EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals "This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP – by Cloud Video Platform. A face to face hearing was not held because it was not practicable and no-one requested the same."

Claimant: Miss D Lawrence

Respondent: Barnet, Enfield & Haringey Mental Health NHS Trust

Heard at: Watford (by CVP) **On:** 24 September 2021 (by CVP); 30 September 2021 (Tribunal in chambers)

Before: Employment Judge George,
Mr Steven Woodward, and
Mrs Jessica McGregor

Appearances
For the claimant: Ms A Cheung, counsel
For the respondent: Ms R Owusu-Agyei, counsel

RESERVED JUDGMENT

1. (By a majority, Mr Woodward dissenting in part) The respondent shall pay to the claimant compensation for unfair dismissal of **£10,344.31** calculated as set out in the following table.

Basic Award		
6 X 1.5 x £487	4,401.00	
LESS 25% for conduct s.122(2) ERA	(1,100.25)	
	3,300.75	3,300.75
Compensatory Award		
Prescribed Element		
52 weeks @ £448.53 net of tax and NI) p.w.	23,323.56	
LESS		

Polkey reduction @ 75%	(17,492.67)	
Subtotal	5,830.89	
s.124A ERA 25% deduction for conduct s.123(6) ERA	(1,457.72)	
Subtotal (Prescribed Element)	4,373.17	4,373.17
Non-Prescribed Element		
Loss of statutory rights	500.00	
Pension Loss	10,181.56	
Subtotal	10,681.56	
s.124A ERA: 75% deduction for conduct s.123(6)	(8,011.17)	
Subtotal (non-prescribed element)	2,670.39	2,670.39
Total **COMPENSATORY** Award		7,043.56

2. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. The prescribed element is £4,373.17 and the prescribed period is 17 February 2018 to 16 February 2019.

REASONS

1. The reserved liability judgement was sent to the parties on 16 August 2021 and we had reference to our findings in that judgment. At the remedy hearing on 24 September 2021, we heard further evidence from the claimant with reference to a statement which ran to 26 pages and upon which she was cross examined. The respondent called Ahilan Sandirasekaram. He adopted in evidence a seven page witness statement which predominantly was directed to the issue of whether the claimant has failed to mitigate her loss. We also have the benefit of a remedy bundle which ran to 292 pages, including a copy of the reserved judgement. Page numbers in this reserved judgment from that bundle are referred to as RB pages 1 to 292 as the case may be. On the morning of the remedy hearing, the respondent introduced an NHS Pensions-COVID 19 fact sheet. We also had the benefit of a skeleton argument from Ms Cheung.

2. Ms Owusu-Agyei had not been forwarded a copy of Ms Cheung's skeleton argument and we therefore adjourned for a short period to enable her to see it. We are grateful to both counsel for their input.

Issues

3. It was helpful that the parties had each submitted and exchanged schedule of loss and counter schedule of loss (at RB page 262 and RB page 288 respectively) so we were able to see the extent of the dispute between them and the issues on remedy that we needed to decide. They were as follows:

a. What is the correct approach to the application of the deduction of 75% to take account of the likelihood that the claimant would have been fairly dismissed in any event by applying the principles set out in Polkey v AE Dayton Services Ltd [1987] IRLR 503. Should the tribunal, as argued for by the claimant, decide upon a period of time during which the claimant should receive compensation for the full amount of her salary on the basis that that would be the length of time taken for a fair dismissal to take place a 75% deduction made from her compensation thereafter? Alternatively, as argued by the respondent, was the decision of the tribunal sent to the parties on 16 August 2021 determinative of the Polkey issue such that no further submissions should be entertained?

b. If the claimant is right and there should be a period of time during which the claimant is compensated for the full loss of her salary, how long should that period be?

c. Has the claimant failed to mitigate her loss?

d. At what time, acting reasonably, would she have obtained or will she obtain work which extinguished the amount of her loss?

e. What is the correct approach to the calculation of pension loss in the present case? The respondent argues that the claimant would be sufficiently compensated for her loss by an award of lost contributions. The claimant, on the other hand, argues that a complex pension loss calculation should be done given the circumstances of the present case.

f. What should be the compensation for loss of statutory rights: should it be £350 as argued by the respondent or £500 as argued by the claimant?

4. It emerged during cross-examination of the claimant that she has received some social security benefits but she was vague about which benefit she had received during which period. No documentary evidence had been disclosed by the claimant about any benefits received. She turned 60 years of age on 13 November 2018 and from that point started to draw her NHS pension. However, she still receives ESA and gave oral evidence that she has been receiving either ESA or JSA since roughly 2018 after a period when she received neither. Because the recoupment provisions potentially apply we make the usual order. However, the claimant was vague in her evidence about the period during which she has been paid welfare payments because of the unrelated injury to her foot and by way of personal independence payment.

5. The amount of the basic award is agreed at £4,401.00. It was also confirmed on behalf of the claimant that the figure for net weekly loss put forward by the respondent was the accurate figure of £448.53.

Findings in relation to Polkey

6. We start with the question about whether paragraph 4 of the reserved judgment sent to the parties on 16 August 2021 was determinative of the calculation of the deduction to be made pursuant to the principles in Polkey. At the time of the remedy hearing it was argued on behalf of the claimant, within the CSA (paragraphs 26 to 34), that the Tribunal's finding by the reserved judgment determined the chance that a fair dismissal would have taken place but left open the date at which such a dismissal might take place. We were therefore invited to make a finding as to the length of time the claimant would have been employed before a future fair dismissal took place and it was submitted on behalf of the claimant that that would take at least 10 months.

7. In making our decision at the remedy stage we have revisited the arguments which were run by the respective parties and our conclusions on the Polkey issue at the liability stage.

8. In the liability hearing in April 2021, it was agreed between the claimant and the respondent that, despite Polkey strictly speaking being a remedy issue, the factual basis for the arguments were so intertwined with those relevant to liability that it would be convenient and a proportionate use of time to rule on those arguments at the initial stage, in the event that the claimant were successful to any extent. Different counsel appeared for the claimant at the liability hearing. It is clear from Mr Sendall's written closing submissions on liability (paragraphs 48 & 49) that the argument run by the claimant at that stage was that there should be no deduction to take account of the chance that she would have been further dismissed in any event because the procedure was so flawed, it was alleged, that it cannot seriously be argued that it could be determined that a fair dismissal was likely to have resulted. The Employment Judge's note of the respondent's submissions on Polkey is to the effect that it would be a matter for the Tribunal's discretion to order that the compensation be subject to a deduction of a particular percentage of the chance that the claimant would have been fairly dismissed in any event "and how long" – in other words how long after the actual dismissal.

9. It therefore seems clear to us first, that the claimant was not arguing for the position that she has now adopted and secondly, that the possibility that the tribunal might make a decision about how long it might take before the employment was terminated by a fair dismissal or for some other reason was adverted to by Ms Owusu-Agyei in her submissions. In any event, having revisited our judgement, and in particular paragraph 195 and 196 it is clear to us that this is an issue that has already been decided. The conclusion we reached on the issue at the liability stage was that there should be a 75% deduction from compensation to be calculated from the date of dismissal, taking

account a number of variables – including the possibility of a failed attempt at reintegration ending in dismissal for misconduct in raising further malicious or vexatious grievances or for breakdown in the employment relationship. Although not stated explicitly, we are clear that that was the judgement we made on the last occasion for the reasons expressed in paragraph 195 and 196.

10. This was an argument that, had it been going to be canvassed, should have been raised when the parties agreed that Polkey issue was to be decided at the liability stage. As the Respondent says it was open to us to make the kind of award which is now sought but that was not the claimant's position at the time.

Failure to mitigate

11. We then go on to consider the argument that the claimant has failed to mitigate her loss. This is for the respondent to prove. When there is a substantial issue as to whether the claimant has failed to mitigate, the questions that we need to ask ourselves are

    a. what steps were reasonable for the claimant to have to take in order to mitigate his or her loss;

    b. whether the claimant did take reasonable steps to mitigate loss; and

    c. to what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps. Whether an employee has done enough to fulfil the duty to mitigate depends on the circumstances of each case and is to be judged subjectively. (Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498, EAT)

12. There are two respects in which the respondent argues that the claimant has failed to mitigate her loss: that she should have applied for NHS jobs and that she was not sufficiently proactive in alternative employment in the industries and sectors in which she did look.

13. It is argued on behalf of the respondent that the claimant has produced by way of disclosure a limited selection of jobs and the inference should be drawn that this is the sum total, or nearly the sum total, of the applications made by her, in part because her witness statement does not state that the documents only represent a sample of job applications. In particular the dates are suggested to indicate that the claimant was spurred into action when the liability judgment was sent to the parties. It is pointed out that she has been represented throughout.

14. That is the evidence relied on in support of the allegation that there was more that she could have done in relation to the sources of work which she did try. Additionally, it is argued that, in the light of her relevant experience it would

have been reasonable for the claimant to seek work with another NHS Trust because it was the obvious place to start.

15. The claimant explained the steps she had taken to seek work in her statement (paragraphs 6 to 13). She identifies 15 job websites to which she uploaded her curriculum vitae. She found help with an organisation called "HeadsUp" in her search for work and began to have mentoring sessions with them in August 2018 (her paragraph 9). She describes widening her search to jobs as an office manager, personal assistant, executive assistant. She gained a qualification in project management from APM (the Association of Project Managers) and updated her software skills. In part she excused the limited job searches on the basis of the impact of Coronavirus pandemic because the libraries were shut. We recall that the claimant does not have access to a personal computer or laptop at home and she described being limited to applying for jobs on her phone when the libraries were closed. She said that that also limited the evidence she had been able to retain of her job applications.

16. It was specifically argued that the claimant had unreasonably narrowed her prospective employers by not applying to other NHS Trusts. Ms Cheung's argument, on behalf of the claimant, was that, from her perspective, she has had a few traumatic years. She had been referred to a neurosurgeon for stress. Dismissal came after an 8 month long procedure prior to which there had been sickness absence from April 2016 to August 2017 when she was suspended. It was argued to be entirely reasonable that she would avoid applying to the NHS given her treatment by the respondent Trust. Contrary to the respondent's argument that it was the most obvious place to start looking for a role, it was argued on behalf of the claimant that it was unreasonable to expect her to start by applying for roles at the last place from which she was dismissed. Overall, the claimant's argument was that she has made every reasonable effort to find alternative employment.

17. We have heard that the claimant has recently started to explore work for an NHS Trust (not the respondent) which was proposed by one of the agencies she has signed up to. We find that this means that she does not, in fact, have a deep rooted distaste for working for the NHS now – she only described in in paragraph 21 of her statement as being "slightly reluctant" to try to work again in the NHS.

18. Furthermore, in her statement paragraphs 18 to 21 she explained that her intention had been, had she remained employed by the respondent, to take her pension when she reached the age of 60 years and continue to work for the NHS. She also states (paragraph 21) that she believed that she could not apply for permanent jobs with the NHS and claim an NHS pension although she thought she could have worked as a contractor. She appears to accept now that any belief she had to that effect was in fact mistaken. She also refers in paragraph 21 to a belief that another NHS Trust would not look sympathetically on her application because she had been dismissed by this respondent.

19. She referred to a document at RB page 273 on "NHS Pensions – Returning to the NHS after retirement". It was suggested to her that the document did not suggest there was any reason why she could not return to NHS employment after retirement and taking her pension. She is in the 1995 section and page 273 suggests that were she to return to work after taking her pension she might be unable to rejoin the same pension scheme but she would be able to join a pension scheme and that is not the same as a bar on re-employment. Her oral evidence was that she thought she would have had to resign and return as a contractor – although that seemed to be a reference to what she would have done had she not been dismissed. She accepted that she had not asked anyone whether there was an impediment to her applying for an NHS job but described this as being a view she formed based upon her recollection of something she had been told in a workshop some years previously. She "wasn't specifically looking for a job in NHS because I had been dismissed" and believed that the job search she was making through the websites she had registered with had, in fact, taken in jobs across the board.

20. The majority view (Employment Judge George and Mrs McGregor, the employer-side non-legal member) is that the claimant's rationale for not applying for jobs in the NHS is flawed. She said orally that she was open to NHS jobs and her statement evidence did not go further than to say that she was slightly reluctant to seek work for the NHS – even in a different Trust. The majority consider that the evidence does not support a finding that she had particular antipathy towards working for the NHS – let alone a reasonable held one. The Tribunal finds that the claimant appears to have believed that she was not entitled to apply for a permanent employment by the NHS once she had taken her pension. However the majority view is that she did not take reasonable steps to find out whether what she had been told in a workshop was true.

21. In fact, there appears to be no impediment to her seeking work with the NHS. By not actively looking on NHS Jobs website the majority view is that she failed to take the reasonable step of actively considering a potentially productive source of employment. She did not even try the main source of NHS Jobs and she did not in her oral evidence rely on the argument that she had just been dismissed as the explanation for that failure. She said that if another Trust had an available job she would have looked at it. This is inconsistent with her saying she wasn't interested in applying to any NHS Trusts or was unwilling because of her experiences prior to dismissal by the respondent to work for the NHS in the future. The evidence does not support such a finding.

22. The majority view is that a reasonable step to mitigate her loss would have been for the claimant to apply for jobs through the NHS jobs website.

23. The minority view (Mr Woodward, the employee-side non-legal member) is that, the respondent must take the claimant as she is, with the health problems that

she had at the time of dismissal. His view is that by making the applications she did, she was making rational judgements according to her own perspective. She took steps to increase her transferable skills and reasonable steps to seek work through job agencies websites.

24. It is also argued by the respondent that it would have been reasonable for the claimant to make more applications than she did.

25. Here the Tribunal are unanimous that the evidence before us of the applications made suggests a surge of activity at particular times rather than a spread of applications more evenly. The evidence she has produced has a flurry of activity once the judgment came out and this causes us to infer that she applied to a large number of jobs in order to be able to evidence having made a search for a job rather than in a genuine attempt to get one. We accept that the courses she attended to improve and update her skills was useful. The efforts she has made by approaching job coaches is to her credit and we accept that, initially at least, her confidence would have been knocked by the experience of suspension and dismissal.

26. The claimant's oral evidence was that the documentary evidence only showed a sample of the applications she made. On balance the Tribunal's unanimous view is that she could have applied for more positions than she has evidenced. Furthermore, she could have evidenced other applications by making a diary of the application, for example, even if no copies of applications were retained. The number of jobs that the claimant has applied for recently suggests that more could have been applied for than are evidenced and we think it is probable that more suitable roles would have been available - particularly in the 2 years prior to the coronavirus pandemic. We accept that the claimant was working within restrictions during the pandemic. We accept her evidence that her financial position did not permit her to buy a laptop, although from time to time she was able to have access to a family member's. We accept that applications would, therefore, have been challenging during the library closures caused by the pandemic but, notwithstanding that, consider that more could have been done than has been evidenced before us.

27. We then need to go on to make findings about what would have happened had the claimant taken the steps which we think it was reasonable for her to take: making an increased number of applications and (by a majority) looking at the NHS jobs website and applying directly to roles advertised there. The respondent (at RB page 173 and following) has provided some evidence of roles which it alleges were suitable for the claimant to apply for within the NHS. However the respondent hasn't provide evidence of particular jobs which were available and which the claimant did not apply for outside the NHS.

28. Mr Sandirasekaram provided evidence of a number of jobs in his paragraph 7 which the claimant accepted were located within a reasonable travel time of her home. The claimant appears to have made no attempt to apply for a fixed term

job as a first step to mitigating her loss and her (mistaken) belief that she would not both be able to work for the NHS and claim a pension only applied to permanent jobs so there was no reasonable basis for not considering fixed term roles. She had been employed by the respondent for more than 6 years before dismissal and in the role of project support officer for more than 3 years. We consider it to be reasonable to assume that the claimant could put together an attractive job application for a project support officer role in another NHS Trust. She has not disclosed her CV which would have been helpful. She could have disclosed her updated CV if she wanted to demonstrate she didn't have the skills that project support officer needs.

29. Although the claimant would have had to disclose to prospective employers that she had been dismissed by her previous employer we accept the respondent's argument that the dismissal for some other substantial reason could have been explained as a clash of personalities. There are ways of truthfully explaining such as dismissal which do not reflect badly upon the applicant as a prospective employee in a different environment. It is clear from the analysis evidenced by Mr Sandirasekaram that the availability of NHS jobs did not reduce during the national lockdown. We accept that the claimant has shown that there were valid reasons why she would, potentially, not be successful were she to apply for the last two in his list. We find that we have to be reasonably cautious about saying any specific jobs would have been suitable for the claimant given the limited information about some of the roles.

30. We do accept the evidence of Mr Sandirasekaram that the relevant hiring manager for a vacant post would be likely to show flexibility in relation to whether an application form evidences an essential skill "or equivalent" when deciding which applications to progress. Therefore, the mere fact that the claimant (who had been carrying out the role of a project support officer for more than 3 years) does not have all of the skills listed as essential in the person specification for another such role does not necessarily mean that her application would not progress. Once again, we are hampered by lack of the claimant's up-to-date CV from which to judge what her strengths were. On the other hand, we do not have any information about how many people applied for these jobs when they were advertised from which to evaluate the chances of success.

31. There are, therefore, a number of uncertainties in the evidence before us when seeking to make a judgment about when the claimant would have obtained alternative work had she taken the steps which we think it would have been reasonable for her to take. Given the claimant's experiences in relation to her dismissal which would have meant some time and coaching was necessary to rebuild her confidence before starting to look for employment by the NHS. Doing the best we can, had the claimant started looking for jobs in the NHS within a reasonable time after her dismissal we think that it would have taken a year from dismissal for her to obtain alternative employment which extinguished her losses.

Pension.

32. The final area of dispute is the method of calculation of pension loss. It was argued on behalf of the claimant that, in the present case, were the claimant to be compensated for the lost contributions she would be significantly undercompensated. Pension loss should, it was argued, be calculated in full in accordance with the substantial/complex calculation. Reliance was placed on paragraph 5.53(i) of the Pension Principles (2021) and Sibbit v The Coverning Body of St Cuthbert's catholic Primary School (UKEAT/0070/10). In that case, the claimant had been employed for a long time and was unlikely to have changed employment before retirement had she not been dismissed. She was a teacher which was unlikely to be affected by the economic cycle and the loss was quantifiable. Similarly, argued Ms Cheung, the claimant's loss was quantifiable, she was 9 months away from retirement age at the time of dismissal, the job was stable and the NHS did not undergo restructuring in a way which affected the claimant's job. The claimant calculates her pension loss to be £11,889.52 (see RB page 272).

33. The respondent argued that there is no basis for calculating loss on the substantial loss basis given the short period of loss. Ms Owusu-Adjei referred us to section D: Compensation for a Claimant with a Defined Benefit Pension of the "Basic Guide to Compensation for Pension Loss" which summarises the "Principles for Compensating Pension Loss". In particular the guidance that,

    "Sometimes it will be appropriate to assess the loss based on employer contributions (…). This might be the case where, for example, the ET find that the claimant would not have remained in that employment for very long, so the pension loss is small."

34. It was argued that calculation of the actual contributions was an adequate measure of the claimant's loss, that the calculation put forward by the claimant (RB page 272) was difficult to follow.

35. The Principles (4th Ed. 3rd rev.) cover defined benefit schemes in Chapter 5. At paragraph 5.30 one finds the guidance that

    "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".

    However, paragraph 5.33 recognises 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".

36. The guidance suggests a rule of thumb. The claimant's payments into the 1995 Pension Scheme of which she was a member (either on her own behalf or on

her employer's behalf) would only have continued until her 60th birthday had she not been dismissed because her intention was then to take her pension and return to working for the NHS on whatever altered arrangement was in accordance with the regulations. In the particular circumstances of this case that was a few days short of 9 months since she was dismissed with effect from 16 February 2018 and turned 60 years of age on 13 November 2018. That causes there to be a short period of missed contributions resulting from the dismissal. However paragraph 5.41 states that there are cases which "for some other reason, involve a potentially significant quantifiable loss; a bright-line rule that fits all cases is impossible."

37. We accept the claimant's argument that this is such a case. Essentially their argument, based upon paragraph 5.53(i) of the Principles (4th Ed 3rd rev.) is that the contingencies which affect pension loss calculation and which are reflected in the withdrawal factors referred to by the editors of the Principles, are much less uncertain in the claimant's case than they would be in the case of a short period of loss due, for example, to a finding that dismissal would have happened at a particular future date. We accept that in the period of time under consideration there were no reorganisations which would have meant that the position was at risk, the uncertainties in the claimant's circumstances are reflected in the Polkey reduction and it can be demonstrated that the loss to the value of the claimant's pension is considerably more than the amount of the contributions payable. We accept that without using the complex calculation there is a serious risk that the claimant will be undercompensated.

38. The pension calculation at RB page 272 follows the seven steps model from the Principles (4th Ed 3rd rev).

    a. Step 1: the claimant's net pension income at retirement if dismissal had not occurred is £8,161.25 (we accept the calculation on RB page 272 of the effect of approximately an additional 9 months' service on the pension);

    b. Step 2: the claimant's net pension income in the light of dismissal is £7,830.22 (see the pension statement for 2017/2018 RB page 58 confirmed by the calculation on RB page 272);

    c. Step 3: The difference between the actual pension and the one which would have been received had the claimant not been dismissed is £331 per annum ("the multiplicand");

    d. Step 4: The claimant was 59 at the date of dismissal with a normal pension age of 60 years. This should be adjusted to take account of the effect on life expectancy of having a defined benefits occupational pension scheme and a discount rate of – 0.25% is appropriate (see para.5.58 and para.5.53(c) of the Principles). From the Ogden Tables

(at a glance) in Appendix 2 of the Principles the adjusted tables at pages 103-104 give a multiplier of 27.76.

e. Step 5: the total pension loss is £331 x 27.76 = £9,188.56.

f. Step 6: the claimant should be compensated for the diminution of the lump sum received on retirement: 3 X £331 = £993.00.

g. Total pension loss is £10,181.56.

Loss of statutory rights

39. We consider that, taking into account the claimant's age, the length of employment, the reduced prospects that in her working like she will again acquire statutory rights it is just and equitable to award £500 under this head.

40. The calculation of total compensation taking into account the above conclusions on the issues is set out in the judgment.

I confirm that this is our Reserved Remedy Judgment with reasons in the case of 3330720/2018 Lawrence and that I have signed the Judgment(s) by electronic signature.

Employment Judge George

Date:…4 January 2022 ……
Corrected: 17 March 2022

Sent to the parties on:

7 January 2022

For the Tribunal: