EMPLOYMENT TRIBUNALS

Claimant: Miss A Davin

Respondent: **R1** The Governing Body of District Church of England Primary School
R2 St Helen's Borough Council

Heard at: Liverpool **On:** 1 February 2022
In Chambers

Before: Employment Judge Aspinall
Mr A Clarke
Mr J Murdie

Representation
Claimant: no appearance, written submissions by agreement
Respondent: no appearance, written submissions by agreement

Reserved Judgment on Remedy Part 2 – pension loss
and decision on request for reconsideration

The respondent is ordered to pay to the claimant £ 22,003.89 [1]

The Tribunal rejects the claimant's application for reconsideration of the decision not to award an ACAS uplift.

Reasons

Background

1. By a Reserved Judgment on Remedy Part 1 – non pension loss (Remedy Judgment 1) dated 20 December 2021 the claimant was awarded £131,945.00.

[1] The figures have been calculated as set out in the Reasons below and rounded to remove decimal places.

The liability Judgment in this case was dated 19 April 2021 and found that the claimant had been unfairly dismissed and discriminated against because of her disability.

2. Remedy Judgment 1 did not address pension loss but advanced the Tribunal's proposal to make an award for "missing contributions" being:

   (i) pension loss based on the lost contributions at the rate of previous contribution 16.48% of gross annual salary from date of termination of employment 1 September 2019 until reemployment in a Teacher's Pension Scheme employer on 1 November 2021 and

   (ii) a shortfall in contributions between the rate of contribution (in the Together Trust role from 1 November 2021 at 8.6% as revealed by a pay slip produced by the claimant) and the contributions the claimant would have had on the salary she would have had as a primary teacher (£ 41,604) until 1 September 2022 at 16.48%.

3. Remedy Judgment 1 also stated;

   (at paragraph 96) The Tribunal proposes to accede to the claimant's request that it does not delay or require further information so as to make a complex calculation or lump sum loss award.

   (at paragraph 97) The Tribunal proposes to issue a Remedy Judgment Part 2 – pension loss following representations from the parties as required by the case management orders, made of its own volition on 20 December 2021, below.

4. The following case management orders were made on 20 December 2021:

Calculations, right to object and right to be heard

1.1 The parties have 21 days from the date on which this order is made to revert to the Tribunal and copy to each other their pension loss calculation based on the missing contribution methods outlined above or to object in writing with reasons to the proposal that that is the method of calculation to be used.

1.2 Upon receipt of the calculations above the Tribunal proposes to reconvene to make a decision in Chambers, without the parties present, on pension loss and to issue a Remedy Judgment Part Two setting out its pension loss award.

1.3 Upon receipt of a written objection to the method of calculation to be used the Tribunal will issue further case management direction as appropriate.

1.4 Assuming the basis of calculation is agreed and calculations are shared, the parties have a further 7 days from the date on which they receive a copy of the other side's calculations to write to the Tribunal to object to a decision in Chambers and seek a hearing and the right to make representations on the calculations.

5. In response to Remedy Judgment 1 and the case management orders made on 20 December 2021 neither party objected to the "missing contributions" method

of calculation. Neither party objected to the decision on pension loss being made on paper in Chambers. The parties each submitted written calculations and made representations as detailed below.

6. The claimant made an application for Reconsideration of part of Remedy Judgment 1. She argued that the ACAS uplift ought to have applied to her case and wished to have the Tribunal's decision that it did not apply reconsidered. The claimant's grounds for seeking a reconsideration were set out in her email dated 6 January 2022 at 15.59 and were copied to the respondent. The respondent included its objection to reconsideration in an email dated 12 January 2022 at 12.58. The claimant sent a further submission on reconsideration dated 13 January 2022.

7. The Tribunal acknowledged receipt of the following documentation for its In Chambers deliberation on pension (and whether or not to reconsider) on 1 February 2022:

   <u>From the claimant</u>

   - 6 January 2022
   - 10 January 2022 attaching 3 documents
   - 13 January 2022 attaching a Response and evidence from the bundle used at final hearing
   - 14 January 2022 resending the 13 January 2022 email

   <u>From the respondent</u>

   - 12 January 2022

8. The Tribunal noted that the claimant alluded to an email that the Tribunal had not received (or had received and not retained), dated 4 January 2022. The Tribunal wrote to the parties on 19 January 2022 detailing the documents received above and instructing the respondent, if it wished its 4 January 2022 email to be considered on 1 February 2022, to send it to the Tribunal marked for the urgent attention of Employment Judge Aspinall. The Tribunal also wrote:

   Neither party has objected to the final pension determination taking place in Chambers in response to their written submissions and calculations as received above. The matter is listed for a one day in Chambers deliberation on 1 February 2022 at which the Tribunal will consider (i) whether or not to reconsider its decision on the ACAS uplift and (ii) a pension loss award.

9. As at 1 February 2022 the Tribunal has not received a copy of the 4 January 2022 email and has had no further correspondence from the respondent. The Tribunal has otherwise been copied into correspondence from the claimant to the respondent relating to DWP recoveries not relevant to the determination of the Tribunal on reconsideration or pension loss.

Reasons for rejecting the application for Reconsideration

10. The relevant law is set out at Rules 70 – 73 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

11. The Rules provide that the Employment Judge alone shall consider the application for reconsideration. If the Employment Judge considers that there is no reasonable prospect of the original decision being varied or revoked the application shall be refused.

12. The Employment Judge accepts the respondent's submission that all of the points raised by the claimant in its grounds for reconsideration application (excluding the 13 January 2022 letter, to which the respondent had not responded) were made by the claimant at the remedy hearings on 12 November and or on 7 December 2021.

13. The Employment Judge considers that none of the points made by the claimant in its 13 January 2022 letter would advance any new fact or legal argument on uplift.

14. The claimant accepts that the ACAS uplift does not apply to medical incapacity dismissals. She sought, retrospectively, at the remedy stage to argue that her dismissal was not solely for medical incapacity but *was also* a dismissal that attracted the application of the Code.

15. The reason for dismissal was determined at the liability hearing and reasons given for it in the Judgment dated 19 April 2021. The argument that the claimant was dismissed because of her absence arising from her disability was successful. It is somewhat surprising that the claimant now seeks to undo her own successful argument, in part, by suggesting that the reason for dismissal was both disability *and conduct* related. Argument as to the application of the Code was made and considered at the first and second remedy hearings and rejected.

16. The Employment Judge concludes that it is not necessary in the interest of justice to reconsider the decision on ACAS uplift. There is no prospect of the decision being varied or revoked because all of the submissions and relevant case law were considered by the Employment Judge and Full Tribunal at the Remedy Hearing and in its deliberations leading to Remedy Judgment 1.

The Relevant Law

17. Section 124 Equality Act 2010 provides for three types of remedy available where a tribunal has found that an employer has discriminated against an employee. The tribunal may i) make a declaration, ii) order the respondent pay compensation iii) make a recommendation that the employer take specified steps for obviating or reducing the adverse effect of anything to which the proceedings related.

18. The tribunal has a broad discretion as to whether to make an award for compensation or not though it is highly unusual for an award not to be made. The central aim in awarding compensation is to put the claimant in the position

so far as is reasonable as she would have been in had she not been discriminated against *Chagger v Abbey National plc 2010 IRLR 47.* The losses that are recoverable include lost earnings and benefits. The tribunal will need to compare the claimant's position had she not been discriminated against with her position in future. Factors include what pay rises might have been achieved, what new employment has been found or might be found and whether those new benefits might increase in the future. The tribunal can also take account of the chance of the original employment not continuing. That loss can include pension loss from a final salary defined benefit (DB) pension scheme.

19. Where DB loss is concerned there can be two methods of calculation depending upon the complexity of the case. Simple cases can include those where it would be disproportionate perhaps because of a relatively short period of loss, to engage in a complex calculation. A simple calculation of loss of contributions will not award loss of enhancement of accrued pension rights. In simple cases the calculation, according to the Employment Tribunal Remedies Handbook, will be the same as that used for defined contribution schemes. The missing contributions method involves:

    - Obtaining details of the employer's contribution rate
    - Identifying the date on which the period of loss ends
    - Calculate the employer contributions to the date of the remedy hearing
    - Calculate future loss of employer contributions in the same way taking account of future pay rises
    - Credit any employer contributions made by a new employer against the award.

20. Complex cases are those where there are longer periods of loss such as career long losses. Those cases will have a two stage remedy hearing. The first stage will identify the non pension losses and make findings of fact relevant to pension loss. There will then be a period for the parties to try to agree pension figures. The second stage will identify the pension loss using Ogden tables or expert actuarial evidence. The complex cases might include calculations for both loss of annual pension and loss of lump sum.

21. The 2021 Principles for Compensating Pension Loss identify a seven step approach for calculating losses. Information is required from the claimant to be able to complete the seven steps.

The Pension award

Missing contributions

22. The facts are as the Tribunal found them to be in the Judgment from 19 April 2021 and the Remedy Judgment 1 dated 20 December 2021 and as stated below for the purposes of the calculations.

23. The claimant had not provided information necessary to engage in a complex calculation despite an adjournment to allow her to do so. The parties agreed that this would be a "simple" missing contributions method of calculation.

24. The parties agreed the missing contributions for the period from date of dismissal to date of new employment at the daily rate of salary applicable at each of those times (the salary increased and so did the daily rate) and at the agreed rate of contribution of 23.6% using the following agreed formula:

    the daily rate, multiplied by the percentage rate of employer contribution multiplied by the number of days as follows:

    1 September 2019 – 17 March 2020
    107.96 x 0.2360 x 199 £ 5070.23

    18 March 2020 – 17 March 2021
    110.93 x 0.2360 x 365 £ 9555.51

    18 March 2021 – 31 October 2021
    113.98 x 0.2360 x 228 £ 6133.04

25. The Tribunal awards the amount agreed between the parties of £ 20,758.78 being missing contributions from date of dismissal to date of reemployment.

26. The parties disagreed about the method of calculation for the period from new employment on 1 November 2021 to end of the period of loss on 1 September 2022. The claimant's calculation used an annualised salary and applied the percentage contributions. The respondent's calculation used the daily rate method that the parties had agreed as at paragraph 19 above. There was very little, less that £10.00 difference, in it. The Tribunal adopted the method used by the parties at paragraph 19, to calculate missing contributions (shortfall) from date of reemployment to end of period for the sake of consistency.

27. The claimant had a new salary of £35197.49 and a daily rate for calculating contribution of £ 96.43. Her salary had she remained employed by the respondent would have been £ 41604 giving a daily rate of £ 113.98.

    Had she remained employed by the respondent the contributions would have been:

    113.98 x 0.2360 x 304 £ 8177.28

    In her new employment the contributions were

    96.43 x 0.2360 x 304 £ 6918.27

28. The Tribunal awards the shortfall in contributions between respondent employment and new employment from the commencement of new employment to the date on which the Tribunal found the claimant might resume employment at the level previously employed (1 September 2022) of £ 1259.11

Loss of growth claim

29. The claimant also sought compensation for loss of accrued growth of 1/57th of pensionable earnings per year. This element of loss was claimed first in the claimant's "Final Calculations for Pension Loss for Claimant 10.1.22" document.

30. The respondent objected to its inclusion. The respondent said,

The respondents dispute the inclusion of the loss in growth of pensionable earnings included on pages 4 and 5 of the document. The Tribunal is asked to consider that this case was originally scheduled for a final remedy hearing on 12 November 2021, which was later adjourned to the 6 December 2021 to allow the claimant more time to obtain documentation on pension loss. The respondent therefore objects to the claimant being given further opportunity to add to her claim beyond both the initial date and subsequent adjourned date.

31. The claimant's response to this objection, alongside apologies for delay which was not of her making in obtaining pension information, was

I would have received it if I had not have been dismissed

32. The claimant's request is in effect a request to deviate in part from the simple missing contributions method of calculation of pension loss that had been agreed on 7 December 2021. The Tribunal considered:

The claimant had had plenty of time to set out her position

27.1 the claimant had legal representation and support in putting together her initial Schedule of Loss and her Closing Submissions for the Liability and Remedy hearings. Although the position has changed since the initial Schedule of Loss the claimant and her representative were aware of the possibility of the need to provide information on pension loss should she succeed in her claim from the outset.

The claimant had time after the Judgment to update her position

27.2 there was a long gap between the promulgation of the liability judgment on 19 April 2019 and the remedy hearing on 12 November 2021 which gave the claimant sufficient time to get her house in order on her pension loss claim.

There were case management orders to prepare submissions

27.3 the tribunal instructed the parties to agree case management directions following the liability judgment. The parties did not reach agreement but the respondent requested standard directions which were sent by tribunal administrative staff without the matter having been referred to a Judge, to the parties on 11 May 2021. Those directions related to preparation of bundles and were not specific to a remedy hearing. Employment Judge Aspinall then reviewed the file and made specific case management orders for updated Schedule of Loss, Counter Schedule, Impact Statement for Remedy and Written Submissions on Remedy. Those Orders were dated 2 June 2021 with the date for exchange of submissions being 8 October 2021, a month before the hearing.

the claimant's position was not clear on 12 November 2021

27.4 The Revised Schedule of Loss and Submissions did not make clear / provide adequate information as to the basis on which the claimant was seeking pension loss. Paragraph 86 and onwards of the Remedy Judgment 1 takes up the chronology and is reproduced here

"86. On 12 November 2021 the Tribunal invited representations from the parties as to whether they thought this would be a simple contributions method of loss calculation or a complex pension calculation for the claimant. The Tribunal proposed that this ought to be a complex calculation but noted that it did not have the requisite up to date information to carry out that calculation from the claimant and that the parties had not attempted those calculations between themselves.

87. The remedy hearing was adjourned, adopting the two stage approach advocated in the Principles for Compensating Pension Loss 2021. The claimant was directed to seek advice and to gather information, including from an actuary, so as to be able to return on 7 December and make submissions as to the method of calculation and, if arguing for a complex calculation, to provide information to the respondent in advance of the resumed hearing to enable the parties to try to reach agreement."

the claimant agreed missing contributions method

27.5 The claimant appeared on 7 December 2021 and argued for the simple missing contributions method of calculation. Her submissions on 7 December 2021 are set out in Remedy Judgment 1 and reproduced here:

" 92. The claimant accepts that she has not provided all of the information needed to calculate the pension losses by the complex method or to compensate her for loss to lump sum. She says she has tried her best to obtain figures and now wants to put this behind her.

93. The claimant was offered a further adjournment and referred again to the Principles for Compensating Pension Loss and asked did she want specific case management orders for information that she could send to The Teachers' Pension Scheme or to a privately instructed actuary.

The claimant wants to proceed today. She does not want an adjournment and ***does not want further delay in an award even if that means her pension award may be less than it would otherwise be.*** *The claimant wants the Tribunal to do what it can to make an award to her for her pension loss and accepts that this might mean it is only on the basis of missed contributions from the date of termination of employment until her rejoining the scheme."*

The respondent acted in reliance on the agreed method

27.6 The missing contributions method was the basis on which the parties went away to make their calculations. Figures were exchanged and representations made in writing as above.

The claimant did not object or request to be heard on changing the method

27.7 The case management Orders of 20 December 2021 made provision for either party to object in writing to the basis of calculation and to request to be heard. The claimant did not object in writing and did not request to be heard.

33. The Tribunal had regard to paragraph 5.30 of the Fourth Edition (3rd Revision) 2021 Principles for Compensating Pension Loss which provides:

> **"5.30 Where the period of loss to be compensated is relatively short, a tolerably accurate assessment of the net value of lost DB pension benefits can be done using the contributions method….it is enough to aggregate the employer's pension contributions for all relevant periods covered by the award of compensation (without recoupment)"**

29. 5.33 provides that the Principles do not set in stone the period of loss that would be short enough to merit use of the contributions method since much will depend on the facts. In this case the claimant resumed employment that entitled her to rejoin the Teachers Pension Scheme albeit on a lower salary and in a CARE arrangement within just over 2 years of her dismissal. In *Network Rail Infrastructure Ltd v Booth EAT /0071/06* the EAT said it would be a mistake for tribunals to adopt a substantial loss approach if the period of loss was for more than two years. The facts in this case were that the claimant resumed employment within 26 months. Applying the guidance in the Principles for Compensating Pension Loss, the *Network Rail* case and having regard to the claimant's position on agreeing a missing contributions method, the Tribunal finds that this case sits at the higher end but within the range of the "short period" in respect of which the missing contributions method is appropriate.

30. The claimant agreed to a missing contributions method. To allow her to change that now would prejudice the respondent and put it to additional cost and delay. Having had regard to the overriding interest and the claimant's heartfelt submission at the reconvened hearing on 7 December 2021 that the tribunal get on an make an award and allow no further delay, *even if it means that her award might be less than it would otherwise be* the Tribunal rejects her claim for inclusion of loss of growth.

31. The total amount awarded for pension loss, bringing remedy determination in this case to its conclusion, using the agreed missing contributions method is £22,003.89.

Employment Judge Aspinall
Date: 9 February 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
3 March 2022

FOR EMPLOYMENT TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2410971/2019**

Name of case:	**Miss A Davin**	v	**1. The Governing Body of District Church of England Primary School** **2. St Helen's Borough Council**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 3 March 2022

"the calculation day" is: 4 March 2022
"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.