EMPLOYMENT TRIBUNALS

Claimant: **Mr A Hurle**

Respondent: **London Fire Commissioner**

Heard at: **East London Hearing Centre (in public by video)**

On: **4 September 2023 and in chambers 5 September 2023**

Before: **Employment Judge S Moor**
Member: **Mr B Wakefield**

Representation

For the Claimant: Mr J Franklin, counsel
For the Respondent: Miss R Thomas, counsel

JUDGMENT ON RECONSIDERATION

The unanimous judgment of the Tribunal is that it is not necessary in the interests of justice to reconsider the First Remedy Judgment.

REASONS

Procedural Chronology

1. By a claim form presented on 6 September 2019 and subsequently amended to include claims about dismissal, the Claimant made claims of disability discrimination. After a liability hearing on 21-23 October 2020 (in public) and 12 November 2020 (in chambers) the tribunal gave judgment for the Claimant. Written reasons were sent to the parties on 23 November 2020.

2. After an appeal was dismissed on 18 January 2022, a first stage remedy hearing was held on 13 and 14 July 2022 (in public) and 15 July and 3 October 2022 (in chambers). Written judgment was sent to the parties on 11 October 2022.

3. On 25 October 2022 the Claimant applied for a reconsideration of the remedy judgment. This was partly refused in a Judgment sent to the parties on 18 November 2022. EJ Moor decided that part of the application should be heard relating to whether the Tribunal should have decided the issue set out at paragraph 1.4.1.3 of the List of Issues (attached to the first stage remedy judgment).

4. Meanwhile one of the non-legal members, Ms Long, became unavailable and the parties agreed that EJ Moor and Mr Wakefield could sit to hear the reconsideration application without her.

5. Unfortunately, through listing errors the hearing was delayed from June to September. We have already apologised for the undoubted further problems this has caused, especially as the Respondent has not yet paid to the claimant the parts of the pension loss that the parties have been able to agree.

6. The parties suggested an economical approach to the reconsideration hearing by providing detailed written submissions, allowing the Tribunal half a day to read, and then attending at 2pm on the first day of the hearing to answer our questions.

7. We thank both counsel for their thoughtful work on those submissions and their helpful oral submissions. We have spent a good deal of time reviewing the material before us at the first stage remedy hearing: the list of issues, the witness statements, our notes of the hearing, the written submissions, and the schedules of loss. We have also, of course, re-read our first stage remedy judgment.

Reconsideration Hearing Issues

8. At the Preliminary Hearing on 23 June 2023 a List of Issues was agreed and prepared for this reconsideration hearing as follows:

    8.1. Whether the Tribunal should decide issue 1.4.1.3 of the List of Issues attached to the Remedy Judgment. This issue relates to whether the Tribunal should have assessed the chance that, if the Claimant had left the Respondent, it would have been by Ill Health Retirement ('IHR').

    8.2. If not, whether in any event, part of the claim for pension benefit loss should include the loss of the value of IHR benefits under the pension scheme.

    8.3. Whether the claim includes loss of the value of ancillary benefits under the pension scheme namely Death in Service benefits and Surviving Widow's Pension benefits.

8.4. If not, then whether the Claimant is allowed to amend his claim to include the value of those ancillary benefits.

8.5. If it is decided that loss of the value of the ancillary benefits is part of the claim, then how in principle those benefits should be decided.

9. Both parties agree that, in fact, the Tribunal has already decided the question of whether a 2-year adjustment be made to the multiplier in its first stage remedy decision, paragraph 247.1. This question is therefore not a reconsideration issue (although the Respondent reserved its position on the point if the reconsideration were granted).

Legal Principles

10. Under Rule 70 of the Employment Tribunal Rules of Procedure 2013, a judgment, including one on remedy, will only be reconsidered where it is '*necessary in the interests of justice to do so*'.

11. In considering the 'interests of justice' the Tribunal must be guided by the principles of natural justice and fairness and give effect to the overriding objective at Rule 2 including:

11.1. ensuring the parties are on an equal footing;

11.2. dealing with cases in ways that are proportionate to the complexity and importance of the issues;

11.3. avoiding unnecessary formality and seeking flexibility;

11.4. avoiding delay so far as compatible with proper consideration of the issues; and

11.5. saving expense.

12. Tribunals were reminded by the EAT, in Ebury Partners UK Ltd v Davis [2023] EAT 40, that the finality of litigation is also a central aspect of the interests of justice. It is unusual for a litigant therefore to be allowed a 'second bite at the cherry' as HH Shanks observed. After citing the procedural mishap problem in Trimble (see below), he held: '*the jurisdiction should not be invoked to correct a supposed error made by the tribunal after the parties have had a fair opportunity to present their case on the relevant issue.'* The principle of finality in litigation is a very important one. Cases need to be resolved after one hearing. This is an important principle for the efficient administration of justice and the saving of expense and time and to be fair to those waiting for their cases to be heard. A party cannot pick up a point after

judgment that he could have argued earlier. Nor can he use the judgment as a starting point from which to make further arguments.

13. In AB v Home Office EAT 0363/13 the EAT held that if an issue had been overlooked by the Tribunal, then it should usually arrange for a reconsideration because it would be necessary in the interests of justice to determine that issue.

14. In Lindsay v Ironsides Ray and Vials [1994] ICR 384, EAT, it was held that it would not normally be in the interests of justice to reconsider a decision due to the error of a party's representative. In that case the representative had omitted to make submissions on whether it would be just and equitable to extend time, a reconsideration was allowed, but an appeal against this upheld.

15. As far back as Trimble v Supertravel Ltd [1982] ICR 440, cited in Lindsay the following approach has been adopted that where there was an error of law then that is a matter of appeal, but if there has been a decision on a point on which a litigant has not had a fair opportunity to make submissions, then that was appropriate for review (now reconsideration).

> *As it seems to us the fundamental question is whether or not the industrial tribunal's decision that the employee had failed to mitigate her loss was reached after she had had a* ***fair and proper opportunity to present her case on the point****, being aware that it was a point which was in issue. We do not think that it is appropriate for an industrial tribunal to review their decision simply because it is said there was an error of law on its face. If the matter has been ventilated and properly argued, then errors of law of that kind fall to be corrected by this appeal tribunal. If, on the other hand,* ***due to an oversight or to some procedural occurrence one or other party can with substance say that he has not had a fair opportunity to present his argument on a point of substance****, then that is a procedural shortcoming in the proceedings before the tribunal which, in our view, can be correctly dealt with by a review … [now reconsideration]... however important the point of law or fact may be. In essence, the review procedure enables errors occurring in the course of the proceedings to be corrected but would not be normally be appropriate when the proceedings had given both parties a fair opportunity to present their case and the decision had been reached in the light of all relevant argument." (our emphasis)*

16. Thus, for example, if there has been a genuine misunderstanding by the parties as to the extent of the issues in the hearing (e.g. whether mitigation would be considered or left to a remedy hearing) then that would likely provide grounds for a reconsideration, as in Smith v Clarke EAT 617/84.

17. The Principles for Compensating Pension Loss (3rd Edition) ('the Principles') are important guidance. Nevertheless they do not operate as a checklist: the Tribunal must select guidance from those principles that is relevant to the case put before them. The Principles do not tell the Tribunal what losses are claimed, the claimant must do that.

18. The Principles give guidance on the use of the two-stage remedy hearing to decide pension loss (Chapter 6). They suggest it is used where there is a realistic prospect of substantial pension loss. Paragraph 6.7 sets out the purpose of the first stage, to enable the Tribunal to do three things:

    18.1. issue a judgment on non-pension compensation;

    18.2. rule on as many areas as possible that are relevant to calculating pension loss without getting into the precise figures. This may include things like age of retirement but for dismissal; future promotion prospects; **what adjustments are to be applied to reflect withdrawal factors**; and

    18.3. hear submissions on whether the 7-step method (using the Ogden tables) or the use of expert actuarial evidence is appropriate or a blend of the two.

19. The Principles suggest that the parties can be given a time-limited opportunity to agree a figure for pension loss after the first stage judgment. If agreement cannot be reached, then a second-stage hearing will deal with the parties' competing contentions on the figures.

20. In Parekh v Brent LBC [2012] EWCA 1630 it was observed by Mummery LJ that a list of issues was a useful case management tool. If agreed, then the parties cannot usually go beyond it. But the Tribunal is not required '*to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence*'. Lists of Issues vary, especially those produced by agreement between the representatives. Some merely set out questions for the Tribunal, others include the parties' respective cases or arguments on those questions.

21. We were referred, for the first time, to Parry v Cleaver [1969] UKHL 2. As the result of negligent driving by the Defendant, the Claimant was disabled from continuing in his employment. He received a disablement pension. The question was how it should be dealt with in the assessment of his losses. The House of Lords decided (3:2) that the disablement pension should not be deducted from his lost earnings because it was akin to an insurance payment or deferred payment (see Lord Reid, page 8, of Claimant's bundle of authorities). This was an exemption to the general principle that damages must represent an employee's real loss. The House of Lords also decided

that the disablement pension should be taken into account in relation to pension loss upon retirement. The loss at that stage was '*the difference between the full pension which he would have received if he had served his full time and his ill health pension*.' Lord Reid reasoned that at this stage the Claimant was receiving like with like.

Factual Findings

Issues at First Stage Remedy Hearing

22. The first issue was '*What financial loss has been caused to the Claimant as a result of the discrimination?*'. This issue was broken down into a series of sub-questions after which each side set out their contentions on that question.

23. At Issue 1.4 a sub-question was drafted as follows:

> *1.4 What is the chance that the C would have been able to provide sustained attendance as an SM [station manager] (and subsequently as a Group Manager/Commander), or in another Fire Service role, up to the date of his retirement?*

24. The parties' respective contentions were then set out:

> *1.4.1. The claimant asserts that,*
>
> *1.4.1.1 provided the R followed its MAP in a reasonable and non-discriminatory way, there is a very high chance that he would have sufficiently recovered his health to provide sustained attendance in his chosen roles for the whole of his intended Fire Service career or,*
>
> *1.4.1.2 if prevented from doing so by illness or injury, that he would have been willing and able to undertake alternative Fire Service employment in an adjusted role;*
>
> *1.4.1.3* ***alternatively*** *if all other opportunities for redeployment were unsuccessful, because of the nature of his incapacity, it is asserted that he would have qualified for medical early retirement benefits (including immediate payment of pension without actuarial reduction for early retirement) (our emphasis).*
>
> *1.4.2 The Respondent contends that there is only a 10% chance that the C would have been able to provide sustained attendance for the whole of his career.*

25. The second main issue at the first-stage remedy hearing was how pension loss should be calculated: whether it be a simple calculation (as the Respondent contended) or a complex calculation using the 7-steps method (as the Claimant contended) and whether, if the latter, any actuarial evidence might be required for any step. (Issue 2).

26. Schedules of loss were produced for the first-stage hearing.

27. The Claimant gave evidence and Ms Paula Bayley and Ms Tapp, among others, gave evidence for the Respondent.

28. The Claimant provided a lengthy witness statement: 25 pages of single-spaced text with 158 main paragraphs and several sub-paragraphs. He gave evidence about ill health retirement only once and briefly at paragraph 71 of his statement as follows:

> *I also cannot see any circumstances where, if the Respondent had properly applied its own capability sickness procedures, I could have been dismissed for injury or ill health reasons, other than in circumstances where I would be entitled to receive medical early retirement benefits (an immediate payment of pension without any reduction for early retirement.)*

He did not refer to the policy or set out the criteria for ill-health retirement.

29. Ms Bayley for the Respondent dealt with the subject of ill health retirement as follows:

> *44. Assuming that redeployment was not an option between February and April 2020, LFB would also have considered the question of ill health retirement.*
>
> *45. Part 12 of the Firefighters' Pension Scheme (England) Regulations 2014 ("the Regulations") provides for a process by which LFB, as scheme manager for its pension scheme, must ask an Independent Qualified Medical Professional (IQMP) to provide an opinion when determining whether a member is permanently unfit to fulfil their substantive role. Regulation 152 of the Regulations confirms that any such opinion by the IQMP is binding on the Respondent unless it is superseded by the outcome of an appeal.*
>
> *46. When providing an opinion as to whether an employee is permanently unfit to fulfil their substantive role, the IQMP considers "whether a person is incapable of performing any duties of the role….because of incapacity of mind or body;" and "whether the incapacity…is likely to continue until normal retirement age" [Regulation 152 (2)(a) and (b)].*

> *47. In my view, the IQMP could potentially, as at April 2020, have considered Mr Hurle to be incapable for performing as a Station Commander (development) because of incapacity of mind. However, given the fact that Mr Hurle was relatively young and some considerable way off retirement, and that there were treatment options available to him which had not yet been fully explored and implemented, I am certain the IQMP would not have found that Mr Hurle satisfied the second part of the criteria. I feel able to confidently comment on this because I am very familiar with the IQMP process and the rationale applied in situations such as these; I have personally participated in a number of Third Stage meetings and many IQMP appeal hearings and have been involved in numerous cases where ill health retirement has been considered by an IQMP.*
>
> *48. As Mr Hurle would not have met both elements of the criteria set out in Regulation 152 (2), the IQMP's opinion would have been that Mr Hurle was not permanently incapacitated for his duties as a Station Commander (development). LFB could not, therefore, have proceeded with the ill health retirement for Mr Hurle.*

Ms Bayley's evidence was that those with PTSD arising out of their work as a firefighter and who were likely only to recover when they stopped that work were good candidates for IHR.

30. We have read our notes of Mr Franklin's cross-examination of Ms Bayley. His very effective lines of challenge were that: she was not medically qualified; she had not included the 'counter-factual' in her assessment (in other words that reasonable adjustments would have been made and how effective they would have been; and that the MAP would have been followed rather than the disciplinary procedure); and, although she had experience of PTSD cases, she did not know the triggers for the Claimant's PTSD symptoms. His strategy was to undermine her opinion that the Claimant would not have stayed in work.

31. Mr Franklin took Ms Bayley to the OH reports some of which were made at a time when the Claimant was being discriminated against by being put in a disciplinary process without reasonable adjustments. In all of those OH reports (referred to in our first stage remedy judgment and our liability judgment) the medical prognosis was for recovery: that the Claimant would be fit for work in the foreseeable future. As a result of that line of questioning, Ms Bayley agreed (contrary to the assertions she had made in her witness statement) that the Claimant was likely to have returned to work in the counter-factual situation.

32. On the question of IHR, Mr Franklin in cross-examination of Ms Bayley using statistics in the bundle, established that only a very small percentage of staff who had left were medically discharged: of 561 leavers between 2004 and 2022, only 17 were medically discharged for all reasons and only 4 for service reasons.

33. Ms Tapp's evidence was that around 10 members of staff left on IHR per year out of a staffing number of around 4700 but she gave us no evidence about their circumstances, for example the length of absence and could not say how many of those had depression.

34. Three schedules of loss were provided by the Claimant. (We make no criticism as to the number: as time progressed, he was able to be more precise about his losses.) The first two schedules do not mention IHR at all and none raise the issue of loss of ancillary pension benefits (death in service, lost IHR value, widow's pension).

35. In the third schedule of loss (starting at p93 of the Remedy Bundle), IHR is mentioned only briefly in a discussion of one of the examples from the Principles, Katarzyna. It does not make any point about how the chance of IHR should be taken into account in his own case.

36. Further, and more importantly, in the third schedule of loss the Claimant set out a detailed calculation of how the 7 steps should be applied in his case. In this calculation, which dealt with both points in principle and the figures, i.e. matters to be covered in the first and second stage hearings, the loss of ancillary benefits is not claimed, nor is the lost value of IHR benefits nor does the Claimant set out that there was a chance of him being medically retired and, if so, how his chance of receipt of an early pension would affect the calculation of his losses. In other words the alternative contention at 1.4.1.3 is simply not covered and the ancillary benefits not claimed.

37. Further, from paragraph K of the third schedule of loss, it is clear to us that the Claimant and his advisers were aware that that all decisions of principle in relation to pension loss were to be made at the first stage hearing. '*K. Once the Tribunal has made its primary findings of fact at the first-stage remedy hearing, it is anticipated that the calculation of pension loss will be fairly straightforward and will not require actuarial input.'*

38. In submissions at this hearing, Mr Franklin contended he had made the alternative argument at 1.4.1.3 about IHR, though he understandably had not made a note of his own submissions and could not say for sure. We have therefore looked carefully at our own notes as well as the written submissions. He did not address us on or pursue the contention at 1.4.1.3 at all. In other words, he did not address to us the

argument in the alternative that, if we disagreed that the Claimant would have been able to stay in work until retirement, then we should factor into the chances of him leaving, the chance of him obtaining IHR. This was simply not an argument pursued at the hearing after the evidence.

39. We do not criticise Mr Franklin for this approach. It was entirely understandable, given how the Claimant had merely asserted the chance in his own evidence very briefly and with no reference to how he would meet the criteria, and given how Mr Franklin had demolished Ms Bayley on her opinion evidence that the Claimant would not be likely to have stayed at work. Further, in closing, it was the Claimant's case through Mr Franklin's oral submissions, that we could not find that he had PTSD. This would have taken him out of that category of cases Ms Bayley had identified as better candidates for IHR. Mr Franklin made the point that while there may have been symptoms, there was no formal diagnosis, and unlike those cases within Ms Bayley's experience, the evidence was that it was more the Respondent's treatment of him that was the trigger – the final drop in the bucket - that meant the Claimant could not cope and in the absence of discrimination, there was a much better picture for resilience.

40. Mr Franklin, on the Claimant's behalf, developed his case extremely effectively in cross- examination and closing. He was faced with the Respondent's case that the Claimant would not have managed any kind of effective return or sustained employment. The Claimant had managed to remain in work for only a very short time. Yet, he succeeded in persuading us that Mr Hurle had good prospects of both a return and sustained attendance. Though we cannot say for sure, and it is strictly irrelevant to our decision, it may be that Mr Franklin (whether consciously or unconsciously) did not pursue the alternative IHR submission because it could have undermined the persuasiveness of his arguments on his primary case that the Claimant would remain in work. (While logically it should not have done so because it would have been put as an alternative, psychologically it could have done.) While IHR has become the focus here it was most definitely not part of the Claimant's case, featuring only fleetingly in his evidence and not featuring at all in his closing arguments. In the end, a decision must be made by an advocate on what contentions can be made good after the evidence is heard: it was therefore unsurprising that the contention at 1.4.1.3 was not eventually pursued.

41. In our first remedy judgment we weighed up the factors for and against the chances of a return to work and sustaining service to retirement. We adopted a global figure for the latter and stated in terms that there had been no suggestion that we did not do so.

42. The reconsideration application begins as follows 'the Claimant contends that, **as a result of the Tribunal's findings of fact,** there is a very high percentage likelihood that, if he withdrew from the fire service before normal retirement age, it would be because of permanent incapacity reasons which would entitle him to receive benefits under the Respondent's Ill-Health Retirement (IHR) scheme' (our emphasis). At paragraphs 8 and 9 of the reconsideration application the Claimant furthers his argument by reference to findings in the first stage remedy judgment.

Submissions

43. We refer to the parties' full and helpful written submissions.

44. Mr Franklin, for the Claimant, argued that the issue at 1.4.1.3 was an issue to be decided, it had been overlooked and that, following AB it should be reconsidered now as being in the interests of justice to do so. His concern was that the Claimant was likely undercompensated if our judgment stood.

45. If we agreed that reconsideration should take place, he argued the approach we should take, was to:

    45.1. decide what chance (and on what date) the Claimant had of leaving with ill health retirement low tier benefits.

    45.2. apply Parry v Cleaver, and not change our loss of earnings calculation;

    45.3. reduce the withdrawal factor for the pension loss calculation. This was because there was a chance of the Claimant having received a pension from the IHR date i.e. sooner and therefore he would be undercompensated if we did not do this. The simplest way to do this was to strip out the chance of obtaining the IHR from the withdrawal factors.

46. He argued that it was the Claimant's understanding that the pension scheme's ancillary benefits and loss of the value of IHR benefits, would be valued at the second stage remedy hearing if no agreement could be reached about them and this was why he had not made any submissions about them at the First Stage hearing. This was a procedural mishap that meant it was in the interests of justice to have a reconsideration. He made this argument, albeit more faintly, in relation to the way in which the chance of receiving IHR benefits should be calculated, too.

47. For the Respondent, Miss Thomas' first submission was that the issues were set out in the main question at paragraph 1 and the serious of sub questions at 1.1, 1.2 etc. The only sensible way for us to read the List of Issues was that the parties' contentions below these sub-issues were just that: their arguments, not separate

issues. The list of issues was a case management tool not slavishly to be followed, but to be used to understand the questions we needed to determine and the case the parties anticipated putting. The Claimant's contention at 1.4.1.3 had not been made at the hearing and therefore we were not obliged to decide it.

48. Miss Thomas argued orally that, even if we considered this was an issue that we had overlooked, we did not have sufficient evidence to assess the chance that an independent medical practitioner would have decided the second limb of the IHR criteria: whether there was likely permanent incapacity to retirement. She argued that in fact the OH evidence that existed even at the time the Claimant was experiencing discrimination was that he was likely to be fit for work in the future. She submitted that the Claimant's approach at the last hearing had been to persuade us of the opposite – that he was likely to have continued in employment until retirement and that he was now pursuing what were entirely new submissions. This was classic 'second bite at the cherry' territory and it was not in the interests of justice to allow the Claimant to make these new submissions.

49. Miss Thomas argued that, even if we had sufficient evidence upon which to make the assessment called for by the IHR criteria, we had not had the benefit of legal argument about how, in principle, that would affect our decision on pension loss. Mr Franklin had not made or developed these arguments at all in his submissions at the first stage remedy hearing. She did not agree with his analysis of how the principle in Parry v Cleaver should be applied to this case. Nor did we have the evidence from the IHR scheme to help us understand whether or not the Claimant would have continued to remain an active member and pay contributions into it and this was an important omission.

50. She argued therefore that the Claimant's reconsideration application was not only about issue 1.4.1.3 but a completely separate issue as to how such a finding, if we made it, would affect the pension loss withdrawal factor. This was not for the second stage hearing but was a point of principle that should have been argued before us at the first stage remedy hearing and set out clearly in the issues. It was not and thus the application was again a second bite at the cherry.

Decision

Should the Tribunal have assessed the chance of IHR?

51. In our judgment the Claimant seeks 'a second bite at the cherry' in this application. He puts forward an argument that was not pursued at the first stage remedy hearing, that there was a chance he would have obtained IHR. It is not in the interests of justice to allow it because it would offend against the principle of finality in litigation.

We have taken into account the overriding objective in reaching this decision as we shall explain.

52. First, we agree with Miss Thomas that paragraph 1.4.1.3 in the List of Issues was not an issue as such but a statement of an alternative case the Claimant intended to put in relation to the issue at 1.4 (the chances of the Claimant remaining in employment). Ultimately, the Claimant did not pursue this alternative contention at the hearing and therefore we did not need to decide it in our judgment. As we have set out above, this issue was not pursued in cross-examination or in closing submissions or in the schedule of loss and the Claimant did not provide us with the necessary legal submissions to enable us to decide in principle how, if we had assessed the chance of obtaining IHR, it would have affected the calculation of pension loss. The legal analysis is not easy. Mr Franklin has tried to find a simple way through for us now. But if we had had to consider, in principle, how the chance of IHR affected pension loss, we would have required assistance on the legal principles at the hearing, we were not given that assistance.

53. Second, even if paragraph 1.4.1.3 could have been described as an issue, our conclusion would remain the same, because it was an issue that was not pursued at the hearing. Either way, we did not have to decide it and have not overlooked it. The argument at 1.4.1.3 could have been made as an 'alternative' to the main argument about return but, in the event, it was not pursued, we think for probably very good strategic reasons.

54. Third, it is instructive to look at the way the reconsideration application is worded. It stems from findings in our remedy judgment. It is not permissible to use the judgment as a jumping off point for further argument, if that argument has not been made at the original hearing.

55. Fourth, the overriding objective is not offended by our decision for the following reasons.

56. The parties were on an equal footing. There was a fair opportunity to pursue the argument: it was foreshadowed in the list of issues and could have been pursued. We do not consider Mr Franklin made an error not to do so, but, if he did, then Lindsay is authority that this is insufficient to engage the interests of justice.

57. While the Tribunal seeks to avoid formality, that must be proportionate to the complexity of the issues. This was a highly valuable and complex case. And the argument presented now is complex. A basic minimum is required: the argument must be put for it to be considered including the legal argument for it. Not just so that we could decide it but so that the Respondent could respond to it.

58. While there have been unfortunate delays in the progress of this case, none of them are relevant to whether we should reconsider. The delays did not impact preparation. There was plenty of time at the first stage remedy hearing for arguments to be put and developed.

59. Fifth, there was no procedural mishap here. This was an argument about a point of principle that it was very clear should have been canvassed at the first stage remedy hearing. There can have been no misunderstanding about this: paragraph K of the Schedule of Loss makes it clear that the Claimant appreciated points of principle to enable later calculation were to be canvassed at the first stage hearing. How the chance of obtaining IHR would affect the withdrawal factors was quintessentially a point of principle rather than a point on the figures.

60. Sixth, if we are wrong, we have gone on to consider whether we had the evidence upon which to make a decision on 1.4.1.3. On this point we disagree with Miss Thomas that there was no evidence. We had some evidence upon which to make the decision if we had been invited to do so.

    60.1. We had the criteria of the scheme from Ms Bayley and her reference to it.

    60.2. We had some sense of the very small numbers of IHR from Ms Bayley and Ms Tapp and Ms Bayley's concession in cross-examination that these were only very small proportions of those leaving.

    60.3. We had Ms Bayley's experience that if a firefighter had PTSD because of the job and had to leave then they had a prospect of IHR because the triggers were the job. But we had reached a view that the triggers in the Claimant's case were the difficulties with his employers (remedy judgment paragraph 168) in other words, Ms Bayley's experience of PTSD was not weighty evidence in this case.

    60.4. Significantly, we had the OH evidence that the Claimant was likely to be fit for work in the foreseeable future. This was also an opinion given at a time when he was being discriminated against and not receiving all available treatment and at a time when the external challenges on him of family, Hampshire litigation and the commute were at their most extreme.

    60.5. The Claimant was relatively young and had a clear vocation and determination to be a firefighter even when times were tough.

61. There is an important distinction between leaving because of ill health (which we were factoring into our withdrawal factor decision) and leaving because you are likely to be permanently incapacitated from the role. Mr Franklin did not distinguish

between these two matters in his written submissions but acknowledged them orally. This is an important distinction.

62. We would have had to consider the chance that an independent medical expert found it likely the Claimant was permanently incapacitated from a firefighting role even if all reasonable adjustments had been provided and earlier treatment had been given. While we found there was a chance of leaving/being dismissed because of the external challenges of the role and the vulnerable mental health: this is not the same as deciding that there was a chance the Claimant would likely be permanently incapacitated from a firefighting role until retirement age.

63. Given all of these factors we would have found it very, very difficult to identify a quantifiable chance of the Claimant succeeding in an IHR application as opposed to the chance that we did find of his employment being terminated through ill health.

Value of the benefit IHR and ancillary benefits

64. In any claim the Tribunal and Respondent need to know before the hearing what is being claimed: this is the purpose of the Schedule of Loss.

65. Until the reconsideration application the Claimant had not claimed loss of the value of IHR benefits or the ancillary benefits of death in service or widow's pension. Most importantly the detailed calculation of pension loss in his Schedule of Loss at p102-103 of the remedy bundle does not include these benefits.

66. There was no procedural uncertainty that prevented the loss of these benefits from being claimed. They would have to have been identified at the first stage remedy hearing so that any point of principle or dispute as the approach to their calculation could have been dealt with.

67. There is no amendment application, despite the reconsideration letter and issues raising the prospect that one might be made. Again, that is probably not surprising.

68. EJ Moor's comments in the reconsideration judgment do not assist the Claimant. She had not appreciated at the point at which she responded to the reconsideration application that they had not been claimed.

69. It is therefore not in the interests of justice to reconsider our remedy judgment to include how these ancillary benefits should be calculated: they have not been claimed. This is classic 'second bite at the cherry territory' and finality in litigation prevents us from allowing the Claimant to add these points to his claim now.

70. Finally, we received an email from Mr Franklin on the second day of the hearing, concerned to clarify one matter. It is not relevant to our decision, as he made clear, but we are happy to do so. It appears from the Case Management Hearing summary attached to his email that it was the Respondent who sought to postpone the remedy hearing set for early 2022. We are happy to clarify this for him, it being having been suggested by the Respondent that it was the Claimant who applied. There have been so many procedural twists and turns in this case, that we did not consider that his professional integrity had been impugned by this suggestion.

Second Stage Remedy Hearing/Informing Tribunal of agreed figures

71. A second stage remedy hearing has been listed for 17 November 2023 by CVP if it is needed. At the 3 March 2023 Preliminary hearing the parties had said they were very close to agreement. As EJ Moor understands it, only those points arising on the reconsideration and the 2-year adjustment point remained in dispute.

72. Miss Thomas, for the Respondent, apologised that the Respondent had missed that the 2-year adjustment point had been decided in the first stage remedy judgment. Now that the reconsideration application has been rejected, and this point already decided, it therefore appears likely that the second stage hearing will not be needed.

73. EJ Moor has made a separate case management order but set out its content here for convenience.

74. The parties must inform the Tribunal in writing:

    74.1. If agreement had already been reached on all other matters not included in this reconsideration then, **within 7 days** of the date this decision is sent to the parties, they should inform the Tribunal of the agreed figure for pension loss (including grossing-up), so that judgment can be promulgated promptly.

    74.2. If not, but agreement can be reached on pension loss, **as soon as they have reached agreement**, the parties should inform the Tribunal of the agreed figure.

    74.3. If they cannot agree the figure for pension loss, the parties should inform the Tribunal by no later than **13 October 2023** to confirm that the second stage remedy hearing listed for **17 November 2023** by CVP is required and they must send to the Tribunal an **agreed list of issues** for that hearing.

74.4. If a hearing is required, the parties should agree a bundle for it by 10 November 2023. And they should send it and skeleton arguments to the Tribunal by 16 November 2023.

Employment Judge S Moor
Date: 7 September 2023