



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr A G Bailie

(1) ADM Investor Services International Limited
(2) Mr F Somerville-Cotton

Heard at: London Central Employment Tribunal

On: 5 July 2021

Before: Employment Judge T Adkin
Mr G W Bishop

Representations

For the Claimant : Mr C Milsom (Counsel)

For the Respondent: Mr T Kibling (Counsel)

JUDGMENT

The judgment of the Tribunal is:

- (i) Compensation for financial losses arising from discrimination is assessed as **£171,938**, to be subject to “grossing up”. The First Respondent will consult with HMRC to agree the “grossing up” figure.
- (ii) Interest of **£16,271.21**.

REASONS

Background

1. Following a remedy hearing on 25-28 January 2021 the Tribunal gave a judgment on remedy with assessed damages for injury to feeling and personal injury. Financial losses were assessed by reference to three distinct periods and percentage likelihood of three different scenarios. The figures giving financial losses were based on gross figures provided by the parties. The Tribunal did not have all of the figures required to calculate net losses, and at paragraph 84 of the written reasons for remedy the parties were invited to calculate net losses. It had already been agreed that parties representatives would attempt to agree the “grossing up” exercise and interest and inform the Tribunal of the result.
2. Unfortunately and frustratingly the parties were not able to agree an approach to calculating net loss, and in fact managed to broaden rather than narrow the areas in dispute. Various points of dispute seem to have arisen in correspondence, although mercifully not all points have not been pursued in front of us in this second remedy hearing.

The Evidence

3. In addition to the agreed 338 page bundle on the first remedy hearing (“the first remedy bundle”), the parties produced a 77 bundle of further documents (“the second remedy bundle”). This did not largely contain evidence, but rather attempts by the parties to calculate loss and inconclusive correspondence between the parties.

Procedural Matters

4. The hearing took place remotely using CVP.

Submissions

5. Both Counsel produced written submissions. These were supplemented by brief oral submissions.

Liability decision

6. For ease of reference, the Claimant’s claims of discrimination under section 13 & section 15 Equality Act 2010 succeeded in respect of

6.1. The removal of the Claimant’s management responsibilities and/or appointment of Ms Williams as co-head of the Equities Desk.

6.2. The failure to consult with the Claimant as to the same.

7. All other claims failed.

The Facts

8. Our decision on liability set out detailed findings of fact. The first remedy decision set out a concise summary of facts.

Period of loss

9. The act of discrimination was a restructure announcement on 3 August 2018, leading to a breakdown on the part of the Claimant, who did not ever return to work from that date, although he remains an employee even now.

10. There is no loss beyond November 2026.

PHI (income protection)

11. The First Respondent made a claim against Generali their income protection insurer in respect of the Claimant in February 2019.

12. By a letter dated 2 July 2019 Generali indicated that they would make a payment of £71,215.44 for the period 2 November 2018 to 30 June 2019, comprised of basic benefit of £59,616.87 (presumably gross with no tax deductions), employer pension contributions of £7,456.28 and employee pension contributions of £4,142.29. They confirmed that there would be a regular monthly payment of £8,954.07 from this point on, comprised of £7,495.73 basic benefit, £937.50 employer pension contribution and £520.83 employee pension contribution.

13. Of some assistance to us, has been the Respondents' table at [2R45] (i.e. page 45 of the second remedy bundle), which contains a summary of net payments received in the Claimant's payslips pre- and post-payment of PHI.

14. It is not in dispute between the parties that the payments made under the PHI scheme will increase by 5% p.a.

15. The following key financial figures were agreed between the parties at the hearing:

15.1. Net monthly salary £5,186.31

15.2. Net monthly commission Co-head £6,045.44

15.3. Net monthly commission Broker £2,160.50.

The Law

16. General legal principles relating to the assessment of loss were set out in our first remedy decision.

17. We have derived some assistance from the decision of the Court of Appeal in the case of *Ministry of Defence v Wheeler* [1998] 1 WLR 637, in two respects:

(1) in calculating the compensation due to an applicant where post-dismissal earnings had to be taken into account as mitigation of loss, the proper approach, in order to put the applicant in the position she would have been in had she not been unlawfully dismissed, was to take the sum that the applicant would have earned but for the unlawful dismissal, deduct from that sum the amount that she had, or should have, earned elsewhere and then apply to that net loss the percentage chance that she would have remained in her pre-dismissal employment (641D–E, 646D–E, 651C–E).

(2) where the tribunal made different percentage quantifications for different periods of the chance that the applicant would have remained in the armed forces during each period, the percentage chances should in principle be applied cumulatively; but that, provided the industrial tribunal made it clear that they had adopted the correct approach, they were entitled to approach their task in the way that they found most satisfactory (650C–E. H–651A).

CONCLUSIONS

The approach

18. We have considered the net loss to the Claimant in each scenario contained within each period.
19. There are three periods, namely
- 19.1. September 2018 – March 2020;
 - 19.2. April – October 2020;
 - 19.3. 6 years from November 2020 onwards.
20. The three scenarios within each period, which have been given a percentage of likelihood:
- 20.1. Claimant worked as co-head of department;
 - 20.2. Claimant worked as executor (i.e. broker);
 - 20.3. Claimant unable to continue working.
21. Notwithstanding the points to the contrary initially taken in correspondence by the Respondents, it was agreed that the figures should be taken cumulatively.
22. The analysis of the cumulative probabilities set out in paragraph 2 of Mr Milsom's written submissions for the second remedy hearing on 5 July correctly identifies

the principles. For example, taking the probabilities cumulatively, by the third period the Claimant only had a (50% x 50% x 70% =) 17.5% chance of remaining cohead following the Q4, 2020 redundancy exercise, (30% x 75% x 85% =) 19.13% chance of remaining executive/broker, and (100% - 17.5% - 19.13% =) 63.38% likelihood of not remaining in either role.

23. The slight discrepancies between these and Mr Milsom's probability calculation figures are due to rounding errors.

Calculation of loss - submissions

24. While the Tribunal strictly is concerned with the effect of income post discrimination, in practical terms the loss has arisen in this case as a result of the Claimant moving from a situation where he received basic salary plus pension contributions plus commission payments to a situation where he received PHI payments plus pension contributions and no commission payments. For the purposes of the analysis, we have focused on pre- and post PHI.
25. Mr Kibling for the Respondents has highlighted that the basis of calculation for both employer and employee pension contributions made by Generali under the PHI scheme is to pay greater than he is contractually entitled to. The figure taken for pensionable salary is £125,000 under PHI, whereas before PHI his salary was £100,000 [page 312 of the first remedy bundle]. In short therefore he has enjoyed a benefit in respect of his pension provision, which, it is argued should be taken account of.
26. Additionally the Respondents wish the tribunal to take account of 5% annual increases in the PHI payments that the Claimant is receiving from Generali. The Respondent's position is that over time this represents a discrepancy, not only in the sum received for basic pay but also the employer and employee pension contributions, which over time increase by comparison with the contractual entitlement to pension pay. The Respondents have urged on us in consequence a detailed calculation, set out on three pages of Excel spreadsheet, with a line by line calculation for each year of the future periods of loss.
27. The Respondents submit that given in recent years the Claimant and other colleagues have received £100,000 per year without inflationary increases, we must take this as a given, such that the increase in the PHI payment introduces a substantial discrepancy over the period of loss. The Respondents has also suggested that we need to take account of childcare vouchers.
28. Mr Milsom on behalf the Claimant is that the effect of the PHI scheme, viewed broadly, is to cancel out the Claimant's base salary, such that we should simply make an assessment of loss by reference to commission only, ignoring basic salary altogether. He submitted that the Tribunal should ignore the complexity caused by the 5% p.a. increase in the PHI payments by Generali. Initially on his case the Claimant is disadvantaged in respect of the basic salary element. There is there a tipping point after which the Claimant is advantaged by the 5% increase. In essence, it is submitted that the amounts are not material and the Claimant loses in part but gains in part which to some extent counterbalances.

PHI enhancement in basic pay & pension contributions

29. The Tribunal has decided to disregard to the effect of childcare vouchers, given that they seem to be a constant factor and the tax effect of which is likely to be minimal. By contrast, we do consider that the effect on the Claimant's pension is material.
30. We are satisfied, considering Mr Kibling's submissions and the Respondents' figures, that we ought to take account of the discrepancy between the PHI payments and the basic salary and pension contributions which it has taken the place of.
31. *Pre-PHI basic salary + pension contributions* - the parties agreed at the hearing that the Claimant's basic salary was equivalent to £5,186.31 net per month based on a 19 month reference period. Adding back monthly employee pension contributions of £416.67 and employer pension contributions of £750 gives £6,352.98.
32. *Post-PHI basic element + pension contributions* - by comparison, for the 9 month period July 2019 – March 2020 [second remedy bundle 45] the Claimant received an average net monthly salary from PHI of (£45,131.10/9 =) £5,338.50, plus average employee contributions of (£5,338.50/9=) £593.17 and average employer pension contributions of (£9,573.40/9=) £1063.71 gives £6,671.44.
33. Considering basic pay and pension contributions pre and post PHI suggests an average monthly net discrepancy of **£318.46** (i.e. the Claimant is better off for these elements ignoring the loss of commission).
34. Having identified that the Claimant is receiving more for combined basic pay and pension because of the way that the Generali scheme operations, we consider it just to take account of this in evaluating monthly loss. We have deducted this discrepancy from the monthly losses calculated below.

Effect of 5% p.a. increases

35. While we have accepted the Respondents' submission that we should factor in the gain to the Claimant caused by the discrepancy identified above when assessing the net monthly loss, we have taken a different view in respect of the 5% p.a. increases. Essentially we accept Mr Milsom's submission that this is overly complicated and would not do justice to the parties. Specifically we have considered:
 - 35.1. Proportionality: the Tribunal is carrying out a broad brush assessment, requiring a degree of speculation and some strong assumptions. It would not be a good use of judicial resources to spend hours refining or constructing an Excel model to factor in a year by year analysis. Furthermore, it would suggest a degree of "science" and precision which does not reflect the reality of this broad brush exercise.
 - 35.2. We have not attempted in our calculations to factor in the effect of inflationary or other increases in the commission payments. It would be

unfair to the Claimant to factor in inflation in the PHI payments which would count against him but not factor in inflation in substantial commission payments that he would have received which would count in his favour. Inflationary increases in commission might easily cancel out the increase in PHI payments. We have assumed no inflation for all elements of pay for simplicity. Each party gains and loses by this approach.

35.3. It is not a foregone conclusion in reality that the Claimant's basic salary and pension provision would remain static for the whole of the period 2018 – 2026. Again we have simply assumed this for simplicity in this broad brush assessment. This assumption operates in the First Respondent's favour.

35.4. It is assumed, based on a concession from the Claimant for ease of calculation that he will remain in employment and the payments from Generali will continue in payment throughout the period of loss. This is a strong assumption and it operates in the First Respondent's favour. Again, were we to get into the level of precision suggested by the Respondent's case on the inflationary increases, basic assumptions like these ought to be re-examined. Were we to apply discount for the possibility that the Claimant did not continue to receive the PHI payments for some reason, this might easily cancel out the 5% inflationary figure. Again for simplicity we take the view that it is better to take a broad brush approach.

Monthly losses

36. We have calculated the net monthly losses of the three scenarios as follows:
- 36.1. Co-head part time **£5,726.98** (agreed net monthly commission of £6,045.44 less net discrepancy above of £318.46).
 - 36.2. Executor/Broker part time **£1,842.04** (agreed net monthly commission of £2,160.50 less net discrepancy above of £318.46).
 - 36.3. Does not continue working **£0** (this is on the basis that the Claimant would be in receipt of PHI payments whether or not there have been discrimination).

Applying the monthly losses to the three periods

37. Period 1, post restructure, in the period September 2018 to March 2020 the Claimant had a
- 37.1. 50% chance of working as a Co-Head of the Global Equities and Fixed Income Department, working 3 days a week (i.e. 60% of full time), on a gross salary of £100,000 plus annual commission/bonus payments of £132,161. The net loss is $50\% \times £5,726.98 \times 18 \text{ months} = \mathbf{£51,543}$.
 - 37.2. 30% chance of working as a Broker, working 3 days a week (i.e. 60% of full time), on a salary of £100,000 plus annual commission/bonus payments of £44,700. The net loss is $30\% \times £1,842.04 \times 18 \text{ months} = \mathbf{£9,947}$.

- 37.3. 20% chance of being too unwell to engage with the restructure and as a result not returning to the First Respondent's workplace. **£0.**
38. We do not accept Mr Kipling's submission that having applied the 50% and 30% we should additionally reduce by 20%. This is double counting the possibility that the Claimant would be too unwell to continue, which is already factored in.
39. Period 2, post market volatility March/April 2020, had he remained in employment following a restructure above, in the period April to November 2020 there was a
- 39.1. 50% chance of employment as Co-Head coming to an end in April 2020. The net loss is $50\% \times 50\% \times £5,726.98 \times 6 \text{ months} = \mathbf{£8,590}$.
- 39.2. 25% chance of employment as a broker coming to an end in April 2020). The net loss is $30\% \times 75\% \times £1,842.04 \times 6 \text{ months} = \mathbf{£2,487}$.
40. Period 3, post redundancy exercise, had the Claimant remained in employment following the market volatility above, in the period November 2020 to November 2026 there was a
- 40.1. 30% chance of employment as a Co-Head coming to an end in November 2020. The net loss is $50\% \times 50\% \times 70\% \times £5,726.98 \times 72 \text{ months} = \mathbf{£72,160}$.
- 40.2. 15% chance of employment as a broker coming to an end in November 2020). The net loss is $30\% \times 75\% \times 85\% \times £1,842.04 \times 72 \text{ months} = \mathbf{£25,365}$.

List of issues

41. We have considered the list of issues proposed by the parties. Not all of points were not actually in dispute before us. For this reason we have adjudicated on the issues which we considered required adjudication on.
42. **[Issue 1]** this is dealt with above.
43. **[Issue 2]** The £100,000 salary and the annual commission payments of £132,161 are gross figures
44. **[Issue 3]** Whether the PHI payments actually received (and to be received in the future) should be applied for each respective period, or in one aggregate lump sum from the total at the end?
45. Following *Wheeler*, we have deducted the PHI payments within each scenario within each period.
46. **[Issue 4]** Whether the deductions for the PHI payments should be offset before the percentage discount or after the discounts have been applied given the complication of calculating the offsets against the split scenarios in each period?
47. We have deducted for PHI payments first, for reasons given above.
48. **[Issue 5]** Should the deductions for the PHI payments be applied before discounts, whether the appropriate way to approach this is to apportion the deductions on a

5:3 basis against the notional co-head/broker pay before the first 50%/30% discount application in each period and how to account for the fact that we will be deducting actual payments for a single role, from total payments for two roles?

49. As set out above, we have deducted the PHI payments for each scenario in each period. The approach is to identify the net loss in each scenario by deducting the PHI payments received (net of tax) from the net income we have found that the Claimant would have received but for the discriminatory event.
50. **[Issue 6]** Whether full credit should be given for PHI payments actually received (and to be received in the future) or whether they should be reduced by a percentage to reflect the likelihood of the Claimant not returning?
51. Credit has been given for PHI payments received and anticipated to be received. We do not understand the point about the Claimant not returning.
52. **[Issue 7]** How is interest to be calculated? In particular:
53. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (see Reg 6(1)(a) Industrial Tribunals (Interests on Awards in Discrimination Cases) Regulations 1996).
54. We have calculated the injury to feeling interest figure as follows - 1067 days (from 3.8.18 to 5.7.21) / 365 x £25,000 x 8% = **£5,846.58**.
55. Interest is awarded on all sums other than injury to feelings awards (i.e. in this case award for psychiatric injury and past pecuniary loss) from the mid-point of the date of the act of discrimination complained of and the date the tribunal calculates the award (Reg 6(1)(b) IT(IADC) Regs 1996). The mid-point date is the date half way through the period between the date of the discrimination complained of and the date the tribunal calculates the award (Reg 4 IT(IADC) Regs 1996). Where a tribunal considers that serious injustice would be caused if interest were to be calculated according to the approaches above, it can calculate interest on such different periods as it considers appropriate (Reg 6(3) IT(IADC) Regs 1996).
56. We consider that it would be a serious injustice to the Respondents to calculate interest on pecuniary losses at 8% for the second period of loss starting from a period before the loss was incurred. For this reason we have calculated this period of loss from 1.7.20 i.e. half-way through the second period April to October 2020.
57. As to the third period of loss, this is substantially in the future and accordingly we have not calculated any interest on this amount.
58. We have calculated these as follows:
 - 58.1. Psychiatric injury – 533.5 days (half of 1067) / 365 x £20,000 x 8% = **£2,338.63**.
 - 58.2. First period pecuniary loss – 533.5 days (half of 1067) / 365 x £61,490 x 8% = **£7,190.12**.

58.3. Second period pecuniary loss – 369 days (1.7.20-5.7.21) / 365 x £20,000 x 8% = **£895.89**.

58.4. Third period – **no interest**.

59. Interest will immediately accrue on any unpaid judgment sum at the rate of 8%.
60. **[Issue 8]** Whether the Respondent should be responsible to pay to HMRC any tax due on the compensation awarded as the Claimant's employer or whether the Claimant should be responsible?
61. This was canvassed with the parties at the hearing. We acknowledge that the First Respondent remains the Claimant's employer and ordinarily would be responsible for tax.

ORDER

1. By **1 October 2021** the parties will notify the Tribunal of the agreed figures for an award including grossing up if one is required or in the event that any point remains in dispute, the basis for dispute, setting out each side's position in brief and an indication of whether the parties are content for this point to be resolved on the papers.

Employment Judge Adkin

Date 18/7/21

WRITTEN REASONS SENT TO THE PARTIES ON

19/07/2021.

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.