Case Numbers: 2206291/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr N Matar

Respondents: Imperial College Healthcare NHS Trust (1)

Mr P Ziprin (2)

Heard at: London Central

On: 13, 14 & 15 October 2021

In chambers: 2 December 2021

Before: Employment Judge Khan
Ms C I Ihnatowicz
Ms E Flanagan

Representation
Claimant: Mr D Panesar QC, Counsel
Respondents: Mr S Keen, Counsel

JUDGMENT ON REMEDY

The unanimous judgment of the tribunal is that the respondents are ordered to pay the claimant as follows (the compensatory award to be grossed-up):

(1) A basic award of £3,048

(2) A compensatory award, compromising:
   a. Loss of statutory rights: £300
   b. Past lost of earnings: £78,796.77
   c. Annual leave: £8,369.26
   d. Pension loss: £15,199.58
   e. Injury to feelings: £30,000 (incorporating aggravated damages of £5,000)
   f. ACAS uplift: 12.5%: £16,583.20

(3) Interest of £25,751.40

REASONS

1. Having upheld the claims for age discrimination (in part) and unfair dismissal in our reserved judgment on liability dated 6 May 2021, the purpose of this hearing was to determine all remedy issues and also the parties' respective applications for costs. We used the time available to hear the evidence and submissions on remedy, having considered applications made by the claimant to strike out the response and for specific information/disclosure.

Relevant legal principles

2. Where, such as in this case, the claimant's dismissal has been found to be both unfair and discriminatory, the compensatory award should be made by the tribunal under the discrimination legislation (see *D'Souza v London Borough of Lambeth* [1997] IRLR 677).

3. Any award of compensation made under the Equality Act 2010 ("EQA") is to be assessed under the same principles that apply to torts (sections and 124(6) and 119(2) EQA). The aim is to put the claimant in the position, so far as is reasonable, he would have been in had the wrongdoing not occurred (see *Ministry of Defence v Wheeler* [1998] IRLR 23; and *Chagger v Abbey National plc* [2010] IRLR 47).

4. Causation and remoteness limit the damages available to a claimant: only those losses caused by the unlawful conduct will be recoverable. However, any loss proved to flow directly from the discriminatory act will be recoverable (see *Essa v Laing Ltd* [2004] ICR 746).

5. A claimant is expected to take reasonable steps to mitigate the losses they suffered as a result of the unlawful conduct. The burden is on the respondent to prove that there had been a failure to mitigate such losses (see *Fyfe v Scientific Furnishing Ltd* [1989] IRLR 331). The respondent must show not just that the claimant failed to take a reasonable step but that this failure was unreasonable (see *Wright v Silverline Car Caledonia Ltd* UKEATS/0008/16). A tribunal should therefore consider:

    (1) What steps the claimant should have taken to mitigate his losses
    (2) Whether it was unreasonable for the claimant to have failed to take any such steps
    (3) If so, the date from which an alternative income would have been obtained

6. Although credit must be given for any earnings received, the same does not apply to early receipt of a pension following dismissal (see *Knapton v ECC Card Clothing* [2006] IRLR 756).

7. Injury to feelings awards compensate for non-pecuniary loss. The award is intended to compensate for the anger, distress and upset caused by the unlawful treatment. The focus must be on the actual injury suffered by the claimant and not the gravity of the respondent's culpable acts (see *Komeng v Creative Support Ltd* UKEAT/0275/18/JOJ). In *Prison Service v Johnson*

[1997] IRLR 162, the EAT enumerated the following general principles applicable to an assessment of an injury to feelings award:

(1) Awards are compensatory in nature and should be just to both parties. They should compensate fully without being punitive.
(2) Awards should not be too low as that would diminish respect for the policy of anti-discrimination legislation. On the other hand, awards should be restrained.
(3) Awards should bear some broad general similarity to the range of awards in personal injury cases.
(4) Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or earnings.
(5) Tribunals should bear in mind the need for the public to respect the level of awards made.

8. In *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102, the Court of Appeal identified three broad categories or bands (i.e. lower, middle and upper) into which an award for injury to feelings shall fall, save in exceptional cases. The ranges of award for each of these bands is uprated each year by means of an Addendum to Presidential Guidance which was issued on 5 September 2017. The relevant guidance for present purposes is the First Addendum to Presidential Guidance (applicable to claims presented on/after 6 April 2018) which sets out the following ranges of award for the three *Vento* bands:

(1) Lower band: £900 to £8,600.
(2) Middle band: £8,600 to £25,700.
(3) Upper band: £25,700 to £42,900.

9. Aggravated damages may be awarded where the discriminator has acted in a high handed, malicious or insulting manner in relation to the discriminatory act itself or the way it was dealt with (see *Singh v University Hospital NHS Trust* EAT/1409/01). In *Commissioner of Police of the Metropolis v Shaw* [2012] IRLR 291 Underhill P (as he then was) identified the following three categories: (i) the manner in which the wrong was committed, (ii) the motive of the discriminator, and (iii) the subsequent conduct of the employer including the way that a grievance was investigated or proceedings conducted.

10. Exemplary damages fall be awarded in highly exceptional cases involving public authorities. They are recoverable if compensation is insufficient to punish the wrongdoer and if the conduct is oppressive, arbitrary or unconstitutional action by the agents of a government, or where the conduct is calculated to make a profit which exceeds the compensation payable to the claimant and the wrongdoing must be conscious and contumelious in nature (see *Kuddos v Chief Constable of Leicester Constabulary* [2002] 2 AC 122; and also *Ministry of Defence v Fletcher* [2010] IRLR 25).

11. Under section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 a tribunal has the power to increase by up to 25% any compensatory award it makes in relation to relevant proceedings where it finds that an employer has failed unreasonably to comply with a relevant

ACAS Code of Practice, which in this case is the ACAS Code of Practice on Disciplinary and Grievance Procedures, and it considers it just and equitable to do so. The ACAS Code's disciplinary provisions only apply in cases where there is culpable conduct or performance correction or punishment (see *Holmes v Qinetiq Ltd* UKEAT/0206/15; and also *Phoenix House Ltd v Stockman & Anor* UKEAT/0264/15/DM). When making an adjustment under this provision, a tribunal must take account of the absolute value of the uplift made and not simply the percentage award (see *Acetrip Ltd v Dogra* UKEAT/0238/18/BA; and also *Slade and anor v Biggs and ors* UKEAT/0297/19).

12. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Under regulation 2 the tribunal shall consider whether to award interest and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. Under regulation 6(1) the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation; and in the case of all other damages and past losses awarded, interest shall be for the period beginning on the mid-point date and ending on the day of calculation. Following the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 the rate of interest payable is 8%.

Discussion – the ultra vires issue

13. In evaluating remedy, it is necessary for us, as Mr Keen contends, to recast the world on the basis that the discrimination and unfair dismissal had not eventuated. Mr Keen also says that this exercise must be circumscribed by consideration of the steps which the parties could lawfully have taken.

14. The respondents' primary argument is that the continued employment of the claimant would have been ultra vires pursuant to the NHS (Appointment of Consultants) Regulations 1996 ("the 1996 Regs"). Mr Keen contends that it is therefore impermissible for us to proceed on the basis that the claimant would have continued to be employed after 23 May 2018 as a locum consultant. It is therefore contended that no pecuniary loss flows from the discriminatory treatment, unfair dismissal or wrongful dismissal. Mr Keen owned that this was an unattractive argument but one which was nonetheless bound to prevail. The respondents' secondary argument is that but for the discriminatory conduct and dismissal the claimant would have worked up to 60th birthday so that any pecuniary losses flowing from the date of termination should be restricted to that date, subject to our findings on causation and mitigation.

15. Mr Panesar says that the respondents' contention is not only unattractive but invalid. The claimant's primary case is that the ultra vires issue is not applicable to the facts because the claimant would have continued to be employed by the first respondent in another (i.e. vires) capacity, such as that promised to Mr Hakky (which did not materialise in his case). The claimant seeks post-termination pecuniary losses up to his 65th birthday.

16. Mr Keen referred us to *Shrewsbury and Telford Hospital NHS Trust v Lairikyengbam* [2010] ICR 66, in which the EAT held that the employment of L, who like the claimant was not on the Specialist Register ("the Register") and was employed as a locum consultant for more than 12 months, was ultra vires. The EAT also held, notwithstanding this conclusion, that L had been employed under a lawful contract of employment. Slade J reviewed the relevant authorities:

    (1) In *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2009] EWHC 862 (QB) a compromise agreement was held to be ultra vires because the sum agreed was irrationally generous. This was to be contrasted with *Eastbourne Borough Council v Foster* [2002] ICR 234, CA in which a compromise agreement was deemed to be ultra vires but in which F continued to be employed pursuant to this agreement. The court rejected the Council's argument that it was impermissible to imply a new contractual relationship between the parties. Rix LJ said this:

        > *"…Although it is impermissible to accord any validity to the compromise agreement and I agree that it therefore follows that no reliance can be placed on any promise or representation that merely reflects an alternative legal argument for binding the council to an undertaking that it had no power to give, nevertheless the conduct of the parties still exists in the real world and cannot be ignored for all purposes…*
        >
        > *"…Mr Foster's employment by the council continued, but on a new basis…it seems to me that not to accept that the relationship and status of employment continued is to acknowledge less than the reality of the situation demands, while at the same time to accept the reality of that relationship is to do no more than the invalidity of the compromise agreement allows…this solution does justice both to the facts that occurred, and to the doctrine of ultra vires and thus to the need to ignore, and not by other means to give effect to, the false formal basis upon which the parties mistakenly believed themselves to be acting."*

    (2) Citing *Craven-Ellis v Canons Ltd* [1936] 2 KB 403 (which was approved by the Court of Appeal in *Guinness plc v Saunders* [1990] 2 AC 663), a second case in which the status of a worker who continued working under a contract which was deemed in part to be ultra vires, Rix LJ continued:

        > *"where, as here, the relationship between the parties is best described as a relationship of employment the law must necessarily impose a contractual solution."*

    (3) Noting that the same approach was applied in *Foster*, Slade J commented that the court:

        > *"considered it necessary to make a distinction between the compromise agreement which was unenforceable as being ultra vires…and the necessity of recognising the reality that Mr Foster had worked for the council pursuant to the ultra vires agreement. The court held that such work was performed under a contract of employment."*

17. Applying the same approach, the EAT in *Lairikyengbam* similarly concluded that notwithstanding the continued employment of L as a consultant for more than 12 months, he was to be treated as performing his duties under a contract of employment during that period. This was premised on the following facts: the claimant was suitably qualified to occupy a consultant cardiologist post, was regarded as competent, there was no general prohibition on the trust which prevented it from employing him nor was there any suggestion that the parties did not view the relationship between them as one of employment. We find that each of these factors applied or would have applied had the claimant continued to work for the first respondent.

18. Mr Keen also took us to *Kings Castle Church v Okukuisie* UKEAT/0472/11/JOJ in which the EAT held a tribunal to have erred in failing to consider whether the claimant was entitled to work before going on to make an award of compensation for unfair dismissal under section 123(1) of the Employment Rights Act 1996 ("ERA"). In that case, O required leave to remain and to work in the UK and had neither which meant that he had no legal right to continue to work in the UK on a date some three months after the date of his dismissal which the tribunal had failed to take into account. We find that the claimant's case is distinguishable because he was able to work lawfully in the UK and also for the first respondent in the same way that F had in *Foster* and L had in *Lairikyengbam*, whereas for O there was an absolute bar (from the relevant date).

19. We are satisfied that the correct approach is to: firstly, make findings of fact on what would have obtained but for the wrongdoing we have found; secondly, consider the ultra vires issue; finally, consider causation (including mitigation).

The evidence

20. The hearing was a remote public hearing, conducted using the Cloud Video Platform (CVP) under rule 46. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. There were a number of intermittent connectivity issues which were resolved. In accordance with rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.

21. We heard evidence from the claimant.

22. For the respondents, we heard evidence from: Julie Eaton, formerly an HR Consultant; and Steve Russell, People Business Partner for the Surgery, Cancer and Cardiovascular Division.

23. There was a remedy hearing bundle of 934 pages. We agreed to admit a 25-page document which was relied on by the respondents against the claimant's objection. We read the pages to which we were referred in this bundle and also the liability hearing bundle.

24. We considered the written and/or oral submissions made by the parties.

25. We also considered the claimant's calculation of net weekly pay dated 21 October 2021 which it was ordered to provide.

26. References below to [L/X] and [R/X] are to pages in the liability and remedy bundles, respectively.

The facts

27. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

28. We find that had the discrimination and dismissal not occurred, the claimant would have continued working for the first respondent as a locum consultant until his 60th birthday, on 18 May 2019, when he would have retired under the NHS Pension Scheme. We do not find that he would have applied to join the Specialist Register ("the Register"). We do not accept the claimant's evidence to the contrary.

On the claimant's intention to retire

29. We find that the claimant's intention to retire at 60 preceded the meeting on 17 January 2017 with the second respondent and Ms Eaton, and was not made in response to what he was told at that meeting. Upon being told about the respondents' intention to appoint two substantive consultants, the claimant understood that he was being replaced and his concern was that he would suffer a shortfall in his pension if he was unable to work until 60 and we found that he left that meeting hopeful that this outcome would be accommodated. In our liability judgment we found that the claimant had commonly shared this intention to retire at 60. We also found that the respondents' knowledge of the claimant's proximity to this earlier retirement age informed the conduct we have found to have been discriminatory.

30. We also find that when the claimant reiterated this intention at the interview with Professor Papalois on 27 July 2017 he was again expressing a pre-existing and genuinely held intention to retire at 60: Professor Papalois asked the claimant if he had applied for permanent posts, and he replied "I have passed 58 and I am planning to retire at 60". He then went on to explain to Professor Papalois why he felt the status quo suited both himself and his employer. Given that this exchange took place 17 days after the claimant was first placed on restriction in relation to the GF case, he had already met with the second respondent on 10 July 2017 to discuss this issue when we have found he felt reassured, Dr Redhead had written to him on the same date to confirm that this restriction would be for an initial period of two weeks and there was an investigation completion target of four weeks, and the claimant was not at this stage aware that three other cases were being considered for investigation, we do not find the claimant's evidence that on 27 July 2017 he was contemplating a long restriction, alternative employment, and making a last-ditch attempt to return to work, to be credible.

31. The claimant's objective of maintaining the status quo until his 60th birthday in May 2019 to protect his pension was revisited at the meeting on 22

December 2017. We find that the claimant was reiterating the same intention he held prior to the meeting 11 months before which preceded the claimant's and the respondents' knowledge of the regulatory issue. Although the claimant was now, in December 2017, cognisant of the regulatory issue he remained focused on retirement at 60 and we found that he came away from this meeting hopeful that this objective remained achievable.

32. We also find it likely that the claimant's intention to retire at 60 was predicated on projected pension benefits which factored in accrued pension contributions that included his protected higher rate of pay in 2014. The claimant obtained pensions benefits statements based on his "normal retirement age" of 60 in December 2014, September 2015 and April 2016 and requested a pension statement in March 2018 (which was revised in June 2018) each of which referred to the protected pay figure. According to the June 2018 statement, the claimant was entitled to a pension annuity of £49,166.80 and a tax free lump sum of £147,500.41. For reasons which we have not found to be unlawful, following further investigation by the NHSPS in relation to the claimant's contractual arrangements which preceded the commencement of his 2014 contract, his pension benefits were revised and substantially diminished (i.e. an annuity of £20,763.65) to the extent that the claimant said was not financially viable as his sole source of income.

<u>On whether the claimant would have applied to join the Register</u>

33. In our liability judgment, we found that the claimant was content with the status quo and intended to remain in his locum consultant role until his retirement at 60. He had applied to join the Register in 2010 and 2011 but made no further application in the next six years. In making this finding, we took account of the fact that the first respondent had not made joining the Register a condition of his ongoing employment as a locum consultant so that the claimant understood that this was not required.

34. We also took account of the fact that the claimant knew that the application process was time-consuming. In cross-examination, the claimant was taken to the GMC's Speciality specific guidance on documents to be supplied in evidence for an application for entry onto the Specialist Register with a Certificate of Eligibility for Specialist Registration (CESR). The claimant did not agree that all of the requirements set out in this document were applicable to him and said that many of those which were would not have been onerous, in both cases, because of his experience of working autonomously as a consultant. He also said that it would have taken him between three and six months to gather all of the requisite evidence. We found that this was unlikely because of the evidence the claimant needed to gather and the time which would have been available to him in addition to his working hours, had he remained employed by the first respondent. Notably, during closing submissions, Mr Panesar conceded that it was likely to have taken the claimant between 18-24 months to gather this evidence, excluding the five-month period, from July to December 2017, when we have found that the claimant was lawfully restricted from practising. On the claimant's case, we therefore find that had he been informed of the regulatory issue at the same time as Mr Hakky was in October 2017, and returned to practice in January 2018, he would not have been in a position

to submit his application before June 2019 and perhaps not until December 2019. The claimant did not challenge the assertion that once submitted it could take the GMC around six months to process an application and there was the possibility that he would be asked to provide further information or evidence for consideration before it was granted.

35. We also take into account the claimant's animus towards the second respondent and his employer. He was aggrieved by the restriction to his practice which he felt the second respondent had orchestrated. We have found that the restriction between July and December 2017 was not unlawful and the decision to restrict the claimant and to maintain this restriction was made by the MMT and by Mr Vale, in particular. The claimant also disputed the findings of Professor Papalois, as he confirmed when giving evidence at the liability hearing when he said that he stood by his letter dated 1 February 2018 in which he wrote that he disagreed "strongly" with the "false allegations".

36. We therefore find it unlikely that, given his intention to retire at 60 and his projected pension benefits, the length of time it would have taken him to complete an application to join the Register, and the claimant's animus towards the second respondent in particular which related to conduct which we did not find to be discriminatory, that had he been treated in the same way as Mr Hakky in relation to the regulatory issue in October 2017, returned to his locum consultant role in January 2018 and been supported with an appraisal, that he would have applied to join the Register.

37. The claimant says that had he known about his reduced pension benefits retirement at 60 would not have been a financially viable option. We do not find that this is a relevant factor because the claimant would not have known about the revised and diminished value of his pension benefits until he submitted his pension application. Having found that the claimant would have agreed to remain in post until his 60th birthday, without applying to the Register, we find that it is likely, as happened in 2017, when he submitted his pension application, the protected pay issue would have been queried and there would have been the same process of investigation by NHSPS and the same outcome, several months later. It is therefore likely that the claimant would not have discovered the shortfall between his expected and actual pension earnings until after his 60th birthday when he would no longer have been employed by the first respondent nor on the Register.

Recasting the world i.e. the counterfactual

38. We find that but for the extended restriction from January to 20 April 2018 the claimant would have returned to his normal hours of work including the same amount of overtime he had worked prior to his restriction in July 2017.

39. We also find that but for the discrimination and unfair dismissal the claimant would have returned to work in January 2018, he would, like Mr Hakky, have been served with notice of termination on 1 March 2018 effective on 31 May 2018. His focus would have been on remaining in the same role and pay until his 60th birthday.

40. We have found that the claimant would not have applied to join the Register.

It is therefore likely that he would have been faced with the choice between moving to a Speciality Doctor role or remaining in situ until his 60th birthday and he would have chosen the latter option for the reasons given above. The claimant was adamant that he would not move into the role of Speciality Doctor which required him to be supervised, and had a significantly lower salary and status. (We note here that the assurances which the second respondent gave to Mr Hakky in October 2017 and February 2018 were ultimately ineffective, because he challenged his putative transfer to a Speciality Doctor role which resulted in the agreement that he would be retained in his locum role and supported with making an application to join the Register in the meantime, and we find such assurances would also have been ineffective with the claimant, had they been given by the second respondent, not least because of the loss of trust between them for reasons which were unrelated to the discriminatory conduct we have found.)

41. The claimant resigned with immediate effect on 23 May 2019. This was the day before he was due to meet with Professor Orchard, Ms Eaton and his BMA representative when the disciplinary process would be closed off and settlement of the claimant's dispute discussed. The background to this was set out in an email which Professor Orchard sent to senior colleagues, including Dr Urch, and HR advisors, Ms Eaton and Mr Russell, on 11 May 2019 [L/468]:

> "As you are aware we have been trying to resolve the employment situation of Mr Nagy Matar, who has been employed by the Trust and the Division outside the Appointment of Consultants Regulations as a locum consultant since April 2014...He has been offered a speciality doctor post at a considerably lesser salary which he has declined and effectively unless we find a solution we will have terminated his contract at the end of this month. The Division has previously explored the option of redundancy but this option is not viable for financial reasons. Quite separate to this, the Division has raised issues about his competence which have been largely resolved through investigation of the issues raised including two Serious Incidents. Mr Matar's communication was criticised, but his surgical skills and judgement were not found to be below an acceptable standard.
>
> Through the Medical Director's office we have been in on-going discussions with the BMA about a possible resolution. We have reached a point where resolution is possible without dismissal but this will involve extending his contract for a final period not to exceed 6 months + a 3 month notice period effectively an extended notice period of 9 months terminating his contract under a settlement agreement at the end of February 2019. During this time we will be able to use his services on locum consultant duties as before. I am therefore seeking your agreement to pursuing this option with the BMA which will effectively resolve the situation without recourse to legal action or further financial costs…"

Mr Russell replied on 23 May to confirm that Ms Eaton [L/467]:

> "has offered the BMA rep a solution which involves Nagy confirming (via a legal agreement) that he will leave us on 31 March 2019, but will continue to be called a locum consultant and paid as such."

When Dr Urch queried how the claimant could retain the same title without a CCST, Mr Russell clarified the position in the following terms [L/466]:

> "He can be called locum consultant without being on the Speciality Register

> and can continue to be employed with the MDO's [Medical Director's Office's] permission."

This proposal therefore involved the MDO and senior HR advisors, and represented the first respondent's solution, which we have found was being explored on an exceptional basis, to retain the claimant as a locum consultant in order to resolve this dispute. We do not find that the first respondent took the view that this was ultra vires at the time (nor the alternative arrangements it agreed with Mr Hakky, in early June 2018, to retain him on a locum consultant contract whilst he went through the protracted CESR process) because it was sanctioned by the MDO.

42. We accept the evidence of Julie Eaton that had the claimant remained employed, the first respondent would have offered to extend his locum consultant contract for another nine months and it is highly likely that this offer would have been extended by another three months to coincide with the claimant's 60th birthday, and intended retirement date.

43. We do not find that the claimant would have resigned in any event notwithstanding the animus which he had towards the second respondent (in relation to conduct we have found to be neither discriminatory nor which breached the claimant's trust and confidence). This is because we find that he would have taken up the option to retain his locum consultant contract until his 60th birthday to safeguard his projected pension benefits instead of resigning without another job to go to and with some uncertainty about his ability to obtain like employment elsewhere.

On the claimant's mitigation

44. The claimant applied for his pension in June 2018, one month after his employment ended. We find that the claimant took his pension on this date because of his dismissal in May 2018. He did not apply for work for five months, until 11 November 2018, ten days after he received notification of the diminution to his pensions benefits. Although this is consistent with our finding that the claimant had intended to retire on his 60th birthday instead of continuing to work in the longer-term, we also take account of the impact of the discriminatory treatment and the claimant's dismissal on his readiness and willingness to begin applying for work, and to return to the labour market in the immediate aftermath of these distressing events. We do not therefore find that the claimant withdrew from the labour market or that if he did this was to a large extent because of the discrimination and his dismissal. We do not find that this breaks the chain of causation.

45. The claimant provided no evidence that he attempted to find work before November 2018. He then made 11 applications on the following dates: 11 and 30 November 2018, 20, 21 and 29 December 2018, 29 January 2019, 13, 14, 15 and 28 February 2019, and 3 March 2019. He undertook ad hoc shift work between 25 March and 4 August 2019 at London North West University Healthcare NHS Trust. The only days he worked prior to his 60th birthday were 25-29 March 2019 for which he was paid the net sum of £712.64 [R/392].

46. He completed a laparoscopy course in late October 2019. He also contacted the GMC in January 2019 about applying to join the Register via

the CESR route although we find, in the absence of any evidence to the contrary, that he has taken any further steps in relation to an application, for example, by gathering the required evidence.

47. The claimant's evidence was that he was unable to complete online job application via the NHS Jobs website because of the requirement to provide responses to the following questions: the date and reason for leaving previous employer; the date of last appraisal and revalidation; he was required to provide a copy of his logbook of surgical operations in the last year; details of any restrictions placed on clinical practice; to confirm whether he was on the Register or within six months of joining it. He also said that it took three months to obtain references. Although we did not find this evidence wholly cogent or compelling, we do find that absent the discriminatory conduct and dismissal, the claimant would have been in a fundamentally different and advantageous position when looking for work: he would have been restricted for five months instead of nine, he would have been returned to work in January 2019 and been able to show that his surgical practice was unimpaired by his restriction, would have evidence of the surgical work completed in the last 12 months for his logbook, he would have completed his appraisal and would have had access to his records and support from his employer.

48. We remind ourselves that the burden is on the respondent to show that the claimant has failed to take reasonable steps to mitigate his losses so that we are in a position to consider and determine what steps should have been taken by the claimant, whether he acted unreasonably in not taking any of those steps, and the date when it is likely he would have obtained new employment had they been taken. The respondent's evidence on mitigation was very limited: Mr Russell's evidence was that "a number of" locum and substantive surgical consultant posts were advertised in north west London in the last three years, including colorectal and emergency surgeon roles, however, other than this very general statement, his evidence was that he had reviewed the NHS Jobs website on 4 October 2021 when he noted four locum consultant vacancies across the country on that date. We do not find that the respondent has discharged the burden of showing that the claimant failed to mitigate his losses and we are not in a position to say when it is likely that the claimant would have obtained employment as a locum consultant, or any other alternative roles.

The ultra vires issue

49. We have found that the parties would have agreed that the claimant remained employed as a locum consultant until his 60th birthday in May 2019. Whilst the compromise agreement would have been ultra vires, there would have been a subsisting employment relationship which would not: the claimant would have been employed lawfully throughout. This is what obtained with Mr Hakky until the date when he joined the Register. As the Court of Appeal held in *Lairikyengbam* the fact that the ongoing employment of L was ultra vires did not preclude the existence of a lawful employment contract.

Conclusions

Basic award

50. The claimant conceded that he is bound by the terms of contract which provided that his continuous employment commenced on 14 April 2014. He completed four years' service at the date of termination. The 1.5 age-related factor and statutory cap of £508 are applicable. We have calculated that the claimant is therefore entitled to a basic award of £3,048.

Loss of statutory rights

51. The parties agreed on the figure of £300 for loss of statutory rights.

Past loss of earnings

52. We have calculated that the claimant has suffered past loss of earnings attributable to the first respondent's unlawful conduct in the net sum of £78,796.77 as follows:

    (1) *The period of unlawful restriction (1 January – 20 April 2018):* It is not in dispute that during his restriction the claimant was unable to undertake clinical work including additional paid work. Having ordered the claimant to set out its calculations, and applying the figures which we have accepted for the claimant's net weekly pay in 2016/17 tax year of £1,609.49 and calculating the net weekly pay for the period of unlawful restriction based on the claimant's net monthly pay over this period as £1,352.03 (i.e. £5,842.87 + £5,843.26 + £5,842.86 + £4,103.49 = £21,632.48 divided by 16 weeks) we find that there was a net weekly loss of earnings of £257.46 and a total net loss in this period of £4,119.36 (i.e. £257.46 x 16 weeks).

    (2) *The period from the date of termination to the claimant's 60th birthday (24 May 2018 – 18 May 2019):* Having used the same figure for net weekly pay of £1,609.49 for this 51-week period and deducting the claimant's non-pension income in this period of £6,693.94 and £712.64 we find that there was a total net loss of earnings of £74,677.41.

Future loss of earnings

53. We make no award for future loss of earnings because of our finding that the claimant's employment would have ended on his 60th birthday had the unlawful conduct not eventuated.

Loss of annual leave

54. The parties agreed on the net sum of £8,369.26 for unpaid annual leave accrued on termination.

Pension loss

55. We have calculated that the claimant has suffered pension loss attributable

to the first respondent's unlawful conduct in the sum of £15,199.58.

56. The claimant was in a defined benefit ("DB") pension scheme. We have found that but for the unlawful conduct the claimant would have applied for his pension on his 60th birthday on 18 May 2019. The period of loss is therefore 51 weeks.

57. The respondents rely on para 5.3.3 of the Employment Tribunals: Principles for Compensating Pension Loss (Fourth Edition, 3rd Revision) 2021:

> *5.3.3 These Principles do not set in stone the period of loss that would be short enough to merit the use of the contributions method in a DB case, since much will depend on the facts. As a rule of thumb, six months would very likely to be a short period; twelve months would probably still be short; 18 months and above would probably not be short. As always, the parties will be free to make their arguments to the tribunal.*

Absent any assertion to the contrary being made by the claimant, in relation to a 12-month period of loss, and having reviewed the Principles we can see no basis on which to depart from the rule of thumb set out above. We therefore use the contributions method in a DB case to assess the claimant's pension loss.

58. Using the pensionable pay figure set out in the claimant's revised pension statement dated 7 June 2018 [R/428] of £107,772, the employer contribution rate of 14.38% and a period of loss of 51 weeks we agree with the respondents' calculation for pension loss of £15,199.58.

Injury to feelings incorporating aggravated damages

59. The claimant is awarded injury to feelings of £30,000 which incorporates an award of £5,000 for aggravated damages.

60. The claimant claims £30,000. The respondents contend for a figure of £15,000, although Mr Keen acknowledged that this figure was put before the respondents received the claimant's remedy statement.

    (1) We accept the claimant's unchallenged evidence in his remedy statement that the respondents' treatment had the following impact on him: he was extremely hurt and distressed; he has suffered with long periods of severe stress and stress-related illness; he was isolated and avoided socialising (as a result of the extended restriction); he experienced overwhelmingly negative feelings, pent up anger, resentment on a daily basis; since April 2021 he has had frequent headaches, muscle pain and fatigue, nightmares and difficulty sleeping, and wakes up with excessive sweating, palpitations, difficulty breathing, an increased heart rate and blood pressure.
    (2) We also accept the claimant's unchallenged evidence that these symptoms have caused him greater anxiety, even fear for his life, because of his family history of coronary heart disease, heart attacks and strokes; and he has discussed his symptoms with his GP and

they have agreed that medication would be ineffective at this time.

(3) As to the treatment which caused this impact on him, the claimant has identified the following "worst examples" in his remedy statement: (a) Mr Vale's decision to extend his restriction indefinitely on 3 October 2017; (b) being threatened with disciplinary action and dismissal, the two-month delay in convening a disciplinary meeting, which was then rearranged two days before his termination date; (c) his ongoing restriction from January to 20 April 2018; (d) the obstruction of his return to work thereafter; (e) the fact that Mr Hakky was not treated in the same way; (f) the lack of consultation with him before the respondents attempted to impose the role of Speciality Doctor on him; (g) the failure to deal with his grievances; and (h) the failure to conduct his annual appraisal. We have found that the treatment enumerated at (c), (d), (e) and (h) was discriminatory. We also found that (c) was sufficient on its own to amount to a breach of the claimant's trust and confidence in his employer and we accept his evidence that this made him feel isolated and caused him to become socially withdrawn.

(4) We also find that the claimant's dismissal has had the impact on him which he has articulated in the relevant part of his remedy statement which is not challenged by the respondent. We have found above, that the claimant's failure to apply for any work in the five months after his dismissal was related to this impact.

(5) Overall, we find that the discriminatory conduct upheld has had a profoundly adverse impact on the claimant as set out above. This treatment impacted not only on the claimant's work but also on his personal life as well as his physical and mental wellbeing.

(6) The effect of this restriction, obstruction and dismissal (in comparison to the more favourable treatment of Mr Hakky) was to exclude the claimant from his workplace and his role from which he derived his professional reputation and status, satisfaction and self-esteem. It is relevant that we have found that but for this conduct the claimant would not have resigned when he did and would have continued working until his 60th birthday.

(7) We find that find that half of the injury to feelings award (excluding aggravated damages) i.e. £12,500 is attributable to the dismissal.

(8) We also accept the claimant's unchallenged evidence that the respondents' late disclosure of evidence on day four of the liability hearing, which demonstrated that he had been treated less favourably than Mr Hakky, and the failure to provide any explanation for this late disclosure, caused significant distress and compounded the sense of the injustice which the claimant felt about his treatment, including the discrimination we have found, which this material revealed clear evidence of. We found that this material was centrally relevant and the respondent's failure to disclose it inexplicable. Furthermore, the respondents have failed to date to explain the reasons or the circumstances which led to this late disclosure. For completeness, we do not find that this failure is exculpated by the fact that the claimant's costs application to which this issue also relates remains to be heard. It is relevant that the respondents are well-resourced and this litigation has been ongoing since October 2018.

(9) We are satisfied that this is a case in which aggravated damages are applicable because of the late disclosure of centrally relevant

material without explanation then or since the date of this disclosure which we find has aggravated the impact of the discrimination we have upheld. We find that it is just to make an award of £5,000 in relation to this conduct.

Exemplary damages

61. No award is made. The claimant has not shown that the circumstances in which such an award are recoverable are applicable.

Wrongful dismissal

62. No award is made. This is covered by the award for past loss of earnings.

ACAS adjustment

63. The claimant contends for a 25% adjustment of any compensatory award. We find that justice is served by awarding an uplift of 12.5% to the compensatory award taking account of the overlap between the claimant's grievances and our findings on liability, and also of proportionality.

64. The claimant submitted a grievance on 23 April 2018 when he complained about the requirement for him to return to work under a revised job plan (a) and a second grievance on 9 May 2018 to complain about the decision to proceed with the disciplinary process (b), the threat of dismissal (c), the delay in scheduling a disciplinary hearing (d) and the extension of his restriction to 20 April 2018 (e). We have found that items (a) and (e) were discriminatory. We also found that (a) contributed to the claimant's loss of trust and confidence and (e) was sufficient on its own to have breached the claimant's trust and confidence (although this was only a part of the overall conduct which the claimant relied on when he resigned). The first respondent failed to deal with these grievances. In these circumstances we find that the onus is on the first respondent to explain why its failure was reasonable in the circumstances. It provided no evidence in relation to this failure and has not discharged this burden and we therefore find that there was an unreasonable failure to comply with the Code's provisions in relation to the grievance procedure.

65. We do not find that the Code's disciplinary provisions are applicable.

Interest

66. Interest is awarded at 8% in the total amount of £25,751.40 which has been calculated as follows:

    (1) Injury to feelings: Interest at 8% on £25,000 is £5.48. The claimant is awarded £5.48 per day from 11 October 2017 until the day of this judgment (1,542 days) = £8,450.16.
    (2) Aggravated damages and past loss: Interest at 8% on £102,365.61 is £22.44. The claimant is awarded interest of £22.44 per day from the mid-point until the day of this judgment (771 days) = £17,301.24.

Employment Judge Khan

31.12.21

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

4 January 2022

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FOR EMPLOYMENT TRIBUNALS