



EMPLOYMENT TRIBUNALS

Claimant: Ms L Fairhall

Respondent: University Hospital of North Tees & Hartlepool NHS Foundation Trust

CERTIFICATE OF CORRECTION **Employment Tribunals Rules of Procedure 2013**

Under the provisions of Rule 69, the Judgment and Reasons sent to the parties on 6 July 2022, is corrected as set out in block type at paragraphs 2 and 4 of the Judgment and paragraph 21 of the Reasons.

G Johnson

Employment Judge Johnson
15 December 2022

Important note to parties:

Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Fairhall

Respondent: North Tees and Hartlepool NHS Foundation Trust

HELD at Teesside Justice Hearing Centre

ON: 30 and 31 May 2022

BEFORE: Employment Judge Johnson

Members: Mr S Wykes

Mr P Curtis

REPRESENTATION:

Claimant: Mr M Rudd of Counsel

Respondent: Mr D Bayne of Counsel

JUDGMENT ON REMEDY

1. The respondent is ordered to pay to the claimant a basic award for unfair dismissal/automatic unfair dismissal in the sum of £14,478.
2. The respondent is ordered to pay to the claimant a compensatory award for unfair dismissal/automatic unfair dismissal in the sum of **£423,322.44**.
3. The respondent is ordered to pay to the claimant a compensation for injury to feelings in the sum of £35,000.
4. The total sum ordered to be paid to the claimant by the respondent by way of compensation is **£472,800.44**.

REASONS

1. This matter came before the Tribunal this morning for consideration of the claimant's claim for a remedy, pursuant to the Judgment of the Employment Tribunal promulgated on 8 January 2020, in which the Employment Tribunal upheld the claimant's complaints of unfair dismissal, automatic unfair dismissal for making protected disclosures, being subjected to detriments for making protected disclosures and breach of contract (failure to pay notice pay). The claimant was represented by Mr Rudd of counsel and the respondent by Mr Bayne of counsel.
2. There has been some delay in concluding the claimant's application for a remedy, primarily due to the respondent's appeal to the Employment Appeal Tribunal against the Tribunal's findings in that original Judgment. Apart from a requirement from the Employment Appeal Tribunal for the Tribunal to provide more detailed reasons about the imposition of the detriments, the Employment Appeal Tribunal upheld the original Judgment. The purpose of today's hearing was therefore to consider and calculate what sums are properly payable to the claimant by way of compensation.
3. The claimant had prepared a schedule of loss and the respondent had prepared a counter schedule of loss. The claimant had prepared a witness statement and today attended to give evidence, be cross-examined and to answer questions from the Tribunal. The respondent tendered a witness statement from its independent lead investigator, Miss Lisa Johnson, which statement deals with her identification of various job vacancies which currently exist. The contents of that statement from Miss Johnson were not challenged by Mr Rudd and accordingly the contents of the statement were accepted and taken "as read" by the Tribunal.
4. At the beginning of the remedy hearing, both counsel confirmed that certain parts of the claimant's schedule of loss were now agreed. The basic award for unfair dismissal was agreed in the sum of £14,478. The claimant's loss of earnings from the date of dismissal to the date of today's hearing was also agreed in the sum of £135,646.98, subject to the respondent's submissions that the claimant had to date failed to mitigate her loss by searching for and obtaining alternative employment. The claimant's calculation of her pension loss was also agreed in the sum of £1,076.22, again subject to the respondent's submission that the claimant had failed to mitigate her loss. It was agreed that the claimant's claim for 3 months' notice pay was effectively a duplication, because the claimant's calculation of her loss of earnings to date included the 3-month period covered by the lack of notice pay. Counsel had agreed that the value of the loss of the claimant's statutory rights (the right not to be unfairly dismissed) should be in the sum of £400. Counsel also agreed that the cost to the claimant of undertaking the therapy sessions which she is presently undergoing, would amount to £3,120 assuming that 26 such sessions would be required.
5. An unusual part of the schedule of loss is that which claims costs incurred by the claimant in taking out an "equity loan" on her house. The claimant claims an advice fee of £1,490, legal costs of £180, interest of £5,047 and an early repayment charge and redemption fee of £6,416. That totals £13,133. The respondent denies that any of those costs may be properly claimed from the respondent.
6. The claimant's schedule of loss is calculated on the basis that, since her suspension and ultimate dismissal, she has been incapable of any kind of work and that she will never be capable of undertaking any kind of work in the future. Effectively, the claimant therefore claims what is commonly now known as "career-long loss". The claimant's position is that, but for her dismissal, she would have continued working until her normal retirement age at the age of 66 on 8 December 2025. The claimant accepts that any losses will be capped as at that date. The claimant claims loss of earnings up to that date is on the basis that she remains unfit for work and will not be fit for any kind of work before that date. The claimant's position is that she is a qualified, trained and experienced clinical co-ordinator and that it would be "demeaning" or "insulting"

for her to be expected to undertake more menial work, even if she were fit to do so. The respondent's position is that the claimant was and is obliged to mitigate her loss by undertaking any form of work which becomes available to her, as soon as she is fit to do so.

7. The respondent concedes that the claimant will be entitled to be compensated for injury to feelings, due to the Tribunal's findings that she had been subjected to detriments because she had made protected disclosures. The respondent maintains that any such compensation would be within the middle band of the Vento guidelines as they existed at the time the detriments were imposed. The claimant's position is that the award should fall within the upper band of the Vento guidelines.
8. Accordingly, the 4 issues to be decided by the Tribunal today are as follows:-
 - (i) Whether the claimant has failed to mitigate her loss by not obtaining alternative employment prior to the date of the hearing.
 - (ii) The extent of any future loss of earnings and pension.
 - (iii) Whether the claimant is entitled to recover the borrowing costs incurred in re-mortgaging her home.
 - (iv) The appropriate award for injury to feelings.
9. At the previous case management hearing on 27 July 2021, it was agreed that independent medical expert evidence should be obtained to provide an opinion as to the nature of any psychiatric condition from which the claimant may suffer, the extent to which that was caused or exacerbated by the detriments imposed upon the claimant by the respondent and what impact that mental health condition may have upon the claimant's ability to find employment. A psychiatric report from Dr Cullen appears at pages 475-513 in the bundle. The report also contains Dr Cullen's answers to questions raised on his report by both representatives. The essential elements of that report may be summarised as follows:-
 - (i) The claimant had no problems with her mental health immediately before she was suspended.
 - (ii) Following her suspension in November 2016, the claimant became upset, anxious and distressed. The claimant informed Dr Cullen that "she could not function" and that her mood was low, she could not sleep and could not go out because she did not want to bump into anyone because she would burst into tears as she felt ashamed. The claimant informed Dr Cullen that the cause of her depression was the suspension and the "insidious nature of management".
 - (iii) The claimant was prescribed Sertraline, an anti-depressant, but thereafter did not begin to feel better until she received the Judgment of the Tribunal in January 2020.
 - (iv) When asked about her views on returning to work, the claimant told Dr Cullen, "I won't work again, I've lost all confidence in myself. I wouldn't be a safe practitioner. I need some peace to get better. I can't be around people. I won't put myself in that position." Dr Cullen records that the claimant informed him that she did not want to be a nurse again because she "cannot trust anyone".
 - (v) The claimant has a history of anxiety and depression. Dr Cullen's diagnosis is one of an "adjustment disorder with mixed anxiety and depressed mood (DSM-V-309.28)." Dr Cullen describes this as having fluctuated over time and which in his opinion has been moderate in severity with anxiety and low mood prominent at different times. The claimant "presents mainly with some depressive symptoms, but also with anxiety". There is no other mental health impairment or diagnosis. That condition was first identified and diagnosed by

her GP in February 2017 and Dr Cullen acknowledges that the onset was in February 2017.

- (vi) Dr Cullen records that the claimant describes her mental health after dismissal as being significantly affected and that she was in shock and that her mental health subsequently fluctuated over time. Dr Cullen records that there would have been likely to be a significant emotional impact with worsening of symptoms following her dismissal. Dr Cullen records that but for that dismissal, the claimant would not have continued to suffer from her condition.
 - (vii) Dr Cullen recommends a course of 12 sessions of Acceptance and Commitment Therapy (ACT), which Dr Cullen considered should significantly improve the claimant's condition.
 - (viii) At page 506 in the bundle, Dr Cullen records as follows:-

"I note Mrs Fairhall's views on return to employment. I believe that with conclusion of proceedings and appropriate therapy, she would likely to be able to undertake some form of employment notwithstanding her age and the type of employment. Returning to nursing would be difficult for Mrs Fairhall given her experience with her previous employer and the subsequent proceedings and due to the cognitive demands and stress associated with such a role. Mrs Fairhall makes the valid point of one's responsibility in such a role and given her previous experience I believe that overall it would be detrimental to her mental health and well-being for her to return to nursing."
 - (ix) In replies to questions from both parties' solicitors, Dr Cullen records that he would expect the claimant to be able to return to employment, other than nursing, in a full time capacity. It would take between 12 and 24 weeks to complete the course of ACT therapy, after which the claimant would be able to begin looking for employment. When asked what effect it may have on the claimant if she was only ever able to secure minimum wage work without any level of responsibility, Dr Cullen confirmed that the effect of any non-nursing related future employment may be detrimental to her mental health due to loss of previous role and identity.
10. It was agreed by both Mr Rudd and Bayne and accepted by the Tribunal, that the claimant would never be able to return to nursing related work because that would have a detrimental effect on her mental health. However, the Tribunal found that the claimant may be able to return to non-nursing related work once the Tribunal proceedings are concluded, she has completed the course of ACT therapy and thereafter has been given a reasonable period of time to obtain alternative employment. The Tribunal takes note of Dr Cullen's advice that nursing-related employment **would** adversely affect her mental health, whereas non-nursing related employment **may** have a detrimental effect on her mental health and well-being.
11. Mrs Fairhall gave evidence to the Tribunal under oath, was cross-examined by Mr Bayne and answered questions from the Tribunal. The Tribunal accepted Mrs Fairhall's evidence that she had dedicated almost 40 years to her nursing career, that she felt that she had been betrayed by the respondent and that their behaviour towards her had made it impossible for her to consider a return to nursing. The Tribunal accepted Mrs Fairhall's evidence that she has lost all trust and confidence in the NHS to such an extent that she could never contemplate returning to work in a nursing-related position. The Tribunal was satisfied that this loss of trust and confidence began with her suspension, continued and worsened throughout the suspension and culminated in her dismissal. On the claimant's evidence, as supported by Dr Cullen, the Tribunal found that the claimant will never be able to return to a nursing-related position.

12. The Tribunal was invited to address its mind to the respondent's allegation that the claimant had failed to mitigate her loss by obtaining alternative employment from the date of her dismissal to the date of this hearing. Again, the Tribunal accepted the evidence of the claimant, as supported by the report of Dr Cullen, that the claimant has never been fit to obtain alternative employment throughout that period and presently remains unfit for any kind of work. Accordingly, the claimant is entitled to be compensated for her loss of earnings from the date of her dismissal to the date of this hearing.
13. The Tribunal accepted the claimant's evidence, as supported by the report by Dr Cullen, that the claimant will remain unfit for any kind of work until she has completed the course of ACT therapy and thereafter been given a reasonable period of time in which to seek alternative employment. The Tribunal found that this period would extend to 28 February 2023, after which the claimant may begin to search for employment and may be able to obtain alternative employment.
14. The claimant's evidence to the Tribunal was that she genuinely believes she will never be able to obtain any kind of alternative employment. The Tribunal accepted the claimant's evidence that she would indeed find it demeaning or insulting to undertake minimum wage type employment. The claimant's evidence was that this is how she would feel were she to "bump into any of my former colleagues whilst I was stacking shelves."
15. Mr Rudd accepted on behalf of the claimant that she would have expected to retire by 8 December 2025. Accordingly any future loss would be limited to the period from 1 March 2023 to 8 December 2025, that being the period during which the claimant may be able to obtain employment after her ACT therapy has finished. That is a period of 2 years and 9 months. That is the length of the "career-long loss". It is not a particularly long period, taking into account the claimant's length of service.
16. The Tribunal takes note of the recent guidance given by The Employment Appeal Tribunal in **Secretary of State for Justice v Plaistow** and the earlier EAT decision in **Wardle v Credit Agricole Corporate Investment Bank**. Having considered all the evidence, the Tribunal found that there is a possibility that the claimant will obtain some kind of alternative employment, but that this will never be in any kind of nursing-related position and is unlikely to be in any other position of responsibility which would attract a wage much higher than the National Minimum Wage. The Tribunal was satisfied that the claimant should be compensated in full for her losses up to and including 28 February 2023. The Tribunal found that the claimant should also be compensated in full for the period from 1 March 2023 to 8 December 2025, but that there should be a 25% reduction in compensation for that future period, to reflect the possibility that the claimant may obtain employment in a relatively menial role.
17. Mr Bayne for the respondent conceded that the respondent should be responsible for the cost of the ACT therapy treatment in the sum of £3,120.
18. The Tribunal carefully considered the claimant's evidence with regard to the equity release loan, taken out by the claimant in September 2021, in the sum of £77,700. The Tribunal notes that Mrs Fairhall informed Dr Cullen that she had done this to enable her to pay her legal fees. In her witness statement, the claimant says, "I have had to withdraw equity on my house, as I can no longer afford to pay my monthly bills without it." The Tribunal was not satisfied that the claimant had adduced sufficient evidence about her financial situation so as to justify her claim for compensation in this regard. The Tribunal was not satisfied that this head of claim was sufficiently foreseeable or sufficiently connected to the imposition of the detriments to make it just and equitable for compensation to be awarded under that head of claim. That head of claim is rejected.

19. In accordance with section 207 of the Trade Union Labour Relations (Consolidation) Act 1992, the Tribunal is obliged to take into account any failure to comply with the ACAS Code of Practice. For the reasons set out in its Judgment on liability, the Tribunal was satisfied in this case that the respondent had indeed failed to comply with the ACAS Code. The respondent had failed to carry out a reasonable investigation without unreasonable delay and had failed to ensure that the period of suspension was as brief as possible. The respondent had failed to fairly inform the claimant of the nature of the allegations against her and had failed to conduct the disciplinary process without unreasonable delay. Taking into account the overall size of the compensatory award, the Tribunal was satisfied that there should be an uplift in this case at the rate of 10% to reflect the respondent's failure to comply with the ACAS Code of Practice.

Injury to feelings

20. The Tribunal found that the respondent had deliberately targeted the claimant after she made her protected disclosures and thereafter repeatedly and consciously embarked upon a course of conduct from the suspension through to the dismissal which showed a total disregard and lack of concern for its impact upon the claimant. The Tribunal found that the respondent had the means to address the claimant's genuine concerns about the way she was being treated, but wholly failed to do so. This was a lengthy campaign of deliberate victimisation from the date of the suspension. The Tribunal accepted the claimant's evidence as to the devastating effect this had upon her mental health and well-being. The Tribunal rejected Mr Bayne's submissions that the award for injury to feelings should fall within the middle band of the Vento guidelines. The Tribunal had no hesitation in finding that this was one of those cases which easily fell within the upper band of the Vento guidelines. The Tribunal was satisfied that the appropriate award for damages for injury to feelings is the sum of £35,000.

21. The Tribunal provided those findings to Mr Rudd and Mr Bayne, who then prepared an agreed schedule of the appropriate figures under each head of claim. The agreed figures included grossing-up for tax purposes. The agreed figures are as follows:-

Basic award - £14,478

Compensatory award

- (i) Loss of statutory rights - £400
- (ii) Past loss of earnings - £135,246.98
- (iii) Past pension loss - £1,076.22
- (iv) Future loss to 28 February 2023 (including pension) - £26,393.06
- (v) Future loss on 1 March to 8 December 2025 - £73,342.65
- (vi) Therapy - £3,120

Total compensatory award - £239,578.91

10% ACAS uplift - £23,957.89

Total compensatory award - £263,536.80

22. Having applied the appropriate grossing up provisions, the total compensatory award is **£423,322.44**. The basic award is **£14,478**. Compensation for injury to feelings is £35,000. The total award of compensation is therefore **£472,800.44**.

G Johnson

Employment Judge Johnson

Date 5 July 2022

JUDGMENT SENT TO THE PARTIES ON
6 July

M Richardson

FOR THE TRIBUNAL OFFICE

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