Case No: 1600772/2016 (V)

EMPLOYMENT TRIBUNALS

Claimant: Mrs J Climer-Jones

Respondent: Cardiff and the Vale University Local Health Board

Heard at: Remotely, by video

On: 22 July 2021

Before: Employment Judge S Moore
Mrs L Bishop
Mr P Bradney

Representation
Claimant: In Person
Respondent: Ms C Davis, Queens Counsel

RESERVED JUDGMENT ON REMEDY

1. The respondent is ordered to pay the claimant notice pay in the net sum of £2438.10.
2. The respondent is ordered to pay the claimant the sum of £5333.93 in respect of holiday pay accrued but unpaid upon her dismissal.
3. In accordance with S123 and S124 Employment Rights Act 1996, the respondent is ordered to pay the claimant a total of £115,759.66 in relation to the compensatory award.
4. This comprises of the net sum of £44,465.52 for the immediate loss of wages between 22.6.16 - 22.7.21 and the net sum of £60,770.54 for the claimant's future loss of wages between 23.7.21 - 22.7.23 (£105,236.06). The compensatory award shall be subject to an uplift of 10% for failure to follow the ACAS Code of Practice on Grievance Procedures.
5. The Employment Protection (Recoupment of Benefit) Regulations 1996 apply to this award. The prescribed element is £44,465.52 attributable to 22.6.16 - 22.7.21. The total monetary award is £123,531.69. The amount to be paid to the claimant, pending recoupment of benefit, is £79,066.17.
6. The respondent is ordered to pay the claimant the sum of £23,259.09 in respect of expenses.
7. The respondent is ordered to pay the claimant the sum of £27,000 for injury to feelings and £14,149.47 interest accrued.
8. The Respondent is ordered to pay the Claimant £4,000 aggravated damages.

9. In respect of the personal injury claim the Respondent is ordered to pay the Claimant the sum of £5,500.
10. The Respondent is ordered to pay the claimant interest on the aggravated damages and personal injury award in the sum of £2488.22.
11. The Respondent is ordered to pay the claimant the sum of £42,151.01 in respect of tax payable on the award ('grossing up').

REASONS

Background and Introduction

1. This is the reserved second part of the Judgment on remedy following the reserved first remedy Judgment dated 15 April 2021. That judgment set out headline findings and awarded amounts for injury to feelings, aggravated damages and personal injury damages. These are all included above for sake of completeness and to ensure appropriate grossing up and interest amounts are clarified all in one judgment.

2. By directions dated 11 May 2021 the parties were ordered to agree some draft orders in respect of assessing pension loss and submit these to the Tribunal on or before 1 June 2021. An position paper concerning remaining areas in dispute was directed to be lodged with the Tribunal on or before 22 June 2021.

3. Since the promulgation of the first remedy judgment, the respondent has lodged an appeal with the Employment Appeal Tribunal and the claimant has cross appealed. The respondent's request for reconsideration of the remedy judgment was refused in a judgment dated 12 May 2021.

4. The respondent sought permission to delay compliance with the orders (see paragraph 2 above) pending the outcome of the appeal and reconsideration. This was refused by EJ Moore and the date for compliance with the above orders was varied (as neither party had complied) to 15 July 2021.

5. The respondent duly filed a position paper on 15 July 2021 and an updated paper on 19 July 2021 in response to the claimant's position paper. The position papers had not been agreed and no draft orders in respect of assessing pension loss were submitted by either party.

6. The second stage remedy hearing was heard on 22 July 2021. The decision was reserved. The Tribunal has reached a decision on all outstanding matters save for pension loss which they have decided of their own initiative requires reconsideration and the claimant's costs application. The parties have been written to separately about this. The pension loss element of remedy and the claimant's costs application are stayed, pending the outcome of the appeals.

7. On 21 May 2020, the respondent had paid the claimant the sum of £4671.50 in respect of the basic award and loss of statutory rights, pursuant to a consent order.

8. The following issues remained between the parties:

a) Notice pay and overpayment of salary 21-30 June 2016;
b) Compensation in respect of accrued but untaken annual leave;
c) Loss of earnings from date of dismissal to date of remedy hearing;
d) Future loss of earnings;
e) Acas uplift;
f) The Claimant's claim for reimbursement of expenses.

9. The Tribunal did not hear any further witness evidence. There was a revised bundle of 593 pages.

10. Prior to the hearing the claimant had informed the Tribunal by email dated 20 July 2021 that she had been unwell and required intervention from her GP and mental health services. The Tribunal asked the claimant to confirm she was well enough to take part in the proceedings and the claimant confirmed she was and wished to proceed.

Conclusions

Notice pay

11. The parties agreed the notice pay calculation set out on the respondent's position paper. The sum agreed was £3,189.62 gross and £2,438.10 net which sets off the overpayment of salary from 21 – 30 June 2016.

Annual leave

12. The respondent continues to maintain that holiday pay should be paid based on the claimant's basic rate of pay. We reject this for a second time and remind the respondent again that compensation for this head of loss is calculated under S49 (2) ERA 1996 as it was a detriment claim (this claim was not brought as a holiday pay claim under S13 ERA or WTR - see paragraphs 605 – 613 of the liability judgment and 121 – 129 of the first stage liability judgment).

13. In paragraph 4 of our first judgment on remedy we ordered the respondent to pay the claimant her outstanding holiday pay for the years 2014 – 2015, 2015 – 2016 and 2016 – 2017. The first and last year were subject to pro rating as the claimant had taken some leave in 2014 and left part way through 2017.

14. The parties had not been able to agree how many hours the claimant had accrued. The claimant submitted she had accrued 439.50 hours. The respondent's figures had been calculated by the NHS Shared Services Partnership ("Shared Services") who provide support to the respondent and other health boards including administering and calculating annual leave payments to staff. Shared services calculated the claimant had accrued 468.35 hours which based on the Tribunal's findings in respect of

gross pay and net pay at the time of dismissal amounted to £9,029.25 gross and £5,333.93 net.

15. We accepted the figures calculated by shared services. They are responsible and experienced in administering the calculations and had provided the calculations based on the Tribunal's findings in respect of salary.

Loss of earnings from date of dismissal to 22 July 2023

16. In the position paper for this second hearing, the respondent cited the claimant's calculation in her schedule of loss for the compensatory loss between date of dismissal and date of the first remedy hearing. In this schedule of loss provided on 10 March 2021 (pages 197-200 of the bundle prepared for the first stage Remedy Hearing), the claimant indicated that during the period 21 June 2016 to 1 March 2021 she would have earned £131,787.18 net had she still been employed by the respondent and that she actually earned £101,524.40 net in mitigation giving a net loss for this period of £30,262.78.

17. The claimant's calculation of her loss of earnings did not reflect her actual loss sustained for two reasons. Firstly it did not take into account of any annual basic salary increase or allowance increase during the period of immediate loss. Secondly, as we found at paragraph 13 of our first judgment on remedy, the net pay had been calculated by a monthly division instead of weekly. Therefore if we used the claimant's figures this would not result in a calculation of the award by reference to the loss sustained as required by S123 ERA 1996.

18. At the date of the dismissal on 21 June 2016, the claimant's gross annual pay was £36,282.19 which equates to £697.73 per week gross and £535.92 net. This included basic pay and various enhancements for unsocial hours. The claimant was a Band 5 nurse at the top of the scale.

19. The claimant was employed on a 0.96 FTE equivalent.

20. We were not provided with a breakdown of the additional allowances and whether they increased year on year with annual pay awards. Evidence of the annual salary increases for band 5 nurses was included in the bundle (up to and including 1.4.22). These provided for annual increase of between 1 – 1.03% during the relevant period. The increases took place each year from 1 April.

21. Taking a broad brush approach, in order to calculate the claimant's loss between date of dismissal and the date of the remedy hearing we have applied a 1% annual increase year on year starting with the total salary as at date of dismissal. We conclude this is the most appropriate way of assessing the loss of earnings since the dismissal. The following table sets out the claimant's projected loss of earnings between the date of dismissal and date of the second remedy hearing.

22. The net amounts have been calculated using an online tax calculator.

Period	Annual gross salary assuming a 1% year on year payrise	Annual net salary	Weekly net loss	Annual loss
21.6.16 – 31.3.17 (40.5 weeks)	36282.19	27867.84	535.92	21704.76
1.4.2017 -31.3.18[1]	36645	28200.08	542.31	28200.08
1.4.2018 -31.3.19	37011	28550.16	549.04	28550.16
1.4.2019 -31.3.20	37381	28956.72	556.86	28956.72
1.4.2020 -31.3.21	37754	29314.52	563.74	29314.52
1.4.2021 -22.7.21[2]	38886.62	30106.86	578.98	9263.68
Total loss to hearing				145,989.92

23. The claimant received the sum of £496.55 job seekers allowance for the period 16 December 2016 to 13 January 2017. There was also reference to the claimant being in receipt of Employment Support Allowance prior to the remedy hearing but despite requests the Tribunal has not been advised of when the claim began, its duration and the amounts.

24. Since the claimant's dismissal she has earned the sum of £101,524.40 in the various roles she has undertaken. This sum was verified by HMRC records in the bundle for all of her various roles since dismissal.

25. Her last period of work ended on 21 February 2021.

26. The claimant has not worked since February 2021. In her position paper the claimant says this is due to increased anxiety and stress and that she recently suffered a mental relapse with suicidal thoughts. She had an emergency appointment with Gabalfa Mental Health Services and a face to face GP appointment on 13 July 2021. She is now on a waiting list for distress management.

[1] Applying the 1% increase from the previous year

[2] This requires a 3% uplift see paragraph 29 below (37754 as at 31.3.21 would have received a 3% pay increase for the tax year 2021-2022 applying a 16 week period to date of hearing)

27. The net amount of loss for the period to the remedy hearing is therefore £44,465.52 (145,989.92 - 101,524.40).

Future loss of earnings

28. Our conclusions in respect of future loss were set out at paragraphs 177-184. We have noted some typographical errors in a number of paragraphs and have issued a certificate of correction and corrected judgment. Our conclusions remain that the claimant should be awarded two years future loss. For the avoidance of doubt, we concluded that the claimant will not be in a position to work in any role for two years because of the reasons set out at paragraph 179- 181.

29. The claimant submitted evidence that the Welsh government announced that Welsh NHS staff will receive a 3% pay rise backdated to April 2021 for the pay period 2021 – 2022. This was in the form of a link to the NHS website setting out the pay award announced by the government and a press article quoting the Welsh Health Minister as accepting the recommendations of the NHS Pay Review Body. We accepted this evidence.

30. We have calculated the future loss as follows.

31. From 23 July 2021 to 31 March 2022 the net weekly loss is £578.98 @ 36 weeks which amounts to £20843.28.

32. The annual pay increase for NHS staff for 2022-2023 is not settled. Taking a broad brush approach, we have averaged the annual pay increases between 2016 and 2021 which have been 1% each year except for 2021/22 which was 3%. This equates to 1.33%. Between 1 April 2022 – 31 March 2023 this would equate to an annual gross salary of £39392.15 (£38886.62 x 1.3%). Using the online tax calculator this amounts to a net annual salary of £30450.62 and a net weekly salary of £585.59.

33. In respect of the period 1.4.2023 – 22.7.2023 we apply the same principles. Therefore we apply a likely pay increase of 1.3% to the 2022 salary of £39392.15 which equates to £39904.25. Applying an online tax calculator this gives a net annual salary of £30798.85 and a net weekly salary of £592.29. If we multiple this by the number of weeks during this period (16) this amounts to a net loss of £9476.64.

34. In assessing the future net loss we acknowledge that the online tax calculator would assess the net sum based on this year's tax figures but there was no plausible alternative available as the future tax allowances are not yet published.

35. Accordingly the future net loss is:

Period	Amount
23.7.21 – 31.3.22	20843.28
1.4.22 – 31.3.23	30450.62
1.4.23 – 22.7.23	9476.64
Total	60770.54

36. Both the immediate loss and future loss elements require to be adjusted upwards by 10% for the failure to follow the grievance procedure. The equates to £48,912.07 and £66, 847.59. The total compensatory award is therefore £115.759.66.

Expenses

Petrol costs

37. The Tribunal found at the first remedy hearing that the claimant should be awarded petrol costs in respect of journeys she undertook whilst mitigating her loss (see paragraphs 160-167). Some of these journeys were made in a hire car and some were in the car she purchased. The hire car journeys were for the period 16 January 2017 to 9 January 2019 at which point she purchased a car. This was dealt with in the Tribunal's order dated 29 June 2021 where the claimant was directed to provide a schedule setting out the mileage claimed including start and end of the journey (including the name of the hospital where appropriate), date and number of miles claimed. It also had to show whether the journeys were taken by hire car or the claimant's own vehicle.

38. The respondent's representative had agreed in correspondence with the claimant that the HMRC rate of 45 pence per mile was agreed (email dated 12 May 2021). Ms Davis subsequently made submissions at the hearing that petrol costs should be treated differently depending on whether they were incurred in a hire car or the claimant's own vehicle. This is because the HMRC mileage rate of 45 pence per mile includes wear and tear which according to Ms Davis would not be applicable to a hire car. Ms Davis submitted that it would plainly perverse and double recovery not to discount the hire car costs to reflect this issue. The problem with this submission is that it was contrary to what had been agreed by the respondent's instructed solicitor and we had no alternative rates put forward by the respondent as to what rate we should award for petrol costs when using a hire car. The HMRC rates in the bundle did not differentiate rates for a private car and a hire car. The only evidence we had before us, which had been agreed, was that HMRC rates were 45 pence per mile. The claimant had specifically pointed this out to the instructed solicitor prior to this being agreed.

39. On this basis we award the mileage costs at the rate agreed by the parties prior to the hearing @ 45 pence per mile.

40. The respondent had agreed the majority of the expenses claimed save for those that were marked in red in the updated spreadsheet sent to the Tribunal on 22 July 2021. These were resisted on the basis the claimant had allegedly not provided any evidence of the journey concerned. We asked Ms Davis to clarify the submission there was no evidence as meaning there was no documentary evidence as the claimant had given witness testimony of those journeys. Ms Davis confirmed this was her meaning when she referred to there being no evidence and that the respondent's representative had spent many hours checking the bundle for the documentary evidence of these journeys but been unable to find any.

41. The disputed journeys were all whilst working as an agency nurse with Randstad and then Greenstaff (under the umbrella arrangement with Orangegenie) as follows:

a. 2 – 29 July 2019 between the claimant's home and the Royal Gwent Hospital in Newport;
b. 3 August 2019 and 19 December 2019 between the claimant's home and Morriston Hospital, Swansea; and one journey to Neath Port Talbot Hospital on 24 August 2019;
c. 11 January 2020 – 2 February 2020 between the claimant's home and Princess of Wales Hospital, Bridgend;
d. 2 journeys of 1.3 miles each between the claimant's accommodation in Blackpool and Blackpool Victoria Hospital on 6 and 7 November 2020;
e. 7 December 2020 – 10 December 2020 journeys between the claimant's home and accommodation in Oldham then between the hospital during her stay in Oldham;

42. We revisited the claimant's witness statement prepared for the purpose of the first remedy hearing. The claimant had prepared a spreadsheet of her assignments with the agency that was referenced in her statement and included in the bundle. There were also a large number of timesheets provided by the claimant in the bundle for the various placements as well as invoices for accommodation. We noted that there was correspondence in the bundle from the claimant stating that she had provided the timesheets and accommodation invoices to the respondent in date order. For reasons we are unclear on, they had not subsequently been placed into the bundle in that chronological order and were also in different sections of the bundle. This had meant that in order to produce the schedule we ordered, the claimant had to cross reference the 2630 page bundle, locate the timesheets that were placed in different sections and then provide a page number for each journey that evidenced that particular journey. In respect of the disputed journeys the claimant had not been able to provide a reference number for any documentary evidence in the bundle. The respondent was critical of the claimant in this regard and alleged it had been impossible to cross refer documents to the schedule of loss. Given that the claimant had initially provided her documents in a chronological structure this criticism was not well founded.

43. We were not taken to any actual timesheets showing the claimant had worked at the Royal Gwent Hospital between 2 – 29 July 2019. We did however have sight of the claimant's bank statements for 13 June 2019 – 12 July 2019 which demonstrated an income from Orangegenie that matched the wages the claimant says she received for her placements at the Royal Gwent Hospital. The pay slips do not show a breakdown individual assignments. Bank statements in the bundle show payments made on the claimant's bank card on 8 and 9 July 2019 to the Royal Gwent hospital which corroborates the claimant was physically present at the hospital.

44. The same can be said for the journeys made to the August to December 2019 journeys to Morriston Hospital. We noted card payments made by the claimant at Morriston Hospital on 3, 4, 9, 11 August 2019, 2, 23, 30 November 2019 and 1 December 2019 all of which in our judgment also

corroborates the claimant's witness evidence that she worked at the hospital, mitigating her loss on these dates.

45. The claimant had stayed in an Airbnb accommodation in Blackpool between 5 -9 November 2020 whilst working at the Blackpool Victoria Hospital. It was reasonable to conclude that on 6 and 7 November 2020 the claimant would have commuted by car between her accommodation and the hospital in order to work her shifts. It was not reasonable nor was it proportionate to dispute these journeys based on the evidence.

46. We had sight of an invoice from the Premier Inn[3] in Oldham confirming the claimant had stayed there between 8 – 11 December 2020 which marries with the journey costs disputed above. It was reasonable to conclude that if the claimant was working in Oldham and could evidence she was staying at the Premier Inn in Oldham that she would have incurred the mileage claimed when she drove her car from her home to the Premier Inn in Oldham and also drive to and from the hospital. It was not reasonable nor was it proportionate to dispute these journeys based on the evidence.

47. In light of the above evidence and the claimant's witness evidence that she worked at the hospitals between these dates and has declared that income for the purpose of mitigation, we accept that the claimant worked at the hospitals concerned on these dates and would have used her car to travel to the hospitals.

48. We award the claimant the petrol costs sought in the sum of £12583.20.

Car Hire

49. Between 6 February 2017 and 9 June 2017 the claimant shared journeys to work with her husband in the hired car. The respondent submitted that it would be perverse not to take into account that Mr Climer Jones had the benefit of the hire care and inconceivable that it would be used solely for work journeys.

50. However, as set out in paragraph 70 of the first judgment on remedy, the claimant had already acknowledged the car had been shared with Mr Climer Jones for the work journey when they both travelled to Ebbw Vale in 2017. This is why she had discounted the hire car costs by 50% to £794.81.

51. The claimant incurred hire car costs in respect of journeys she undertook to travel to agency assignments in the sum of £2636.89. These journeys were not shared with Mr Climer Jones.

52. We therefore award a total of £3431.70 in respect of hire car charges.

Car purchase

53. We award the sum of £1400 in respect of the car purchase (see paragraph 118 of the first remedy judgment).

[3] Page 1017 of remedy bundle 1

Accommodation and bridge tolls

54. We award the sum of £3,380.45 for the cost of accommodation necessary whilst working away from home on agency placements.

55. We award the sum of £79.30 in respect of Severn Bridge tolls incurred whilst travelling away from home on agency placements.

Child care costs

56. We refer to our findings of fact at paragraph 46 of the first remedy judgment. We found that prior to her dismissal the claimant had not needed child care but due to the times and geographical locations of her roles since dismissal has needed childcare. The claimant incurred child care costs from Bluedoor Nursery in the sum of £889.33 and Playworks and a childminder in the sum of £1120.31. We award the sum of £2009.64 in respect of this head of claim.

Online training, uniform and DBS checks

57. The online training amounted to £66. The uniform was £47. The DBS checks for different agencies amounted to £261.80.

Grossing up

58. The portion above £30,000 requires to be grossed up in accordance with section 401 of the Income Tax (Earnings and Pensions) Act 2003. Based on the information before the Tribunal, and on the basis that the Claimant has had no income in the current tax year, using the Welsh tax rates for the tax year 2021/2022, the relevant calculation is as follows:

Tax Band	Rate	Calculation	Tax
Up to £12,570	0%	-	-
£12,571 - £50,271	20%	37700 * 20%	7540
£50,270 - £100,000	40%	49,730 * 40%	19892
£100,000 - £124,531.69	60%	24,531.69* 60%	14,719.01
Total			42,151.01

59. The awards that are required to be included for the purpose of grossing up are the notice pay, holiday pay, basic and compensatory award, injury to feelings and aggravated damages. The total amounts to £154,531.69. The personal allowance is tapered where earnings exceed £100,000.

60. The basic award was paid to the claimant in May 2020 under a consent order. We therefore have not included that award in the grossing up calculation.

61. We firstly deduct the tax free threshold of £30,000 from £154,531.69. The sum to be grossed up is £124,531.69.

62. The personal allowance is tapered where earnings exceed £100,000. Every £2 earned above £100,000 will reduce the personal allowance by £1 which means the personal allowance is reduced once the employee earns £125,140.

63. We have accounted for this in the calculations by applying a 60% tax band between £100,000 and £124,531.69 to avoid a proportion of the personal allowance rate being moved into a 40% tax band.

Interest

64. The first stage reserved remedy judgment was issued with a notice under the Employment Tribunals (Interest) Order 1990. This was an error as it was intended to be a headline judgment. Accordingly the relevant decision day is the date this judgment is promulgated.

65. In respect of the injury to feelings award the date of the first detriment was 27 September 2013. The calculation date is 7 October 2021. There are 2391 days between these two dates. We did not receive submissions that applying this calculation would cause serious injustice. We calculate the interest to be £14,149.47 applying the interest rate of 8%.

66. In respect of the aggravated damages and the personal injury the interest is to be calculated from the mid point to the date of calculation. Therefore, applying the aggregate of the two awards at £9500 at 1195 days we calculate the interest to be £2488.22.

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Employment Judge S Moore

Date: 18 October 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON 4 November 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche