**Case No: 1303330/2017**

# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Fiona Burns

**Respondent:** University Hospitals Coventry and Warwickshire NHS Trust

**Heard at: Midlands West by CVP** **On:** 18 March 2022 and 4 April 2022 ( in Chambers)

**Before: Employment Judge Woffenden**
**Members: Mr D McIntosh**
**Mr P Talbot**
**Representation**
Claimant: In Person
Respondent: Mr M Islam-Choudhury of Counsel

# RESERVED JUDGMENT(REMEDY)

The respondent will pay the claimant compensation in the sum of £20282.27 as set out in the schedule attached.

# REASONS

## Introduction

1 The claimant's claims under sections 15 and 20 Equality Act 2010 and for unfair dismissal having succeeded, there was a preliminary hearing (by telephone ) on 7 May 2021 at which a remedy hearing for 13 January 2022 was listed and case management orders made. That hearing was postponed very shortly before the hearing date until 18 March 2022 due to the ill health of the claimant. At 9.35 am on 18 March 2022 the claimant sent an email to the tribunal in which she said she would like to apply for a postponement. Notwithstanding the claimant attended by CVP at the commencement of the hearing at 10.00.The tribunal informed the claimant that her application was refused because she had been told in writing on 17 March 2022 how to apply for a postponement but had not complied with the relevant rules ( Rule 30(2) and Rule 30A of the Employment Tribunal Rules of

Procedure ) and had provided no reason for the application. The tribunal asked the claimant if she wanted to renew her application but she said she did not and wanted matters concluded .

## Evidence

2 The tribunal heard evidence from the claimant. On behalf of the respondent the tribunal heard from Mr N Rees ( one of the respondent's Workforce Business Partners) . There was a bundle of documents ( 764 pages).

## The Issues

3 The issues for the tribunal to determine were agreed at the preliminary hearing on 7 May 2021.At the commencement of the hearing on 18 March 2022 after the tribunal had explained what orders may be made under section 113 Employment Rights Act 1996 , the circumstances in which they may be made and asked her if she wished the tribunal to make such an order, the claimant said she did not wish such orders to be made. The remaining issues to be determined by the tribunal were therefore as follows:

### Remedy for unfair dismissal

3.1 What basic award is payable to the claimant, if any?

### Remedy for discrimination

3.2 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

3.3 What financial losses has the discrimination caused the claimant?

3.4 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job from either March 2018 or in the alternative June 2018 ?

3.5 If not, for what period of loss should the claimant be compensated?

3.6 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

3.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

3.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? (the respondent says it does not)

3.9 Did the respondent or the claimant unreasonably fail to comply with it (the claimant has not specified any alleged failures and the respondent says the claimant failed to raise a grievance)?

3.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

3.11 By what proportion, up to 25%?

3.12 Should interest be awarded? How much?

**Findings of Fact**

4 The claimant was employed by the respondent as a Band 2 Healthcare Assistant ('HCA') working weekends only from 2 April 2012 to 7 July 2017 when she was dismissed by reason of capability. She was 48 years old when she was dismissed. Under her contract of employment her contracted hours of work were 15 hours a week over 2 shifts and her employment was subject to an unsocial hours payment. Her last full pay slip before sick leave (November 2016) shows she received £879.37 gross pay for 65 hours that month including unsocial hours payments( Saturday and Sunday working).Her weekly net pay was £ 147.50 . Her annual salary was £6548.80.The respondent paid her 5 weeks' pay in lieu of notice on dismissal.

5 The claimant also had a full-time job with Croner Group Limited ('Croner') working as a health and safety consultant Monday to Friday from home and in the office. She earned £23 604.35 per annum.

6 By 8 October 2017 the claimant's entitlement to half pay would have ended and she would have been on nil pay until 28 February 2018.She was not fit for any work until that date .By 15 June 2018 she had been discharged from the care of her consultant. Although under cross -examination she said she was doubtful that before that date she would have been able to carry out her normal duties as a health care assistant even if reasonable adjustments had been made for her, her evidence about this was vague and unconvincing. We find that she was fit to work as a health care assistant from March 2018 onwards.

7 The respondent has included details of health care assistant /care assistant advertisements in and outside the NHS in the Coventry Bedworth and Nuneaton areas for February March and April 2019 November 2020 and October 2021 but none of them were for weekends only ,referring to working rotating shifts zero hours and working nights.It was put to the claimant in cross examination that when she was fit to work she should have tried to work to mitigate her loss to which she responded by referring to her financial resources (several properties endowments shares and investments ) from which we infer that she felt under no immediate financial imperative to do so. It was also put to her that she should have tried to replace her job at the respondent by applying for a healthcare assistant role but she had failed to do so. She replied by saying she had done so (though this transpired to be a reference to a role as a healthcare assistant with Turning Point which she was offered on 31 December 2020 having applied on 30 November 2020).She was asked if she had applied for a similar health care assistant role prior to that and replied that retrospective applications were no longer on the NHS website. When asked about again about this she said she had been applying for other jobs in the NHS in an 'improved' role and would then have applied for a healthcare assistant weekend role. We did not find her evidence about prior applications or her explanation for not having made any at all convincing and find that the first application she made for a healthcare assistant role was to Turning Point.

8 Between 1 February 2018 and 27 October 2021 the claimant applied for over 80 roles both within and outside the NHS. By way of example on 1 February 2018 the claimant applied (unsuccessfully) for a post as health and safety advisor ( a non NHS role).On 5 March 2018 she applied unsuccessfully for an internal role at Peninsula. On 18 March 2018 she applied (unsuccessfully ) for a position as Senior Fraud Prevention Officer in the NHS. On 24 March 2018 she unsuccessfully applied for a post as a health and safety advisor at an annual salary of between £38000 and £45000. This salary range was more than the claimant's salary at Croners and her wages as an HCA added together. On 26 March 2018 she (unsuccessfully) applied for the role of health safety and environment officer at an annual salary of £35000.On 27 March 2018 she (unsuccessfully) applied for a post at Sandwell and West Birmingham Hospitals NHS Trust as a Trust Overseas Visitors manager .On 11 April 2018 she (unsuccessfully) applied for the role of health and safety business partner. On 3 May 2018 she (unsuccessfully) applied for the role of health and safety manager at a annual salary of between £34000 and £36000. On 31 May 2018 she (unsuccessfully) applied for NHS Assistant Director of Communications .On 3 October 2018 she (unsuccessfully) applied for NHS Associate Director of Operations. As she said in her witness statement (which evidence we accept) she applied for a variety of roles to look to increase her overall salary . Most of the roles she applied for were for health and safety advisory roles and for more money. She felt she had stagnated at Croners and had the skill sets to apply for the roles in question.

9 The claimant was offered and accepted a promotion by Croner to the role of Health and Safety Team Leader at an annual basic salary of £35000 with effect from 1 March 2019 ( offer letter 12 June 2019). Employers' pension contributions were said to be 7% but there was no evidence the pension scheme in question was a defined benefits scheme. She continued to look for other roles outside of Croners and received another offer from the Open University on 9 October 2019 but did not take that role because of some legal complication that arose. On 10 April 2021, the respondent offered to the claimant a new Healthcare Assistant Band 2 role working only on weekends. The offer was made without need to go through any selection process, but subject to the respondent's usual preemployment checks. On 16 April 2021, the claimant accepted the offer. Although the usual time frame for hiring a healthcare assistant is 41 days the claimant was not in post by the date of this hearing. She attributed this to a variety of 'hoops' such as being interviewed for her job of choice and administrative difficulties she encountered but we find that had the claimant applied herself to the tasks in hand she would have been in post by early Summer 2021 and that she did not do so because she did not really want to work for the respondent in the role of healthcare assistant.

10 Although the claimant's schedule of loss assessed her injury to feelings at '£45000 upper tier' ,her witness statement contained no evidence whatsoever about this. Her explanation for this omission under cross examination was that she did not know she had to which she attributed to the effect of dealing with several bundles of documents. We did not find her ignorance about the need for such evidence credible in view of the clear identification and discussion of the issue at the preliminary hearing on 7 May 2021.

11 The claimant was a member of the respondent's pension scheme which is a defined benefit scheme. The employers' contributions were 14.83%.She was

(and therefore would have been had she remained in the respondent's employment) entitled to increments due to the implementation of NHS Agenda For Change pay increases. For the period 1 April 2017 to 31 March 2018 her net weekly pay ( including enhancements) would have been £ 152.81 .For the period 1 April 2018 to 31 March 2019 her net weekly pay (including enhancements ) would have been £ 160.14.

**The Law**

**Remedy for Unfair dismissal**

12 Under section 119 Employment Rights Act 1996 ('ERA'):

'(1)Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

(a)determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b)reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c)allowing the appropriate amount for each of those years of employment.

(2)In subsection (1)(c) "the appropriate amount" means—

(a)one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b)one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c)half a week's pay for a year of employment not within paragraph (a) or (b).'

12 A weeks' pay is the gross contractual remuneration an employee is entitled to be paid when working their normal hours of work each week calculated in accordance with Chapter 11 sections 221 to 224 ERA. A basic award is calculated in a similar way to a statutory redundancy payment.

13 Under section 123 (1) ERA:

'(1)Subject to the provisions of this section and sections 124 124A and 126 , the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

14 Under section 123 (4) ERA:

(4)In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to

damages recoverable under the common law of England and Wales or (as the case may be) Scotland.'

15 Any claimant will be expected to mitigate the losses they suffer as a result of an unlawful act by giving credit for earnings in a new job. The tribunal will not make an award for losses that could reasonably have been avoided .The claimant is expected to take reasonable steps to minimise the losses suffered as a consequence of the unlawful act .The respondent has the burden of proving a failure to mitigate ( **Fylde v Scientific Commissioning Ltd 1989 IRLR 331**). It is insufficient for a respondent merely to show the claimant failed to take a step that it was reasonable to take. The respondent has to prove the claimant acted unreasonably .If the claimant failed to take a reasonable step the respondent has to show any such failure was unreasonable.

**Remedy for Discrimination**

16 Under section 124 Equality Act 2010 ('EqA') the following discretionary remedies are available: a declaration as to the rights of the parties ,an order for compensation to be paid to the claimant and an appropriate recommendation.

'(1)This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2)The tribunal may—

(a)make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b)order the respondent to pay compensation to the complainant;

(c)make an appropriate recommendation.'

17 In **Ministry of Defence v Cannock and Others ICR 918**,the EAT said in relation to compensation that the aim is 'as best as money can do it, the applicant must be put in the position she (or he) would have been in but for the unlawful conduct.' The tribunal must ascertain the position the claimant would have been in had the discrimination not occurred. Causation requires tribunals to form a view about what would have happened, despite many unpredictable factors. The question of what loss is caused by a particular act of discrimination is related to the question, in a discriminatory dismissal case, of whether the employee could or would have been fairly dismissed were it not for the discrimination. Tribunals may need to consider whether, were it not for the discriminatory dismissal, there could have been a non-discriminatory dismissal at the same time, or whether there would have been a non-discriminatory dismissal at some definable point in the future. The chance that the claimant could or would have been dismissed in any event, with no discrimination, can be recognised by making a reduction in compensation for future loss. This may take the form of a percentage reduction to reflect a chance. It may also be possible to say that employment would have come to an end in any event by a certain point. In **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**, the House of Lords established that where a dismissal was procedurally unfair, but the employer could show that there was a significant chance that, had it followed a fair procedure, it would have dismissed anyway, compensation could be reduced. A respondent can rely on **Polkey** in discrimination cases to contend there should be a reduction in compensation because a fair dismissal was likely at some point in the future. In **Abbey National**

**plc and anor v Chagger 2010 ICR 397** CA. Lord Justice Elias stated that the possibility of dismissal of the claimant had to be factored into the measure of loss. An employment tribunal might also consider the chance of the claimant remaining in employment in any event. It may also be necessary to consider if the chain of causation has been broken(**Essa v Laing Ltd [2004]IRLR 313 CA)**.

18 Compensation (e.g., for loss of earnings) may overlap in the claims of unfair and discrimination. Double recovery must be avoided. Section 126 ERA prevents double recovery, but does not specify when the award should be made as compensation for unfair dismissal or discrimination. In these circumstances, the EAT has suggested that tribunals should award compensation under the discrimination legislation, thereby avoiding the cap on the unfair dismissal compensatory award (**D'Souza v London Borough of Lambeth 1997 IRLR 677, EAT).**

19 Tribunals may make an award for injury to feelings in discrimination cases. The tribunal bears in mind that compensation is designed to compensate the injured party rather than punish the guilty one .Awards should bear some relation to those made by the courts in personal injury .The tribunal follows guidelines first given in **Vento v Chief Constable of West Yorkshire Police[2003] ICR 318** in which the 3 broad bands of compensation for injury to feelings were set out as follows:

> i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
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> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
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> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

20 In **Vento** it was stated at paragraph 66 that 'There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case'.

21 On 5 September 2017 the Presidential Guidance rated the bands as follows (for claims lodged after that date): Lower - £800 to £8,400; Middle - £8,400 to £25,200; Higher - £25,200 to £42,000.

22 A tribunal can increase an award by up to 25% if an ACAS Code applies and there has been an unreasonable failure by a party to comply with it.

23 When a tribunal calculates compensation for discrimination, it is obliged to consider awarding interest. If it decides to do so, interest is calculated from the date of the act of discrimination up to the date of the calculation, save for interest on lost wages, where the calculation is made from the middle of that period. The tribunal will then include that interest in the award made.

24 Some cases can lead to an award for loss of pension where the unlawful act

(usually dismissal) causes a loss of pension contributions or a reduction in the value of pension benefits. Sometimes it is appropriate to assess the loss based on employer contributions for a claimant with a defined benefit pension if a tribunal finds the claimant would not have remained in employment for very long ('the simplified approach').

## Conclusions

Issue 3.1

25 Mr Islam Choudhry submitted that for the purpose of a weeks' pay supplemental payments such as bonuses and overtime should be excluded and calculated on the basis of the claimant's basic hours each week. We conclude that the claimant's gross contractual remuneration should include the unsocial hours payment that she received for working weekends which was in the nature of a contractual bonus. We therefore the basic award to which the claimant is entitled is £ 879.37 x 12/52 x 7.5 = £ 1521.98.

Issue 3.2

26 We make no recommendation. The claimant has not asked us to do so .She has no longer works for the respondent and has no wish to be re-engaged or re-instated to their employment.

Issues 3.3 3.4 3.5 and 3.7

27 As a result of the unlawful discrimination the claimant was unfairly dismissed on 7 July 2017.She was paid 5 weeks' pay in lieu of notice in the sum of £969.69.Had she not been dismissed she would have been on half pay between 12 August 2017 and 8 October 2017.Thereafter between 9 October 2017 and 28 February 2018 ( after which she became fit for work) she would have been on nil pay.

28 Mr Islam Choudhry submitted that there were three alternatives that we should consider, as follows: a. the claimant would have been fairly dismissed on or before 28 February 2018, or if not, she failed to mitigate her financial losses from that date (Position 1) b. she failed to mitigate from 15 June 2018 after she is discharged from her Consultant (Position 2). c. she obtained a promotion with Croner on 1 March 2019 and therefore she would have left the role in any event, or has failed to mitigate since that date (Position 3).

29 We remind ourselves that we found at paragraph 59 of the liability judgment that the claimant had wanted to continue in the employment of the respondent because it provided the benefit of a pension and would have afforded her the opportunity to progress her career within the NHS potentially into a health and safety role. However we conclude she would not have stayed in the role of healthcare assistant indefinitely. Had she not been dismissed we conclude she would have continued to undertake the healthcare assistant role ( as and when she was fit enough to do so) until she had found something which satisfied her career and remuneration aspirations and (since this was not a benefit in the promoted role she was offered and accepted at Croners) whether or not it offered a defined benefits pension scheme . Absent a dismissal on the balance of probability we conclude that her job search would have followed a similar trajectory to that which she undertook after she was dismissed and she would

have ceased to have been employed as a healthcare assistant and would have secured alternative employment by 1 March 2019.

Position 1

30 The respondent's argument in relation to position 1 runs like this: if following the appeal on 30 November 2017 the respondent had made the reasonable adjustment of putting the claimant back 'on the books' pending an OH report, that report would have been available by no later than mid-January 2018.As we found the claimant was not fit to work until 28 February 2010 ( six weeks later) on the balance of probabilities the OH report would have said either she was not fit for work or may be fit within 6 weeks or the prognosis was unclear. It was likely that if such a report had been obtained the claimant's employment would have ended ( fairly) then by reason of capability so the claimant suffered no loss after that date.

31 We reject that submission. Even if Mr Islam Choudhry is correct about the putative contents of such a report there was no evidence before us about what Mr Kee (or whoever would have been the decision maker following the appeal) would have done in relation to the claimant's continued employment.

32 However Mr Islam Choudhry goes on to submit that the claimant has failed to mitigate her loss. She was well enough to do some healthcare assistant work from 1 March 2018, yet she did not apply for any suitable roles. Instead, she applied predominantly for Health and Safety roles. She was trying to replace her Croner and Healthcare Assistant roles with a more senior Health and Safety role but that was not a reasonable step to take, as her recoverable losses were to put her back in the position she would have been in had there been no discrimination. This would have meant that she would have carried on doing the Healthcare assistant role and the Croner role at least until she found something better.

33 We conclude that the approach which the claimant took to mitigate her loss after dismissal was to look to increase her overall salary ,in other words instead of having 2 jobs as she had done in the past ,she tried to get a better paid job ( focusing on health and safety roles) which paid more than the total of her wages for her Croner and health care assistant jobs. She did not try and get another weekend job while working during the week at Croners, for example as a healthcare assistant, a role in which she had experience. We conclude that she thereby failed to take a step that it was reasonable for her to take. However, we do not conclude that her failure to do so was unreasonable. Although she took a different approach there may be more than one reasonable approach for an employee to take to mitigate loss. We conclude that overall the approach the claimant took was reasonable, even if ,in relation to some of the roles for which she applied, her belief that she had the requisite skill set was not reasonable and her aspirations were unrealistic because of the seniority of the role and the higher salary it commanded. The respondent has not provided evidence that there were more junior lower paid jobs available and that it was unreasonable of the claimant not to apply for them. Even if the claimant's failure to try and get another weekend healthcare assistant or other job was unreasonable the respondent has not provided evidence of such weekend only jobs available prior to April 2021 and that it was unreasonable of the claimant not to apply for them.

Position 2

34 We have already found that the claimant was fit for work from March 2018 onwards so her duty to mitigate arose then.

Position 3

35 As far as position 3 is concerned Mr Islam Choudhury submits that by having been earning across her two jobs the total of about £30,000 gross. She was offered the promotion to Team Leader at Croner with a salary of £35,000 gross – i.e. more than the combined income of her two previous jobs. Her pattern of job applications had been to find a role to replace her pre-existing Croner role. This had now been achieved and amounted to a break in the chain of causation. On the balance of probabilities, it means that if the claimant had remained in the Healthcare Assistant role, she would likely have resigned from it upon promotion. The Tribunal can be confident of that, because the claimant still did not apply for any healthcare assistant or carer roles at the material time, despite the abundancy of vacancies. Alternatively, for the same reasons, the claimant had failed to act reasonably to mitigate loss.

36 We conclude that having achieved her goal of a salary which paid more than the combined income of her two previous jobs by having been offered and accepted the promotion at Croners, this amounted to a break in the chain of causation or alternatively that by 1 March 2019 the claimant thereby had mitigated her loss.

Issue 3.6

37 Although there was no evidence about this in her witness statement there was some evidence available to us about injury to feelings. The claimant had been employed part time in the NHS for 5 years .She had wanted to keep that job (paragraph 59 of the liability judgment).That judgment shows she tried very hard to keep it ,appealing against her dismissal and attending and representing herself at an appeal hearing. In those circumstances there must have been some injury to her feelings when she lost that job. Although dismissal is a one off event ,it is a serious consequence of the unlawful discrimination which occurred. However, there is no evidence of any continuing effect whatsoever on the claimant and in her submissions she did not mount any challenge to Mr Islam-Choudhury's submission that the award be no more than £4000.We conclude that £4000 is an appropriate award for injury to feelings.

38 Mr Islam-Choudhury submitted that in this case the simplified approach was the correct approach to pension loss. Although she had been referred to Employment Tribunals (England and Wales) -Presidential Guidance Guidance Note 6 :Remedy (which has a section on Pensions Loss and the separate guidance available on this) and had been recommended to read it , the claimant made no submissions about this aspect of her loss. We concluded at paragraph 29 that the claimant would have left her role as health care assistant by 1 March 2019.She was not fit to return to work until 1 March 2018. Given that had she remained in employment she would have had substantial periods of half pay and no pay before that date we consider that her period of loss is 'relatively short' and conclude that therefore a simplified approach is the correct approach.

39 As far as interest is concerned we accept Mr Islam -Choudhry's submission that interest will be payable from the date of dismissal (7 July 2017) to the date of

hearing (18 March 2022) @ 8% per annum. This relevant period is 1,715 days.

Issues 3.8 to 3.10

40 The ACAS Code of Practice on Disciplinary and Grievance Procedures is designed to help employers employees and their representatives deal with disciplinary and grievance situations .Disciplinary situations include misconduct and /or poor performance but not capability (ill health ) dismissals and the claimant did not raise a grievance. No relevant ACAS Code applies and no uplift can therefore be made.

41 The Recoupment Regulations do not apply. The claimant was not in receipt of state benefits.

Employment Judge Woffenden
15 June 2022