THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH by CVP**

BEFORE: **Employment Judge Truscott KC**
Mrs S Dengate
Ms N O'Hare

BETWEEN:

Ms A Gillespie **Claimant**

AND

Guy's and St Thomas' NHS Foundation Trust

Respondent

ON: 23 and 24 March 2023, in chambers 5 and 6 April 2023 and 1 September 2023

Appearances:

For the Claimant: **Mr M Jackson of Counsel**

For the Respondent: **Ms Y Genn of Counsel**

JUDGMENT

The unanimous judgment of the Tribunal is:

The respondent is ordered to pay the claimant compensation of £41935.18.

REASONS

PRELIMINARY

1. The Tribunal convened to address the award of compensation having found (1) that the claimant was unfairly dismissed and subsequently (2) that the respondent had failed to make reasonable adjustments contrary to section 20 of the Equality Act.

2. At a case management discussion on 15 November 2022, arrangements were made to obtain all the information necessary to award compensation and also to receive submissions on that subject on the reconvened hearing dates. At the reconvened hearing, the parties agreed that until the judgment was issued on reasonable adjustments, final submissions on compensation could not be made. The Tribunal agreed and parties were in agreement that the Tribunal would identify what information it sought and written submissions would be supplied sequentially in order that the Tribunal might finally assess compensation. Despite its best efforts the Tribunal has not received all of the information it requires. The claimant suggested that the Tribunal take a stage-by-stage approach but the Tribunal decided it was more appropriate to bring this case to a conclusion on the information currently available to it.

3. The Tribunal heard evidence from the claimant and Mr Kargbo. The Tribunal was also provided with a remedy bundle running to 839 pages, of which much was vacancy documentation, to which other documents were added during the hearing.

FINDINGS of FACT

1. On 16 November 2018, O Osman provided a pension estimate to the claimant [171-180 Remedy] which set out the pension benefits payable as at 31 March 2018 and projected benefits as at normal pension age (9 April 2019).

2. In a medical report dated 27 September 2019 [275 Remedy], the consultant (whose name was cut off the bottom of the letter) but according to the Index is Dr F Lofts in writing to Dr Proctor noted that “She is hoping to return on a part time basis as physically she has recovered from …”

3. In a further medical report dated 21 November 2019 [292 Remedy], certain questions are posed of Dr Lofts, seeking an opinion in relation to a forthcoming tribunal hearing who opined as follows:

> To what extent do you believe she could have carried out the duties of her substantive role or an alternative nursing role that was less physically demanding, such as an office based district nursing role or assisting in the clinics?
>
> I think the process of coming to terms with her own diagnosis as well as recovering from prolonged anti-cancer would have precluded Ms Gillespie returning to a substantive role as a district nurse both from the physical and psychological perspectives for many months. Whether she could have returned to an office based role would depend on the Intensity of the work, level of responsibility and the hours expected. I would emphasise that patients returning to work following a prolonged course of treatment need to work very much less than full time and often may not be able to take on the responsibility of being a sole provider of that particular task, not only to allow for follow-up visits to the hospital but also they may feel overwhelmingly fatigued on an unpredictable basis. Thus if supported within that office environment I expect Ms Gillespie would have been able to do a few hours a week but probably not be the sole person responsible for that activity.

SUBMISSIONS

4. The Tribunal heard oral submissions from both parties and received written submissions from each. These are not repeated here.

LAW

5. The Tribunal's aim, in awarding compensation, must be to, 'as best as money can do it, "... put [the claimant] into the position she would have been in but for the unlawful conduct" (**Ministry of Defence v. Cannock and ors** 1994 ICR 918 EAT).

6. The claimant's complaint relates to a dismissal which we found to be both unfair and discriminatory, so the heads of compensation largely overlap and we must guard against awarding the same compensation twice (section 126 Employment Rights Act 1996). Following **D'Souza v. London Borough of Lambeth** 1997 IRLR 677 EAT, we therefore award compensation for past and future loss of earnings under the discrimination legislation alone.

Mitigation

7. In **Singh v. Glass Express Midlands Limited** UKEAT/0071/18, the Employment Appeal Tribunal emphasised that it is for the wrongdoer to show that the claimant acted unreasonably. HHJ Eadie QC's (as she then was) summarised the guidance in that decision, given by Langstaff P in **Cooper Contracting Ltd v. Lindsey** UKEAT/0184/15, on the correct approach to the question of mitigation:

> (1) The burden of proof is on the wrongdoer; a claimant does not have to prove they have mitigated their loss.
> (2) It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.
> (3) What has to be proved is that the claimant acted unreasonably; the claimant does not have to show that what they did was reasonable.
> (4) There is a difference between acting reasonably and not acting unreasonably.
> (5) What is reasonable or unreasonable is a matter of fact.
> (6) That question is to be determined taking into account the views and wishes of the Claimant as one of the circumstances but it is the ET's assessment of reasonableness - and not the Claimant's - that counts.
> (7) The ET is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.
> (8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.
> (9) In cases in which it might be perfectly reasonable for a Claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the ET to conclude that the employee has acted unreasonably, but is not, in itself, sufficient.

Injury to feelings

8. Section 124 of the Equality Act states that the amount of compensation which may be awarded for discrimination corresponds to the amount which could be awarded by a County Court in England & Wales or a Sheriff in Scotland. Section 119 of the Equality Act 2010 provides that an award of damages may include compensation for injured feelings.

9. In **Prison Service & Ors v. Johnson** [1997] ICR 275, the EAT summarised the general principles that underlie awards for injury to feelings. They are not repeated in full here, but the Tribunal have taken them into account.

10. Three bands of injury to feelings awards were set out by the Court of Appeal in **Vento v. Chief Constable of West Yorkshire Police (No 2)** [2003] ICR 318. Injury to a claimant's feelings is subjectively, rather than objectively measurable, echoing the words of Lord Justice Mummery in that case: injury to feelings encompasses "subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise…Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms".

11. The **Vento** bands were subsequently uprated to reflect inflation (**Da'Bell v**. **NSPCC** [2010] IRLR 19 EAT and **AA Solicitors Ltd t/a AA Solicitors and anor v. Majid** EAT 0217/15) and the decisions reached in **Simmons v. Castle** 2012 EWCA Civ 1288 and **De Souza v. Vinci Construction (UK) Ltd** [2018] ICR 433.

12. The Presidential Guidance for Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury (and subsequent annual updates) provides guidance on further uprated bands, taking into account inflation and the **Simmons** uplift.

Taxation

13. Following the **Gourley** principle, the Tribunal must take care that its approach to tax does not put the claimant in either a better or worse financial position that if the dismissal had not occurred. Where the award will be taxed under section 401 ITEPA 2003, the Tribunal must gross up that part of the award which will fall to be taxed.

14. Section 401 applies to payments in connection with the termination of a person's employment. The first £30,000 are tax free in any tax year, and tax will be paid on sums in excess of that amount. Neither is subject to employee national insurance. The relevant year for consideration of the tax burden is the year in which the claimant will receive the payment.

15. The amounts to be included in the calculation for section 401 purposes are loss of statutory rights, past financial loss, future financial loss and interest.

16. Following the decision in **Moorthy v. Revenue & Customs** [2016] UKUT 13 (TC) and the amendment to section 406 ITEPA 2003 with effect from 6 April 2018,

compensation for injury to feelings related to termination of employment is also taxable to the extent that the £30,000 tax free allowance is exceeded.

DISCUSSION and DECISION

17. The Tribunal reminded itself of the evidence it heard at the liability hearing. In particular, at paragraph 33 of the liability judgment the Tribunal found:

> The outcome of that meeting, issued on 12 July (2018), was that she was not medically fit to return to her substantive post [500] but that she could work in a role that did not require walking or standing for more than 2-3 minutes or regular manual handling

18. The Tribunal reminded itself that at the time of her resignation, the claimant was not willing or able to leave her home. The Tribunal was satisfied that the claimant's condition was such that her physical capacity for employment would have been so limited that it was highly unlikely a suitable vacancy would have arisen or could be found even with adjustments.

19. This stood in some contrast with the evidence given by the claimant at the remedy hearing where she said that she wanted to and was able to return to her substantive role with reasonable adjustments. The Tribunal decided that the evidence provided to the liability hearing was more accurate and on the basis of that evidence concluded that the claimant could not have returned to her substantive role even with reasonable adjustments.

20. A substantial amount of time was taken up in evidence at the remedy hearing addressing what job vacancies were/might have been available to the claimant had the respondent considered redeployment at the appropriate time and what the claimant was capable of doing either with or without reasonable adjustments or if different, a phased return to work. This evidence is best captured by a document "Further analysis of roles following the exchange of witness statements" which sets out the claimant's and respondent's position on each vacancy which was provided to the Tribunal. The Tribunal decided that during the period when redeployment should have been considered there were no posts which the claimant could have worked at with or without reasonable adjustments. This decision was made on the basis of the claimant's physical capabilities at the time of her resignation through to 30 April 2019. The Tribunal decided that the claimant was not physically capable of undertaking even part time work until relatively recently but if indeed her health was improving to the extent she stated at the remedy hearing, she had failed to mitigate her loss by seeking other employment herself.

21. In addition, in its liability judgment, the Tribunal noted the aggressive manner in which the claimant conducted herself with the respondent's employees. No amount of incompetence by the respondent, and there was a lot, justified the behaviour of the claimant. Her attitude towards the employees of the respondent continued to be combative right up to the end. The Tribunal considers that the claimant would have maintained the same attitude towards the respondent even if it had embarked on the redeployment policy and would not have been co-operative whether or not a vacancy had been found. The Tribunal considered the animus the claimant displayed towards the respondent and its employees over time and concluded that, from a psychological

perspective, there was no prospect of her co-operating in any efforts to find her alternative employment.

22. The Tribunal decided that the redeployment process would have commenced on 23 January 2019 and would have run for approximately three months. At that point, the termination process would have been commenced after the redeployment policy ended and she would have been given due notice for which she would have been paid in lieu. The respondent submitted that it is unlikely that the claimant would have been paid in lieu of notice given the provisions of part 21 of the Sickness Absence Procedure [p200, Redeployment considered at p216, para 21.1] which provides that:

> "In instances where a formal management case has been heard and a decision had been made to dismiss an employee on grounds of capability due to ill health, part of any redeployment period will run concurrently with their contractual notice..."

The procedure in this case had not reached the stage of a formal management case and, in any event, the Tribunal was highly doubtful about the fairness of running redeployment and notice concurrently, in the present circumstances. The effect of the findings is that the claimant would have been fairly dismissed on 30 April 2019 at the latest and she would have been paid in lieu of notice.

Calculation of compensation
Basic award

23. The claimant is awarded a basic award of £7620 being 10x 1.5 weeks' pay of £508 (gross and cap applies). This figure was agreed between the parties.

Loss of statutory rights

24. The Tribunal awarded £500 loss of statutory rights.

Loss of notice pay

25. The notice pay at a net weekly rate has been agreed by the parties to be £382.02, having regard to her length of service of 11 years (as at 30.4.19) this amounts to £4202. Notwithstanding the claimant's submission to the contrary (although not her updated schedule of loss), the amount is awarded net and included in the grossing up calculation.

26. Interest on notice is calculated from the mid-point until the calculation date (1.9.23) namely 4202 x 8% = £336.16 / 365 = £.92 per day x 862 days = £793.04

Loss of wages

27. In the light of the Tribunals findings, compensation should run from 12 December 2018 to 30 April 2019. However, as the claimant was on no pay due to her sickness, having exhausted her contractual and statutory sick pay entitlements, and the Tribunal found that she continued to be unfit for work with no suitable alternative work being available with the necessary reasonable adjustments, any extension of service would therefore not attract pay.

28. The Tribunal declined to award any compensation for the period after 30 April 2019 except in so far as included in the pension loss calculation.

Pension loss

29. The claimant took her pension when she resigned from employment on 12 December 2018. From the information available, it seems to the Tribunal that it would have been to the considerable advantage of the claimant to await her 55th birthday. In the process of the redeployment policy being operated over time, the Tribunal found that it was likely the claimant would have achieved the age of 55 and then being fairly dismissed on 30 April 2019. The Tribunal seeks to compensate the claimant for the loss sustained by her in consequence of the failure to apply the policy but to a limited extent. The claimant states at paragraph 9 of her remedy submission:

> "While a document is known to exist setting out what the claimant's pension would have been but for the reduction for being taken before the claimant's 55th birthday, it has not been found. The simplest way to obtain this would be, it appears, to approach the trustees of the pension scheme to see if they have this calculation and can provide it to answer the question. It is unlikely to be significantly different than the benefit statement at page 172 in the remedy bundle."

30. The Tribunal took from the finding at paragraph 9 that the claimant had available to her information about her retirement at age 55 prior to her resignation. She may also have had information in the lost document about the implications of taking her pension on resignation. In any event, she had available to her the pension switchboard spoken to by Mr Kargbo. The Tribunal concluded that it was unreasonable of the claimant not to have taken proper pension advice and not to have waited for her 55th birthday.

31. As pension loss is the most significant element of the compensatory award, the Tribunal wished to be confident that it is awarding on the correct basis. It was not satisfied that the statement at page 172 was sufficient for this purpose. However, in the absence of better information, the Tribunal proceeded to calculate the likely loss using the same material as the claimant in her schedule of loss. The claimant submitted that expert evidence was required but the Tribunal decided that there should be no further delay. The Tribunal did not accept the respondent's submission that there should be a 100% reduction in any award because the claimant had been invited to withdraw her resignation. The Tribunal decided to make a 90% reduction as the claimant largely caused the loss by not seeking advice on the implications of drawing her pension before she became 55 but the respondent had caused the situation where she had to resign. Whilst the claimant said in evidence that she needed to do so because she lacked money, she ought to have had the relevant information and as she had been unpaid for a considerable period, she should have decided to wait some further months.

32. The pension loss was calculated as follows using the Ogden tables [Remedies Handbook page 119]: the figures on page 176 of the remedies bundle were used (calculated to NRA) as the closest to the actual date the claimant claimed her pension Multiplicand of pension is £3068.38

(this is the annual pension figure on page 176 of the remedy bundle £12273.52 x 25%) and this is the % the claimant says pension was reduced by for drawing early)
Ogden says take 2 years off the age at remedy hearing (59-2 = 57 and state pension age (67-2 = 65) this gives a multiplier of 28.70 (Table 5 of '23-'24 Ogden tables P133 discount rate of -0.75 with 2 year adjustment – as per Step 4 SoL)
£3068.38 x 28.70 = £88062.50

The Tribunal noted that this figure would not have been paid all in advance. The Tribunal reduced the pension and the pension lump sum compensation by 90% contribution by the claimant's the figures as follows:
Lump sum £9205.14 (- £36820.59 x25% P 176) - 90% = £920.51
Pension loss 88062.50- 90% = £8806.25

33. The interest on these is
8806.25+ 920.51 = 9726.76 x 8% = 778.14 / 365 = £2.13 per day
862 days x £2.13 day = £1837.55

Non-pecuniary loss

34. Parties were agreed that what had been found to have happened to the claimant justified an award in the middle band of **Vento**. The Tribunal considered that £12,000 reflected the injury to feelings because of the dismissal. This is to the lower end of the middle band because the claimant resigned for a number of reasons of which this was one.

The injury to the claimant's feelings resulted from her discriminatory dismissal and fell into the grossing up calculation.

Interest

35. Interest is calculated differently as between the awards for injury to feelings and past financial loss. In relation to injury to feelings interest is calculated from the date of the act of discrimination which is taken as the date of resignation which equates to 1725 days until 1.9.23 (date of calculation). £12000 x 8% = £960/365 days p.a. = £2.63 day. X 1725 days = £4536.75 .

Other heads of loss

36. The Tribunal declined to award an ACAS uplift.

37. There is no prescribed element for the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996 as the award is made under section 124 Equality Act 2010

Grossing up

38. The Tribunal proceeded on the basis that payment would be made in the tax year 2023/24.The Tribunal grossed up the awards assuming a 20% marginal rate and a £30,000 tax free allowance. The Tribunal took it that the claimant's personal allowance would have been used for her current pension income.

Loss of statutory rights	£ 500.00
Pension loss	£ 9726.76
Interest	£ 1837.55
Notice pay	£ 4202.00
Interest on notice	£ 793.00
Injury to feelings	£12,000.00
Interest on injury to feelings	£ 4,536.75
Total	£33596.06
Deduct tax free £30,000	£ 3596.06
Grossed up amount	£3096.06 + £ 719.12 (20%)

39. Total award is as follows:

Basic award	£7620.00
Loss of statutory rights	£ 500.00
Loss to date of hearing being pension loss and pay in lieu of notice	£16559.31
Injury to feelings	£12000.00
Interest	£ 4536.75
Grossing up amount	£ £719.12
Total compensatory award	£41935.18

Employment Judge Truscott KC

Date 18 September 2023