed that was one where the Claimant would have secured the position. Most of the roles required qualifications, skills or a track record that the Claimant simply did not have. The fact that the Claimant might have put in an application as she put it 'stretching herself' does not mean that she would have got the job. In respect of other roles whilst the Claimant had relevant qualifications the Respondent was not required to disregard the Claimant's shortcomings in record keeping and administration. As such whilst I accept that the Claimant might have given such roles a try (which is admirable) I find that there is no possibility that she would have actually got such a job. As above I am bolstered in my conclusion by the evidence that the Claimant has applied for numerous jobs at this level over many months but has not been successful.

52. As set out above there were many more junior jobs where any concerns over the Claimant's capability would not act as a bar to her being offered a job. I would accept that almost all of the band 3 jobs would fall into that category. That would mean that she at least had a chance of remaining in employment <u>if she applied</u>.

53. Mr Edwards argued on the Claimant's behalf that the her actions in seeking low level employment provided good evidence that she would have accepted such work if it had been brought to her attention and she had been encouraged to apply. Whilst the point was well made I do not accept it. I note that the Claimant did not find any

low level work until August 2018. That is nearly 2 years after her dismissal. I get very little support for the suggestion that the Claimant would have accepted such a vacancy during her notice period from that fact. It would have been much more persuasive if the Claimant had given evidence of applications for work at such a level close to the date of her dismissal.

54. I have found above that the Claimant was very focused during her notice period on her appeal. She did not and still does not accept the findings made against her. Whilst I accept that the Claimant has a strong work ethic I do not believe there is any chance that during the 12 weeks during which the Claimant should have been considered for redeployment she would have considered work at a much lower level and at a greatly reduced salary. Whilst the arguments before me focused on band 3 jobs my own assessment is that the Claimant would not have even considered anything below band 6 if at all. I do not think there is any possibility that given her feelings of indignation she would have followed a course suggested to her by Dr Patch. All of her efforts at that time and much of her effort since has been focused on getting back to being a Genetic Counsellor.

55. For these reasons I find that even had the Respondent followed its own policy the Claimant would not have found and been given an alternative role. In those circumstances it is not just and equitable to make any award of compensation beyond the basic award.

Employment Judge John Crosfill

Date: 21 June 2019