EMPLOYMENT TRIBUNALS

Claimant: **Dr H. Jaleel**

Respondent: **Southend University Hospital NHS Foundation Trust**

Heard at: **East London Hearing Centre (by CVP)**

On: **4 and 5 February 2021**

Before: **Employment Judge Massarella**
Mr G. Tomey
Mr M. Wood

Representation
Claimant: Mr O. Ojo (Solicitor)
Respondent: Mr B. Gil (Counsel)

JUDGMENT

The judgment of the Tribunal on the Respondent's reconsideration application is that:

1. **it is in the interests of justice to reconsider the Tribunal's conclusions as to the reasons for the Claimant's resignation;**

2. **having done so, the Tribunal confirms its judgment that the Claimant was constructively dismissed.**

The judgment of the Tribunal on compensation for unfair dismissal is as follows:

3. **the Claimant is entitled to a basic award of £10,668.00;**

4. **she is entitled to a compensatory award of £43,060.51;**

5. **after grossing-up, the total sum which the Respondent shall pay to the Claimant is £69,547.52;**

6. **the Claimant shall account to HMRC for any tax liability due on this sum.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Procedural history

1. By a judgment sent to the parties on 22 November 2019, the Tribunal concluded as follows:

    1.1. that the Respondent breached the implied term of trust and confidence by its conduct of the interview for the DME position on 16 April 2018;

    1.2. alternatively, that the conduct of the interview, taken together with Ms Maton's inappropriate imposition of duties on the Claimant in 2016/2017, amounted to a breach of the implied term;

    1.3. that the Claimant resigned, in part at least, in response to the breach; and

    1.4. that she did not affirm the contract between the breach and her resignation;

    1.5. accordingly, she was constructively dismissed and, absent any potentially fair reason for the dismissal, it was unfair;

    1.6. the Claimant's claims of direct race discrimination, harassment related to race, and victimisation were not well-founded and were dismissed.

2. By letter dated 26 February 2020, the Claimant made an application for reconsideration of the Tribunal's rejection of her claims of direct race discrimination and harassment related to race, in relation to the re-advertising of the DME role and the conduct of the interviews for that role. That application was considered at a hearing on 5 and 6 November 2020, which had been listed to deal with the reconsideration application and with remedy. The outcome of the application, which was that the decision to dismiss the Claimant's claims of race discrimination was confirmed, was given orally at the hearing; the reasons are recorded in a judgment, sent to the parties on 11 November 2020.

3. Shortly before the November hearing, the Respondent lodged an application for third-party disclosure, and an application of its own for reconsideration. The background to those applications is set out in a case management order, sent to the parties on 12 November 2020.

The hearing

4. The parties provided us with a bundle of documents, running to some 250 pages. We heard evidence from Ms Katie Palmer (Medical Education Manager), which was relevant to the reconsideration issue only. We heard evidence from the Claimant in relation to both reconsideration and remedy.

5. In its application for reconsideration, which was made some six months outside the time limits provided for in the 2013 Rules, the Respondent submitted that the finding of constructive dismissal because evidence had subsequently emerged that the Claimant had applied to train as a GP in November 2017, and had been accepted onto that training programme before the interview for the DME post, at which the repudiatory breach of contract occurred. In the light of that evidence, the Respondent argued that it was in the interests of justice for the Tribunal to reconsider its decision as to whether the Claimant resigned, in part at least, in response to the repudiatory breach.

6. Between the two preliminary hearings, I considered the Respondent's application on the papers, and decided to extend time, and permit the reconsideration application to proceed. The Claimant objected in writing, on the basis that she had not had an opportunity to address me on the time limits issue. On my own initiative I decided to reconsider the question of time limits as a preliminary issue at the beginning of the hearing. The representatives agreed that this was a matter for me to decide alone, rather than an issue for the full Tribunal.

7. I heard evidence from Ms Palmer, who was cross-examined by Mr Ojo; both representatives made submissions. I deliberated, and came to the conclusion (recorded below) that time should be extended. The full Tribunal then heard evidence from the Claimant, who was cross-examined by Mr Gil, both on the reason for her resignation, and on remedy issues.

8. At the beginning of the second day, I raised concerns with both representatives as to adequacy of the schedule and counter-schedule of loss: neither had been updated in preparation for this hearing; the Respondent's calculations were predicated on a hearing in June 2019, the Claimant's on a hearing in October 2019; the Claimant had wrongly used gross, rather than net, figures in calculating the compensatory award; it was unclear whether the Respondent had used gross or net figures.

9. I asked the parties to seek to agree the core net figures, the figure for pension loss and, if they were not able to do so, to identify the precise basis of any dispute. The Tribunal then heard oral submissions, both on the reconsideration application and on the principles of their approach to remedy. We then broke for around two hours, to allow the parties to seek agreement on the calculation issues. As a result of that process, they helpfully provided the Tribunal with some agreed figures, which are recorded below.

Reconsideration of the decision to extend time for the Respondent's application

<u>The law</u>

10. Rules 70 to 73 of the Employment Tribunal's Rules of Procedure 2013, make provision for the reconsideration of Tribunal Judgments as follows:

> **Principles**
> **70**
> **A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.**

> **Application**
> **71**
> **Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.**
>
> **Process**
> **72**
> **(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.**
>
> **(2) If the application has not been refused under paragraph (1), the original decision shall be considered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.**

11. There is a general power to extend time in Rule 5:

> **The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.**

12. In *Outasight VB Ltd v Brown* UKEAT/0253/14 the EAT held (at [46-48]) that the Rule 70 ground for reconsidering Judgments (the interests of justice) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules. HHJ Eady QC explained that the previous specified categories under the old rules were only examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds, leaving only what was in truth always the fundamental consideration: the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

13. The key point is that it must be in the interests of justice to reconsider a judgment. That means that there must be something about the case that makes it necessary to go back and reconsider, for example a new piece of evidence that could not have been produced at the original hearing or a mistake as to the law. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue his or her case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their arguments before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue

his or her case, to have 'a second bite at the cherry' (per Phillips J in *Flint v Eastern Electricity Board* [1975] IRLR 277).

14. The expression 'necessary in the interests of justice' does not give rise to an unfettered discretion to reopen matters. The importance of finality was confirmed by the Court of Appeal in *Ministry of Justice v Burton and anor [2016] EWCA Civ 714* in July 2016 where Elias LJ said that:

> **'the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (*Flint v Eastern Electricity Board* [1975] ICR 395) which militates against the discretion being exercised too readily; and in *Lindsay v Ironsides Ray and Vials* [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review.'**

15. In *Liddington v 2Gether NHS Foundation Trust* EAT/0002/16 the EAT, *per* Simler P, held at paragraph 34 that:

> **'a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or by adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered.'**

16. The test for determining whether fresh evidence is to be admitted is that laid down in *Ladd v Marshall* [1954] 1WLR 1489. The party seeking to adduce the fresh evidence must show: (1) that the evidence could not have been obtained with reasonable diligence for use at the original hearing, (2) that it is relevant and would probably have had an important influence on the hearing, and (3) that it is apparently credible.

Background to the application

17. The Claimant resigned on 1 May 2018, giving three months' notice. Her last day of employment with the Respondent was 31 July 2018. She commenced GP training (GPST1) on 1 August 2018.

18. On 6 March 2019, the Respondent's solicitors wrote to the Claimant's solicitor, asking him to confirm when the Claimant applied for the GPST1 role, and requesting a copy of the application. Mr Ojo replied on 11 March 2019 that his instructions were that the application was made in May 2018, and that the Claimant did not have a copy of the application, as it was done online. That response was challenged by the Respondent, reasserted by Mr Ojo, and accepted by the Respondent.

19. At a preliminary hearing on 20 July 2020, the Respondent asked for further documents relating to mitigation, and an order for further disclosure by 3 August 2020 was made. On 3 August 2020, the Respondent's solicitor chased disclosure, particularly in relation to the GP training application. The Respondent gave the Claimant until 27 August 2020 to disclose those documents. The Claimant insisted that they were not in her possession. The Respondent became concerned about the veracity of the Claimant's position,

and made its own investigations, which led to an application for specific disclosure on 16 September 2020. On 17 October 2020, the Tribunal ordered the Claimant to set out in her witness statement for the remedy hearing why she did not have documents relating to the application, and what steps she had taken to obtain them. When that statement was produced, the Claimant did not address in any meaningful sense her application for the GP training, save to say that she applied for it in November 2017. On 17 October 2020, the Respondent made an application for third-party disclosure, and for reconsideration of the Tribunal's decision on liability, in relation to constructive dismissal.

20. On 29 October 2020, the Respondent sought disclosure of documents from Health Education England ('HEE'), copying in the Claimant, in order that she might consent to the release of the information. Mr Ojo replied to the Respondent and HEE:

> '… we understand that for you to disclose the information requested, you must seek our client's consent for that disclosure. We however note that Capsticks did not say that Dr Jaleel has given her consent for the information to be disclosed. We therefore hope that you will not equate our being copied into this email as Dr Jaleel's consent which has to be given by Dr Jaleel herself.'

21. On 30 October 2020, HEE wrote to the Respondent, saying that, without the Claimant's express consent, or an order from the Employment Tribunal, it could not release the information requested. In the event, the Claimant did not give her consent until the second day of the hearing in November 2020.

22. When disclosure was eventually provided by HEE, it was limited, because as a matter of course, HEE only retained applications for thirteen months (i.e. until December 2018). It did not include the Claimant's original application form, but did include confirmation of the surrounding circumstances, including the date of her application, and the date on which she was notified by email that it was successful.

Decision on extension of time

23. Having reconsidered, on my own initiative, my decision to extend time under Rule 5 for the presentation of the Respondent's reconsideration application, I confirmed that decision, and permitted the application to proceed.

24. Dealing firstly with whether the new evidence satisfies the *Ladd and Marshall* test, I was satisfied that it did. It was new evidence: the fact that the Claimant applied for the job on 20 November 2017, not May 2018, as the Respondent was told in the period leading up to the liability hearing, was revealed for the first time in her witness statement on 26 October 2020. It was potentially relevant to the finding of unfair constructive dismissal. It was plainly credible: the evidence the Claimant gave in her witness statement for the remedy hearing aligned with the information provided by Health Education England; it was also consistent with such information as the Respondent was able to discover through its own enquiries.

25. As to whether the existence of the evidence could not reasonably have been known about at the time, I found that the Respondent made appropriate

enquiries before the liability hearing as to when the Claimant was offered her new job. It was given a clear answer, which was that the Claimant had applied for the role in May 2018. It queried that answer, but the information was reasserted by the Claimant's representative. Although the Respondent could have made an application for specific/third-party disclosure at that point, I do not consider that it acted without reasonable diligence in not doing so. A party is not required to go to those lengths, in circumstances where the other party, through its professional representative, has given information which it is entitled to take at face value.

26. The Respondent took the view that the question could be explored further at the remedy hearing, insofar as it went to the *Polkey* question. The desirability of probing the Claimant's answer further in relation to liability was only confirmed in the light of the information given by the Claimant in her witness statement. Further, I accept the evidence of Ms Palmer (who was not involved in the preparation for the liability hearing) that knowledge of the timetable for the GP training application process was information which those within the Respondent charged with preparing the case were unlikely to have.

27. In resisting the application, Mr Ojo effectively submitted that the Respondent should have been more sceptical about the information which he provided in his emails of March 2019. That was an unattractive submission.

28. I was not entirely satisfied by the Respondent's explanation as to why the application could not have been made somewhat earlier. Nonetheless, Rule 5 gives me a broad discretion to extend time, in which delay is only one relevant consideration. I also had regard to the fact that, although the Claimant did consent to the application for third-party disclosure, she did so at the last moment, having previously done nothing to indicate her consent. Mr Ojo's assertion that the May 2018 date was his error, rather than the Claimant's responsibility, emerged only on 27 October 2020; that underlined the fact that getting to the bottom of this matter proved a difficult, and evolving, exercise for the Respondent, and went some way to mitigating the delay in making the application.

29. I accepted Mr Gil's submission that, knowing what we know now, the parties were not on an even footing at the liability hearing: neither the Tribunal nor the Respondent had important information, on the basis of which Mr Gil would undoubtedly have cross-examined the Claimant as to her reason for resignation, and which might have had a material influence on the Tribunal's findings of fact and conclusions.

30. The circumstances of this application were exceptional in one important respect: precisely the same evidence and submissions were relevant to the issue of remedy, in particular *Polkey*, as were relevant to the matter which the Respondent sought to be reconsidered. Mr Ojo argued that that was a reason not to permit a reconsideration of the liability issue, because the Respondent could still have a positive outcome of sorts, if it succeeded in its *Polkey* argument. I took the opposite view: the fact that the Tribunal had already assigned time to deal with this new evidence in the context of the remedy hearing argued in favour of both issues being allowed to proceed: its time would not be unnecessarily taken up, nor would other litigants be inconvenienced. A two-day listing was needed in any event for the remedy hearing: the hearing of

a reconsideration application merely required the parties to approach the hearing efficiently, so as to ensure that all issues could be dealt with in the time available.

31. For all these reasons, I considered that the balance of prejudice favoured the Respondent: the prejudice to the Claimant of allowing the application to proceed was confined to the obligation to defend it. If she succeeded, she would retain the finding of constructive dismissal. On the other hand, the prejudice to the Respondent of not allowing the application to proceed was very substantial: there was a risk that a finding of unfair dismissal would stand against it, which the evidence heard at the remedy stage might suggest was unsound. I concluded that it was in the interests of justice for time to be extended, and for the reconsideration application to proceed

32. I observed that none of this went to the question of whether the reconsideration application would succeed. The Respondent faced a high hurdle: if the Tribunal remained satisfied that the repudiatory breach formed some part at least of the Claimant's reason for resigning, a finding that she had other reasons for resigning would not vitiate that conclusion, although it might have an impact on the compensation to which she was entitled.

Decision on the Respondent's substantive application for reconsideration of the liability judgment

The application process

33. GPST1 recruitment is a multistage process, which is carried out by HEE according to a set timeline. The Claimant accepts that the account given by Ms Palmer as to that timeline was correct: the closing date for applications was 30 November 2017; a remote exam took place in January 2018; and she attended a selection centre in February 2018, where she was observed and assessed.

34. An offer of GP training was made to her on 28 February 2018, which she accepted by 2 March 2018. Having an offer of training was not the same as an offer of employment. The guidance to the process expressly stated as follows:

> 'Offers of Employment & Pre-Employment Checks
>
> The offer and allocation of a Training Programme referred to above is NOT an offer of employment. An employment contract detailing the terms and conditions of employment will be issued by the responsible employing organisation and is made subject to satisfactory pre-employment checks. Your offer of employment will include the name of your employer, the start date and length of the period of employment, the location, the hours, the minimum rate of remuneration in the notice period applicable.'

35. Once the initial offer was made, she had a number of options: to accept, to decline or to defer. Having accepted the offer of training, there was nothing to prevent the Claimant withdrawing at a later stage. Although there was no formal mechanism for her to withdraw later on, in practice there would have been nothing to prevent her from doing so. The offer provided her with another option, should there be a further deterioration in her relationship with the Respondent.

36. Once she had accepted an offer of training within a particular region, the Claimant was then asked to indicate her preferred geographical location in terms of the placement. Higher performing applicants were offered a higher preference from the pool of local placements.

37. The Claimant handed in her notice to the Respondent on 1 May 2018, and accepted an She joined as a trainee GP on 1 August 2018. In order to take up that post, she had to give notice to the Respondent on 1 May 2018, which she did.

38. In her new post, the Claimant enjoyed pay protection in respect of her basic salary, but not the additional pay elements, such as the remuneration for the DME role. That pay protection lasts until August 2021.

The Claimant's reasons for making the application

39. The Claimant did not disclose at the liability hearing the fact that she had made the application for GP training in November 2017. Instead, an incorrect case was advanced through her solicitor; she did not correct that incorrect account until November 2020; she then did not consent until the last moment to an order for third-party disclosure. Either the Claimant gave wrong information to Mr Ojo, or Mr Ojo gave the wrong information without first taking proper instructions from the Claimant.

40. That conduct caused us to approach the Claimant's evidence at the reconsideration/remedy hearing with caution. Although we had regard to this failure, we do not infer from it, as the Respondent invites us to do, that the disclosure of her application for GP training would probably have proved that the Claimant was committed to a new career, and always intended to resign, irrespective of the Respondent's subsequent conduct.

41. The Tribunal considers that it would be very surprising for any job applicant to do other than express enthusiasm for, and commitment to, a role, for which she is applying. Even if she had done so, it would not be especially probative of her private intentions: whether she was applying because she had already resolved to change career, or because she had concluded that she needed a fallback position. We concluded that testing the Claimant's evidence that the latter was the case against what we knew, or could find, about the context in which she made the decision, was more likely to lead us to the truth.

42. The Claimant applied for GP training on 20 November 2017. Four days later she made her first explicit complaint about Mr Rothnie, through her BMA representative.

43. In her witness statement, the Claimant explained that she spoke to colleagues, who suggested that complaining about Mr Rothnie might have an adverse effect on her career, and that she ought to consider having a safety net in place. This made her anxious. One of her colleagues was applying for GP training, and suggested that she do the same. She wrote:

> 'After careful consideration, I came to the conclusion that I should have an option of at least earning a living as a doctor even if it meant taking a substantial cut in salary, in case things go south for me at the

Respondent whilst also looking for other positions, before I am pushed out finally.'

44. Mr Gil put to the Claimant that the reason why she applied for the GP training, was because she was dissatisfied with her current employment for a number of reasons: she had been asked to do work outside her remit; there had been changes to a contract with which she was not happy; she felt that she was unsupported; and she had been told that Dr Coward would not step down as associate DME. He put to the Claimant, and submitted to us, that the Claimant's explanation did not make sense: why, he asks, would she have disregarded the advice not to raise a grievance against Mr Rothnie?

45. Although she was plainly unhappy about these issues, we consider that there are factors, which point to the Claimant not having made a definitive decision to leave. We consider that it was unlikely that she would have pursued her existing grievances with such persistence, if she were not genuinely seeking to improve her position within the Respondent. We think it even more unlikely that she would have put herself through the inevitable anxiety of raising a grievance against Mr Rothnie, if she had no intention of remaining in employment.

46. We note that in the course of her meeting with Ms Barnes, the Claimant thanked her for changing her reporting structure, and assigning her Directorate to another department (from Medicine to Women and Children), which meant that she would not be reporting to the managers with whom she had had significant disagreements (Ms Maton and Ms Harwood). In our view, that suggests that she was looking towards an improved future within the Trust.

47. Further, we think it highly unlikely that, had she decided definitively to accept the offer of GP training, the Claimant would have reapplied for the DME post, which on any view she must have anticipated would be a taxing process. Mr Gil put to the Claimant that the only reason she did so was so as to increase her salary, which would then be protected in her future role. We reject that suggestion: there was no evidence to support it, and we regarded it as fanciful. In any event, it emerged in cross-examination that the Claimant continued to be paid in relation to the DME role up to the end of her employment with the Respondent.

48. We find that the Claimant did not ignore the advice she had been given by colleagues; on the contrary, she followed it. She pursued the GP training route as a backup, in case her relationship with the Respondent further deteriorated. We are satisfied that she felt vulnerable in her position within the Respondent organisation: she had already raised grievances against colleagues; her perception was that the decision to advertise the DME post undermined her position; and she had made the decision to make further allegations against Mr Rothnie, a very senior figure within the organisation, who had been her line manager in the DME role.

49. Although it is right that she had been accepted by HEE to be allocated to a trust, the Claimant knew that she could withdraw and remain with the Respondent right up until the last minute. The point at which she was unlikely to change her mind was after she had given her notice to the Respondent, because there would then be no guarantee that if she did so, the Respondent would accept the retraction of the resignation. However, she knew that she had

some time before she had to make that decision; the deadline was the end of May.

50. We are satisfied that the Claimant's actions in the period between November 2017 and May 2018 were more consistent with her seeking to restore the employment relationship, than with her having already decided to walk away from it. After careful consideration, we accept the Claimant's evidence that she had not made a definitive decision to retrain as a GP when she made her application in November 2017, and that she pursued it as a fallback position.

51. We conclude that the conduct of the Respondent in relation to the DME interview was the trigger which prompted the Claimant to commit to the GP training route, because (as we have already found) that conduct, viewed objectively, was likely seriously to damage the relationship of trust and confidence.

52. The fact that the Claimant waited until the end of the month before giving notice does not undermine that conclusion. There was no suggestion that by doing so she waived the breach.

53. Accordingly, we are satisfied that the repudiatory breach formed part of the reason for the Claimant's resignation, and the Tribunal confirms its judgment that she was constructively unfairly dismissed.

Remedy: submissions

The Respondent's submissions

54. Mr Gil's primary submission was that the Claimant was not entitled to any remedy, as she was not constructively dismissed. That submission falls away in the light of the Tribunal's confirmation of its original decision.

55. His secondary submission was that, even if the finding of unfair dismissal is maintained, there was a 100% chance that the Claimant would have resigned in any event, because she was dissatisfied working for the Respondent, and had decided to become a GP. He submitted that it was probable that Dr Coward would have been appointed to the DME role. The Claimant should be entitled only to a basic award and an award for loss of statutory rights.

56. Mr Gil's tertiary position is that the period of loss should be confined to 3 months, with an 80% *Polkey* reduction. If the Tribunal accepts that submission, he is content for it to use the agreed, full net weekly loss of salary as the core figures (£406.06). He submitted that the Claimant had failed to mitigate her loss by not applying for other Consultant roles.

57. If the Tribunal is minded to award a longer period of loss, Mr Gil argues for a lower net weekly loss of earnings figure (£127), for reasons which are given below.

The Claimant's submissions

58. Mr Ojo invited the Tribunal to find that the new evidence changed nothing: the Claimant made the application for GP training as a fallback position, should she find herself in a position where the current employment became untenable.

59. Further he submitted that, by taking up the GP training, she had acted reasonably in mitigating her loss. There was no evidence that the Claimant would have been appointed to the consultant position, which he invited us to find she had applied for.

60. As for the *Polkey* issue, Mr Ojo invited us to find that there was a 0% chance that the Claimant would have resigned in any event, had there been no breach of the implied term. He invited the Tribunal to find that the Claimant would have been appointed to the DME role; she had six excellence awards, had performed very well, and was a valuable member of the team.

Compensation

The Tribunal's conclusions

61. Having heard evidence from the Claimant, and having read the documents to which we were referred in the remedy bundle, we make the following findings of fact, and draw the following conclusions. The relevant law is set out under each sub-heading. Those figures agreed between the parties on the second day of the hearing are incorporated below.

Basic award

62. The Claimant is entitled to a basic award, which the parties agree should be £10,668.

Compensatory award

63. S.123 ERA provides that the amount of the compensatory award shall be such as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the Claimant in consequence of the dismissal, insofar as that loss is attributable to the action taken by the employer. Heads of compensation might include: immediate loss of earnings – i.e. from dismissal to date of hearing when the Tribunal decides on compensation; future loss of earnings, i.e. estimated loss after the hearing; and loss of pension rights.

64. Where the dismissal occurred after 6 April 2018, and before 5 April 2019, the amount of the compensatory award shall not exceed the lower of £83,682 or 52 weeks' pay ('the statutory cap'). A week's pay is calculated according to the rules in ss.221-229 ERA, but without applying the cap in s.227 ERA. The statutory cap is applied after the grossing up calculation has been carried out (*Hardie Grant London Ltd v Aspden*, UKEAT/0242/11/RN).

The Claimant's net weekly loss

65. The Claimant's annual salary was composed of a basic salary, with additional elements, relating to such matters as her Clinical Excellence Award and Additional Programmed Activities.

66. The parties agreed that the basic salary element is extinguished, because of the pay protection, to which the Claimant was entitled in her new role. Consequently, the only relevant earnings for the purposes of the compensatory award are the additional salary elements, listed in the schedule and counter-schedule.

67. The parties' agreed figure for the net weekly loss of salary in relation to all of those additional elements was £486.06.

68. At the end of his oral submissions, Mr Gil argued for a much lower figure in respect of the net weekly loss, on the basis that 'the Claimant would not have been in receipt of any DME uplift and her additional programmed activities, which came out at £2000 gross per month, have been replaced by shift work which comes out at £1000 gross per month'. He argued that the figure the Tribunal should use for any future loss is, therefore, £1000 gross monthly, which produces a net weekly figure of £127. He submitted that this should then carry forward into the calculation of net weekly pension loss.

69. Mr Ojo's submission was that the full amount of £486.06 should be used for the calculation of past and future loss of earnings.

70. We deal first with Mr Gil submission that the Claimant would not have been appointed to the DME position, had there been no unfairness. Mr Gil submitted that, because the Claimant is asserting that she is entitled to the loss of that salary element, the burden is on her to show that she would have been appointed. However, the Respondent was positively asserting that the Claimant would have resigned in any event, in part because she was unlikely to be reappointed to the DME role.

71. In the circumstances, we conclude that the burden of proof as to who would have been appointed is a shared burden, although we observe that the natural source from which we would expect to hear evidence on this issue would be the Respondent, since it would be making the decision as to which of the two candidates was the more likely to be appointed. No such evidence was led. Nor, indeed, was it put to the Claimant in cross-examination that that Dr Coward was the better candidate, had more relevant experience etc., and was more likely to be appointed.

72. Doing the best we can in the circumstances, we had regard to the fact that both the Claimant and Dr Coward were qualified for the role, and both of them had performed the role; there was no suggestion that either had not performed it well. Accordingly, we estimate that the chance of the Claimant's being re-appointed to the role was 50%.

73. We deal then with Mr Gil submission that, had the Claimant not been appointed to the DME position, that would have had a knock-on effect on other salary elements. We reject that submission: it was unsupported by any evidence; it was not flagged up in the counter schedule of loss; and the point was not put to the Claimant in cross-examination. Consequently, the only reduction we are prepared to make is to the element identified in the counter-schedule as 'clinical director fees', in the amount of £5000 which, in a footnote to the counter schedule, the Respondent stated the Claimant would no longer receive, if she was no longer in the DME post.

74. Because the parties had not broken down the calculation of the net weekly earnings of £486.06, the Tribunal was obliged to carry out its own estimate of what the impact of a reduction of 50% on the £5000 element would have on the weekly figure. The total amount of the additional elements (using the figures in the Respondent's counter schedule) was £63,749.36. Deducting £5000 from

that sum produce a figure of £58,749.36, which is 92.16% of the larger figure. Applying that percentage to £486.06 produced a net weekly figure of £447.95, which we then used as the core weekly figure for the calculations below.

Past loss of earnings, subject to reductions

75. The effective date of termination was 31 July 2018; the calculation date was 5 February 2021. The period between those two dates is 131.57 weeks.

76. The past loss of earnings, subject to any reductions for mitigation and *Polkey*, is £58,936.78

Future loss of earnings

77. In her schedule of loss, the Claimant claimed loss of earnings in respect of a period of 3 years from the effective date of termination. That period is 156.57 weeks. Deducting the period of past loss (131.57), gives rise to a period of future loss of 25 weeks. We are not minded to award a longer period, in part because the Claimant has not claimed more in her schedule of loss, and in part because we heard little or no evidence as to what her employment prospects will be after the end of her training.

78. The future loss, by reference to the weekly net loss of £447.95, is £11,198.75, subject to any reductions for mitigation and *Polkey*.

Pension loss

79. The parties' agreed figure for loss of pension is £5,310.76. That is an annual figure to be applied to the periods of loss found by the Tribunal; it produces a weekly figure of £102.13.

80. Past loss of pension is £13,437.24; future loss is £2,553.25; both are subject to arguments as to reductions.

Loss of statutory rights

81. One of the heads of loss for which a Tribunal may award compensation is the value of accrued statutory rights that have been lost: where an employee begins a new job following the termination of their employment, they will need to accrue two years' continuous service before they will have acquired the right to claim unfair dismissal or a statutory redundancy payment, and may have lost the right to a lengthy statutory notice period if they have been employed for several years.

82. The parties agreed a figure of £350.

Total compensatory award, before any reductions

83. £58,936.78 (past loss of earnings) + £11,198.75 (future loss of earnings) + £13,437.24 (past pension loss) + £2,553.25 (future pension loss) + £350 (loss of statutory rights) minus £355 (private fees earned) = £86,121.02.

Earnings which have mitigated the Claimant's losses/sums which reflect any unreasonable failure by her to mitigate

84. It is a fundamental principle that any Claimant will be expected to mitigate the losses she suffers, as a result of an unlawful act, by giving credit, for example for earnings in a new job (mitigation in fact); and that the Tribunal will not make an award to cover losses that could reasonably have been avoided (mitigation in law).

85. In *Cooper Contracting Ltd v Lindsey* UKEAT/0184/15, Langstaff J reviewed the authorities relating to mitigation. The following principles emerge:

    85.1. the burden of proof is on the wrongdoer; a Claimant does not have to prove that she has mitigated loss; it is not a broad assessment on which the burden of proof is neutral;

    85.2. what has to be proved is that the Claimant acted unreasonably; she does not have to show that what she did was reasonable; there is a difference between acting reasonably and not acting unreasonably; what is reasonable or unreasonable is a matter of fact.

    85.3. It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts;

    85.4. the Tribunal is not to apply too demanding a standard to the victim; after all, she is the victim of a wrong. She is not to be put on trial as if the losses were her fault when the central cause is the act of the wrongdoer;

    85.5. in a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

86. Without evidence adduced by the employer upon which the Tribunal can be satisfied that, on the balance of probabilities, the Claimant has acted unreasonably in failing to mitigate, a claim of failure to mitigate will not succeed; see: *Look Ahead Housing and Care Limited v* Chetty, UKEAT 0037/14.

87. In addition to the salary in her new role, the Claimant did a small amount of private work, for which she and earned £355 and she gives credit for that. We reject the Respondent's contention that the Claimant had not provided full disclosure in relation to this: had the Respondent been dissatisfied with the disclosure provided, it could have made it an application for specific disclosure; none was made

88. The Respondent submitted that the Claimant had unreasonably failed to mitigate her losses.

89. The starting-point is that, when the Claimant considered that it might be necessary to find alternative employment, and some time before the termination of her existing employment, she took steps to find work, which guaranteed her the same basic salary for three years; that itself was a reasonable step to take. We have concluded that it was not unreasonable for her to accept this job which guaranteed her the same basic salary for three years, even though it did not guarantee the additional payments. It effectively eliminated the majority of her potential loss.

90. In September 2018, the Claimant's evidence was that she also applied for the role of Consultant in Sexual Health and HIV Medicine at Chelsea and Westminster Hospital, but was not offered an interview. She accepted that this was the only such role she applied for. The Respondent challenged that evidence, and suggested that, had she applied for the role, she would have received an email confirmation; the Claimant has disclosed no such confirmation.

91. On the balance probabilities, we are satisfied Claimant did apply for the role, but either did not receive an email, or has not been able to locate it. If we are wrong about that, the Respondent sought to persuade us that, had she applied for it, she definitely would have been appointed. The Respondent led no evidence to make good that assertion. Absent any evidence as to such matters as how many applications were received, and what the quality of those applications were, the Tribunal cannot possibly make the finding the Respondent urges upon us.

92. Mr Gil fairly accepted that the exercise of seeking show that an employee has failed to mitigate her loss usually requires the employer to point to a critical mass of job vacancies, to cross-examine the employee to the effect that they were suitable, and to invite the Tribunal to find that she would have been successful in one or other of them, and had acted unreasonably in not applying for them. Mr Gil's task was made the harder by the fact that the Respondent led no evidence at all of any other jobs, which it contended the Claimant ought to have applied for, and which attracted a higher salary than the GP training role.

93. Moreover, we accept the Claimant's evidence that she formed the view that, given her age (55), and the fact that she was in one of the highest salary brackets for consultants, her chances of securing a comparable role were poor; organisations are looking to maximise value for money, and would be unlikely to appoint a highly-paid individual, with only a few years left to retirement. Although Mr Gil challenged that in cross-examination (in hypothetical terms), the Respondent led no evidence to support that challenge.

94. The authorities are clear that the burden is on the employer to show that the employee has acted unreasonably in relation to mitigation. The Respondent has not discharged that burden, and the Tribunal declines to apply a reduction to compensation on this basis.

Should a Polkey deduction be made to reflect the chance the employment would have ended, had there been no unfairness?

95. The relevant principles of law relating to a *Polkey* deduction as set out in *Software v 2000 Limited v Andrews & Others* [2007] IRLR 568 at [54] are, insofar as they are relevant to this case:

> **(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.**
>
> **(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) Having considered the evidence, the Tribunal may determine:**
>
> > **(a) 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.**
> >
> > **(b) That employment would have continued indefinitely.**

96. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.

97. We considered what the chance was that the employment relationship would have continued and, if so, for how long. There was no suggestion by the Respondent that the Claimant would have been dismissed; this is a case where we must try to assess what the chances were that the Claimant would have resigned, had there been no unfairness. This is, by its very nature, a speculative exercise, and we must do the best we can on the evidence that we have heard. We cannot accept either of the percentage figures for which the representatives contended: we consider both of them to be extreme and self-serving.

98. We acknowledge that the Claimant had experienced a period of very considerable dissatisfaction: she had raised grievances against her managers; she had been required to reapply for the DME role. Moreover, she had a ready escape route, in the form of the GP training role, which she had already secured. Clearly there must have been some possibility that she may have resigned.

99. We consider that there are factors, which suggest that the Claimant would not have resigned, had there been no repudiatory breach by the Respondent: she had deep roots in the organisation; she had shown great commitment to it, and consistent ambition to progress within it; leaving the Trust, and giving up her role as a consultant, would involve a substantial cut in salary and a significant change of status.

100. Further, we have already referred to the fact that one of the principal sources of dissatisfaction in the Claimant's working life within the Respondent had been resolved to her satisfaction: her directorate had been moved to a different

department, and she would no longer be reporting to the line managers with whom she was in dispute.

101. On the other hand, we took into account our earlier finding that there was only a 50% chance that the Claimant would have been reappointed to the DME role. We think that is crucial to the *Polkey* finding. We considered what would have happened had she not been reappointed. She regarded the Respondent's decision to re-advertise the DME role as wrong. By reapplying for the role, she was effectively giving the Respondent an opportunity to right that wrong. We think it inevitable that, had the Respondent not appointed her, she would have regarded that as at least as serious a breach of trust and confidence as its mishandling of the DME interview. We have concluded that, if a fair and reasonable interview process had been conducted, but the Claimant had not been appointed, she would have resigned in response, and taken up the GP training opportunity. By contrast, had she been reappointed, we consider that it would have restored her faith in the organisation, and she would not have resigned.

102. Having regard to these findings, we estimate the chance that the Claimant would have resigned to be 50%. Consequently, the compensatory award must be reduced by that factor, producing a figure of £43,060.51.

Total of the elements set out above

103. £10,668.00 (basic award) + £43,060.51 (compensatory award) = £53,728.51.

Grossing up

104. If the combined sum of any basic and compensatory award awarded to the Claimant is greater than the £30,000 provided for in s.401 of the Income Tax (Earnings and Pension) Act 2003, the excess figure will be subject to tax. To avoid the Claimant being disadvantaged, the Tribunal must 'gross up' any award it makes over £30,000. This essentially requires adding the sum that is deductible for tax back on to the award, thus cancelling out the tax burden.

105. The correct approach is for the Tribunal to gross up the sum in excess of £30,000 taking into account the employee's personal allowance and tax banding: *Shove v Downs Surgical Plc* [1984] 1 All ER 7. Grossing up takes place before the statutory cap on the compensatory award is applied: *Hardie Grant London Ltd v Aspden* UKEAT/0242/11.

106. Again, in this area, the information provided to us was unsatisfactory. The Claimant had not provided details of her other income (which we understand includes income from property) in the relevant tax year, and thus the full extent to which her existing earnings will take her into the higher tax bands. In closing submissions, the parties invited the Tribunal to take a rough-and-ready approach to the grossing-up exercise, while approaching the exercise in a way which, so far as possible, was favourable to the Respondent, on the basis that the Claimant ought to have produced this information. Mr Gil indicated that he did not object to the Tribunal's taking the base salary of £97,787, adding the award to it, and dealing with the taxable elements by applying the applicable tax bands. Mr Ojo did not object to that approach. The Tribunal regarded this as a sensible compromise, which was most likely to produce a just result, without the need for further evidence and/or a further hearing, which we considered would

be disproportionate in the circumstances, especially having regard to the amount of Tribunal time which has already been allocated to this case.

107. The award will be received in the 2021/22 tax year. The relevant tax bands are:

Personal allowance (PA)	£12,570
Basic rate (BR)	£12,571 - £50,270
Higher rate (HR)	£50,271 - £150,000
Additional rate (AR)	£150,000 upwards

108. There is an additional consideration, which is that the personal allowance is tapered for earnings between £100,000 and £125,000. For every £2 earned above £100,000 the PA is reduced by £1 which means that the PA will be reduced to zero once the employee earns £125,140. That reduction to zero will apply in these circumstances, given the combined size of the salary and the award.

109. The calculation is as follows:[1]

PA = 0

BR (20%) on £37,700, leaving £30,160 net

HR (40%) on the next £112,300, leaving £67,380 net

Note that the HR tax band has effectively been widened because the PA is now zero. The HR tax band now stretches between £37,700 and £150,000

[AR (45%) on anything over £150,000, which does not apply here]

The gross salary is £97,787

The first £37,700 of the salary will be taxed at BR (20%)

The balance of the salary (£60,087) will be taxed at HR (40%), giving a net figure of £36,052.20

Deduct that net figure from the total net figure referable to the HR band (£67,380); the balance (£31,327.80) is the maximum net amount of any Tribunal award which would be taxed at this rate

The total Tribunal award is £53,728.51.

The first £30,000 will be tax-free.

The taxable balance is £23,728.51. Since that is less than the £31,327.80 maximum, it will fall into the HR tax band, and will be taxed at 40%

[1] Based on Example 2, p.37, Employment Tribunal Remedies Handbook 2021, Bath Publishing, tax bands adjusted for 2021/22 rates

Consequently £23,728.51 should be grossed up by 40%, producing a figure of £39,547.52 (i.e. £23,728.51 ÷ 0.6)

110. The Respondent shall pay to the Claimant the total sum of £69,547.52 (i.e. £30,000 (tax free) + £39,547.52 (the grossed-up balance of the award)).

111. The statutory cap has no application in this case.

Employment Judge Massarella
Date: 21 May 2021