THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Falconer**

Respondent: **The Commissioners of Her Majesty's Revenue & Customs**

Heard at: **North Shields** **On:** **20 and 21 January 2020**

Before: **Employment Judge Morris**

Members: **Miss B G Kirby**
Ms R Bell

Representation:

Claimant: **Mr R Stubbs of Counsel**
Respondent: **Mr D Bayne of Counsel**

RESERVED JUDGMENT ON REMEDY

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant has discharged the burden of proof upon her to satisfy the Tribunal that the loss that she has suffered is to be assessed on the basis that it will continue for the course of her working life.

2. The continuation of this Remedy Hearing has been fixed for 3 March 2020 at which submissions will be made and Judgment given on any outstanding issues appertaining to remedy. That Hearing will take place at Newcastle Civil & Family Courts and Tribunal Centre, Barras Bridge, Newcastle upon Tyne NE1 8QF.

REASONS

Representation and evidence

1. The claimant was represented by Mr R Stubbs, of counsel, who called the claimant to give evidence.

2. The respondent was represented by Mr D Bayne, of counsel. No witnesses were called to give evidence on behalf of the respondent.

3. The Tribunal also had before it a significant number of documents contained in an agreed bundle comprising four lever-arch files, which was supplemented at the commencement of the hearing. The numbers shown in parenthesis below are the page numbers in that bundle.

Context

4. This Remedy Hearing arose from the decision of this Tribunal, promulgated on 31 January 2019, that (simply put) the respondent had discriminated against the claimant by failing to make reasonable adjustments to avoid the substantial disadvantage to which she was put as a disabled person and by treating her unfavourably because of something arising in consequence of her disability; and, further, that the respondent had unfairly dismissed the claimant.

5. In discussion with the representatives during the hearing it was agreed that it would be efficient (and would accord with the Overriding Objective) if the Tribunal were first to consider the contention made by the claimant that compensation payable to her by respondent should be assessed by reference to what is termed "career-long-loss".

6. As such, the remainder of these Reasons relates to that discrete issue albeit, of necessity, there is something of an overlap with the related question of whether, in the context of the judgment of the Tribunal at the Liability Hearing ("the Liability Judgment"), the claimant took such steps as were reasonable to mitigate her loss.

The Hearing and Findings of fact

7. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at this hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the facts set out below either as agreed between the parties or found by it on the balance of probabilities. Although there is inevitably some overlap it is convenient to divide this section of these Reasons to address the two principal considerations that are relevant to this part of this Remedy Hearing.

Pursuit of alternative employment

7.1 The claimant left school aged 16 years without any academic qualifications. From leaving school (and to an extent before that) she had always worked. Prior to her employment with the respondent she worked in what she terms the unskilled labour market including in the retail and catering industries.

7.2 The claimant gained her employment with the respondent in 2006 having successfully completed a test in relation to which her lack of formal academic qualifications did not count against her. During her employment with the respondent the appellant was specifically trained on aspects of the work she was required to undertake including the respondent's bespoke IT systems. As such, she has little, if any, ability in relation to IT systems more commonly in use in other places of work. As set out more fully in the Liability Judgment, the claimant undertook most aspects of the work to which she was assigned by the respondent competently and excelled in some yet struggled significantly with others. In her appraisals, apart from one occasion when the claimant was facing quite serious issues in her home life, she was always awarded an "achieved" grade.

7.3 The first role the claimant undertook at the respondent was as a contact centre adviser. Her role involved taking calls from customers, obtaining information from and providing information to them and, at the end of the call, making very detailed notes. The claimant had undertaken this role from January 2006 and was diagnosed with a heart condition in around September 2008. The medication she then took to manage her condition had several side-effects including resulting in poor concentration and causing her to struggle to remember and she realised that she was finding it difficult to take the call, handle the information and make the required note as sometimes she could not remember the detail. This could have a massive impact on the customer who had called. As a result, she was referred to occupational health which confirmed that she was unfit to perform these duties and she should be removed from online work to an off-line clerical post, which she was in September 2008.

7.4 From the date of the claimant's dismissal by way of her resignation on 17 August 2017 she did start to look for alternative employment and made some applications but, at least initially, the efforts she was able to make in that regard were limited by two factors.

7.5 The first factor was that at the time of her resignation she was sufficiently unwell to have been absent from work for some eight months. Further, on that day she had broken down during an appointment with her psychologist and felt that she was on the verge of a mental breakdown. As she said in evidence, she was "in a fragile state". In these circumstances the Tribunal accepts that it was not unreasonable for the claimant not immediately to begin a search for alternative employment.

7.6 The second factor was that the claimant was going through the employment tribunal process, which took its toll upon her physically and mentally. This commenced with the claimant presenting her claim on 13 October 2017 and involved hearings over several days both in June and October 2018, and would obviously involve preparation before both the presentation of her claim and the hearing dates. As accepted by the respondent's representative, the claimant is not to be criticised, particularly given her impairments, for not making particularly strenuous efforts to find alternative employment during the Tribunal process.

7.7 Nevertheless, during this period from August 2017 until November 2018 the claimant did make some attempts to secure alternative employment. The claimant was not at this time keeping records of the applications she made as she was not advised to do so until after the Preliminary Hearing in this case, which the Tribunal notes was on 28 March 2019. Nevertheless, there is evidence of two job applications she made in, respectively, November and December 2017 in relation to the first of which she was invited for interview but the job was not suitable given what the work involved when considered against her impairments; the claimant had thought that the job involved sitting at a scanning machine but it turned out to be more than that. In addition to the evidence of these two job applications, it is not disputed that during this period August 2017 to November 2018 the claimant did make a number of applications of which she has no records (none of which resulted in an interview) as sales assistants at a number of mainly retail outlets and one fast-food restaurant.

7.8 The reasons why the claimant looked for that type of employment in the retail and catering industries was that that was work with which she was familiar, had previous experience, had done well and therefore she thought she would be able to do it again, and this type of work would avoid the need to have to provide academic qualifications whereas administrative positions do require such qualifications.

7.9 The last day of the Liability Hearing was 4 October 2018, although the Tribunal deliberated thereafter. The claimant started looking for work in earnest in November 2018. In the Liability Judgment the Tribunal has recorded advice from occupational health consultants as to the limitations on the content of the work the claimant could do and in its consideration of the claimant's search for alternative employment following her dismissal the Tribunal has taken that advice into account together with the claimant's work experiences with the respondent; for example, her inability to work as a contact centre adviser (as explained above) being a reasonable indication that she would be unable to work in commercial contact centres.

7.10 The claimant registered with an online employment agency, Totaljobs, from which she would receive regular job alerts. Although not immediately, she also registered with Caterer.com and Indeed.com, which is more administrative based than manual. She also accessed the Northumbria Police website, considered advertisements on Facebook, Instagram and in the local press, researched Google (such as the website of Newcastle Airport where all jobs are advertised including within the airport and, for example, car hire businesses outside) and attended three job fairs. She considered every job alert that she was sent. On the basis of its findings in the Liability Judgment, the claimant's evidence then and before the Tribunal now, the medical reports and the Statement of Entitlement in respect of Personal Independence Payment ("PIP") to which the claimant is entitled (for example, she "can stand and then walk unaided more than 20 metres but no more than 50 metres") (R663) the Tribunal accepts that it was realistic for her not to pursue work that she knew she could not do. This included that which was full-time, physically demanding, involved standing or walking, was within a contact centre due to the claimant lacking sufficient concentration.

The claimant also reasonably sought the option of the significant flexibility that she had enjoyed with the respondent including not only starting and finishing times but also that although the intention was that she would work on a Monday and Tuesday each week, if she felt unable to do so she could shift her days of work if the symptoms were such that she felt unable to attend on a particular day. This pattern of work with the respondent, which was introduced at the claimant's request when she reduced her weekly working hours from 24 to 16 in February 2016, meant that she could go to work consistently and, until the matters leading to her resignation she had no days of sickness absence. Although the claimant would require a number of adjustments to enable her to work, she explained that flexibility such as this is principal amongst them because, as she put it, this allows her to determine when she can work.

7.11 The claimant considered more than 200 advertisements, made some 106 applications (including some in respect of jobs that she feared she would not be able to do) and made additional enquiries of some 20 employers to ascertain whether their advertised roles were suitable for her. Additionally, the claimant spoke to friends and acquaintances and actually visited the premises of prospective employers, for example, retail stores and coffee shops, where she spoke to staff to see whether theirs was an industry in which she could find a role. She learnt, however, that the jobs involved a lot of walking, standing, lifting and carrying, which led the claimant to believe that she would not be able to complete the duties required of such roles. She was also disheartened to learn that jobs that she had undertaken in the past, for example at supermarkets, were no longer limited to sitting at a checkout (which is what the claimant had done earlier in her employment history) but required more flexibility in terms of working on the shopfloor, which involved long periods of standing or walking and heavy lifting, and did not have the option of flexible start or finishing times. The claimant had also, somewhat speculatively, sent her curriculum vitae to 20 businesses in her local area but did not receive any replies.

7.12 The claimant obtained one interview in person prior to November 2018 and has obtained 9 interviews since that date (6 in person and 3 by telephone) but none was successful, often because the claimant realised, at the interview, that she could not perform the requirements of the role. One of the interviews was on 5 November 2019. It was for a post of receptionist. It was conducted by a panel of three persons. The claimant explained that she has a heart condition and one of the panel stated that he had too, and at least initially the interview proceeded quite well. The claimant then revealed that she had resigned from her employment with the respondent and had brought a claim against it before this Tribunal, which had found in her favour. The interview then changed and the claimant was later advised that she had not been successful.

7.13 One specific example of the claimant's search for work was that she asked for a trial at a local pub/restaurant serving customers and clearing tables as she had enjoyed doing earlier in her employment history. After only some 15 to 30 minutes, however, her heart began beating erratically and she felt faint. The owner advised the claimant's husband to take her home, which he did.

The claimant was very upset at this experience as it was the kind of work that she had enjoyed previously and it left her feeling very anxious about her future.

7.14 Other initiatives pursued by the claimant included enquiring in November 2018 about a dog grooming course at a local agricultural college but she discovered that it was actually a very physical job and also involved standing and lifting. As a result, she was unable to pursue this enquiry further.

7.15 The claimant also tried to establish herself, self-employed, in an ironing business but without success despite having distributed some 9,500 'flyers', which she had had printed at her cost. Similarly, at the end of the year/early January, she tried to work in her daughter's cleaning business but she found even dusting and wiping surfaces to be tiring. At this time she also attempted to undertake the book-keeping at her husband's business but that was unsuccessful due to her concentration failing and she missed certain deadlines.

7.16 With this experience the claimant found that the only jobs that do not involve long periods standing/walking and heavy lifting are office-based administrative roles but there are far fewer of those jobs in the marketplace. She can get up to 20 job alerts each week for manual jobs but only one or two alerts for administrative roles, and most of those require qualifications that she does not have or a very good working knowledge of Microsoft programs.

7.17 In these circumstances, to enhance her job prospects the claimant recently applied for a Vision2learn Essential IT Skills level I course. This is a free course. She is unable to pursue a fee-paying course due to the finances of her and her husband being very tight. When the claimant was contacted by Vision2learn, in September 2019, however, she did not pass the entry questions. She was therefore advised to undertake the Microsoft Office 2010 basic course, which she has done and continues to do and although she did pass an assessment at an early stage, after module 10, she has been unable to pass the first of two final assessments (modules 51 and 52) despite several attempts and re-doing relevant parts of the course.

7.18 As mentioned above, a key factor in the claimant being able to work successfully with the respondent was that she had flexible start and finishing times. She would be willing to try a role without that flexibility if she could identify one now but does not know how she would manage and, in reality, feels that she would struggle and her symptoms are not predictable enough to manage without an element of flexibility.

7.19 In the course of preparation for this Remedy Hearing the respondent produced and sent to the claimant details of 38 roles that it put forward as possible options for her. The Tribunal accepts the claimant's evidence, however, that none was suitable for a number of reasons including the following: requirements for IT proficiency including Microsoft/Excel; requirements for GCSE in English and Maths; fairly significant travel to and from and in the course of the work; contact centre work; book-keeping;

physical work; work at a higher grade than she undertook with the respondent.

7.20 In respect of the additional roles in the Civil Service put forward by the respondent, having applied 'filters' so as to include those with full flexi benefits like she enjoyed with the respondent and those on a part-time basis within a 20 mile radius of her home none actually remained.

7.21 The Tribunal accepts that the claimant genuinely wants to return to work in respect of which she cites her motivations as being that it provides a structured life, friendships and financial rewards. As to the latter, the claimant's present situation is that she cannot renew her mortgage, has significant credit card debt and owes her mother more than double that amount in respect of her legal fees in pursuing her complaints to this Tribunal.

7.22 The Tribunal also accepts that the claimant fully intended to work for the respondent until she retired at 60 years of age, in relation to which it brings into account the guidance contained in the decision of the Court of Appeal in Vento v Chief Constable of West Yorkshire Police (No.2) [2003] ICR 318. Further, that the claimant would have been able to work until retirement given the size and resources of the respondent, which meant, first, that there were various roles she could undertake and, secondly, it could allow her the flexibility required to accommodate her disability. In this latter respect, the Tribunal notes that in the decision in Abbey National plc v Chagger [2009] EWCA Civ 1202, the Court of Appeal stated, "It does not follow therefore that his prospects of obtaining a new job are the same as they would have been had he stayed at Abbey". Thus, the fact that the claimant would, with the adjustments and accommodations made by the respondent, have been able to continue in her employment with the respondent is no indication that she can readily obtain new employment.

Medical evidence

7.23 First, the Tribunal brings into account the medical evidence that it considered previously and is referred to in the Liability Judgment.

7.24 The medical evidence before this Remedy Hearing includes correspondence from the claimant's GP and between her and the claimant's treating consultant cardiologist during January to May 2019 (R618 to R631). Additionally, there is a medicolegal report of an independent expert, who is also a consultant cardiologist, who was jointly instructed by the parties (R239) and his response to further question asked of him on behalf of the respondent (R251).

7.25 So far as is relevant to this part of this Remedy Hearing, there are references in the open letter from the claimant's GP dated 26 February 2019 (R627) (which was written in relation to the appellant's PIP payment) that refer to the medication the claimant is required to take leading to dizziness and fatigue, that she suffers from stress whenever there are adverse circumstances and this affects her condition, and that while she mobilises within the surgery,

> "I would presume that she would be unable to walk any significant distance carrying any shopping or do any sustained physical activity requiring any increase in heart rate for any period of time as she would then become breathless."

7.26 In the correspondence from the claimant's treating consultant there are references including as follows: the appellant's "daily dizzy episodes"; her ventricular function having been "stable for many years"; her having "no significant heart rhythm disturbances"; her having a "tendency to low blood pressure". A letter from that consultant typed on 22 February 2019 (R625) includes as follows,

> "As a result of Ms Falconer's cardiac condition and the medication she is required to take for this, she may get slightly more tired and breathless on exertion than your average person. She may also feel slightly dizzy if she has a job role that requires her to bend a lot. However with appropriate workplace adjustments such as regular breaks and avoiding significant physical exertion, given that Ms Falconer's cardiac condition is only mild and has been stable for many years I cannot see any medical reason from a cardiology perspective that she could not work until retirement age with appropriate and reasonable workplace adjustments."

7.27 A letter from the claimant's consultant to her GP typed on 13 May 2019 (R628) refers to the claimant reporting being off-balance, the floor being a bit "swimmy", hitting her head having fallen and misjudging distances causing her to knock her head. An open letter from that consultant, also typed on 13 May 2019 (R630), contains the following section:

> "As a result of Mrs Falconer's cardiac condition and blood pressure secondary to her required cardiac medications she may become more tired and breathless on exertion than your average person. She may also feel dizzy or light headed if she has a job role that requires her to bend a lot or remain on her feet a lot without regular breaks. However with appropriate workplace adjustments I cannot see any medical reason, from a cardiology perspective, that Ms Falconer could not work until retirement age assuming appropriate and reasonable adjustments are implemented. Reasonable adjustments that I would propose from a medical perspective would be allocating her a parking bay close to the entrance building lift so she would not have to walk excessively or climb stairs excessively given the likelihood that this would cause her to become fatigued and breathless. Regular workplace breaks. Flexible start and finish times and regular breaks so she is not expected to stand for long periods as this can make her light headed. Similarly avoiding the need for regular and frequent bending up and down given this can also bring on symptoms of light headedness."

7.28 In respect of the above, in answer to questions asked of her at the hearing the claimant agreed, "100%" with the consultant's opinion that she could work until retirement age assuming appropriate and reasonable adjustments are implemented but added that that was only if she could secure "the right position". The Tribunal accepts that qualification.

7.29 The medicolegal report of the independent expert (R239) records the appellant's relevant past cardiological history, his interview with her and clinical examination of her on 2 October 2019 including reference to her current symptoms, and his diagnosis of mild non-ischaemic dilated cardiomyopathy, and addresses specific questions asked of him on behalf of the parties.

7.30 The expert expresses his opinion that the claimant's heart condition, the medication she takes and the anxiety related to the diagnosis all contribute to her current and past symptoms, which he records as being of lightheadedness, fatigue and tiredness nearly all the time, poor concentration, breathlessness on exertion and feeling anxious and stressed. He records that these are limiting her daily activities: the impact of her lightheadedness and fatigue varies from day to day; her poor concentration particularly relates to new tasks or learning new tasks; she can walk indoors slowly at her own slow pace but walking outside in the wind or cold she is severely restricted to just a few yards and she cannot walk and talk at the same time.

7.31 The expert records that he is in agreement with the statements made by the claimant's cardiologist and quotes in his report the quotation set out at paragraph 7.27 above. The concluding paragraph of the expert's report is as follows:

> "Hence I do think, with some workplace considerations, Ms Falconer could carry out a part time administrative role. The only specific duties that would not be recommended or suitable for her condition would be heavy lifting or a lot of walking or climbing stairs. In my opinion, given the stability and perhaps improvement objectively of her cardiac function over the past 9 years along with the correct management of her condition, and also perhaps the cardiac rehabilitation and management of her associated anxiety/depression, Ms Falconer could be expected to work through to the normal retirement age."

7.32 In the above respect, the Tribunal notes a slight inconsistency in the expert's report. On the last page of his report (R249) he first records that he is in agreement with the statements made by the claimant's treating cardiologist as set out at paragraph 7.27 above from which it can be seen that she proposes a range of reasonable adjustments including a parking bay close to the entrance of the building, a lift, regular workplace breaks, flexible start and finish time, regular breaks to avoid standing for long periods and avoiding the need for regular and frequent bending up and down. Then, in the paragraph of his report immediately following, which is set out above, the expert states that the "only specific duties" that would not be recommended or suitable would be heavy lifting or a lot of walking or climbing stairs: the inconsistency being that there is no reference there to the other reasonable adjustments proposed by the claimant's treating cardiologist. Given that the expert has expressly stated that he is in agreement with the statements of that cardiologist, however, the Tribunal accepts that the range of reasonable adjustments proposed by her from a medical perspective are those that it should bring into account.

Submissions

8. Following the conclusion of the claimant's evidence the parties' representatives made submissions both orally and in the very helpful written skeleton arguments that each of them had prepared. It is not necessary to set them out in detail here because they are a matter of record and the salient points will be obvious from our conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made, together with the case precedents referred to, and the parties can be assured that they were all taken into account in coming to our decision. That said, the Tribunal records the key aspects of the submissions below in which, given that the written submissions exist, it focuses principally upon those that were made orally.

9. On behalf of the respondent, Mr Bayne made submissions including as follows:

9.1 The clear evidence from the roles the claimant undertook for the respondent, most of which she managed and in two of which she excelled, was important to any consideration of her future career prospects.

9.2 There was very little evidence of the job search undertaken by the claimant prior to October 2018 when the Liability Hearing before this Tribunal concluded. There was no criticism of the claimant for that but she obtained one interview so even when she was not particularly trying she had some success. From November 2018 there had been a flurry of applications, which is what would be expected, although with hindsight it is not surprising that she was not successful as these were not jobs that she could do. She did not then appear to make significant efforts until June 2019 although she did attempt to start operating an ironing business. Then from June to October 2019 there was a further substantial volume of emails between the claimant and Totaljobs**;** although the claimant has explained why most of those were not suitable, even those for which she applied. It was not until October 2019, less than three months ago, that the claimant really looked into administrative roles, signed up with Indeed.com and looked at government websites; which was because the respondent's solicitors had stated that there were prospective jobs there that she could be expected to do. Only since then had the claimant looked for jobs that she is best equipped to do.

9.3 There is a slight unreality in the claimant's evidence regarding her IT skills despite the fact that she excelled at IT work with the respondent. Once the stress of the Tribunal is behind her it will not be long until she concludes her present training course, which it is very sensible for her to do.

9.4 The question for the Tribunal is, on balance of probabilities, when is the claimant likely to secure another job? The burden of proof is upon her to establish that she is unlikely ever to do so. The question is whether in 6, 12 or 18 months' time the claimant is more or less likely to have a job. The overwhelming likelihood is that she will find a new job and in short order.

9.5 Referring to the decision of the Court of Appeal in Wardle v Credit Agricole Corporate and Investment Bank [2011] EWCA Civ 545, the assessment of loss over a career lifetime "will be a rare case". In the normal case it is for the Tribunal to assess whether "the employee is likely to get an equivalent job by

a specific date". The claimant's hourly rate of pay at the respondent of £9.71 is a factor to bear in mind in respect of her job search. The medical evidence is clear that the claimant is capable of undertaking a part-time administrative role with adjustments and her physical symptoms are being treated; and the claimant is clearly capable based on her experience with the respondent.

9.6 The claimant's experience thus far in looking for work is not a good indication of the future. She did not start looking seriously until November 2018 and did not look at administrative roles until the end of October 2019. Despite that she had obtained 10 interviews for jobs for which she was clearly not suited and would do better if she applies for jobs for which she is suited. The claimant had only undertaken one trawl of central government, none of local government (other than at Newcastle City) or in the National Health Service. These are likely to be fruitful grounds.

9.7 It is accepted that she has the disadvantage of no qualifications but people can succeed without qualifications and the claimant's own evidence regarding applying for work with the respondent is that she was appointed on the basis for an aptitude test. It is accepted that the claimant is not in an ideal position. She has things agin her but is nowhere close to exceptional circumstances such that she will not work again.

10. On behalf of the claimant, Mr Stubbs made submissions including as follows:

10.1 The issue is the reality of the claimant in the real world and the fundamental problem is that she has to get through the door before anyone sees the type of person she is. With web-based recruitment the claimant will be filtered out before she even gets to interview. The starting point is that the respondent must take the claimant as it finds her: BAE Systems (Ops) Ltd v Konczak [2018] ICR 1.

10.2 The Tribunal does not need to find that definite career loss is likely. Relying upon the decision in Wardle, where it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (salary, pension and defined benefits), loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job rather than on a career-long basis. Due to the constraints of the claimant's disability, however, she is not likely to obtain an equivalently remunerated job. That this would be a rare case is neither here nor there.

10.3 Reliance is also placed upon the decision in Chagger: the starting point is the period for which the claimant would have been employed by the respondent and there is no evidence that that would have been other than until retirement age; the task of the Tribunal, is to put the claimant in the position she would have been in had there being no discrimination; the claimant is on the labour market at the time and in circumstances which are not of her own choosing; there is some evidence that the claimant may have been stigmatised by taking proceedings against the respondent and this may have some effect on her chances of obtaining employment; the proper assessment of loss is to be determined by asking when the claimant might expect to obtain another job on an equivalent salary; the best evidence to answer that question is provided by the efforts she has made to obtain

employment, which "is the best indication of the labour market at the time when the unlawful dismissal has occurred".

10.4 Contrary to the submission on behalf of the respondent regarding the claimant not having applied for administrative jobs, she cannot apply for the majority because they are full-time and require minimum qualifications of two GSE passes in English and Maths, without which she is immediately sifted out. The evidence in this case is that that is the reality in the actual marketplace.

10.5 The starting point is that even when the claimant was seriously unwell she was applying for jobs. There is no dispute that she would be trying given her credit card debt, she cannot re-mortgage and is in debt to her mother. She has tried everything she can. In respect of the period since November 2018 the claimant has provided three pages of applications including in administrative positions. Also in that time she went back to consider work that she had previously done. That made sense because she had the experience. She also tried self-employment, working with her daughter, which she could not do physically, and working with her husband but ironically she could not deal with the complications of the HMRC system. Additionally she has carried out IT training but after four months and having tried on numerous occasions she cannot pass the first of two final tests; and even if she can she will then have to do a basic course with further assessments.

10.6 Administrative posts require high proficiency in IT, which the claimant cannot demonstrate so she is really struggling to do the type of job the medical evidence says that she should look at. Travel time is also an issue for the claimant with chronic fatigue, which is either a separate issue or related to her heart failure. She cannot 'bolt on' travel time to the working day. There is no evidence of lots of administrative posts in local authorities or the NHS as the reality is that they have both shed such jobs.

10.7 The claimant is entering the labour market against her will with no qualifications and no proficiency in IT, and she needs to explain why she is not keen to get a reference from the respondent and why she left, which will have a stigma effect. Then she will need to introduce her disability and the many adjustments she needs. That is the reality. The respondent was so large it had the resources to accommodate the claimant. The claimant needs to find an equivalent employer, which she is not likely to do with equivalent remuneration in the future: she might do but is not more than likely to do so.

11. Responding to the above, Mr Bayne added the following further submissions:

11.1 The starting point may be that the claimant is out of work but that is not rare and applies in almost every case; similarly having been stigmatised as a result of the employment tribunal process is not rare and applies in almost every case.

11.2 It is not doubted that the majority of administrative posts are full-time but the roles included in the document bundle that had been produced by the respondent are entirely part-time, although it is accepted that it is not

reasonable for the claimant to travel to work in Durham or Darlington. Also not all those roles require GCSE grades and many employers recognise that a better sift is an aptitude test.

11.3 It is appreciated that there is a headwind and it is not suggest that it is not a difficult proposition but it is suggested this is not something the claimant will not overcome.

Consideration: application of the facts and the law to determine the issues

12. The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment (in relation to this discrete issue of whether, in consequence of her dismissal as a result of her discriminatory treatment by the respondent, the claimant is entitled to be compensated for "career-long-loss") having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

13. There is clearly an overlap between the two elements set out above regarding the claimant's pursuit of alternative employment and the medical evidence. Self-evidently, the latter is highly relevant to the former and it is therefore appropriate that the Tribunal should address the medical evidence first.

Medical evidence

14. In this respect it is repeated that the Tribunal brings into account the medical evidence that it considered at the Liability Hearing as well as that at this Remedy Hearing, which is fully detailed above with particularly relevant excerpts being set out. The medical evidence confirms the claimant's cardiac condition and also that her symptoms arise from both that condition and the medication she is required to take. At the risk of some over-simplification, the symptoms include the following: lightheadedness or dizziness that can occur daily; fatigue; poor concentration (particularly in relation to new tasks or learning new tasks); breathlessness on exertion; feeling anxious and stressed; an inability lift heavy weights; an inability to bend up and down a lot; an inability to climb a lot of stairs; an inability to do any sustained physical activity requiring any increase in heart rate; as to walking, being only able to do so at her own slow pace, being severely restricted walking outside in the wind or cold, being unable to walk and talk at the same time, being unable to walk significant distances (quantified as being between 20 and 50 metres).

15. The above notwithstanding, the claimant's treating consultant and the independent expert agree that, with appropriate workplace adjustments, no medical reason has been identified, from a cardiology perspective, why the claimant could not work until retirement age assuming appropriate and reasonable adjustments are implemented. As set out above, the claimant's treating consultant proposes that, from a medical perspective, such adjustments would be "allocating her a parking bay close to the entrance building lift so she would not have to walk excessively or climb stairs excessively given the likelihood that this would cause her to become fatigued and breathless. Regular workplace breaks. Flexible start and finish times and regular breaks so she is not expected to stand for long periods as this can make her light headed. Similarly avoiding the need for regular and frequent bending up and down given this can also bring on symptoms of light headedness."

16. The Tribunal has explained above that the conclusion expressed by the independent expert is more limited in that the "only specific duties" that he considers would not be recommended or suitable would be heavy lifting or a lot of walking or climbing stairs but, given that he has expressly agreed the relevant paragraph in the letter from claimant's treating consultant, the Tribunal accepts that the range of reasonable adjustments proposed by her from a medical perspective are those that it should bring into account.

17. Rightly, those persons providing such medical evidence have repeatedly made it clear that they are considering matters from a medical perspective. That evidence must be treated with respect and given due weight. The Tribunal also has to bring into account, however, the evidence of the claimant, which the Tribunal has accepted, not least because:

17.1 it is she who experiences the effects of both her cardiac condition and of the medication that she needs to take and how those effects impact upon her day-to-day activities, which include the important activity of employment, and

17.2 it is she who has had the experience of looking for alternative work the responsibilities of which she would be able to undertake, with appropriate adjustments.

18. The Tribunal has considered, in the round, the claimant's evidence in light of all the medical evidence referred to above and that before this Tribunal at the Liability Hearing. It accepts that the current medical evidence is that there is no medical reason, from a cardiology perspective, why the claimant could not carry out a part-time administrative role until retirement age. That would, however, require significant reasonable adjustments including as follows: part-time working; flexible working (not only in respect of start and finishing times on a particular day but also to give the claimant the ability to shift her days of work in any particular week to overcome an increase in her symptoms); regular workplace breaks; light duties; avoiding lifting heavy weights, excessive standing, walking, climbing stairs (requiring access to a lift if necessary) or bending up and down; having a parking bay provided near the entrance.

19. As recorded above, the claimant agreed, "100%" with the consultant's opinion that she could work until retirement age assuming appropriate and reasonable adjustments are implemented but added that that was only if she could secure "the right position". The Tribunal takes that qualification to mean a position in respect of which the claimant would have the benefit of the above adjustments. That could be described as being 'a tall order' but it reflects the position that she had with the respondent and the accommodations or adjustments it was able to make her.

Pursuit of alternative employment

20. In this regard, both representatives agreed that the decisions of the Court of Appeal in Chagger and Wardle are of particular relevance.

21. The guidance the Tribunal takes from the decision in Chagger includes the following:

21.1 The well-understood approach in relation to any assessment of compensation that our starting point "is to put the employee in position he would have been in had there been no discrimination".

21.2 "…. in many cases, the starting point in the case of a discriminatory dismissal will be the period for which the employee would have been employed by the discriminating employer."

21.3 The claimant "is on the labour market at a time and in circumstances which are not of [*her*] choosing" and it is "easier to obtain employment from a current job than from the status of being unemployed".

21.4 The claimant "may have been stigmatised by taking proceedings, and that may have some effect on [*her*] chances of obtaining future employment."

21.5 "On the facts as found by the tribunal, the proper assessment of loss is therefore to be determined by asking when [*the claimant*] might expect to obtain another job on an equivalent salary*". "*The best evidence available to answer that question is provided by the efforts [*the claimant*] has made to obtain employment. This is the best indication of the labour market conditions at the time when the unlawful dismissal has occurred."

22. In Wardle, having stated that in the normal case it is for a tribunal to assess "that the employee is likely to get an equivalent job by a specific date" the Court of Appeal continues as follows:

> "Exceptionally a tribunal will be entitled to take the view on the evidence before it that there is no real prospect of the employee ever obtaining an equivalent job. In such a case the tribunal necessarily has to assess the loss on the basis that it will continue for the course of the claimant's working life."

23. The Court of Appeal then goes on to consider the decision in Chagger including as follows:

> The tribunal in that case had evidence that the employee "had made every effort to obtain employment in his chosen field, having made countless applications for new employment. There was a suggestion that he had been stigmatised in the eyes of other employers as a result of the manner of his dismissal. He had taken reasonable steps to mitigate his loss by going into teaching. In those circumstances the tribunal was entitled to conclude that he had suffered permanent career damage and should be compensated accordingly. Where such a loss is established, a tribunal has to undertake that task, however difficult and speculative may be."

24. The Tribunal is satisfied that those features in Wardle that the Court of Appeal has identified in Chagger apply equally in the case before us, the necessary amendments having been made. Thus, on the basis of the findings of fact set out above the Tribunal is satisfied that the claimant has "made every effort" to find alternative employment. The Tribunal understands and accepts the reasons why, while she did look for work before November 2018, she did not look in earnest until after that date, being primarily that at time of her dismissal she was distinctly unwell (as is borne out by the medical evidence before the Tribunal at the Liability Hearing)

and thereafter she was bound up in the Employment Tribunal proceedings, which she found stressful; this latter reason having been accepted as reasonable by the respondent's representative. In this respect the Tribunal accepts the submission made on behalf of the respondent that the claimant only signed up with Indeed.com and looked at government websites because these sources had been drawn to her attention by the respondent's solicitors and had not generally considered central government, local government (other than at Newcastle City) or the National Health Service simply because, as she put it, it had "never occurred" to her to do so. That is a negative consideration from the claimant's perspective but, considering this question in the round and particularly the efforts that the claimant has made to find alternative employment (both in number and diversity) that does not cause the Tribunal to depart from its conclusion that she has made every effort in this regard.

25. The Tribunal also understands and accepts why, at least initially, the focus of the claimant was to consider jobs in respect of which she had previous work-experience, had enjoyed, had done well and did not require paper qualifications, albeit that she was disheartened when she realised that, given her medical condition and the effects upon her of the medication that she needed to take to manage her condition and alleviate her symptoms, she was no longer suited to those roles because of the changes in such roles (particularly in supermarkets) since she had last undertaken them. It further accepts that the administrative roles that the medical evidence suggests she could undertake in theory are unlikely to be available to the claimant in practice given that the majority require full-time working, minimum academic qualifications and IT literacy.

26. The Tribunal is also satisfied on the basis of the evidence before it that the claimant did make "countless applications for new employment" as a result of which she was only able to secure some 10 interviews in person or by telephone but she was not successful in any of those interviews either because the prospective employer did not recruit her or, perhaps more disappointingly, she realised that she would not be able to perform the functions of the job for which she had applied.

27. At one of those interviews there is some "suggestion that [*she*] had been stigmatised in the eyes of" that prospective employer and it is a reasonable inference that other employers might adopt the same position if the claimant were to apply for employment with them; whether that be as a result of the claimant's disability and the circumstances of her resignation or that she then proceeded to present complaints against the respondent in the employment tribunal in which she was successful.

28. In relation to her search for alternative employment, the claimant's evidence was telling. When she commenced that search she had been positive as she had worked all her life and assumed that she would get a job. She does not obtain many interviews but when she does she needs to explain that she has a bad heart and, as to the gap in her recent employment history, that she took the respondent to the employment tribunal. "If 50 people apply – will they take me on?" "In theory I should get another job but that is not the reality".

29. In addition to making such applications for new employment the claimant sought to diversify by enquiring in November 2018 about a dog grooming course but she discovered that that was a very physical job that involved standing and lifting, which she would be unable to do. She also sought to establish herself, self-employed, in an ironing business but, despite distributing some 9,500 'flyers' that she

had printed at her expense she attracted no real interest. Then, at the end of that year and into January 2019 she attempted to work with both her daughter and her husband but those attempts also failed as, in respect of her daughter's cleaning business, she found even dusting and wiping surfaces to be too tiring while, in respect of her husband's business, she struggled to understand the HMRC system and her poor concentration levels resulted in her missing certain deadlines.

30. In submissions the respondent's representative suggested that the claimant's experience thus far in looking for work is not a good indication of the future. The Tribunal does not accept that submission, not least given the guidance in Chagger that the best evidence available to answer the question of when the claimant might expect to obtain another job on an equivalent salary is provided by the efforts she has made to obtain employment. It is acknowledged that that guidance continues that this is the best indication of the labour market conditions "at the time when the unlawful dismissal has occurred", which in this case is approaching 2½ years ago but the Tribunal nevertheless considers that this principle of having regard to the efforts the claimant has made to obtain employment as an indication of when she might be expected to obtain an alternative equally remunerated position continues to apply.

31. Although at this stage of this Remedy Hearing the Tribunal is only considering the discrete issue set out above and not the question of sufficiency of mitigation in itself, the Tribunal is satisfied (again returning to the excerpt from the decision in Wardle as to the elements that the Court of Appeal has identified in Chagger set out above) that the claimant "had made every effort to obtain employment" and did make "countless applications for new employment" but, more than that, in addition to the typical methods of registering with online employment agencies, researching the Internet including social media and monitoring vacancies in the local newspaper, she explored every possible way that she could think of to secure new employment including by talking to friends, visiting prospective employers and speaking to staff to discover what their roles involved and speculatively sending her curriculum vitae to 20 businesses in her local area.

Conclusion

32. In the circumstances, and bringing together the above two overlapping considerations of the medical evidence and the claimant's pursuit of alternative employment, the Tribunal finds that she has discharged the burden of proof upon her to satisfy it that she has suffered permanent career damage and should be compensated accordingly.

The continuation of the Remedy Hearing

33. This Judgment and these Reasons having been limited, by consent, to a consideration of the discrete issue of whether the compensation to be awarded to the claimant should be assessed on the basis of "career-long-loss", as set out above, the continuation of this Remedy Hearing has been fixed for 3 March 2020 at which submissions will be made and Judgment given on any outstanding issues. Such issues might include, for example, the matters discussed with the representatives at the conclusion of the Hearing of an upwards-sliding scale of discounts being applied to sequential future slices of time to reflect the progressive increase in likelihood of the claimant securing an equivalent job and whether (referring to the decision in

Wardle) “some reduction should have been made for the vicissitudes of life”, and any compensation for injury to the claimant’s feelings by reference to Vento, the parties being agreed that some awards should be made within the middle Band as described in that decision, as updated.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 27 January 2020