EMPLOYMENT TRIBUNALS

Claimant: Ms L Sewell

Respondent: Worcestershire Health and Care NHS Trust

Heard at: Birmingham **On:** 23 September 2022 and 14 November 2022 in chambers

Before: Employment Judge Miller
Mr Virdee
Mr Kelly

Representation
Claimant: In person
Respondent: Mrs G Harrad – solicitor

RESERVED JUDGMENT

The respondent shall pay the claimant the following sums:

Basic Award	£9906
Loss of earnings	£28,128.90
Pension losses (including death in service and lump sum)	£67,524.71
Loss of statutory rights	£400
Injury to feelings (determined at the previous hearing and included on previous judgment)	£17,500
Personal injury (determined at the previous hearing and included on previous judgment)	£21,000
Interest	£13,520.07
Grossing up award	£41,169.41
Total award	**£199,149.09**

REASONS

1. This is our latest, and hopefully last, judgment in this case. It concerns a claim brought by the claimant against the respondent for unfair dismissal, discrimination arising from disability under s 15 Equality Act 2010 and a failure by the respondent to make reasonable adjustments under section 20 and 21 Equality Act 2010.

2. By a judgment dated 15 October 2020, we decided that all the claimant's claims were successful.

3. There was a remedy hearing on 6 July 2021, following which we decided, as far as is relevant for this judgment that:

4. Future loss of earnings will be awarded for a period of three years and 2 months from the date of the [first] remedy hearing

5. Loss of earnings will be awarded for the period from the date of the claimant's dismissal on 5 February 2019 to the date of the [first] remedy hearing on 6 July 2021 for a total period of 85 weeks and 6 days (reduced from 126 weeks and 4 days to reflect a period of nil pay under the respondent's sick pay scheme). For 11 weeks and 2 days of that period, the claimant is entitled to compensation reflecting 50% of her pay.

6. The multiplier that will be applied in assessing the value of the claimant's losses over the period from the date of her dismissal is 1.43% per year to reflect potential increases in pay had the claimant remained employed.

7. The total amount of compensation referable to loss of earnings from the date of the claimant's dismissal must, after the application of the multiplier, be reduced by 30% to reflect the possibility that the claimant would not have returned to work and/or been fairly dismissed in a non-discriminatory way at some point.

8. We also made an award for injury to feelings, personal injury and recommendations. We ordered that there would be a further hearing at which the tribunal would decide the total amount of compensation that is payable to the claimant including the amount of loss of earnings, pension losses and any interest. It was not anticipated that this second hearing would in reality be required but, in the event, there were matters still in dispute between the parties that we needed to resolve.

9. We are asked to determine the final amount of compensation due to the claimant and the specific issues that we were asked to resolve were follows:

    a. In what order the 30% deduction should be applied to calculate the final figure for the claimant's loss of earnings. In broad terms, the respondent's case is that the deduction should be applied to what the claimant would have earned, and then her income in the relevant deducted from that to give her over all losses. The claimant

says that her overall losses should be calculated, after deduction for income, and then the 30% deduction applied;

b. How to calculate the claimant's pension losses. This includes

   i. Whether to use the simple or complex calculation in the Principles for Compensating Pension Loss Fourth Edition (Third Revision) 2021;

   ii. What sort of pension the claimant should be deemed to be likely to receive in the notional work she is likely (we have found) to obtain from 6 September 2024;

   iii. Whether, and if so how, to account for the loss by the claimant of death in service benefits; and

   iv. Whether a withdrawal factor should be applied, or of that is accounted for in our 30% reduction.

c. Whether the salary that the claimant would have received had she carried on working and the wages she has subsequently received form her new job should be increased to what they actually are (as at the date of this second remedy hearing) or if the uprating figure of 1.43% should be used for all periods. If the uprating figure is to be used, what salary should it be applied to? The respondent suggests an average salary figure, the claimant says the last salary before the period to which the uprating applies.

d. How much interest should be awarded? Mrs Harrad made representations about the overall value of the claimant's compensation having regard to the effect of awarding interest at the statutory rate.

Order of calculation

10. The starting point is the words of our previous judgment. We said "The total amount of compensation referable to loss of earnings from the date of the claimant's dismissal must, after the application of the multiplier, be reduced by 30%".

11. The total amount of compensation is the compensation payable after account has been taken of mitigation and any payments made by the respondent (see, for example, *Digital Equipment Co Ltd v Clements* [1997] EWCA Civ 289 in which a distinction was drawn between the treatment of additional discretionary redundancy payments and other income). That total compensation is calculated by reference to the loss of earnings, it is not the loss of earnings that must be subjected to such a reduction but the total compensation.

12. Although *Digital Equipment* related to unfair dismissal, we can see no reason why the same principles would not apply to awards for discrimination.

13. The appropriate order of calculation for loss of earnings is therefore:

a. Total losses suffered in the period from dismissal to the end date we have set on our previous judgment and referred to above

b. Deduct payments made by the employer on termination

c. Deduct the claimant's earnings in the period

d. Apply the 30% reduction

Pension losses

What method should be used to calculate pension losses?

14. The claimant was in a defined benefit pension scheme. The scheme changed over the course of her employment, initially being the 1995 scheme (NHSPS1995), a final salary scheme, latterly the 2015 scheme (NHSPS2015) which is a Career Average Revalued Earnings (CARE) scheme.

15. There are, in the "Principles for Compensating Pension Loss" ("The Principles") two main ways in which pension losses can be calculated. Both parties agreed that this guidance is suitable for calculating pension loss, but not which of the principles should be used. We note that use of the Principles have been approved in a number of cases including *Network Rail Infrastructure Ltd v Booth* EAT/0071/06 and we refer to the Fourth Edition (Third Revision) 2021 of the Principles.

16. The two principal methods are the simple method or the complex method. The simple method is intended for use in respect of defined contribution schemes (which the claimant's scheme was not) and in respect of defined benefit schemes (which the claimant's was) but where the period of losses is short. The simple method requires that the tribunal calculates the pension contributions that the employer would have paid during the period in which losses are found to be likely to accrue and awards a sum based on that calculation.

17. The complex method requires the Tribunal to assess the pension benefits that the claimant would have accrued under the scheme or schemes of which she was a member had she remained employed, less the pension benefits that the claimant would be likely to accrue (if any) in any future employment and less the pension benefits actually accrued under the schemes of which the claimant was a member. While it is well recognised that this requires a degree of speculation, the Principles apply a detailed set of tools for addressing the numerous variables in such circumstances.

18. In paragraph 5.33 of the Principles the authors suggest that for a 6 – 12 month period of losses the simple method is likely to be appropriate, possibly up to 18 months but it is unlikely to be so beyond that.

19. They refer to *Network Rail Infrastructure Ltd v Booth* EAT/0071/06 in which the EAT observed that there is no cut off 'time period of losses' to apply in deciding whether to apply the simple or complex approach, but, effectively, the tribunal should look at the matter in the round and satisfy itself that the approach adopted adequately reflected the claimant's losses.

20. Additionally, and relevantly, the EAT said *"the Tribunal was fully entitled to have regard to the fact that it was more likely than not that in future Ms Booth would be likely to be employed in a pension scheme which applied the Money Purchase rather than the Final Salary principles of assessment. This would be likely to increase her loss, and make the simple approach too crude a calculation".*

21. In our view, this means that we should take account of all relevant factors when deciding which method to use to assess the claimant's pension losses, but that the overriding question is which is most likely to adequately compensate the claimant.

22. The claimant also referred to the case of *Griffin v Plymouth Hospitals NHS Trust* [2014] EWCA Civ 1240 as claimant as authority for the proposition that the complex method should be applied. The Court of Appeal were dealing with an earlier version of the Principles in that case which appeared to set out more prescriptive criteria to consider when deciding which method to use to assess pension loss. However, in our view, their judgment remains helpful guidance, even though they caution that the Principles are not binding and could usefully be (and subsequently have been) updated. At paragraph 67 they say:

    "Para. 4.13 [of the earlier version of the Principles] *is intended to identify the general considerations affecting the choice of approach. It identifies three factors which point in favour of the use of the substantial loss approach – the length of time that the claimant has been employed; the "stability" of the employment; and whether the employee "has reached an age where he is less likely to be looking for new pastures". What those three factors have in common is that they all increase the likelihood that the employee would, but for the dismissal, still have been an active member of the scheme at retirement. The importance of that is that it tends to justify the use of a method that starts – as element A in the equation – with an assumption of "whole-career loss" (albeit modified by the use of a discount as described at para. 62 above). The contrast is with the case where the employee would probably have changed jobs, and thus have left the scheme, before retirement age anyway, as a result of "the uncertainties of employment in modern economic conditions". In such a case he or she would have suffered, perhaps only a year or two later, precisely the same kind of loss as is being claimed for in the proceedings; and it is more appropriate simply to award lost contributions up to that date, as per the simplified approach, rather than embarking on the exercise of valuing rights on retirement which would almost certainly never have accrued and then applying a massive "finger-in-the air" discount. The question is whether the uncertainties that would have to be reflected in such a discount are so great that they undermine the point of assessing the hypothetical whole-career loss in the first place. Whether that is so in any particular case is a matter for the judgment of the tribunal. The observation at the beginning of para. 4.13 that the simplified approach "will be appropriate in most cases" is because, so the authors believe, experience shows that in most cases the relevant uncertainties are indeed too great".*

23. In our view, what this case says is that the Tribunal should consider whether there is sufficient certainty – whether because of subsequent

events or the Tribunal's determination about what it considers likely to happen – to be able to assess substantial losses using the complex method, or if things are so uncertain and/or the losses are for such a short period that no injustice would be done by using the simple approach.

24. We have found in our previous judgment that there was a chance that the claimant's employment might have fairly and in a non-discriminatory way been brought to an end earlier, and we have identified a percentage reduction in damages to reflect that. However, in the absence of the chance materialising, we have heard nothing to suggest that the claimant's employment would not have continued until retirement age. In fact, it has been the claimant's evidence throughout that she intended to continue working for the respondent *past* retirement age, until the age of 70, because of her financial commitments and she reasserted that in her submissions.

25. We find, therefore, that all other things being equal and subject to the percentage reduction already referred to, the claimant would have continued to work for the respondent until she retired at the age of 70.

26. At the date of dismissal, the claimant was aged 54 and she had worked for the Respondent for 13 years. We have found that the claimant is, nominally, likely to be able to secure similar employment by September 2024 when the claimant will be aged 59.

27. The claimant calculates her pension losses, using the complex method in her schedule of loss, as £135,836.71 before interest and grossing up. The respondent, using the simple method, puts the claimant's losses at £23,035.96.

28. It was also the claimant's submission with which we agree (see below) that she would be more likely to accrue the benefits only of a defined contribution scheme in any notional future employment than a defined benefit scheme. This means that while the simple method might in theory produce a figure that coincided, more or less, with the claimant's pension losses, it is far less likely to do so that a figure calculated under the complex approach.

29. Finally, it is in in our judgment, obvious that the complex method – which makes an attempt at estimating actual pension losses – will be more accurate that the simple method which the Principles recognise as a broad-brush approach.

30. Having regard to all of these factors, it would not be just to apply the simple approach and it is, in our view, more appropriate to use the complex method. The claimant had worked for the respondent for a reasonable period and was, without the intervening acts of the respondent, likely to remain doing so. Any future employment is more likely to provide access to a defined contribution scheme than to a defined benefit scheme and the simple method has only a very small chance of producing a figure that reflects the claimant's actual pension losses.

Future pension entitlement

31. The next issue we address, which we have already referred to, is what type of pension we think the claimant is likely to benefit from in her notional future employment.

32. We mention at this point that the claimant remained sceptical about whether she would in fact be able to undertake employment at the same level by September 2024. We fully understand that, and we recognise that the claimant did not seek in any way at all to reopen those findings.

33. However, as has been recognised in the authorities to which we have already referred, (and as we think the claimant recognised) the Tribunal is required to make a decision on this issue and it will almost always not coincide with how things turn out. We mention this only to acknowledge the artificiality of our decision, even as we go on to make further decisions about the amount of compensation to which the claimant is entitled flowing from that decision.

34. The claimant's evidence at the previous hearing and her assertions in submissions at this hearing was that she could not countenance returning to work for the respondent. It would, in her view, simply be too damaging for her. The claimant said that it was unrealistic to assume she would return to a clinical role and in the private sector and the only other skills the claimant has are in retail.

35. The respondent did not seek to persuade us otherwise but said that there are other public sector roles available in other Trusts and in the local authority sector.

36. The claimant said that because of her personal responsibilities, about which she has provided no detail, she would not be able to travel to other areas to work and that her skillset was specific so that she would not be able to work in other clinical roles.

37. We have considered the competing submissions and the evidence we heard at the previous hearings. In our judgment, we think it is very unlikely that the claimant's future employment would be in the public sector with an associated defined benefit public sector pension scheme.

38. There are other opportunities that appear on our analysis to fit with what the claimant and Dr Yusuf, the medical expert whose evidence was considered at the previous hearing, said. It is clear that there are locum roles available – the respondent's evidence was that they needed locums and struggled to recruit them, so we conclude the same applies in most Trusts – and there are private health care providers. Given, however, that the claimant has expressed a clear view that she would not work for the Respondent, we think that the nominal employment most likely to be available to the claimant is in the private sector. The claimant acknowledges that the only realistic option for her would be in the private sector.

39. Having regard to the industrial experience of the Tribunal, we agree with the claimant's submissions that in any private sector employment the claimant is *extremely* unlikely to enjoy the benefit of a defined benefit pension scheme.

40. The claimant asserts that the average contribution to a private pension scheme, being the sort of scheme she says (and we agree) she is likely to have the benefit of, is between 7% and 14% and she refers to publicly available tables of data produced by the Office for National Statistics (ONS). The claimant suggests a mid point of a 10% contribution by any future nominal employer. In our view, this is a conservative estimate that operates to the respondent's advantage. The statutory minimum required to be paid by employers into an auto-enrolment scheme is 3%. The respondent's submissions were that comparable employment from September 2024 includes membership of the NHS pension scheme and all pension losses would end from that date. Mrs Harrad made no submissions about the validity of the claimant's assessment.

41. In light of the claimant's conservative estimate, we adopt her assessment and find that, from 6 September 2024, the claimant will nominally have the benefit of a defined contribution scheme into which the notional employer will pay 10% of the claimant's gross earnings.

Loss of death in service benefits

42. The claimant has claimed a sum for the loss of death in service benefits associated with her previous NHS pension. The scheme provides for a payment to surviving relatives if the member dies while still an active member, meaning someone under the age of 75 who is still contributing to the pension scheme. The respondent's argument is that this has a nil value until the claimant actually dies and, in any event, she has not purchased any such benefits.

43. The claimant provided estimates of the cost of purchasing equivalent cover for a conservative estimate of potential death in service benefits, the lowest of which was £18.41 per month. The claimant submitted, and we accept, that she was entitled to death in service benefits only under the scheme in place at the time, which was the 2015 NHS scheme at the date of termination of her employment. The Principles include a summary of the benefits available under that scheme which, as it relates to death in service benefits, is "The higher of: (a) 2 x relevant earnings; or (b) 2 x revalued pensionable earnings for the scheme year at the highest revalued pensionable earnings". Relevant earnings are earnings in the last 2 months of pensionable service.

44. The claimant has adopted, for the purposes of calculating her potential benefits her salary in the last year of her employment being £36,644 pa on the basis that it is the most conservative estimate. The claimant has not sought to revalue that figure under the CARE scheme. This gives a total potential death in service lump sum benefit of £73,288. We agree that this is a conservative estimate which does not prejudice the respondent and we accept the claimant's figures as a reasonable and conservative estimate of her *potential* losses in relation to death in service benefits.

45. We have had regard to the Principles which says, at paragraph 5.69 – 5.70 that it may be appropriate to compensate for loss of such ancillary benefits as death in service benefit which is a "real loss." It is suggested that the

cost of buying an equivalent insurance product on the open market is a suitable way to compensate for that.

46. We do not understand the respondent's argument. The claimant has experienced the loss and the method proposed by the claimant of assessing the value of that loss, on the basis set out in the Principles, is a reasonable one. Whether she chooses to use any such compensation to buy the relevant insurance product or not, and whether that decision was made before or after any compensation is awarded, is wholly irrelevant.

47. We agree with the claimant and accept her figures of £18.41 per month for a period of 14 years (from dismissal to retirement at 70). We therefore award the sum of **£3,092.88**.

Withdrawal factor

48. The Principles refer to a withdrawal factor. It says "This factor caters for other contingencies that arise in the case, and which may affect how long employment would have continued but for the unlawful dismissal (i.e., whether the claimant would have "withdrawn" from the pension scheme, for different reasons, at a future date). It is conceptually similar to a "Polkey" analysis, in that the tribunal engages in some speculation about what the future – indeed, a hypothetical future – may have held. The contingencies could arise from the claimant's personal situation; for example, ill health, caring responsibilities or family circumstances. Equally, they might be factors affecting the respondent, such as the overall viability of the business, its plans for restructuring or the extent to which its workers tend to remain for full careers (e.g., police officers). Put another way, the possibility that the claimant would have left the respondent's employment (and its DB pension scheme) for other reasons can be allowed for by making one or more adjustments during the quantification process after assessing the "old job facts"."

49. In our judgment, any uncertainty about the claimant's potential future employment with the respondent is accounted for in the 30% reduction we have already applied. The chance of other external factors impacting on the claimant's employment – such as potential redundancy – are too remote to speculate meaningfully about and, in any event, we heard no specific submissions form the Respondent about that.

50. In our view, the 30% reduction must be applied at the pint at which, under the principles, a withdrawal factor would be applied.

McCloud issues

51. The respond asserts that the claimant has the right, pursuant to *Lord Chancellor and others v McCloud and others* [2018] EWCA Civ 2844, to choose her pension benefits under either the NHSPS 1995 scheme or the NHSPS 2015 scheme and the claimant had not taken this into account when calculating her likely pension entitlement. We did not hear detailed submissions about this and nor did the respondent set out in any detail what impact such a choice might have on the claimant's pension benefits.

52. The choice as to whether to take benefits under NHSPS1995 or NHSPS2015 scheme is one to be made at retirement. The calculation of pension losses is an exercise in speculation at the best. This, in our view, introduces a further element of speculation about which we have not heard any evidence. The claimant has produced her very detailed and thorough schedule of loss on the basis of the benefits accruing up to 2015 and thereafter. It is proportionate, therefore, to base our calculations on the same assumption that the claimant has about which scheme benefits she will have the benefit of.

How to apply uprating

53. The next question we are required to determine is how the uprating figure of 1.43% should be applied. In our judgment after the first remedy hearing, we said:

> "The multiplier that will be applied in assessing the value of the claimant's losses over the period from the date of her dismissal is 1.43% per year to reflect potential increases in pay had the claimant remained employed".

54. This was to account, as well as we could, for future potential increases in pay in the NHS had the claimant remained employed. In the reasons we gave for that judgment we made findings about the claimant's salary at the date of her dismissal and gross and net salary that would have been payable to the claimant in the years 2019/2020 and 2020/2021 on the basis of published negotiated salaries at the claimant's former band.

55. Those figures were:

    a. 19/20 – £2,176.00 per month (£26,107.00 per year on the claimant's account and £498.23 per week); and

    b. 20/21 – £2,216.00 per month (£26,588.00 per year on the claimant's account and £507.40 per week).

56. The claimant referred in her documentary evidence to the published pay scales from the respondent for 2021/2022 and 2022/2023. These annual figures for the top of Band 6, which was the claimant's band, are £39,027 and £40,588.00 respectively.

57. The claimant submitted that the respondent was now seeking to rely on the claimant's actual earnings from her current employment in calculating her new income while relying on the uprating from the respondent's last year of employment for calculating the claimant's losses. The claimant's case was that it should be the same for both losses and new income – either a calculated uprated amount, or actual figures.

58. Mrs Harrad submitted that the respondent was genuinely trying to comply with the Tribunal's judgment and did not have a strong view either way.

59. We understand the confusion. It is not explicit on the face of our published judgment what method should be adopted. However, in our reasons which were given orally, we said

"To the extent that actual relevant negotiated salaries are not available, the multiplier of 1.43% should be used to calculate the likely increase in the claimant's lost salary.

We note that the claimant has applied the same multiplier to her current wages and the figure of 1.43% should be applied to the claimant's future likely salary to the extent that actual figures are not available".

60. We also refer to *Griffin v Plymouth Hospital NHS Trust* [2014] EWCA Civ 1240, which was cited to us for a different point but in which the Underhill LJ said:

"The first situation is where the court or tribunal at first instance is conducting its primary assessment of compensation. It is well established that in such a case it must have regard to all the facts known to it at the date of assessment".

61. Although this is the second remedy hearing in this case, we are still engaged in making a final determination of compensation. We must, therefore, have regard to the facts available to us at the date of this hearing and that includes NHS pay scales up to the end of 2023 and the claimant's earnings up to the point at which they are known. Thereafter, the 1.43% multiplier will apply and, in our view, the only sensible way of applying it is to apply it to the last ascertainable actual rate of pay.

62. We recognise that in the period form the first remedy hearing to now, economic circumstances have changed drastically – as they have done even in the time between the last remedy hearing and the production of this judgment. However, unlike the availability of actual information about pay, this does not give us a reason to revisit our assessment of the1.43% uprating.

63. The evidence we have about the claimant's actual wages is set out in payslips, P60s and a letter from her current employer that was before the Tribunal at the last hearing.

64. The claimant indicated at the hearing and in her submissions that evidence of actual salaries and associated calculations was available, but it was not produced to the Tribunal.

65. Due to judicial availability and workload, it has regrettably taken longer to produce this decision than any party would have wished. It would not be proportionate to direct the claimant to provide that evidence now and invite comments on it from the respondent in circumstances where we have sufficient evidence available to assess that claimant's current earnings.

66. The claimant was, at 2 April 2021 paid £9.02 per hour for a 37.5 hour week. It is clear from the correspondence from the claimant's employer that once the national minimum wage catches up with the claimant's then pay rate, the claimant would be paid at national minimum wage.

67. As at the date of the remedy hearing the National Minimum Wage for the claimant had increased to £9.18 per hour and we conclude, therefore, that from that date her hourly pay was £9.18 per hour for a 37.5 hour working

week. From 1 April 2023, the 1.43% increase will apply to the claimant's wages.

68. Similarly, the 1.43% multiplier will apply to the Band 6 NHS wage as identified above.

69. The parties have applied the 1.43% multiplier to net wages. This gives a lower figure than if the multiplier was applied to gross wages than net wages. Although both parties adopted that approach and we did not hear representations about it, this is not what we decided in our first judgment. As referred above, our reasons provided that the multiplier should be applied to salaries. This will also be used for calculating pension entitlements, which are based on gross salary, so it would be inconsistent to apply the approach in two different ways. We will therefore apply the approach we have outlined in our detailed calculations, which are set out below.

Interest

70. Interest is payable on discrimination awards in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Regulation 2 says

> (1) Where, at any time after the commencement of these Regulations, an [employment tribunal] makes an award under the relevant legislation—
>
> (a) it may, subject to the following provisions of these Regulations, include interest on the sums awarded; and
>
> (b) it shall consider whether to do so, without the need for any application by a party in the proceedings.
>
> (2) Nothing in paragraph (1) shall prevent the tribunal from making an award or decision, with regard to interest, in terms which have been agreed between the parties.

71. Regulation 3 provides, by reference to s 17 of the Judgments Act 1838, that interest will be payable at the rate of 8% per annum. It is calculated on a simple basis, accruing from day to day.

72. The regulations also set out the basis of calculation which will be addressed in the detailed calculations set out below.

73. Regulation 6 provides that

> (1) Subject to the following paragraphs of this regulation—
>
> (a) in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation;
>
> (b) in the case of all other sums of damages or compensation (other than any sum referred to in regulation 5) and all arrears of remuneration, interest

shall be for the period beginning on the mid-point date and ending on the day of calculation.

(2) Where any payment has been made before the day of calculation to the complainant by or on behalf of the respondent in respect of the subject matter of the award, interest in respect of that part of the award covered by the payment shall be calculated as if the references in paragraph (1), and in the definition of "mid-point date" in regulation 4, to the day of calculation were to the date on which the payment was made.

(3) Where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period or periods in paragraphs (1) or (2), it may—

(a) calculate interest, or as the case may be interest on the particular sum, for such different period, or

(b) calculate interest for such different periods in respect of various sums in the award,

74. Mrs Harrad submitted on behalf of the respondent that the Tribunal should have regard to the overall amount of compensation payable in deciding whether to award interests and how much.

75. In our judgment, we have two elements of discretion under these regulations. Whether to award interest or not at all under regulation 2 and, if we do award interest, in respect of what periods it should be calculated.

76. There is no guidance on what matters the tribunal should take into account in deciding whether to exercise its discretion to award interest. However, regulation 7 provides that we must explain how interest has been calculated or, if it has not been awarded, why not.

77. In deciding over what period to award interest, the tribunal must apply the prescribed approach unless to do so would cause "serious injustice".

78. The respondent's case was that, effectively, because the statutory rate of interest is 8%, the claimant would be overcompensated, particularly when considering that the claimant will receive early payment of some of the sums.

79. In our judgment there is a presumption that interest will be payable unless it is not appropriate or there is a good reason not to. The respondent's submissions do not amount to a good reason and in our judgment it is appropriate to award interest on damages for discrimination. Parliament has decided the rate of interest and the fact that economic circumstances change does not mean it is right for the Tribunal to ignore Parliament's intentions.

80. In respect of the period, the respondent is not asserting that awarding interest for the prescribed period would cause serious injustice and, in any event, we have seen and heard nothing to suggest it would.

81. Mrs Harrad said that, really, the respondent wanted us to have regard to the overall level of compensation – whether it is really putting the claimant in the position she would otherwise have been in.

82. In our view, and with respect, this submission misses the point. Parliament has legislated to provide for the payment of interest on discrimination awards at a prescribed rate. That interest is to be applied after the assessment of damages or compensation. Any attempt on our part to reduce the level of interest outside the two particular circumstances referred to would be an attempt to avoid the intention of the legislation.

83. We will therefore calculate interest at the prescribed rate and for the prescribed period as below.

Other matters

84. Before turning to the detailed calculations, we record that the claimant agreed that she was paid £5,813.72 on dismissal, and we take that into account accordingly.

85. Finally, we also record that the basic award and loss of statutory rights were agreed at the last hearing but we did not record them in that judgment. We therefore also award the agreed sums of £9,906.00 (basic award) and £400.00 (loss of statutory rights).

Calculations

86. As each type of damage falls to be treated slightly differently in respect of interest [**and reductions**] we address them separately.

87. We also state, for the avoidance of doubt, that compensation for loss of earnings and loss of pension rights is awarded as damages for discrimination, rather than unfair dismissal. We did not hear any submissions from the respondent that we should do otherwise, although we note that the claimant's loss of earnings is listed under unfair dismissal in the respondent's counter schedule and pension losses listed under discrimination damages. We can see no reason for that particular distinction. In any event, it would not be proportionate to attempt to split the awards between an award for unfair dismissal and discrimination.

88. We have considered and, as far as relevant, followed the guidance in the Employment Tribunals Remedies Handbook for the relevant year. Particularly, we have referred to the helpful guidance set out in the section on "Adjustments and order of adjustments".

Loss of earnings.

89. We refer to our findings above. Where necessary we have calculated net pay using the same online calculator that the claimant used.

Period	**What the claimant would have earned in**	**What she has earned or is assessed as likely to earn in**	**Difference**

		former employment	**current or future employment**	
5/2/19 (date of dismissal	31/3/19 (end of tax) year	£2,070.62 (from Respondent's schedule of loss – The claimant appears not to have accounted for the student loan deduction which counts as a payment to the claimant)	£388.46 (from Claimant's payslips)	£1,682.16
1/4/19 (start of tax year/new pay scales)	21/4/19 (when contractual sick pay runs out according to the Respondent)	£751.02 (21 days (from John Bagnall witness statement) @ £71.52 per day (from the claimant's calculation of net salary on new rate – the Respondent relied on previous year's salary to calculate this rate which is incorrect).		
22/4/19	3/2/20	£0.00 (agreed nil pay period)		
4/2/20	31/3/20	£4,076.67 (57 days @ £71.52 per day-net income on basis of actual		

		NHS pay rates)		
1/4/19	31/3/20	£4,827.69 (total from above periods)	£20,701.52 (C P60)	(£15,873.83)
1/4/20	31/3/21	£26,586 (actual published NHS rates – net calculated)	£14,852.20 (Claimant's P60)	£11,733.80
1/4/21	31/3/22	£27,927.00 (actual published NHS rates – net calculated)	£15,432.80 (Claimant's P60)	£12,494.20
1/4/22	31/3/23	£28,396.00 (actual published NHS rates – net calculated)	£15,201.15 (calculated on the average of the 4 payslips available up to the date of the hearing)	£13,194.85
1/4/23	31/3/24	£31,887.00 (gross salary for 22/23 uprated by 1.43% and net then calculated)	£16,768 (gross salary for 22/23 uprated by 1.43% and net then calculated)	£15,119.00
1/4/24	6/9/24	£15,748.41 (gross salary for 23/24 uprated by 1.43%, net calculated and daily rate applied for 159 days)	£8,100.72 (gross salary for 23/24 uprated by 1.43%, net calculated and daily rate applied for 159 days)	£7,647.69
Total losses		£137,442.72		

Sums paid by the employer		£5,813.72 (payment on termination)	
Claimant's earnings over the period		£91,444.85	
Claimant's net losses before reduction.			**£40,184.15**

90. The claimant's losses are to be reduced by 30% in accordance with our previous judgment. 30% of £40,184.15 is £12,055.25 so that the claimant's losses are **£28,128.90**

91. We did not hear detailed submissions on adjustment for accelerated receipt of loss of earnings (this will be addressed separately for pension loses and is accounted for in the Ogden tables). Part of the compensation is for a past period and the future payment is for a short period in the future. It is not therefore proportionate to apply any adjustment in this case to this aspect.

92. The final two steps to consider in assessing loss of earnings is the payment of interest and grossing up.

93. We will consider these matters together with all the heads of compensation awarded at the end.

Pension losses

94. We have decided to apply the complex method of assessing pension losses set out in the Principles. This has seven steps as follows

95. <u>Step 1: Identify what the claimant's net pension income would have been at their retirement age if the dismissal had not occurred.</u>

96. The claimant was a member of two NHS pension schemes – NHSPS1995 (final salary) for 9.6 years to 30/9/16 and NHSPS2015 (CARE) from 1/10/16 to her date of dismissal.

97. The claimant's pension entitlement at retirement under the NHSPS1995 is calculated as 9.6 x 1/80 of the claimant's final salary at her retirement (at the age of 70) in 2035. The claimant's service length is fixed at 9.6 years as she transferred to the NHSPS2015 from 1/10/2016.

98. As considered above under loss of earnings, the last salary for which we have actual details is that for 2022/2023 which is a gross salary of £40,588.00. Uprating this by 1.43% until 2035 gives a final salary of £48,127.66

99. The annual pension payable under this scheme would therefore be: £48,127.66/80 x 9.6 = £5,775.32

100. The claimant's pension entitlement under the NHSPS 2015 scheme is calculated by totalling 1/54 of her pensionable pay for each year of service

under the scheme (revalued in accordance with scheme rules). Figures are available for accrued pension for the years ending in March of 2017, 2018 and 2019. Thereafter, accruals are to be calculated as 1/54 of actual or nominal salary (as discussed above under loss of earnings) without revaluing. The claimant has not attempted revaluation in her schedule of loss and it is, as the Principles predict, beyond the expertise of the tribunal. We have therefore used non-revalued figures, reminding ourselves that our role is to seek to award an appropriate amount of compensation doing the best that we can.

101. The accruals are therefore, on the basis of the salaries and nominal increases of 1.43% each year, as follows:

Tax year ending (or actual period)	Pensionable earnings	Pension earned
2017	£17,564.27	£325.26
2018	£35,577.00	£658.83
2019 (to 5/2/19)	£30,536.70	£565.49
5/2/19 – 31/3/19	£2,710.65 54 days at 50% of gross salary)	£50.20
1/4/19 – 21/4/19	£1,072.06 21 days based on 50% of gross salary of £37,267	£19.85
22/4/19 – 3/2/20	£0.00 (agreed nil pay period)	nil
4/2/20 - 31/3/20	£5.819.77 (57 days based on full gross salary of £37,267)	£107.77
2021	£37,890	£701.67
2022	£39,027	£722.72
2023	£40,588	£751.63
2024	£41,168.48	£770.15

2025	£41,757.12	£773.28
2026	£42,354.24	£784.34
2027	£42,959.91	£795.55
2028	£43,574.24	£806.93
2029	£44,197.35	£814.47
2030	£44,829.37	£830.17
2031	£45,470.43	£842.05
2032	£46,120.66	£854.09
2033	£46,780.18	£866.31
2034	£47,449.13	£878.69
1/4/34 – 31/1/35 (C retirement date)	£40,106.38 (10 months = £48,127.66 x 10/12)	£742.71
Annual pension		£13,662.16

102. This provides for an annual CARE pension under NHSPS2015 of £13,662.16 plus an annual final salary pension of £5,775.32 under NHSPS1995 providing for a total annual pension of £19,437.48

103. We now apply the 30% reduction to account for the possibility that the claimant might have been fairly dismissed or dismissed in a non-discriminatory way at some point (as discussed under "Withdrawal Factor" above). This gives a gross annual pension of £19,437.48 x 0.7 = £13,606.24.

104. This annual sum exceeds the claimant's current personal allowance of £12,570. Assuming that the claimant pays income tax, but no national insurance, on this amount (accepting that we do not know what the claimant's personal allowance will be by then), this gives a net annual pension income from occupational pension of **£13,399**

105. <u>Step 2: Identify what the claimant's net pension income will be at their retirement age in the light of their dismissal.</u>

106. This will comprise of the claimant's actual pension from her employment at the respondent plus any pension accrued in actual or nominal alternative employment form the date of dismissal.

107. The pension actually accrued is provided by the claimant's pension provider as follows. Under NHSPS 1995, the claimant is estimated to be entitled to

£4,386.67 and under NHSPS 2015 the claimant is estimated to be entitled to £1,689.35 per year.

108. In respect of alternative employment, we have found that the claimant would be likely to find alternative equivalent employment by 6 September 2024 but with a defined contribution scheme contributing 10% of her salary for the employer and 5% from the employee. Up until then, in our judgment the claimant is likely to continue working for her current employer which includes membership to their defined contribution pension scheme contributing a total of 8% of salary comprising 3% employer and 5% employee contributions.

109. We have adopted the claimant's calculations. This does not take account of the nominal increase in salary between now and 2024 but this would make a negligible difference to the annual pension obtainable which is, in any event, an estimate. The claimant is estimated to be entitled to an annual pension of £490.00 from her current employment.

110. For the claimant's future nominal equivalent employment, she has assumed a salary the same as the notional NHS salary and we agree that this is the only sensible basis on which to calculate it. However, the salary figures that claimant used are different to those we have set out above. Therefore, taking an average figure over the period from 6 September 2022 until 15 January 2035 of notional NHS wages, and on the basis of 10% from the new employer and 5% from the claimant, gives an estimated NEST pension of £4,420 per year.

111. This gives a total gross projected pension of £4386.67 + £1689.35 + £4,420.00 = **£10,496.02**. This is lower than the current rate of personal allowance so is, we assume, equivalent to the net rate.

112. Step 3: Deduct the result of Step 2 from the result of Step 1, which produces a figure for net annual loss of pension benefits.

113. The net annual pension losses are therefore £13,399 - £10,496.02 = **£2,902.98**

114. Step 4: Identify the period over which that net annual loss is to be awarded, using the Ogden Tables to identify the multiplier.

115. The Principles provide that the appropriate multiplier is found by taking the age of the claimant at the date of the remedy hearing (and we agree with the claimant that this must be the date of the first remedy hearing o 6 July 2021) and reducing the age and the retirement date by 2 years to reflect the improved mortality of people in occupational pension schemes.

116. We have disregarded any other potentially discounting or multiplying factors as contingencies are accounted for in the 30% reduction applied above.

117. The current discount rate is -0.25% and this gives a multiplier of 20.76.

118. Step 5: Multiply the multiplicand by the multiplier, which produces the present capital value of that loss.

119. The present capital value of the pension loss is 20.76 x £2,902.98 = **£60,265.86.**

120. Step 6: Check the lump sum position and perform a separate calculation if required.

121. The NHSPS1995 scheme provides for an automatic lump sum of three times the final salary. The loss is calculated by deducting what the claimant will get, her employment having finished on 5 February 2019, from an assessment of what she is likely to have received had she continued in employment.

122. The basic lump sum the claimant is actually likely to receive from the NHSPS is £13,159.99. On the basis of the gross final salary set out above, the nominal projected lump sum payable had the claimant remained employed by the respondent (being 3 x the nominal pension income of £5,775.32) is £17,325.96. The difference is **£4,165.97**

123. Step 7: Taking account of the other sums awarded by the tribunal, gross up the compensation awarded.

124. In order to assess this, we consider the other sums awarded so far, whether they are taxable and whether interest is payable on them.

125. The amount of the award for injury to feelings is £17,500.00 (Taxable and subject to an award of interest)

126. The amount of the award of damages for personal injury arising from discriminatory acts is £21,000.00 (not taxable, but subject to an award of interest)

127. The basic award is £9,906.00 (not subject to grossing up, not subject to an award of interest as awarded under the Employment Rights Act 1996)

128. Compensation for loss of statutory rights is £400.00 (taxable, subject to an award of interest as the dismissal was discriminatory and damages are awarded under the Equality Act 2010, rather than the Employment Rights Act 1996)

129. Compensation for loss of earnings is £28,128.90 (taxable and subject to an award of interest for losses up to 23 September 2022)

130. Compensation for pension losses is £60,265.86 (taxable, but not subject to an award of interest)

131. Compensation for loss of pension lump sum is £4,165.97 (taxable but not subject to an award of interest)

132. Compensation for loss of death in service benefits is £3,092.88 (taxable, but not subject to an award of interest).

Interest on awards

133. Regulation 6 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 prescribes the period in respect of which interest on discrimination awards must be calculated. That period runs from the date of discrimination to the date that interest is calculated (which we take to be the date of the final remedy hearing, being 23 September 2022) or, for awards for injury to feelings only, from the midpoint between the date of the act of discrimination and 23 September 2022.

134. Regulation 5 also provides that no interest shall be payable for any loss or matter which occurs after the date on which remedy is calculated.

135. The appropriate date of the acts of discrimination is, in our view, the date of the claimant's dismissal being 5 February 2019. The period from that date to the date of calculation of remedy is therefore 1,326 days.

136. Interest is payable at 8% per annum, calculated on the simple basis.

137. Interest payable on the award of injury to feelings is therefore:

    0.08/365 x £17,500.00 x 1,326 / 2 = £2,543.01

138. The amount of loss of earnings attributable to 23 September 2022 is calculated as 70% of the sum of the actual losses from 5 February 2019 up to 31 March 2022 (as above) and a proportion of the financial year losses form 1 April 2022 to 23 September 2022 (being 0.48 years x £13,194.85). This is 70% of (£1,682.16 + £11,733.80 +£12,494.20 - £15,873.83 + (0.48 x £13,194.85)) = £16,369.86.

139. Other sums that are subject to an award of interest calculated by reference to the full period are damages of personal injury (£21,000) and loss of statutory rights (£400). The total sum that is subject to an award of interest for the full period is therefore £37,769.86.

140. The sum for interest on these losses is therefore calculated as follows:

141. 0.08 /365 x £37,769.86 x 1,326 = £10,977.06.

142. Therefore, subject to grossing up, the compensation awarded is as follows:

Basic Award	£9,906.00
Loss of earnings	£28,128.90
Pension losses (including death in service and lump sum)	£67,524.71
Loss of statutory rights	£400.00
Injury to feelings	£17,500.00
Personal injury	£21,000.00
Interest	£13,520.07

Grossing up

143. Under the Income Tax (Earnings and Pensions) Act 2003, payments received in consequence of or in connection with the termination of employment are subject to tax as employment income if and to the extent that it exceeds £30,000. This means that after tax, the amount of compensation the claimant will actually receive will be less than that set out above. The amount needs to be increased so that the amount the claimant receives after tax reflects, as far as possible, the amount of compensation set out above.

144. We refer to the Principles which sets out, in a proportionate way, the way in which tax is applied in the year of receipt in the following table. This explains what part of which receipts in the current tax year are allocated to what tax bands. This is a broad assessment for the purposes of grossing up the award. It is not intended to be an accurate reflection of the claimant's tax liability. The claimant's gross salary for this tax year is based on the payslips she has provided for year to date.

145. The total taxable award includes all the amounts set out in the table above except the award for personal injury. This comes to £136,979.68. The first £30,000 is exempt from tax, the amount that is required to be subject to grossing up is therefore £106,979.68.

	Other Income (£)			Taxable Tribunal Award (£)		
	Gross	Tax	Net	Gross	Tax	Net
Personal allowance (0% to £12570)	£12,570.00	0	£12,570.00			
Basic Rate (20% the next £37,700)	£5,019.00	£1,003.80	£4,015.20	£32,681.00	£6,536.20	£26,144.80
Higher rate (40% to £100,000)				£49,730.00	£19,892.00	£29,838.00
Notional rate 60% (accounting for reduction in personal allowance on 100,001 – 125,000)				£24,568.68	£14,741.21	£9,827.47
Totals	£17,589.00	£1,003.80	£16,585.20	£106,979.68	**£41,169.41**	£65,810.27

146. The amount to be added to the award to reflect the likely potential tax liability of the claimant is therefore £41,169.41.

147. The total award is therefore:

Basic Award	£9,906.00
Loss of earnings	£28,128.90
Pension losses (including death in service and lump sum)	£67,524.71
Loss of statutory rights	£400.00
Injury to feelings	£17,500.00
Personal injury	£21,000.00
Interest	£13,520.07
Grossing up award	£41,169.41
Total award	**£199,149.09**

Employment Judge Miller

14 November 2022