



EMPLOYMENT TRIBUNALS

Claimant: Mr J. Edward

Respondent: Tavistock and Portman NHS Foundation Trust

London Central Remote Hearing (CVP)

On: 21 April 2021

Before: Employment Judge Goodman

Mr D. Clay

Mr M. Simon

Representation

Claimant: in person

Respondent: Mr W. Young, counsel

JUDGMENT

1. The respondent is ordered to pay the claimant £ 65,944 compensation for victimisation.
2. The calculation includes the reduction of 40% ordered in the previous judgment, awards for past and future loss of earnings, loss of occupational and state pension, injury to feelings, interest, and has been grossed up for tax liability. No increase was made in respect of the ACAS Code. The full calculations are set out in the reasons.

REASONS

1. In a judgment sent to the parties on 6 April 2020, the tribunal found that the respondent had victimised the claimant in failing to offer him a band 4 post, following his demotion from band 5 for reasons we found not to be discriminatory. Our decision was that there was a 40% chance that he would not have been suited to the role, and have had to leave after 4 weeks.
2. After the judgment had been sent, the claimant applied for the panel to recuse itself as biased against him, having wrongly, in his view, rejected other claims. The panel met on 9 March 2021 to consider written

representations, and our decision that there were no grounds for recusal was sent to the parties on 17 March.

3. This remedy hearing, initially set for June 2020, was delayed by Covid restrictions and difficult availability, but was listed for today at a case management hearing in January 2021.

Issues

4. The claimant updated his schedule of loss in February 2021 and the respondent served a counter schedule. These stand as pleadings for the remedy hearing.
5. The claimant had only found paid work at the beginning of this year. The main issues in assessing remedy were to determine when the claimant is likely to retire, his prospects of finding work, with or without a defined benefit pension, and at what pay level, and whether he had sought adequately to mitigate his loss.
6. When employed by the respondent he was a member of the NHS defined contribution pension scheme, and so there is claim for loss of pension benefit as well as loss of earnings.
7. We must also assess injury to feelings for victimisation.

Evidence

8. We heard live evidence from **John Edward**, the claimant, and **Craig de Sousa**, the respondent's Executive Director, Human Resources and Governance.
9. The claimant had prepared a bundle of 1,651 pages, with a 31 page index, and the respondent a further bundle of 381 pages. Neither includes the terms of the NHS pension scheme, and for that we rely on the summary in the appendices of the Employment Tribunals Principles for Compensating Pension Loss, fourth edition, third revision March 2021, as well as Mr de Sousa's evidence.

Findings

10. The claimant came to the UK from Sri Lanka in 1989, aged 34, to study accountancy, and engaged in part-time work. Fourteen years later, in 2003 he obtained indefinite leave to remain, which gave him the right to work in the UK without restriction. He then worked for a firm of solicitors, and took a third class degree in law with the Open University. He could not afford the Legal Practice Course, so abandoned plans to practise law.
11. In 2010 he started work for East London NHS Trust. He joined the NHS pension scheme on 9 December 2010. In May 2016 he started work for

the respondent as a data quality officer. That was at band 5. As set out in the liability judgment, the respondent Trust eventually found he was not capable of working at that level, but able to work at band 4. He was not however offered a band 4 job, which we found to be victimisation, and so from 8 May 2018 has been on the labour market. His band 5 salary on leaving was £27,280 per annum.

12. At dismissal the claimant was a month short of 63. This year he will be 66, and will attain his state retirement pension age on 8 June 2021. He will not however have paid national insurance for the 35 years required to receive a full state retirement pension, so it will be reduced, and without other income he may have to apply for pension credit or some other means tested benefit. If he continues to work after state retirement age (i.e. after 21 June), he pays income tax, but is no longer required to pay a national insurance contribution, so increasing his take home pay..
13. The claimant is a member of the version of the NHS pension scheme called NHSPS 2008. He can take a pension from age 65, which will be 1/60 of his salary for each year of pensionable service. With only 8 years in the NHS pension scheme, his pension is unlikely to be enough to live on. If he is able to find another job in the NHS before May 2023 (five years from leaving), he can rejoin the scheme and add years.
14. If the claimant finds permanent work with another employer, even a public service employer, he is unlikely to join another defined benefit scheme. Most such schemes are now closed to new entrants, and defined contribution only. This is not as valuable. The employer pays a percentage of earnings only into the pension scheme and the eventual pension relates only to the amount of contributions paid in by employer and employee.
15. The claimant has declared an intention to work until aged 75, another 9 years. His evidence is that while it is rare for NHS staff to work after 65 or 67, there is no compulsory retirement age for NHS staff, and because of his limited contribution history, he cannot afford to retire when others do. He has exhausted his savings while unemployed after dismissal, so he needs to rebuild those too. His wife, now 59, works full time (formerly three days a week); we do not know her income, and she has a small private pension, we do not know how much. He stated both were in good health, though he takes tablets for diabetes. She will achieve state retirement age in 8 years' time, when she is 67. They have no children to support, or to support them.
16. Drawing this together, we set a likely retirement age of 72. The claimant needs to work longer than most people before he can afford to retire, unless he is to be dependent on means-tested state benefit. That projected age, 72, allows for longer or shorter working life if his health is uncertain or he begins to get tired of working. We do not anticipate the date would have been much different had he not been dismissed by the respondent: as long as his health allowed, he would have wanted to build up his pension

entitlement, having started so late.

17. The claimant began his search for work after the respondent's capability process began, expecting he could end up without a job. He looked, without success, for band 5 posts. He was shortlisted for one out of his six applications, but unsuccessful at interview.

18. After dismissal he stopped applying, assuming that if dismissed for capability, he had no chance of success, though he hoped for success in the appeal outcome. When he got the letter dismissing him because there was no band 4 job for him, he asked the sender for clarification about getting a reference. Ms. Umran Murad in HR told him the Trust would be able to provide a factual reference, meaning:

“confirmation of employment dates/sickness data (if required)/job role and any disciplinary actions – current investigations et cetera which may be requested.”

The claimant asked her what she meant by disciplinary investigations, as he did not know what the current investigation was. Ms. Murad replied only that:

“I feel I have provided you with all the necessary factual information and unable to progress further with this conversation”

leaving him with the unfortunate impression that if the Trust were asked for a reference it would be stated that he was subject to disciplinary action, which of course he had not been. In consequence, he did not apply for any more NHS posts, knowing that an NHS employer must take up a reference from the last employer if that was in the NHS. It is not clear why she did not just say he was not under any disciplinary investigation.

19. The claimant then made applications for very wide range of administrative jobs with private employers, and later registered with more than 70 recruiting agencies, in the expectation that if required he could provide a reference from someone other than respondent. Despite the volume of general material in the hearing bundle, nowhere has the claimant included the CV he was uploading to these websites, so we do not know what he said about leaving the last job. In the first year or so he tended to apply just for specific posts advertised. Latterly, he has applied to a great range of agencies.

20. He was interviewed for several posts with private employers, and attributes his lack of success to their specialised technical demands. We can also see that in November 2019 he was interviewed for a post with Public Health England as a QA audit officer on a salary range £25,630-£30,884, for an initial three months with a possible extension to May 2020, but he did not get the job. He was placed through an agency. A reference was not taken up when the decision to appoint another was made. This suggests

that the reference was not a bar to being considered, or the reason he did not get the post.

21. In October 2020, when remedy was due to be heard (though in the event postponed), Mr de Sousa asked the respondent's solicitors to write to the claimant pointing out that there was a job being advertised at Health Education England as a data administrator, which appeared to be suitable. The claimant applied, stating on the application form that he had been dismissed from his previous employment on grounds of capability. He was told that he had not been successful in reaching a shortlist. The respondent argues that it would have been more accurate to state that he had been downgraded from 5 to 4 following the capability procedure, but unfortunately the Trust had no band 4 posts at the time, which would not have the same discouraging effect.
22. Soon after, he applied for a similar role at the same employer, but was not shortlisted. In the next few weeks he applied for several other roles, without success.
23. Mr de Sousa's evidence is that there are 44 NHS Trusts in the London area, most of them much larger than the respondent Trust, between them employing 8,000 to 14,000 staff, some of whom are administrative and clerical, and that in any one month between 900-1,000 clerical and administrative vacancies are advertised; though not all band 4, many are. This continued up until the March 2020 lockdown. Recruiting has since increased because of high NHS demand in all areas for staff.
24. The respondent points out that a negative reference of itself will not have caused lack of success in applications that have been made, because NHS employers do not take up references until after shortlisting and successful interview. They argue therefore that the claimant had no good reason not to apply for NHS jobs before October 2020.
25. The claimant asks us to note that some, though by no means all, agencies require jobseekers to provide their date of birth or a copy of their passport, with the result that potential employers are aware of his age, and may be discouraged.
26. The claimant was able to find work at the end of December 2020 as a data analyst, employed by an umbrella company to work in the public sector at a daily rate of £350, under IR 35 (meaning he pays tax as an employed earner, and the statutory deductions are made for national insurance and tax). The daily rate includes an allowance for holiday pay, said the claimant. This contract was due to end in March, but has recently been extended to September 2021. The payslip for his first two weeks shows a gross payment of £1,698.72, deductions of £409.23 for the umbrella company and holiday pay, and £598.88 for tax and national insurance, leaving a net payment for 2 weeks of £1,099.64, or £549.82 per week. Allowing 5.6 weeks holiday this equates to £28,590.64 net per annum.

27. At the time of the hearing, he understood that he would shortly be eligible to join an auto-enrolled pension scheme, for which 8% will be deducted from his daily rate, and split between 3% employer and 5% employee contribution. This will be a defined contribution scheme.
28. The respondent has also argued that if they had placed the claimant in the band 4 job in May 2018 he would not have stayed. He had very much disputed the downgrading decision, and would have left anyway. The claimant maintains that he would not have left his post without another job to go to, given his age and the need to keep working. The tribunal holds it more likely than not that the claimant would have stayed on, and not left the respondent's employment unless he had a job offer from another NHS employer with better prospects. We know that in fact he was unsuccessful in getting any band 5 post at the time, so the chances are he would have stayed, subject to the point about being suited to the clinic role for which we have already allowed a 40% chance of leaving.

Loss of Earnings Award

29. There is a loss of earnings from 8 June 2018 when the notice period expired, to the end of December 2020. The respondent argues that the claimant did not mitigate his loss, in particular that he made no applications for the band 4 NHS work for which he was best suited. The tribunal accepts the discouraging effect of the exchange with HR at the time of dismissal, and notes that nevertheless he continued to apply for non-NHS work. However, he should have been encouraged by getting an interview (through an agency) in November 2019 with an NHS employer to revise his previous pessimistic view and started to apply, especially as work with an NHS employer will have served to mitigate his pension loss. Doing the best we can, we propose to reduce the loss of earnings by 50% from November 2019 to December 2020, to reflect the prospect that he would have been able to find NHS work had he applied for any the many band 4 posts being advertised.
30. At the time of dismissal we understand from the schedules of loss that the rate appropriate to band 4 was £1,687 per month net, including London weighting, which is £27,899 gross per annum. The claimant would have been at the top of grade 4, so there will have been no grade increases. We have not been given information by either side that we can see of pay increases since then.
31. The claimant received varying amounts of universal credit for some months between May 2020 and January 2021, in total, £2,677.
32. As for the claimant's prospects from now on, the fact that come September he will have been in work for nine months is likely to mean he is better placed to find more work now than he was with a record of unemployment. Further, he can expect his current employer to provide a reference and so

could put aside his fear of any discouragement in the respondent's reference. On the evidence, there are plenty of band 4 NHS posts regularly available, many of them for generic administrative posts, very few requiring special knowledge - we saw only one, requiring experience of an endoscopy clinic; we discount the claimant's dispute on another involving working for clinicians, as the post holder was not required to be a clinician. We do not anticipate any difficulty finding work on account of the claimant's age. Many, possibly most, agencies and employers do not ask for evidence of age. In our finding the low number of older people employed in the NHS reflects the fact that most older NHS employees have accrued enough pension to retire comfortably. It does not indicate that the NHS prefers to hire younger people. The claimant's circumstances are unusual.

33. Nevertheless, to build in some compensation for the risk that he may not be able to find such work to start as soon as his current contract term expires, we award a further 6 weeks from 30 September 2021.

34. Calculation:

(1) Loss of earnings not subject to 40% reduction
4 weeks at £1,687 per month (4x12/52 x 1687) = £ 1,557

(2) Loss of earnings subject to 40% reduction:

(a) From 8.6.18 to 30.11.19
76 weeks at £1,687 x 12/52 = £29,753

(b) From 1.12.19 to 31.12.20
56 weeks at £1,687 x 12/52
£21,891,
Less state benefit 2,677
=19,214, reduced by 50% = £9,607

Total 2(a) plus 2(b) £ 39,360, reduced by 40% =£ 23,616

Total Past loss (1) + (2) £ 25,173

(3) Future loss (no interest)
6 weeks at £1,687 x 12/52 = 2,336. Reduced by 40% = £ 1,402

Pension Loss

35. For reasons already given we expect the claimant to be able to obtain work in the NHS by 14 November 2021. He will then be able to rejoin the pension scheme after a gap of 3.42 years.

36. Working from the gross salary of £27,899, with each year of pensionable service attracting pension of 1/60 gross salary, the loss of pension per annum after retirement is £ 1,591 per annum.

37. We reduce part of this by 50% for the same reasons as before. The proportion of pension loss attributable to the period from 1.12.19 to 14.11.21 is 1.96 years, 57% of the total. Applying 50% reduction to £906.87, and no reduction to £684.13, the annual pension for calculation of the award is £1,138.
38. For multiplier, we have used the Ogden tables in appendix 2 to the Pension Guidelines, which build in the higher life expectation of members of occupational pensions schemes, to arrive at a multiplicand of 17.28. This is for a man now 65, expecting to retire at 72, at the current 0.25% discount rate.
39. We decided not to apply a reduction factor for the vicissitudes of life other than mortality. This is because we have already assessed 72 as a more realistic retirement age given health and ageing, but recognising the claimant's ambition and need to work to 75 if he can it would not be just to reduce this again.
40. This makes the loss of occupational pension arising from victimisation £19,665. Reduced by 40% that is £11,798.
41. Because of the claimant's late entry into the UK labour market, the loss of his job has prevented him from building up his retirement pension (for which 35 years of national insurance contributions or credits are required). The claimant obtained a statement of accrued state pension for May 2018 of £79.27 per week. A similar statement for April 2021 shows state pension of £93.72. He will have resumed making contributions in January 2021, and we do not know if he was credited with NI contributions during the months of 2020 when he received state benefit. There is also the annual increase in state pension. On the face of the figures available, by losing these years he has suffered a reduction of £751 per annum in the state pension he can draw from June 2021 – we take that as the start of this loss, because if he elects not to take it now, he is paid proportionately more whenever he does start to draw it. To take account of the failure to mitigate after November 2019, and we have reduced it by 25% (because for half the period there is a 50% reduction) that makes the annual loss of pension £563.25 per annum.
42. For the multiplier we used table 1 of the 8th edition of the Ogden tables, because the claimant reaches his state retirement age next month. Having regard to the greater longevity of members of occupational schemes as a section of the general population, noted consistently by actuaries as 2 years, and discussed in the Pension Principles, we selected the multiplier for someone with a retirement age of 64 (rather than the claimant's actual 66). At a discount rate of 0.25%, the multiplier for this loss is 21.81. That makes a state pension loss of £12,284.48.
43. Reduced by 40%, that is £7,371.

Injury to Feelings

44. The claimant contends that injury to feelings of victimisation should be in the order of £25,000. He also seeks aggravated damages, stigma damages, and loss of congenial employment, but in our view there are no reasons to make any of these awards. Any stigma, actual or perceived, from the fact of dismissal is already accounted for in the loss of earnings award, and being downgraded from 5 to 4 is not a decision for which compensation is to be awarded. As for congenial employment, the employment was no doubt satisfactory, but such awards are for those where there is a job satisfaction that is not reflected in pay – for example, saving life, or an occupation with particular camaraderie, or exercising a special skill – which is not apparent here.
45. Having heard the evidence at the liability hearing and now, the real injury to the claimant was the finding that he was not capable of a band 5 job. Having found that this was not discriminatory, that injury to feelings cannot be compensated. There should however be some recognition of the shock of losing his job, however much he may have feared this could be the outcome, and the stress of having to find another one. For the harm done by losing the opportunity to work at band 4, which we assess should be towards the lower Vento band. We consider an award of £10,000 appropriate. That too is discounted by 40%, as he might have found himself in this position without the victimization, making £6,000.

ACAS Code on Discipline and Grievance

46. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that if a “claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies”, and the employer or the employee failed to follow any provision of the Code, a tribunal can order an award to be increased or decreased by up to 25% to the extent that this would be just and equitable in all the circumstances. The claimant argues that by limiting his appeal against the decision to downgrade to specific factors he was deprived of redress. We do not accept there was breach of the Code on Grievance (this was not disciplinary action). The claimant was able to pursue an appeal. We do not consider this an appropriate case for an increase in award.

Interest on Awards

47. The Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provide that tribunals making awards in discrimination cases should consider awarding interest. By regulation 6(1), interest on loss of earnings is calculated from the mid-point of loss to the calculation day, and interest on awards for injury to feelings from the date of the act of discrimination. These need not be followed, according to regulation 6(3) if ‘serious injustice’ would result. The applicable rate is 8%.

48. From 8 May 2018 to 13 May 2021 is 3 years 5 days. The interest on the injury to feelings award is $£6,000 \times 8/100 \times 1,100/365 = £1,447$.

49. The loss of earnings period runs from 8 May 2018 to 31 December 2020. The mid-point between these dates is 15 months and 11 days after 8 May 2018, which is 19 August 2019. The period from then to now is 20 months and 24 days. We did not serious injustice to either side in not splitting up the awards because they were reduced by different amounts in different periods. The interest on the awards for past loss of earnings of £25,173 - see paragraph 33(2) – therefore is $£ 25,173 \times 8/100 \times 632/365 = £ 3,487$.

50. **Summary of Awards**

Injury to Feelings	£ 6,000
Interest thereon	£1,447
Past Loss of Earnings	£25,173
Interest thereon	£ 3,487
Future loss of earnings	£1,402
Loss of Occupational Pension	£11,798
Loss of State pension	£ 7,371
Total	£56,678

Grossing Up for Tax

51. The injury to feelings award arises from the termination of employment and will be treated by HMCTS as liable to tax on receipt.

52. The whole award attracts the statutory exemption of £30,000 for a termination payment.

53. That leaves £ 26,678 which will be treated as income liable to tax in the year ending 5 April 2022. He expects to earn £39,054 if he continues to earn at his present rate of pay over 46 weeks of the year. The total taxable income therefore will be £65,732.

54. Of that, the first £12,500 is the tax free personal allowance. The next £37,000 is taxed at 20%. Of his income other than the tribunal award, £16,554 will be taxed at 20%.

55. That leaves £20,446 of the 20% basic rate band to be applied to the tribunal award. The claimant must receive £ £25,557 to leave him £ 20,446 in this band. The remaining £6,232 of the taxable part of the award will be taxed at 40%. He must receive £10,387 to leave him with £6,232 in this band.

56. After grossing up, the award required to compensate the loss comprises £30,000 plus £25,557, plus £10,387, in all £65,944.

Employment Judge Goodman

Date: 13th May 2021

JUDGMENT and REASONS SENT to the PARTIES
ON 13/05/2021.

FOR THE TRIBUNAL OFFICE