EMPLOYMENT TRIBUNALS

Claimant: Mrs L. Hancock

Respondent: Warrington & Halton Hospitals NHS Foundation Trust

HELD AT: Liverpool **on:** 21st September 2022

BEFORE: Employment Judge T. Vincent Ryan
Mr M. Gelling
Ms. J. Stewart

REPRESENTATION:

Claimant: Mr. K. Ali, Counsel
Respondent: Dr. E. Morgan, King's Counsel

RESERVED FURTHER REMEDY JUDGMENT

The unanimous judgment of the Tribunal is:

1. Pension Losses:

   1.1. If the claimant had secured re-employment within an NHS recognised organisation within five years of her constructive unfair dismissal by the respondent, she may have been enabled to gain access to the NHS Pension Scheme; the claimant did not act unreasonably in failing to secure such re-employment. The award in respect of pension losses will be unaffected by the claimant remaining in employment with a private company that is not an NHS recognised organisation entitling her to access to the NHS pension scheme.

   1.2. The Tribunal's finding in its provisional remedy judgment sent to the parties on 16th September 2019 ("the Provisional Remedy Judgment") relating to the claimant's mitigation of loss in respect of her loss of earnings claim does not, as a matter of legal principle, preclude recovery of pension losses for any period of loss beyond 30 March 2019;

   1.3. The claimant shall be awarded compensation in respect of pension loss for the period from the date of her constructive unfair dismissal until her

attainment of 60 years of age ("the 15-year period", as it is approximately that duration).

1.4. In the event, the tribunal was not asked to decide upon the issue: "how are such losses to be calculated"; we have not reached a judgment on that matter.

2. Adjustment of Award under s.207A Trade Union & Labour Relations (Consolidation) Act 1992 (TULRA) ("ACAS uplift"):

2.1. The ACAS uplift provisions apply to these proceedings.

2.2. It appears to the Tribunal that:

2.2.1. the claims to which these proceedings relate concern matters to which a relevant code of practice, ACAS Code of Practice 1: Disciplinary and Grievance procedures (2015), (and ACAS Guide: Discipline and Grievances at Work (2020)) applies,

2.2.2. the respondent has failed to comply with that code in relation to that matter, and

2.2.3. that failure was unreasonable.

2.3. The Tribunal considers it just and equitable in all the circumstances to adjust its provisional award made in the Provisional Remedy Judgment ("the Provisional Award") increasing it by 10%. In the exercise of its discretion to increase "any award it makes to the employee" the Tribunal has limited the exercise of its discretion to the Provisional Award; the Tribunal does not consider that it would be just and equitable to apply the ACAS uplift to any award for pension losses. The claimant is awarded an adjustment to the Provisional Remedy Judgment by way of uplift, being an additional sum of **£4,498.46**.

REASONS

The Issues: the parties agreed a list of issues for determination at this remedy hearing; in the event the parties considered that only some of the issues were pertinent. The revised list is as follows:

1. Pension Losses :

1.1. Would the claimant's re-employment with an NHS recognised organisation have enabled her to gain access to the NHS Pension Scheme?

1.2. Does the Tribunal's finding on the duty to mitigate - as a matter of legal principle - preclude recovery of pension losses for any period beyond 30th of March 2019?

1.3. Is the claimant to be awarded compensation in respect of pension losses in respect of any period beyond 30th of March 2019? [The parties agreed that the Tribunal did not have to go on to consider: "and if so

1.3.1. which losses?
1.3.2. for what period?
1.3.3. and how are such losses to be calculated?"]

2. Uplift: what should be the appropriate uplift to be applied to compensation, pursuant to the Tribunal's findings that the respondent failed to adhere to the ACAS code of practice?

3. [Grossing up: should any element of the compensation awarded to the claimant be grossed up? - The parties agreed that the Tribunal did not need to decide this matter which is not in issue.]

Introduction

4. The Tribunal heard the case on liability in November 2017, reserving judgment which was reached in Chambers in December 2017. A reserved judgment on liability was signed on 9 January 2018 and sent to the parties on 19 January 2018 ("the Liability Judgment").

5. On 23 July 2018, upon the claimant's application, there was a reconsideration hearing in respect of the liability judgment. A reconsideration judgment was signed on 23 July 2018 and sent to the parties on 14 August 2018 ("the Reconsideration Judgment").

6. The first remedy hearing was held on 18th - 20 March 2019. The judgment on remedy, excluding consideration of pension losses and ACAS uplift, was signed on 5 April 2019 and sent to the parties on 16 April 2019 ("the Provisional Remedy Judgment", which made a partial award, "the Provisional Award").

7. A preliminary hearing was held on 19 August 2019 to address the outstanding remedy issues of pension loss and ACAS uplift. Case management orders were made in accordance with agreement reached with the parties and the Order was sent to the parties on 22 August 2019.

8. For reasons of public health in relation to the COVID pandemic, and personal health of members of the Tribunal, exacerbated by the unavailability of one or other advocate and usual listing pressures encountered by the Tribunal, the remedy hearing to address pension loss and ACAS uplift was serially postponed. Today's hearing was listed for two days but was reduced to one day as Monday 19th September was declared a public holiday.

Facts & deliberations:

9. The tribunal endorses and confirms, and indeed is constrained by, its findings of fact in the respective Liability Judgment, Reconsideration Judgment, and

Provisional Remedy Judgment. This further remedy judgment dealing with pension loss and ACAS uplift is principally based on those findings of fact.

10. The Tribunal did not consider pension loss and ACAS uplift in its Provisional Remedy Judgment save to expressly exclude them and discuss those heads of claim as separate matters to the deliberations and conclusions reached at that time. Our consideration of loss, and mitigation of loss, was limited by us to the heads of loss and damage covered by the Provisional Award, and we did not consider or adjudicate upon any aspect of mitigation of loss in respect of pension. It was apparent to us at the time that the parties were hiving off all questions of pension loss pending further consideration of the need for actuarial reports; furthermore, it was considered inappropriate for the Tribunal to address the ACAS uplift until further clarification could be provided in respect of the extent of any pension loss (as the uplift may have been affected by it). The Tribunal considers that this exclusion of pension loss and ACAS uplift from all determinations made at the provisional remedy hearing is evident from any reasonable reading of the Provisional Remedy Judgment. In paragraph 3 of the Provisional Remedy Judgment the Tribunal expressly reserved its judgment in respect of the claimant's claim for pension loss.

11. Following on from paragraph 10 above, it is appropriate to confirm our other findings to the effect that the claimant could not reasonably have been expected to return to employment with the respondent given the treatment she had received and the breakdown in trust and confidence, and that there was no other NHS hospital trust at which she could gain employment within reasonably easy reach of her home, avoiding the need to commute beyond her home locality; the need to so commute would have exacerbated the symptoms of her disabling condition. The claimant did not act unreasonably in failing to secure, or not seeking to secure, employment in an NHS recognised organisation as there was none within a reasonable commuting range of her home save for the respondent; she did not act unreasonably by not returning to work for the respondent.

12. Additional to our previous findings of fact, the Tribunal finds, on the balance of probabilities, that had the claimant not been subjected to unlawful disability discrimination and she had not been constructively unfairly dismissed based upon a breach of the implied term of trust and confidence by the respondent, she would have remained in employment with the respondent until she reached pension age at 60 years old (approximately 15 years after the effective date of termination of her employment) in the role of, or commensurate with, Accuracy Checking Pharmacy Technician. This finding is based upon:

    12.1. our said previous findings of fact.

    12.2. The claimant's insistence that this was her intention, given that we have found her to be a truthful witness.

    12.3. Her apparent conscientious dedication to that role evidenced not least by over 18 years' service in the NHS following her lifelong ambition to so serve.

12.4. Her beneficial position as regards pay scales and favourable prospective NHS pension terms.

12.5. Her purchase of a home in close proximity to Warrington Hospital, thus evidencing her long-term commitment.

12.6. Her ability to perform a similar role for a private company post-termination of employment from 1 September 2016 to date.

12.7. Her stated and apparent work ethic, including her satisfaction at continuing in employment elsewhere notwithstanding the setbacks in her employment with the respondent, all of which is the subject of the earlier judgments and findings.

13. If the claimant had secured re-employment within an NHS recognised organisation it is more likely than not that she would have been enabled to gain access to the NHS pension scheme. We were not taken to this scheme or any detailed terms and conditions of entitlement however we accept the respondent's submission that this was the case, and it was not contested.

14. We reiterate our earlier findings that the respondent unreasonably failed to comply with the relevant ACAS code regarding grievances. It was accepted by both parties on the basis of our earlier judgements that that threshold had been reached. We recite for completeness that the provisional award amounted to £44,984.58 plus interest; we note that on the basis of the 15-year period of loss of pension then by any calculation the pension loss figure will probably exceed £200,000 and may well exceed £300,000.

The Law:

15. Section 123 Employment Rights Act 1996 provides, amongst other things, that the amount of a 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 insofar as that loss is attributable to action taken by the employer. Furthermore, in ascertaining the loss the Tribunal shall apply the same rule concerning the duty of a person to mitigate his/her loss as applies to damages recoverable under the common law of England and Wales.

16. Whereas s.123 ERA provides that where dismissal was to any extent caused or contributed to by any action of the complainant it may reduce the amount the compensatory award by such proportion as it considers just and equitable, it is established law that it would only be appropriate to do so in exceptional circumstances where there is a constructive unfair dismissal based on a breach of trust and confidence by the employer.

17. A tribunal may also reduce an award to reflect the risk faced by a claimant of their having been fairly dismissed at about within a reasonable period after the time of the unfair dismissal.

18. Section 124 (6) Equality Act 2010 (EqA) concerns remedy in the situation where the Tribunal finds that there has been a contravention of EqA . Following a finding

of unlawful discrimination a tribunal has a discretion to make a declaration as to the rights of the complainant and the respondent, an order that the respondent pay compensation to the claimant, a recommendation that the respondent take specified steps obviating or reducing the adverse effect of any matters to which the proceedings relate on the claimant or on any other person in their employment.

19. The aim of the remedy provisions is to put a claimant into the position, so far as is reasonable, that he or she would have been if the unlawful discrimination had not occurred, and so it is treated in the same way as where there has been a tort. This is not a "just and equitable" consideration as explained above in respect of unfair dismissal; this may produce a difference of approach with regard to credits given by an employee in mitigation. Losses caused by the unlawful act will be recoverable and losses that are too remote and unforeseeable will not be recoverable (save at least in respect of harassment where any loss proved to flow directly from it will be recoverable).

20. Although there are some slightly different matters to take into account as regards mitigation of loss for discrimination as opposed to unfair dismissal, the general principle still applies that a claimant must take reasonable steps to minimise the losses suffered in consequence of the unlawful discrimination. Losses are not recoverable where a Tribunal determines that a claimant ought reasonably to have avoided that loss, that is where a claimant has acted unreasonably.

21. The burden of proving a failure to mitigate is on the respondent who must show that a claimant has acted unreasonably in failing to mitigate. It is for the tribunal to consider what steps the claimant should have taken to mitigate, whether it was unreasonable to fail to take those steps and, subject to that, then the date from which mitigation ought to be taken into account; alternatively, the tribunal could apply a percentage reduction facts are uncertain, but this is considered to be a crude approach. Tribunals are encouraged not to be too demanding of claimants in respect of mitigation generally.

22. Pension payments are deferred wages. Where the claimant has received pension entitlement early following dismissal this is not taken into account against loss of income. The parties addressed the Tribunal on this point and accepted the principle that pension is treated differently in terms of mitigation from earned income (albeit Dr Morgan did not consider that this was a relevant consideration as the respondent's concern is not about the receipt by the claimant of any pension but rather that she should have secured access to the NHS Pension Scheme within five years of her constructive unfair dismissal).

Submissions:

23. Both parties provided written submissions in terms of skeleton arguments for this hearing, and they kindly cross-referenced the tribunal's other judgments, an 836-page updated remedy bundle and 20-page supplementary bundle.

24. The claimant also successfully applied to adduce further medical evidence being a report prepared by Dr Binymin dated 8 December 2020 which was disclosed to the respondent on 18 January 2021; the Tribunal attached a little weight to that report save in so far as it bore out the findings of fact contained in the Tribunal's

various judgements and its consideration of the claimant in terms of her honesty and commitment to her role with the respondent; if anything the report was taken as corroboration of the tribunal's view rather than it being persuasive of a particular view. In terms of medical opinion, where the Tribunal is obviously not qualified to comment, the report was duly noted.

25. Mr Ali and Dr Morgan both addressed the tribunal orally emphasising parts of their respective skeleton arguments and responding each to the other.

26. The Tribunal took due account of the written skeleton arguments and oral submissions made by both parties and the authorities to which the Tribunal was referred. The Tribunal is appreciative of respective counsels' clear and pragmatic approach to the complex issues before the Tribunal and for their assistance in our resolving them to our satisfaction. For the sake of all concerned we naturally wished that this litigation had not been so protracted.

Application of law to facts:

27. It is accepted by the Tribunal that the claimant would probably have been entitled to access the NHS Pension Scheme if she had become employed by an NHS recognised organisation within five years of her constructive dismissal. For all the reasons previously stated however the Tribunal finds that she did not act unreasonably in failing to secure such employment. The claimant could not have been expected to return to employment with the respondent. There was no other NHS recognised organisation of the type envisaged within a reasonable commuting distance that would have allowed her the claimant to commute and work without exacerbation of her disabling condition; at the same time she had in any event secured congenial employment allowing her to exercise professional skills in a similar manner to the way she had done so the respondent. The claimant did not fail to mitigate her loss of pension in the way contended for by the respondent.

28. At the provisional remedy hearing pension loss was not on the agenda save for matters of case management, and deferment for further consideration at a later date. Pension loss was expressly excluded from the ambit of the Provisional Remedy Judgement and Provisional Award. At that stage the Tribunal considered the claimant's mitigation of loss of earnings. Loss of earnings is a separate head of loss to pension loss. A claimant has a duty to mitigate each type of loss and different considerations arise in respect of each. In respect of each type of loss there are different factors at play with regard to mitigation and what needs to be taken into account in a Tribunal reaching an award that is either just and equitable or an award that puts someone who has been subjected to unlawful discrimination back in the position they would have been had they not been so subjected.

29. For all the reasons stated in the Provisional Remedy Judgment the Tribunal considered that the claimant mitigated her loss of earnings appropriately in securing alternative employment within a short time; we went on to find that there was a cut off after which she could no longer visit any loss of earnings on the respondent; this was so because she had made a conscious decision to lower earnings expectations and she no longer sought employment with a commensurate rate of pay to that enjoyed when working for the respondent. The

Tribunal considers that they were proper considerations with regard to loss of pay. There is a reasonable expectation that a dismissed employee will seek to make good losses of earnings by obtaining employment at about the same rate of pay as previously enjoyed. Where one settles for less and does not seek to make good the difference then there must come a point where any notional loss is not attributable to the actions of the former employer. In those circumstances a claimant can be considered to have accepted their lot.

30. With regard to the claimant's pension loss however she has never accepted her lot since dismissal. As stated above the claimant could not gain easy or reasonable access to the NHS Pension Scheme given her personal circumstances. The claim for pension loss is a wholly separate claim to that for loss of earnings and different considerations apply with different factors having to be taken into account. It is appropriate for a Tribunal therefore to also consider different factors and circumstances when addressing the issue of mitigation.

31. For all these reasons the Tribunal does not consider that it is constrained by the 30 March 2019 cut-off point in respect of loss of earnings when it comes to consideration of mitigation of pension loss. The Tribunal does not accept that on a point of law, principal, or consistency it needs to apply the same date or the same broad brush. This is not an area where a broad brush is appropriate. In fact, we consider that we would be open to criticism if we did not properly engage in respect of each head of loss with the relevant factors for assessing the loss and considering mitigation of that head. They are distinct and in the interests of justice each requires direct engagement with the appropriate methods of arriving at a proper award.

32. The claimant has shown herself to be honest and conscientious. She was a diligent professional with a vocation. It is evident to the Tribunal that she valued the work she did for the respondent and that she was committed to it. The claimant had secured status, including in terms of pay rates and banding, whilst employed by the respondent. She had the benefit of favourable pension terms enhanced by her lengthy period of service, in excess of 18 years, with the prospect of a further 15 years employment to secure what she always considered to be a favourable pension. The claimant knew that she would not be able to secure employment in an NHS recognised organisation in her vicinity and that pursuit of her vocation and application of her professional skills in a private company would never secure for her a commensurate wage or pension package. On the balance of probability is highly unlikely that the claimant would ever have left her employment at Warrington with the respondent had it not been for the respondent's breach of trust and confidence of discriminatory treatment for. On the balance of probabilities, the claimant would have remained in employment to age 60. That was her stated intention, and it is entirely plausible.

33. The Tribunal notes that it is some six years since the claimant commenced her employment in a pharmacy and that she continues to work commensurate hours with those worked whilst employed by the respondent. She considers that some of the responsibility and tasks that she now undertakes are more onerous than before; we do not doubt her honesty in that regard as that is her stated opinion.

34. The respondent, reacting to the earlier judgments, has somewhat shifted its argument with regard to pension loss from concentrating on its initial stance that the claimant would only have been capable of working for some 2 or 2+ years post her resignation from employment with the respondent, to saying that she ought to have secured employment within five years with an NHS recognised organisation. This is understood to be a pragmatic acceptance of the fact that six years on the claimant is still working, that effectively the 15-year projected at the outset is now only somewhere in the region of nine years. The tribunal does not criticise the respondent; the respondent has been accepting of the Tribunal's various judgments and the current employment facts as they are.

35. Taking all matters into account the Tribunal concludes that the claimant ought to be awarded compensation in respect of pension loss beyond 30 March 2019 and for the period to age 60.

36. Turning to the question of ACAS uplift, the Tribunal considered the claimant's primary case that given the nature of the respondent's non-compliance, its responsibilities and its size that it should pay a 25% uplift on the total award, and the respondent's competing view that the whole question ought to be deferred until the pension figures are either agreed or adjudged. The respondent's submission for a deferral was on the basis that the Tribunal could not adequately assess an appropriate ACAS uplift until it knew the figure in total that was otherwise being awarded to which the uplift might apply.

37. The uplift may be attached to any award of the Tribunal's according to section 207A TULRA. The circumstances for making an award of an ACAS uplift pertain, and the respondent has conceded that the threshold for consideration has been reached. The Tribunal must therefore decide which of any award to attach the uplift to and what would be just and equitable in all circumstances before deciding on the size of the uplift, which must not exceed 25% of the award in question.

38. Perhaps part of the logic of the uplift provision is that had parties properly addressed matters in line with applicable codes litigation may have been avoided. Whether or not that was the motivation it is right that a Tribunal must consider whether and how it should reflect a party's non-compliance with an applicable code. Proper consideration however does not equate to merely granting a windfall and the Tribunal must apply its mind conscientiously to the principles of justice and equity.

39. In this case the claimant sought to bring a grievance. Perhaps if the respondent had complied with the applicable code matters could have been resolved at an early stage and without recourse to litigation (let alone without the emotional and financial investment of the claimant and so many other people over such a long period of time). It could reasonably have been expected that many of the matters forming the basis of the Liability Judgement would have been addressed and maybe some could have been resolved; the claimant may not have suffered such injury to her feelings nor felt compelled to resign and thus would not have lost income. Those matters are all reflected in the Provisional Remedy Judgment and Provisional Award. By virtue of this judgment the claimant will not in fact lose out on her pension entitlement up to the date of projected retirement at 60. The Tribunal considers that it is just and equitable to take the provisional award and

the pension loss award as separate awards; there have been many and varied separate considerations taken into account to reach them.

40. Furthermore, the Tribunal does not consider that it would be proportionate, and therefore it would not be just and equitable, to increase the sizeable pension award by way of a significant percentage uplift.

41. All things considered the Tribunal will uplift the Provisional Award only. Taking all matters into account it is our judgment that it would be just and equitable to uplift the Provisional Award by 10% because of the respondent's failure to comply with an applicable code. The Tribunal is not required to uplift by 25% but is limited to that sum. We have to consider the extent of non-compliance, the likely effect of it, the possibility that the claimant may have succeeded with some claims regardless and may have secured awards notwithstanding compliance by the respondent, the total value of the awards against the respondent both in respect of the provisional award and pension loss award yet to come, and the value in terms of spending power or investment potential of the totality. In all the circumstances we are satisfied that a 10% uplift attaching only to the Provisional Award is fair.

Employment Judge T.V. Ryan
Date: 26.09.22

JUDGMENT SENT TO THE PARTIES ON
29 September 2022

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2400182/2017**

Name of case: **Mrs L Hancock** v **Warrington And Halton Hospitals NHS Foundation Trust**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 29 September 2022

the calculation day in this case is: 30 September 2022

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.