EMPLOYMENT TRIBUNALS

Claimant:	Mrs J Climer-Jones		
Respondent:	Cardiff and Vale University Local Health Board		
Heard at:	Cardiff	**On:**	31 July 2023, 1 and 2 August 2023
Before:	Employment Judge S Moore Mrs K Bishop Mr P Bradney		

Representation
Claimant: Mr Ohringer, Counsel
Respondent: Mr K Bryant, Kings Counsel

JUDGMENT WITH REASONS ON PENSION LOSS STAGE 1

But for the unlawful detriments and dismissal of the claimant for making protected disclosure the unanimous decision of the Tribunal is:

1. The claimant would have retired from the respondent's employment aged 67.

2. The claimant would have been promoted to a Band 6, SCP 4 position within the respondent on 31 October 2023.

3. The claimant would have been promoted to a Band 7 position on 31 October 2024.

4. A withdrawal factor of 15% is applicable to her employment with the respondent.

5. In respect of the new job facts, the claimant will find alternative employment as an Architectural Technologist on 1 September 2025. The nature of the pension scheme in this role shall be a defined contribution scheme. The employer contributions will be 5% and the employee contributions will be 8%. There will be no death in benefits provisions with the scheme.

6. The claimant will retire aged 67 years.

REASONS

<u>Background and Introduction</u>

1. This is the third remedy hearing for this claim. The first remedy hearing took place between 15 – 22 March 2021. The second remedy hearing took place on 15 July 2021. There have been a number of reconsidered judgments as well as multiple appeals and cross appeals. The pension loss hearing was stayed pending the outcome of these appeals. The respondent's appeal was dismissed by HHJ Tucker at a hearing on 29 April 2022, judgment dated 22 April 2023.

2. The hearing had been listed to take place on 27 February 2023. This had to be postponed as neither party was ready for the hearing. It was relisted to the above dates.

3. The parties were unable to agree the list of issues. Eventually the list of issues had to be imposed by Judge Moore.

4. We had before us an agreed bundle of 1066 pages. The Tribunal heard evidence from:

- the claimant;

- (respondent): Carys Fox, Director of Nursing, Strategic Nursing and Midwifery Workforce;

- Jacky O'Grady, Pensions Services Team Manager, NHS Wales Shared Services Partnership.

Findings of fact

5. The Claimant was born on 31 July 1969 and she was 54 years old at the date of this hearing.

6. The Claimant has a 2:1 BA in Development Studies from the University of East Anglia. She is fluent in English and Welsh and can speak rudimentary Arabic. She qualified as a nurse in 1991 and initially worked as a Band 5 nurse on a surgical ward at Llandough Hospital, Cardiff. She spent time in the 1990's travelling and working as nurse in Australia. Between 2001 – 2007 she worked for an agency placed in a wide range of clinical areas mainly with the respondent including cardiac outpatients, Renal, Haematology, vascular surgery, ENT, abdominal surgery, gastroenterology, neurology, nursing homes, oncology and endoscopy / x-ray.

7. Between September 2007 – February 2009 the claimant worked in the cardiac intensive care and outpatients department in a hospital in Saudi Arabia. In April – October 2009 she was engaged to set up and manage an outpatient department in an Egyptian hospital.

8. The claimant is an extremely experienced Clinical Practitioner, she has a wide range of nursing experience in different environments both at home and abroad. This includes surgical wards, intensive care, trauma and emergency assessment units, haematology. We refer to our earlier findings in respect of the Claimant's competence as a nurse, which has never been in question.

9. The claimant commenced employment with the respondent in November 2009 back at Llandough Hospital moving to the Medical Assessment Unit ("MAU") at the Heath in April 2011 where she remained until her (constructive) dismissal in June 2016. At the time of the Claimant's unlawful dismissal she was employed as a Band 5 Nurse, she was at the top of the pay scale for Band 5. This overlapped the pay scale for Band 6 meaning the claimant was at an equivalent level as spinal column point 4 of Band 6 on a salary of £36,282.19. Inclusive of enhancements for unsocial hours this equated to £39904.25 gross. In our previous judgment on remedy we found that by 22 July 2023 the claimant would have mitigated her loss of earnings and have found a job earning the equivalent.

Normal retirement age – old job facts

10. The respondent is one of the largest NHS organisations in Wales serving the population of Cardiff and south and mid Wales for speciality services. The claimant worked at the main and central hospital in Cardiff known as the Heath. The family home is within close working distance of the Heath Hospital where the claimant worked at the time of her dismissal in the MAU.

11. The Claimant's husband is 15 years younger than the Claimant; he works in the private sector. If the claimant were to retire at 67 years of age he would be 52 years of age.

12. The Claimant had her son at aged 42 and he is now 11 years old at the time of this hearing and about to start at High School which is within a close walking proximity of the family home. If he goes to university he is likely to be in full time education for another ten years by which point the claimant will be 64 years old.

13. The claimant is in good physical health and there are no known health issues that would require specific factoring in with regards to the claimant retiring sooner than her normal retirement age.

14. The Claimant had been a member of the 2008 NHS Pension Scheme ("the 2008 scheme") which had a normal retirement age of 65 years old and she retains deferred benefits in that Scheme. She opted out of the Scheme on 31 March 2013 and the Tribunal previously found that she would have been re-enrolled into the 2015 NHS CARE Pension Scheme ("the 2015 scheme") but for her unlawful dismissal on 20 September 2017 (aged 48). This was the respondent's (delayed) enrolment date. The normal retirement age under the 2015 scheme is 67 which in the claimant's case will be on 31 July 2036. It is important to note that the claimant never actually rejoined the 2015 scheme as she had been unfairly dismissed in June 2016.

15. The minimum pension age under the 2015 scheme is 55 years. It operates a % reduction in pension for each year if someone retires early:

Number of years before NPA	12	11	10	9	8	7	6	5	4	3	2	1
Pension	56.3%	58.7%	61.2%	63.9%	66.8%	70%	73.3%	76.9%	80.8%	85%	89.6%	94.6%

16. The claimant's evidence, which we accepted as it was reasonable and plausible based on her personal circumstances, was that the claimant and her husband would not be in a financial position to both retire early. The claimant would have had the better pension and she would have looked to maximise her pension so that they could have the chance of spending retirement together, with Mr Climer Jones more likely to have to retire early, long before his state pension would be available, in order to do so.

17. The Tribunal found at a previous Remedy Hearing based on the evidence we heard at the time that the Claimant had not shown that she had lost the chance of a promotion to a Band 6, see paragraphs 104 – 113 and 170 - 171 of the corrected judgment on remedy dated 15 April 2021. We accepted the speculative evidence from the respondent's witness that there would be two Band 6 vacancies per annum, at the most, within the Directorate.

18. We have heard much more evidence about the promotion chances at this hearing. This is as follows.

19. The MAU was a unit within the Emergency Medicine Directorate ("the directorate"). Most wards are predominately staffed by Band 5 roles and have one or two Band 6 roles (either Clinical leads or Deputy Ward Sister / Charge Nurse) and one Band 7 Ward Sister / Charge Nurse.

20. The skill mix of staff working in the directorate is much richer and there is a higher proportion of Band 6 registered nurses. The current skill mix structure is broadly as follows with the number in brackets reflecting the levels in 2016 when the claimant was dismissed:

- 1 Band 8b Lead Nurse (1 in 2016);

- 3 Band 8a Senior Nurses (3 in 2016)

- 19 Band 7 nurses (20 in 2016)

- 92 Band 6 nurses (82.5 in 2016)

- 82 Band 5 nurses (76.5 in 2016).

21. There is a current turnover of Band 6 nurses of 16.65% per annum. Applying a broad brush approach that equates to about 15 Band 6 positions per year within this directorate alone.

22. The claimant's witness statement incorporated a CV that was a mixture of actual and hypothetical content. The hypothetical content focussed on the higher band roles within the directorate (for which there were supporting job descriptions and specifications in the bundle) and set out why the claimant says she would have been suitable for those roles. It included a number of hypotheses in assuming the claimant would progress through her nursing career ending at a Band 8 role before retirement. The CV did not identify certain elements which would be necessary for a Band 6 role, namely leadership and staff management. The Claimant told the Tribunal that the CV was not produced as if she was applying for particular roles but for the purposes of this Employment Tribunal hearing and was in parts hypothetical. We accepted the Claimant's evidence in this regard.

23. Ms Fox stated in her witness statement that she agreed that it was likely the Claimant would have secured a promotion to Band 6 if she had addressed those attributes that we have outlined above, namely leadership and staff management and in her oral evidence said that the Claimant would have secured such a role by 2017 or 2018. We are however bound by our earlier findings based on there being two band 6 roles per year within the directorate.

24. Between 1 January 2015 and 31 October 2022 of the 698 female nurses born before 1970, the average retirement age for that group (within the respondent's employ) was 58.86 years.

25. Before we look at the Band 6, 7 and 8 roles in more detail, we set out the age categorisation for each band within the directorate:

Band 5

Age Band	Headcount
21-25	20
26-30	12
31-35	18
36-40	5
41-45	1
46-50	1
61-65	1
Grand Total 58	

Band 6

Age Band	Headcount
21-25	2
26-30	21
31-35	14
36-40	11
41-45	8
46-50	11
51-55	3
Grand Total 70	

Band 7[1]

Age Band	Headcount
21-25	2
26-30	40
31-35	91
36-40	119
41-45	146
46-50	152
51-55	147
56-60	140
61-65	46
66-70	4
>=71 Years	3

26. There were the following Band 6 roles before us: Registered Nurse, Deputy Team Leader and Clinical Nurse Specialist.

27. Given that Ms Fox accepted the claimant would have secured promotion to one of these roles by 2017/2018 it is not necessary or proportionate to examine the Band 6 roles in detail. She had the necessary skills for the roles in accordance with the job descriptions we saw in the bundle as well as suitability. By this point the Claimant would have been in a Band 5 role for 14 years. Given the turnover of vacancies that we have seen, and also the age profile of Band 5 and 6 nurses in the bundle, we find that the Claimant would have secured promotion to a Band 6 by 31 October 2023 at spinal column 4 (as the claimant would be matched across to reflect her current SCP).

Band 7 promotion

28. There were the following Band 7 roles before us: Clinical Nurse Specialist and Sister / Charge Nurse. The job descriptions were lengthy and it is not proportionate to set out all of the required attributes.

Clinical nurse specialist

29. The role requires the job holder to work as an autonomous practitioner devise, implement and follow up specialist treatments across the disease spectrum for patients within a specific group. To be a skilled practitioner providing expert clinical care using an extensive theoretical knowledge base and practical experience to underpin the role, while acting as a role model for the delivery of expert care. To deliver specialist educational programmes to a range of healthcare professionals in relation to the specific disease, including medical, nursing and Allied Health Professional staff. To lead research and audit within given speciality internally and externally to the UHB.

Sister / Charge Nurse.

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[1] It appears that the figures provided to us for Band 7 are across the whole of the respondent rather than the Bad 5 and Band 6 figures which were for the directorate.

30. This is the traditional route for promotion. The role requires the job holder to exercise 24-hour accountability for the management of the ward/clinical area, to include leading and developing the core nursing establishment in the delivery of compassionate, high quality, effective, patient-centred nursing care; and providing fair, honest and measured people management. Provide visible, professional nursing leadership, support, supervision and guidance (in line with NMC standards), expert clinical advice and undertake management and monitoring activities in line with legal and professional requirements, statutory rules and UHB policies relating to evidence based practice. Be responsible for the efficient management of the ward/clinical area budget, effectively deploying the nursing team and utilising the allocated resources and raising any financial expenditure concerns to appropriate personnel in a timely manner.

Patient Flow Manager

31. This requires the job holder to he post holder to take a lead in managing the patient-focussed management of patient admissions and discharges, eliminating barriers to timely transfer of care and facilitating flow through the local system, ensuring regular and timely interactions with teams and organisations, both in the inpatient and community sectors. The post holder will work with colleagues in the directorate and other partner organisations to develop clear pathways of care for older people with mental health needs.

Practitioner – Patient at risk team

32. This requires the job holder to have continuing responsibility for supporting the management of the acutely unwell adult. Frequently supervising clinical staff caring for the patient identified at risk of deterioration within the UHB. The post holder will exercise clinical leadership, through a higher level of independent judgement, discretion and decision making, to identify acutely deteriorating patients and institute timely treatment. The post holder will provide specialist advice and interventions, to recognise and resolve issues, in order to improve the experience of Level 1/2 patients throughout the UHB, establishing optimal levels of care and improved, appropriate outcomes. The post holder will support the education and development of nursing and medical staff within the UHB. The post holder will engage in auditing and research to evidence PART team's contribution to the patients' experience, and improve clinical practice and standards of care. The post holder will provide a highly developed specialist knowledge underpinned by theory and experience.

33. There are currently between 18 and 19 full time equivalent Band 7 roles in the Patient at risk team and the Respondent is looking to recruit a further 9 almost around a 50% increase.

34. Ms Fox told the Tribunal that it was desirable for a Band 7 to attain an MSc qualification and Sisters / Charge nurses in post without an MSc would be supported to achieve the qualification. It was not mandatory for someone to have an MSc to secure a Band 7 promotion. Alternatively specific modules can be completed which take approximately 12 weeks. We find that the Claimant was able and ambitious to complete the master's module that would have been required. She is already educated to a degree level.

35. We find that the Claimant would be particularly suitable for the role in the Patient At Risk Team. We find, based on the job description that this is not a physically demanding role insofar as the equivalent of a Band 7 Ward Sister may be for example. The role concerns patient management and risk assessments involving a supervisory type element of treating very unwell patients. We find that given the Claimant's extensive and varied Emergency Department and MAU experience that she would have met all of the requirements for this role. We also note that she is Welsh speaking and the requirement for, or the expressed desire for, Welsh speaking candidates. We took into account the Claimant's experience in her roles with the respondent and other work experience in regard to managing staff and leadership skills. Since her dismissal she already secured two Band 7 equivalent roles in the private sector.

36. Weighing up all these factors we find that the Claimant would have been promoted to the Band 7 position in the Patient at risk team within one year of securing her Band 6 promotion as of 31 October 2024.

37. The Respondent invited us to find that the Claimant would be unlikely or would not want to apply for a promotion to a band 6 or 7 role until her son left secondary school. We have taken into account our previous findings on the Claimant and her husband's ability to cope and manage child care from her dismissal in 2016. We noted that the Claimant often had to stay away from home, travelling long distances to cover agency work. The claimant secured wrap around care when she worked at Regis and the claimant's son had regularly been in child care with no reported difficulties in managing these arrangements. Had she not been dismissed the claimant and her family would have been in a much more stable position with the family home, workplace and school being in close proximity. We find that the Claimant would not have waited until he son reached 18 to apply for a promotion to a Band 6 role for child care reasons.

Withdrawal Factors

38. We further find that the Claimant was very likely to have continued in that vacancy until her retirement for the following reasons:
- It is not a physically demanding role as with other nursing roles and therefore the claimant would be more likely to remain in this role as she got older;
- The Respondent is a stable employer, there is no risk of insolvency or redundancy in the role;
- The role is at the Heath hospital which is close to the Claimant's home within walking distance;
- The Claimant is the main pension earner within the household having access to a defined benefit scheme;
- The Claimant's son is likely to have a further ten years left in education;
- The Claimant will not want to retire many years ahead of her husband;
- The reduction to her pension had she retired early.

39. As of 31 October 2022 there is an average retirement age of 58.86 years for Band 6 nurses. It must follow, due to their age profile that a significant

proportion of that group would either be retiring under the 1995 Scheme or the 2008 Scheme.

40. In light of the claimant's very specific and personal circumstances we do not find this statistic to be particularly relevant to the findings of fact in this case.

41. Applying all of the above factors we apply a withdrawal factor of 15%. We find that we should apply a low withdrawal factor in this case.

Band 8

42. We do not find that the Claimant would have progressed to a Band 8 before retirement. We considered the job descriptions of the Band 8 roles in the bundle very carefully. Whilst we consider that certainly in respect of some of the attributes the Claimant would be able to meet those requirements, we took into account what the Claimant said in her statement about the Band 8 roles and the hypothetical position the Claimant had put herself in. the claimant's evidence was that about 10 years after she achieved a Band 7 she would be going for a Band 8 promotion. As we have found she would have been promoted to a Band 7 role on 31 October 2024, the Claimant would be 65 years old and retiring within 2 years. We also take into account the very small number of Band 8 nurses within the Directorate and on the balance of probabilities given that the Claimant would be 2 years from retirement, we have concluded she would not have progressed to Band 8.

New Job Facts

43. It is important to start from the previous findings that the salary is "pegged" at £39,904.28 until 22 July 2023. We refer to our previous findings of fact regarding mitigation of loss.

44. The Claimant researched a career that would give her security and have good prospects into her 60's and in undertaking that research she settled on a career of an Architectural Technologist. The claimant concluded that this particular degree would give her an advantage in the graduate job market as she will study a particular type of software (called "Revit"). In order to secure government building contracts architectural firms or construction companies are required to demonstrate that they are 'BIM' compliant. (Building Information Modelling). Architectural technology students are introduced to Revit in the first year of study. The claimant's evidence, which we accepted, is that this means she will be very familiar with Revit by the time she qualifies which will mean any future employer will not have to fund training in the software.

45. The Respondent suggested (in cross-examination rather than any evidence) that it would have been reasonable for the Claimant to have secured a public sector role. It was put to the Claimant that she could have retrained as a teacher, or got a job in the Civil Service or at a University. We did not have any evidence on what particular type of roles might have been suitable or where those roles might be. We did not have any job advertisements or job descriptions. This absence of evidence leads us to conclude we could not sensibly entertain that submission as to do so would be wholly speculative. The burden of proof in this regard was on the Respondent and we find that they have not discharged that burden of proof.

46. For these reasons we find the claimant has taken reasonable steps to mitigate her pension loss.

47. The Claimant enrolled in her degree in 2021. She deferred a year and was due to start year 2 in 2023 so she will graduate in 2025. We saw evidence in the bundle from Cardiff Metropolitan University, Prospects.ac.uk and the Chartered Institute of Architectural Technologists regarding both career prospects and salary prospects. We find that after graduating and by September 2023 the Claimant is likely, or very likely, to secure a role as an Architectural Technologist in a private construction company in Wales.

48. In terms of salary progression, the claimant's (unchallenged) evidence and the Prospects.ac.uk document provide:

a. The typical starting salaries are between £20,000 and £25,000. The mid range salary for an Architectural Technologist (classed as "a few years' experience") is expected to be between £24,000 and £45,000. By 2027 the Claimant would have 2 years' experience. The middle of that range is £35,000 which is still below the level of salary we found the claimant would have been earning as of 22 July 2023.

b. The salary range for senior level (classed as 7 years' experience) is between £45,000 and £60,000.

c. However, the medium salary for Architectural Technologists as a group in Wales is £40,671.

49. We looked at the salary ranges applying the years of experience applicable to the claimant as follows:

Year	Experience range	Salary range	C's expected salary
2025	new	20,000 – 25,000	
2027	Bottom mid range	24,000 – 45,000	35,000
2028			37,000
2029	Middle mid range		39,000
2030			41,000
2031	Top mid range		43,000
2032	Bottom senior	45,000 – 60,000	45,000

50. Taking into account all of that information, in particular the Welsh medium salary, we find that the claimant will be earning £35,000 by September 2027. By September 2032 the Claimant would be earning £45,000. We find that that salary would then remain static given the Wales medium until her retirement, subject to inflationary pay rises. The pension loss in respect of the "new job facts" should be assessed on these amounts.

Retirement age in new role

51. We find that the Claimant will retire at her normal retirement age which is 67 for the following reasons. The Claimant is entering a new career and job market. She has undertaken to study a degree to enable this new career. We accepted that she would not wish to retire early due to her personal circumstances regarding the age of her husband and son. The new role will not be physically demanding. We refer to our findings at paragraph 16 above.

<u>New role pension</u>

52. The unchallenged ONS pension statistics for typical employer pension contributions in the construction industry are:

- Just above 67% of employer pensions were below 4%;

- 16.9% paid between 4% and 8%;

- 3.4% paid between 8% and 10%;

- 2.6% paid between 10% - 12%;

- 3.8% paid between 15-20%;

- 3.9% paid between 20% and over.

53. Having regard to the evidence before us we find that the Claimant would have secured a pension in her new job with employer contributions of 5%. This would be a NEST type defined contribution scheme with employee contributions of 8%. We note that these type of schemes do not have death in service allowances and for these reasons, particularly given that these conclusions are supported by ONS stats, we find that the Claimant would not secure a pension with death benefits allowances.

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Employment Judge S Moore

Date: 24 August 2023

JUDGMENT SENT TO THE PARTIES ON 25 August 2023

FOR THE TRIBUNAL OFFICE Mr N Roche