# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs N Hefford**

**Respondent:** **Dr M Jack and others**

**Heard at :** **East London Hearing Centre**

**Date :** **19 November 2021**

**Before:** **Employment Judge McLaren**
**Members:** **Mrs. B Saund**

**Representation:-**
Claimant In person
Respondent: Ms G Crew, Counsel

## JUDGMENT FOLLOWING A RECONSIDERATION and COSTS APPLICATION

1. Following a reconsideration of the judgment of 11 June 2021 the claimant is awarded £313,672.36

2. The claimant's application for a preparation time costs order is refused

# REASONS

Background

1. This matter had been the subject of a separate liability and remedy hearing. At the remedy hearing the parties had consented to proceeding with one member only.

2. At that hearing we made the following awards, £260,271 as a compensatory award which includes:

   a. an uplift of 25% for failure to follow the ACAS code

b. £30,00 by way of injury to feelings

c. Aggravated damages of £5,000

d. Interest calculated at £3123

and in addition

e. £ 12,000 bonus pay

f. £9,300 payment for unpaid overtime

g. £12,801.72 as pay in lieu of notice

3. The remedy judgement was sent to the parties on 11 June 2021. On 15 June 2021 the respondent applied for reconsideration of the judgement. The claimant also applied for reconsideration of the judgement on 16 June.

4. In her application for a reconsideration, the claimant also repeated her application for a preparation time order to be made in her favour.

5. As the remedy judgement was heard with only one member, the reconsideration hearing is accordingly also held with one member. In reconsidering our previous decision, we took into account the applications made in writing by both parties supported by submissions from Mrs Hefford and from Counsel on behalf of the respondent. We set out below the applications and our decision.

The respondent's application for reconsideration

6. The respondent's application was as follows:

> "The Judgment records a total figure of £294,372.72. We believe this is incorrect and the remedy as recorded at the hearing on 12th May was £260,221.72.
>
> The breakdown and calculations used to come to this figure are as follows:
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> Figures
>
> Gross Pay - £923.08 (£48,000 per annum / 52)
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> Net Wage - £695.00
>
> Employer Pension Contribution - £143.73 (the Tribunal determined that the Claimant wouldn't have either left the scheme if not subjected to the treatment and/or would have joined the scheme again when she returned from maternity leave in January 2020). This calculation is based upon the increase contribution to 20.68%. This is the rate the Claimant would have received.
>
> Financial Awards
>
> Bonus £12,000

CCG Overtime £9,300

Notice Pay £12,801.72 (12 weeks pay at £923.08 plus pension loss of £143.73)

These are all gross payments. The Claimant will need to account for her own tax and NI. Total financial award - £34,101.72.

Compensation and Injury to Feelings

The compensatory period is from 01.01.20 – 31.12.22. This is broken down into three periods:

i. 01.01.20 – 31.05.21 – This is 99 weeks at £839 per week (£695 net wage plus £143 pension loss). This equates to a figure of £83,061 less income received of £1,720 (SMP received in January – March 2020)) and £10,661 (income from casual employment throughout the period). Total award for past losses - £70,680

ii. 01.06.21 – 31.12.21 – Maternity Pay of £8,025. This is 90% of the Claimant's wage at £923 for six weeks which is £4984 and a further 20 weeks SMP at £152 per week

iii. 01.01.22 – 31.12.22 – This is 52 weeks at £839 (£695 net wage plus £143 pension loss). This equates to £43,628 less potential future income of £5,300 (Tribunal found that the Claimant would likely earn half of what she has already earned from casual employment). Total award for future losses - £38,328.

Total compensatory award - £117,033 (£70,680 + £8,025 + £38,328)

The Tribunal applied a 25% uplift for failure to follow ACAS Codes of Practice. This equated to £29,258

This brings the total losses compensatory award to £146,291 (£117,033 + £29,258)

Injury to Feelings - £30,000

Aggravated Damages - £5,000

Interest - £3,123. Interest is calculated at 8% per annum. Interest began on 1st April 2019 which was the start of the discriminatory treatment. The daily interest rate on £35,000 (injury to feelings and aggravated damages) is £7.67 (£35,000 x 8% / 365). From 1st April 2019 – 12th May 2021 is 407 days. £7.67 x 407 = £3,123.
Thus the total compensatory award is £184,414 (£146,291 + £38,123)

This needs to be grossed up as the Claimant will pay tax on these elements and the figures are calculated using net figures. 40% is the gross up figure given that the Claimant will be a higher tax payer this year through the award. The £30,000 tax free allowance is deducted (as the Claimant gets tax free sum of £30,000 from any award). The figure to gross up is therefore £154,414. Gross up figure is £61,765 (£154,414 x 40%).

Thus the total compensatory award is £246,120 plus the £34,101.72 (financial loss – bonus, CCG etc) brings a total of £280,221.72

Less interim payment of £20,000.

Total Award to Pay - £260,221.72."

7. Ms Crew took us through the detail of this application, and we compared this with the notes we had taken during the remedy hearing. We agree that the judgment issued on 11 June 2021 is incorrect. In essence the financial liabilities of bonus pay, unpaid overtime and pay in lieu of notice have been added twice. The total compensation that should have been awarded on 11 June hearing is £260,271, being £246,170 as a compensatory award and £34,101.72 for the bonus pay et cetera giving a total of £260,271. In error the total of £294,372.72 was awarded.

<u>The claimant's application for reconsideration</u>

8. The claimant's grounds for reconsideration were application as follows

"NET WEEKLY SALARY FOR FUTURE LOSSES

I can't quite understand why the net weekly salary would be reduced to account for my employee pension contributions. This has had the effect of giving my own pension contributions to the respondent. In reality, those contributions would go into my pension which, upon retirement, I would receive. It's not a payment to the employer or a fee to some external body. It's essentially my own savings for retirement from my own salary. So, why would the respondent be given a discounted rate to pay future losses based on a reduced net weekly pay by deducting my employee pension contributions? Surely this is an error? The net weekly salary used in all calculations should be the net weekly pay I was due, net of NI and Tax, not net voluntary deduction to my own pension.

FUTURE ASSUMED BONUS

The contractual annual Bonus does not appear to have been accounted for in the future losses calculations. It is not clear without the written decision whether the panel considered this element and opted to dismiss it or if it was missed. It was not mentioned at all and there was not time to request deeper descriptions of the decisions made and why at the hearing. I believe this element should have been included in the future losses calculations. I was able to achieve £12,000 of the contractual bonus in the

year I was dismissed, despite the lengthy discriminatory campaign, therefore it is reasonable to assume I would have been capable of achieving similarly in future earnings.

FUTURE ASSUMED CASUAL EARNINGS

The Respondent's solicitor brought a new argument after the consideration period and judgement had been made, and during the calculation time. The argument was for a reduction to future losses to account for "assumed future casual earnings". This had not been discussed at all in the original arguments or submissions but was accepted and calculated on the fly in the final few minutes. I am unclear why the bonus element was not included in future losses but assumed future casual earnings was included as a deduction to future losses, and why this argument was entertained at all so last minute with no time to counter argue. I'd be grateful of a review of this decision.

ANNUAL LEAVE ACCRUED DURING MATERNITY LEAVE

It was discussed in submissions that annual leave should have accrued during my past maternity leave of 6 months in 2019 as part of the past losses portion of compensatory award. This argument was accepted verbally but somehow was missed in the final calculations. The accrual in this period would be 19 days, or 3.8 weeks."

9. The claimant raised one further point at today's hearing. She has been compensated for future pension loss which arose once her employment ended. However, she asked the tribunal to reconsider making an award of the employer pension contributions for the period prior to her employment ending in which she had to leave the scheme. She had given evidence that she had left the pension scheme to get a refund of her own contributions. This was to give her a cushion to live on as she feared she would have no money coming in once she had the baby as she thought job loss was likely. She had been returned her own contributions but, because she had been in the scheme for less than two years, there had been no refund of the employer contributions. For future loss she has been awarded the employer contributions and she could see no reason why this should not apply to the period prior to the end of her employment.

Oral Submissions And Conclusion

10. The respondent conceded that the claimant was correct about the way pension contributions should have been calculated when looking at her weekly pay. The claimant submitted, which was accepted, that the pension contribution should be calculated on her gross pay. When awarding future loss the correct calculation was her net weekly pay, plus the pension contribution calculated as a percentage of gross weekly pay. This would increase the weekly pay figure. As this had been conceded we accept that the figure should be recalculated to take this into account.

11. The claimant asked for future assumed bonus and submitted that she would have earned the maximum, that is £20,000. She was able to earn £12,000 when she was the victim of discrimination and pregnant and therefore was confident that her performance without those factors would have allowed her to achieve the

maximum targets. She also submitted that Covid circumstances have increased a GP's practice ability to earn additional sums. The respondent's counsel submitted that Covid could have depressed matters as well as increased them and it was difficult to say. The best guide to future performance is past performance.

12. We considered the point and noted that the bonus scheme could have been changed at any time by the respondent. There is therefore an element of uncertainty as to how the bonus scheme, if any, would have continued. We note that the claimant says her performance was impacted by the treatment she received ,but also consider that her future performance may have been impacted by other matters, such as her domestic circumstances now having two children. We are unable to determine whether Covid would mean that a bonus scheme was likely to be increased or decreased. In all the circumstances we consider that the interests of justice are best served by using past performance as an indicator of future performance and therefore award the claimant £12,000 future lost bonus.

13. On the topic of future assumed casual earnings, the claimant submitted that the sum she had earned through casual work was over 18 months not a year that she had done so when she had only one small child. She felt it was unlikely she would be able to achieve the same level of earnings with two small children. We considered the point and concluded that the future loss from which these earnings have been deducted is the period in which we expect the claimant to be looking for work and have assumed she will be able to do so, despite her family commitments. On that basis is not unreasonable to expect her to be able to earn at least half of the sum she could earn previously. We conclude that making a deduction of £5,300 as part of our calculation of future loss was reasonable and appropriate. The decision on this point stands.

14. The claimant withdrew her request for payment of accrued leave during maternity and we therefore have not considered this.

15. We have considered her request for payment of employer pension contributions for the period during which she remained employed but was not in the pension scheme. We conclude that the compensatory award awards money from the date employment is lost going forward. It does not address compensation for financial loss prior to termination. That has been dealt with appropriately in the award of injury to feelings.

Remedy calculation

16. The remedy calculation therefore needs to be recalculated to include a higher weekly pay and a further bonus payment. The Claimant is therefore awarded compensation of £313,672.36 calculated and set out below and agreed by the parties

Figures

Gross Pay - £923.08 (£48,000 per annum / 52)
Net Wage - £695.00
Employer Pension Contribution - £190.89 (the Tribunal determined that the Claimant wouldn't have either left the scheme if not subjected to the treatment and/or would have joined the scheme again when she returned from maternity leave in January 2020).

This calculation is based upon the increase contribution to 20.68%. This is the rate the Claimant would have received.

Financial Awards

| | |
|---|---|
| Bonus | £12,000 |
| CCG Overtime | £9,300 |
| Notice Pay | £12,801.72 (12 weeks pay at £923.08 plus pension loss of £143.73) |

These are all gross payments. The Claimant will need to account for her own tax and NI. Total financial award - £34,101.72.

Compensation and Injury to Feelings

The compensatory period is from 01.01.20 – 31.12.22. This is broken down into three periods:

i. 01.01.20 – 31.05.21 – This is 99 weeks at £885.89 per week (£695 net wage plus £190.89 pension loss). This equates to a figure of £87,703.11 less income received of £1,720 (SMP received in January – March 2020)) and £10,661 (income from casual employment throughout the period). Total award for past losses - £75,322.11
ii. 01.06.21 – 31.12.21 – Maternity Pay of £8,025. This is 90% of the Claimant's wage at £923 for six weeks which is £4984 and a further 20 weeks SMP at £152 per week
iii. 01.01.22 – 31.12.22 – This is 52 weeks at £885.89 (£695 net wage plus £190.89 pension loss). This equates to £46,066.28 less potential future income of £5,300 (Tribunal found that the Claimant would likely earn half of what she has already earned from casual employment). Tribunal also awards £12,000 for future bonus. Total award for future losses - £52,766.28

Total compensatory award - £136,113.39 (£75,322.11 + £8,025 + £52,766.28)

The Tribunal applied a 25% uplift for failure to follow ACAS Codes of Practice. This equated to £34,028.35

This brings the total losses compensatory award to £170,141.74 (£136,113.39 + £34,028.35)

Injury to Feelings - £30,000
Aggravated Damages - £5,000
Interest - £3,123. Interest is calculated at 8% per annum. Interest began on 1st April 2019 which was the start of the discriminatory treatment. The daily interest rate on £35,000 (injury to feelings and aggravated damages) is £7.67 (£35,000 x 8% / 365). From 1st April 2019 – 12th May 2021 is 407 days. £7.67 x 407 = £3,123.

Thus the total compensatory award is £208,264.74 (£170,141.74 + £38,123)

This needs to be grossed up as the Claimant will pay tax on these elements and the figures are calculated using net figures. 40% is the gross up figure given that the Claimant will be a higher tax payer this year through the award. The £30,000 tax free allowance is deducted (as the Claimant gets tax free sum of £30,000 from any award). The figure to gross up is therefore £178,264.74. Gross up figure is £71,305.90 (£178,264.74 x 40%).

Thus the total compensatory award is £279,570.64 plus the £34,101.72 (financial loss – bonus, CCG etc) brings a total of £313,672.36

17. the parties agreed that the claimant had received payment of some of this money already. It was accepted that she had received payments of £20,000 and £14,430.65. The claimant said that she had received a further payment of £260,221, leaving a balance to pay of £19,020.71. The respondent needed to take instructions on this, but believed that it had paid £280,000. The parties are to consider this and either the claimant has been overpaid by around £700 or the respondent owes her a further £19,000.

Application for Preparation Time Costs Order.

18. The claimant had made a request for preparation time costs to be awarded in her favour in September 2019. Her grounds for doing so are set out below.

> "I write to make a Preparation Time request under rule 75(2).
>
> The respondents have most certainly met the required standards of Rule 76 (1)(a) for vexatious, abusive, disruptive, or unreasonable behaviour, as set out below:
>
> Throughout this case both in case management and in the hearing itself the respondent and their representatives have created a disproportionate amount of Preparation workload for the Claimant. This includes, but is not limited to the following;
>
> Rule 76 (1) (a) vexatious/unreasonable conduct Further information
>
> Mishandling evidence/ documents, Including failing to disclose relevant evidence. Missing items such as interview notes, documents handed to grievance chairs by the claimant during her employment and the full terms and conditions of the agreement between the respondent and Peninsula as per Judge Ross' order during both preliminary hearings.
>
> Mismanagement of the bundle, including failing to include documents supplied by the Claimant in case management Documents supplied by the claimant during case management did not appear in the final bundle. Time had to then be spent re-checking the entire 700 pages of evidence to identify what had been removed and make a request for these items to be recovered halfway through the hearing. In the new evidence supplied by the respondent for Remedy (page 115 paragraph 4), in an email written by Dr Sivaprasad, one of these documents is referred to in the following terms "the email she sent to be which she wanted including in the bundle" this language demonstrates the respondents position that organising the bundle is a position of authority over it's contents and that the claimant

might “want” items to be included, but the respondent chooses not to include them.

Last minute additions of 8/9 witnesses At the 14th July 2020 Preliminary hearing with Judge Ross the respondent claimed to have “4 or 5” witnesses. In an email on 23/07/2020 at 5:09 to the tribunal, the respondents claim to have 10 witnesses. When witness statements were exchanged on 24/07/2020 at 4:34 there were 13 witness statements. The date for exchange had been moved several times by the respondent thus leaving the unrepresented claimant with 13 witnesses to prepare to cross examine with only 2 weeks before the final hearing.

Inclusion of unnecessary/timewasting witnesses Many of the additional supporting cast witnesses were unnecessary and had nothing to add to the subjects being discussed. So irrelevant were 4 of these witnesses that they were never called for cross examination.

Including witnesses telling lies/exaggerating Louise Wells demonstrably lied in her evidence and other witnesses gave oral evidence which did not corroborate with their written statements. Janet Squired gave several statements which did not match other witnesses or her own previous accounts. Dr Sorouji offered fabricated theories about 2 doorways having some sort of vaccum between them in an attempt to suggest one cannot hear through doors, however another of the respondents own witnesses confirmed when confidential meeting take place both doors are closed and signage is placed to prevent anyone from entering the corridor between 2 doors, obviously because it is possible to enter the corridor and hear from the doorway. Given that the overheard meeting in question has been established to have taken place without refute from those present, this witness simply sought to misdirect the panel and was not offering truthful accounts.

Abusing the role of bundle collator to create an unequal footing in the lead up to the remedy hearing. The claimant approached the respondent’s solicitor to enquire what documents would be required for remedy and by what date these documents would be required. in order to get hard copies to all parties in time. The respondent suggested seeking advice elsewhere and confirmed the 2nd September as a deadline. The claimant duly provided remedy evidence by the 2nd September as requested. The respondent did not send hard copy the all parties on the 2nd September. Instead, the respondent and their representation met and discussed the claimant’s evidence and spent 2 days creating their evidence based on the evidence of the claimant. They gave themselves 2 days advantage in preparations. Their evidence provided in the remedy bundle is all dated 3rd and 4th September and specifically references the claimants evidence. This is a clear abuse of the system to create an unequal footing. The remedy bundle was posted on the 4th September.

Rudeness towards the claimant. Mr Chaudry demonstrated his rudeness during the hearing when he became angry at the claimant for not knowing how to respond to a last minute request for the respondent to immediately bring an extra witness who had not provided a witness statement for the hearing. My Chaudry also demonstrated his rudeness to the claimant in an email chain, attached below, wherein he refuses to comment on the

respondent's failure to collaborate on an agreed neutral reading list and accuses the claimant of wasting his time.

Therefore, the respondents have met the required standards of Rule 76 (1)(a) for vexatious, abusive, disruptive or unreasonable behaviour.

I have brought this request within the 28 day limitations set out in rule 77

As per rule 79 (1) (a) I estimate my time preparing for the 7 day hearing with 13 witnesses and a 700 page bundle to be in the region of 60 hours

As per rule 79 (2) and (3) the hourly rate is currently £33 and the estimated time spend is 60 hours therefore my preparation time request is for £1,980, or such figure as recalculated should the tribunal reach an alternative figure under rule 79(1)(b)."

Relevant Law re preparation time order

19. As the Court of Appeal reiterated in Yerrakalva v Barnsley Metropolitan Borough Council and Anor 2012 ICR 420, CA, costs in the employment tribunal are still the exception rather than the rule. It commented that the tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the tribunals power to specified circumstances. 23. The grounds for making a preparation time order under rule 76(1) of the Tribunal Rules are:

- a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof) ,or
- the claim or response had no reasonable prospect of success

20. Both of the above grounds are discretionary — i.e. the tribunal may make a costs (or preparation time) order if the ground is made out but is not obliged to do so. however, although the tribunal is under a duty to consider making an order when they are made out — rule 76(1).

21. In assessing whether a party's conduct was unreasonable, the tribunal should adopt a "range of reasonable responses" approach rather than substituting its own view (Solomon v University of Hertfordshire UKEAT/0258/18).

22. Even if the threshold tests for an order for costs are met, the tribunal still has discretion whether to make an order. That discretion should be exercised having regard to all the circumstances.

23. Costs are compensatory not punitive. A tribunal is not obliged by rule 84 to have regard to ability to pay — it is merely permitted to do so .Where a tribunal has been asked to consider a party's means, it should state in its reasons whether it has in fact done so and, if it has, how this has been done, it should say why. If it does decide to take into account ability to pay, it should set out its findings on the matter, say what impact these have had on its decision whether to award costs or on the amount of costs, and explain why.

24. Any assessment of a party's means must be based upon the evidence before the tribunal. The assessment does not need to be solely based upon a party's means as at the date the order falls to be made. The fact that a party's ability to pay is limited as at that date does not preclude a costs order being made against him or her, provided that there is a 'realistic prospect that [he or she] might at some point in the future be able to afford to do so".

Conclusion on costs

25. We considered the submissions made by both sides. The complaint as to the mishandling of evidence/documents, including failing to disclose relevant evidence and mismanagement of the bundle was dealt with by this tribunal at the full merits hearing. The claimant made an application to strike out respondent on this basis, which was refused, and we made a finding that the respondent's conduct had not reached the threshold of unreasonable conduct. This aspect of the matter has therefore ready be considered.

26. The last-minute additions of 8/9 witnesses and inclusion of a necessary time-wasting witnesses did not in fact extend the time of the listed hearing and was dealt with at the time. We find that it did not meet the threshold of unreasonable conduct.

27. The claimant complains that witnesses lied or exaggerated. We preferred the claimant's evidence to that of the respondents witnesses, but did not find that any witness had lied. We do not think that the contradiction in witness evidence is sufficient to meet the threshold of unreasonable conduct.

28. We have considered the email that the respondent's representative sent to the claimant in which he referred to her being at risk and considered that this is a relatively standard letter exchanged in the course of litigation. We considered the respondent's representatives conduct to the claimant during the hearing and this was not sufficient for us to make any note within our judgement. We did not find then, and do not find now, that his behaviour was unreasonable or vexatious sufficient to meet threshold.

29. We therefore conclude that no aspect of the respondent's conduct in this case was sufficient to amount to unreasonable or vexatious conduct and as the threshold has not been met, we make no order for preparation time costs.

**Employment Judge McLaren**
**Date: 19 November 2021**