# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Ijomah

**Respondent:** Nottinghamshire Healthcare NHS Foundation Trust

**Heard at:** Midlands (East) - Nottingham
**On:** 17, 18, 19, 20 and 21 June 2024 and panel deliberations 12 August 2024

**Before:** Employment Judge R Broughton
**Members:** Mr C Pittman
Mr J Hill

**Representation**
**Claimant:** In person
**Respondent:** Ms M Barney, Counsel

# RESERVED JUDGMENT

1. The Claimant's application for reinstatement in accordance with Section 114 of the Employment Rights Act 1996 is refused.

2. The Claimant's application for an Order for re-engagement in accordance with Section 115 of the Employment Rights Act 1996 is refused.

3. In connection with the Claimant's claim to compensation for unfair dismissal, the Respondent is Ordered to pay the Claimant the following sum : **£32,486.43.** A breakdown is set out in the judgment.

   The Recoupment Regulations do not apply.

# RESERVED REASONS

## Background

1. The Claimant issued a claim on 20 August 2017. There is a long history to the case before the Employment Tribunal, which is set out in summary in the liability judgment of the Tribunal dated 13 May 2022. The claims which were determined by this Tribunal at the hearing on 14 March to 1 April 2022, (delivered extempore to the parties on 14 April 2022) are set out in its written judgment dated 13 May 2022, sent to the parties on 25 May 2022.Those claims included claims of; ordinary unfair dismissal, a claim of automatic unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 and complaints of detrimental treatment pursuant to

Section 47B of the Employment Rights Act 1996 (ERA).

2. For the reasons set out in detail in that judgment, the claims of both detrimental treatment and of automatic unfair dismissal were dismissed.

3. The claim of ordinary unfair dismissal was upheld, subject to a deduction of 50% made in accordance with the guidance in Polkey v AE Dayton Services Ltd [1987] UKHL and a deduction to both the basic and compensatory award of 20% because of the Claimant's contributory fault and made pursuant to sections 123 (6) and 122 (2) ERA.

**Procedural matters since the liability hearing**

4. We turn briefly to deal with the procedural matters since the liability judgment; this case was set down for a hearing to determine remedy on 15 November 2022. On 20 June 2022, the Tribunal were informed that the Claimant's Solicitors and Counsel, instructed for the liability hearing, were no longer instructed. The hearing in November 2022 was adjourned, given the non-availability of the Respondent's Counsel. The case was then relisted for 31 January 2023.

5. As a consequence of further requests for relisting the case by the Respondent, which were granted, the case was relisted to 25 May 2023. The parties then indicated an interest in judicial mediation, which was listed for 24 March 2023 and the remedy hearing listed for 3 days between 23 – 25 May 2023 was postponed.

6. There was a telephone case management hearing before Employment Judge Broughton on 21 April 2023 at which Orders were made, including that the Claimant provide a statement of loss by 18 August 2023. By 18 August 2023 the Claimant was also ordered to provide, along with the statements of remedy, any pension loss, information/advice/reports and to also set out the terms of any order he was seeking by way of re-engagement. Orders were also made for provision of counter schedules and exchange of documents by 27 October 2023, an agreed bundle of documents by 10 November 2023 and witness statements by 15 December 2023.

7. There was then a request by the Claimant to relist the case because he had instructed new Counsel and Counsel was not available for the main dates. The Respondent agreed to that application. A further urgent telephone case management hearing took place on 1 May 2024. The Claimant was represented by Counsel at that case management hearing who explained that he had, and his Instructing Solicitors, had only recently been instructed. Counsel was given time, during a short adjournment of that hearing, to take further instructions from the Claimant, who was also in attendance. On reconvening after that adjournment, an application was made on behalf of the Claimant to amend the existing case management orders. The Respondent expressed concern that the date proposed by the Claimant for exchange of witness statements would only leave 7 working days for the Respondent to take instructions before the remedy hearing and any delay would be prejudicial. After discussion with the parties, the remedy hearing was listed for 5 days, from 17 to 21 June 2024.

8. A number of orders were made at that hearing including that compliance with the date for provision of statements of remedy (in the event of reinstatement or re-engagement and in the event of compensation only), orders for the disclosure of pension information/reports and provision of the terms of an order sought for re-engagement, were to be provided by 15 May 2024. Counsel for the Claimant had himself proposed the revised date of 15 May 2024 and assured Employment Judge Broughton that now solicitors were instructed those matters would be addressed and those documents produced by that date.

9. Employment Judge Broughton also made an Unless Order, given the concern regarding to the Claimant's failure to comply with previous orders and the impending date for the remedy hearing and taking into account how long it had taken for this matter to reach the final hearing. The order was that unless the Claimant send to the Respondent's Solicitors the witness statements of those witnesses whose evidence he intended to rely upon at the remedy hearing, no later than 5 June 2024, he would not be permitted to rely on that witness evidence.

10. The solicitors instructed by the Claimant came off record on 30 June 2023.

11. Despite Counsel giving reassurance on behalf of the Claimant that the documents as discussed at the 1 May 2024 case management hearing, would be provided by the 15th, on 15 May 2024 the Claimant wrote requesting an extension of time to provide an updated schedule of loss. He advised the Tribunal that he had tasked his legal representative with updating his schedule of loss and that they had the necessary information to update it and that he was in the process of seeking different legal representatives. However, the extension only related to the schedule of loss.

12. On 17 May 2024, the Respondent complained of a failure by the Claimant to comply with the case management orders.

13. On 21 May 2024, Employment Judge Broughton made a number of Unless Orders which included that unless the Claimant send to the Respondent's solicitors the pension documentation and draft re-engagement order, he would not be able to rely on those documents. Further, unless the Claimant sent to the Respondent's solicitors the statements of loss and disclosure of further documents the Respondent had requested, and which Counsel confirmed at the hearing on 1 May 2024 were relevant and should be disclosed, by 27 May 2024, his claim would be struck out. That documentation included communication between the Claimant and the GMC relating to his revalidation and the GMC's notice to sit an assessment for a re-evaluation dated 29 July 2017.

**Breach of Unless Order**

14. On 31 May 2024, the Respondent wrote to the Tribunal complaining that the Claimant had not complied with the Unless Orders. In terms of provision of the Unless Order regarding pension information and an order for re-engagement, the Respondent complained that the Claimant had only partially complied in that although providing the pension information, he had not complied with the order for re-engagement.

15. The Respondent also complained that the Claimant had only partially complied with a second Unless Order in that he had provided a statement of loss relating to compensation only.

16. At the commencement of the first day of the Remedy Hearing on 17 June 2024, the Tribunal had to determine whether or not there had been material non-compliance with the terms of the Unless Order pursuant to Rule 38 and if so, the claims had been struck out without further order from 27 May 2024. The relevant case management orders appeared in the bundle (pages 225 to 228).

**Preliminary issues: Unless Order – Rule 38:**

17. Rule 38 provides as follows:

*(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice*

*to the parties confirming what has occurred.*

*A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.*

18. The Tribunal considered whether there had been non-compliance with the terms of the Unless Order in any material respect and if there had then the Tribunal had no discretion as to whether or not the claim had been struck out as of 27 May 2024. The Claimant could then apply for relief from sanction. The relevant Unless Orders were not made of the Tribunal's own volition, it was made as a consequence of representations made by the Respondent.

19. In terms of the Unless Orders, there had been a degree of compliance with them. The Claimant submitted that as far as he was concerned, he had complied with the Orders and in relation to the document requested by the Respondent at paragraph 4, a copy of the letter of 2 January 2024 was not contained in the bundle but the Claimant submits that he disclosed all those documents in his possession or control. He was not, however, able to take the Tribunal to the document that seems to comply with statement 2 on page 227 (a statement of remedy in the event of reinstatement).

20. The Respondent submitted that there has been non-compliance and in particular it did not accept that the Claimant had disclosed all the documents in his possession or control necessarily as between him and the GMC in terms of the revalidation, provided a document that complies with statement 2 and neither had he, (although this is not subject to a strike out sanction), complied with a requirement in terms of re-engagement order under paragraph 2 on page 226.

21. Nonetheless, the Respondent's position was that it was not advancing a case that any compliance was material and wanted to proceed with a hearing to determine the Claimant's claim in relation to his application for reinstatement, re-engagement or compensation. Whether or not there had been material non-compliance however, is a matter for the Tribunal to determine.

22. On the evidence that was heard, the Tribunal reached a finding that there had been non-compliance, in that the Claimant had not produced a re-engagement order, and that the Claimant has not complied with the provision of a document that complies with statement 2.

23. However, on listening to the representations made by both parties, and taking into account that statement 2 is the terms of a reinstatement order and no reinstatement order has of yet been made, and that can be addressed if and when one is made, and the fact that the Respondent was not asserting that even if there has been a failure to disclose documents in accordance with paragraph 4, that this was not material, the Tribunal were persuaded that the non-compliance was not material in a qualitative sense and therefore determined that the claim had not been struck out under Rule 38. The reasons were provided orally to the parties and the Tribunal then proceeded to determine the remedy issue.

**<u>The evidence</u>**

24. The Tribunal were assisted by an agreed bundle which ran to 869 pages. There was some additional disclosure, namely the front page of an investigation dated 12 May 2011 (870), Job Plan Review (871 – 872). Additionally, the Respondent produced 2 schedules of loss which dealt with different calculations of pension. Additionally, the

Claimant produced a letter which he had attached with his witness statement which was sent to the Respondent on 5 June 2024 and sent to various people at the Respondent (it refers to the 'honourable board members' of the Respondent's Board) on 11 and 12 June 2024 and copied to a number of other bodies (appendix A and C) and which included a number of documents attached with it (appendix B to appendix E). The Respondent also produced on 21 June 2024 Pay and Conditions Circulars for the years 2017 to 2020 (Appendix F) and pay threshold spreadsheets in the case of reinstatement.

25. The Claimant had produced a witness statement. He did not call any additional witnesses. The Respondent produced witness statements and called two witnesses who attended and gave evidence under oath or affirmation; Dr Mark Taylor, employed by the Trust as a Consultant Forensic Psychiatrist working as a part-time Clinician in the Low Security and Community Forensic Care Unit and who also has a substantive role as Associate Medical Director for the Forensic Services Care Group and Dr John Wallace, employed by the Trust as Clinical Director for Rampton Hospital, a Consultant Clinical and Forensic Psychologist. Dr Taylor had appended to his witness statement a list of relevant, vacant roles currently available within the Respondent.

**The Hearing**

26. The Claimant requested adjustments on the grounds that he continues to suffer with PTSD. Those adjustments simply consisted of breaks as and when he required them and those were accommodated.

27. The Claimant attended without representation. The Respondent was represented by Counsel.

28. After dealing with the Unless Orders the Tribunal proceeded to hear the Claimant's evidence on the 2nd day of the hearing. It was explained to the Claimant that he may give supplemental evidence on matters arising from the Respondent's witness statements and he duly gave supplemental evidence. He was then cross-examined by Counsel for the Respondent. The Respondent's witnesses were not called to give evidence until the fourth day of the hearing and their evidence and cross-examination took all day.

29. Submissions were then given by the parties on the last day of hearing on 21 June 2024. Counsel for the Respondent had produced a written skeleton setting out the law and that had been provided to the Claimant.

30. Before we were able to hear submissions on the last day of the hearing, however, there was a further matter that had to be dealt with. Dr Taylor had made Respondent's Counsel aware, after giving his evidence, that during the lunch adjournment when he was part way through his evidence and was under oath, despite being warned not to discuss the case with anyone, he had made contact with someone within the workforce team at the Respondent, to check that his understanding of vacancy information, given in answer to a question, was correct. He disclosed this conversation to Counsel who duly made the Tribunal aware of this. Dr Taylor was called to explain himself under oath. The Tribunal considered that he was candid in the information he gave in recalling that conversation and obviously contrite. The Claimant was content himself with the explanation provided, referring to Dr Taylor as very honest and confirmed that he had no concerns. The Claimant had no questions that he wanted to put to Dr Taylor under oath. The Tribunal panel were content that a fair trial remained possible and no sanction was deemed to be appropriate.

31. At the outset of the hearing, it had been discussed and agreed with the parties what approach the Tribunal would take, namely it would hear all the evidence and would

then hear submissions on reinstatement, and re-engagement and a determination would be made on those issues first, in accordance with the statutory regime. Only if the Tribunal decided not to make an order for reinstatement or re-engagement would the parties then make their submissions on compensation. It was hoped that within the 5-day listing there would be sufficient time to deal with all those matters in that order. The cross-examination of the Claimant however took a considerable amount of time, mainly due to the need to repeat questions because the Claimant was not answering the questions put to him.

32. Further discussion therefore took place with the parties during the course of the hearing and both parties were in agreement that an appropriate way forward would be to complete the evidence on the fourth day and the parties would then give their submissions on all matters on the Friday, with the Tribunal then reserving its decision As it transpired, there was insufficient time for deliberations and the next available date the panel could meet to deliberate was 12 August 2024. The Tribunal, in its deliberations, and as set out in this judgment, have approached the matters for determination in accordance with the statutory regime. The Tribunal address therefore first the issue of reinstatement and then re-engagement.

33. We turn first to the issue of whether reinstatement and then if not, whether reengagement, should be ordered.

**Reinstatement or reengagement**

**Legal framework**

34. A complaint that a person has been unfairly dismissed may be brought in an employment tribunal which *may*, if the complaint is upheld, award one or more of the remedies provided for in Chapter II of Part X of the Employment Rights Act 1996 (" ERA "). The remedies include an order for re-instatement or re-engagement pursuant to **section 113**;

*An order under this section may be—*

*(a)an order for reinstatement (in accordance with section 114), or*

*(b)an order for re-engagement (in accordance with section 115),*

*as the tribunal may decide.*

35. Reinstatement under section 114 ERA is the first remedy a tribunal should consider and it is only if the tribunal decides that reinstatement is not a suitable remedy that it should go on to consider the alternative remedy of re-engagement : section 116 (1) and (2).

36. **Section 114** ERA deals with the terms of an Order for reinstatement :

*(1) An order for **reinstatement i**s an order that the employer shall treat the complainant in all respects as if he had not been dismissed.*

37. An order for re-engagement is dealt with by **section 115** which provides, so far as material, that:

*"(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.*

38. *Section 116 ERA* deals with the order in which reinstatement and re-engagement should be considered and provides that certain material considerations should be take into account when deciding whether to make such an orders It provides as follows:

*(1)In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for* ***reinstatement*** *and in so doing shall take into account*

*(a)whether the complainant wishes to be reinstated,*

*(b)whether* ***it is practicable*** *for the employer to comply with an order for* ***reinstatement,*** *and*

*(c)where the* ***complainant caused or contributed*** *to some extent to the dismissal,* ***whether it would be just to order his reinstatement.***

*(2)If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.*

*(3)In so doing the tribunal shall take into account—*

*(a)any wish expressed by the complainant as to the nature of the order to be made,*

*(b)whether it is* ***practicable*** *for the employer (****or a successor or an associated employer****) to comply with an order for re-engagement, and*

*(c)where the* ***complainant caused or contributed*** *to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.*

*(4)Except in a* case *where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.*

*(5)Where in any case an employer has engaged a* ***permanent replacement*** *for a dismissed employee, the tribunal shall* ***not*** *take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.*

*(6)Subsection (5) does* ***not*** *apply where the employer shows*

*(a)that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement,* ***or***

*(b)that—*

*(i)he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and*

*(ii)when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.*

**Two Stages**

39. There are two stages when a tribunal may have to consider the issue of practicability. The first when it considers whether to make an order for reinstatement or re-engagement at the remedies hearing and the second if the employer refuses to comply with a re-employment order, in which case a second remedies hearing will be necessary.

40. It is only at the second stage that the onus is on the employer to show, on the balance of probabilities, that it was not practicable for it to comply with the order.

41. The tribunal need only make a provisional determination or assessment on the evidence before it as to *whether* it is practicable for the employer to reinstate or re-engage the employee at the first stage'

42. "Practicable" in this context means that reinstatement or re-engagement is not merely possible but capable of being carried into effect with success: see ***Coleman and Stephenson v Magnet Joinery Ltd [1975] I.C.R. 46*** **at 52B-C**

43. When assessing practicability, tribunals should not attempt to analyse in too much detail the application of the word 'practicable' but should look at the circumstances of each case and take a 'broad common sense view': ***Meridian Ltd v Gomersall and anor 1977 ICR 597, EAT***. '

44. ***Rembiszewski v Atkins Ltd EAT 0402/11*****:** the date at which the practicability of an order for re-engagement is to be considered is when such re-engagement would take effect. In practice, this will often mean the date of the remedies hearing.

45. In ***First Glasgow Ltd v Robertson EATS 0052/11*** the EAT held that 'there is no statutory presumption of practicability', the issue of practicability is one which the tribunal is *required* to determine in the light of the circumstances of the case as a whole. The Appeal Tribunal emphasised that it is only if an employer seeks subsequently to avoid being penalised for having failed to comply with an order that it then bears the burden of showing that it was not practicable to comply.

46. **In** ***Freemans plc v Flynn 1984 ICR 874, EAT***, the EAT rejected the argument that the effect of a re-engagement order was to impose a duty on the employer to find a place for the dismissed employee irrespective of whether there were vacancies. This placed too high a duty on employers.

47. Employing a permanent replacement for a dismissed employee will not of itself make re-employment impracticable: section 16 (5) and (6) (above).

48. Re-employment is unlikely to be on the cards if relations at work have become irretrievably soured. However, not all incidences of workplace strife will present a bar to re-employment: ***Sodje v Look Ahead Housing and Care ET Case No.3300755/11*****:** the employment tribunal found that the employee had contributed to her own unfair dismissal to the extent of 50 per cent *but* nonetheless went on to order reinstatement. Her conduct was a one-off emotional outburst and the tribunal could see no reason why both parties could not put this incident behind them and move on.

49. The lack of trust on the employee's part may make re-employment impracticable. In ***Nothman v London Borough of Barnet (No.2) 1980 IRLR 65, CA*****,** the Court of Appeal held that the employee's allegations of a long-standing conspiracy by colleagues to oust her from her job made it impracticable to order reinstatement.

50. In ***Kelly v PGA*** **European** ***Tour 2021 ICR 1124, CA***, Lord Justice Underhill cautioned that the words 'trust and confidence' may carry unhelpful echoes from other contexts (such as the implied term of mutual trust and confidence). In the context of re-instatement and re-engagement, they simply connote the common sense observation that it may not be practicable for a dismissed employee to return

to work for an employer that does not have confidence in him or her, whether because of previous conduct or because of the view that it has formed about his or her ability to do the job to the required standard.

51. In ***United Lincolnshire Hospitals NHS Foundation Trust v Farren 2017 ICR 513, EAT,*** the EAT stressed that the question of a loss of trust and confidence must be approached from the perspective of the employer in question, not that of another employer, still less that of the tribunal.

**Findings of fact relevant to reinstatement and reengagement**

52. The Claimant's substantive contract with the Respondent had been as a Consultant Forensic Psychiatrist working in the DSPD Directorate (Severe Personality Disorder Service). That was the contract that he entered into on 1 October 2005. The DSPD service was a purpose built high secure unit with its own perimeter called the Peaks Unit. At the relevant time there was a separate clinical team for each ward on the Peaks Unit. As set out in the liability judgment (paragraphs 39 – 43), clause 3 of the contract of employment referred to the respective obligations of the Claimant and the Respondent in agreeing and operating a job plan which, pursuant to clause 6.1, was to be reviewed annually. A job plan includes and sets out details of the work to be performed in terms of matters such as what work the Consultant will do, their objectives, when the agreed work will be done and where (e.g. on which wards) how much time the consultant is expected to be available for work etc.

53. As set out at paragraphs 227 through to 256 of the liability judgment, the Tribunal found that the Claimant was offered a position to complete his medical psychotherapy training using 0.5 WTE of his Responsible Clinician time but that this (paragraph 256 liability judgment) had been offered to the Claimant on the basis that it would take 18 months to 2 years to become accredited with the intention or the hope that he would then remain in post as an accredited psychotherapist. However, with the training taking much longer than anticipated, by 2012 the decision was taken not to continue that funding. The Claimant was advised that from 31 March 2013, he would not continue with the work and training in medico psychotherapy and would return to the full-time role as Forensic Psychiatrist.

54. There followed a number of meetings regarding the Claimant's new job plan.

55. As set out by the Tribunal in its liability judgment (paragraphs 374 to 378), the Tribunal found that it had been agreed on 13 January 2014 that the Claimant would return to a full-time Consultant Psychiatrist role. The letter is set out at page 794 of the liability bundle.

56. At the meeting on 25 February 2014 the job plan was agreed including that from 1 April 2014 the Claimant would undertake a role in Personality Disorder (0.5 WTE) on Erskine Ward and 0.6 WTE in Mental Health on Juniper and Barnard wards, both were lower risk wards than DSPD (pages 807 to 808 of the liability bundle). The Claimant signed off his new job plan on 29 September 2014 (page 1031 of liability bundle).

57. As set out at paragraph 435 of the liability judgment, the Claimant signed off a job plan/work programme and objectives schedule commencing 1 October 2014 confirming that the Claimant would be working in the Clinical Directive of Men's Personality **(PD**) and Mental Health Disorder (**MD**) and that he was temporarily working 0.5 WTE in Mental Health service providing cover while Dr Gahir was on secondment.

58. The Claimant had remained unhappy at the removal of the Medical Psychotherapy part

of his position. He asserted, as part of his claims, that this was a detriment because he had raised whistleblowing concerns. He was keen to continue in order to secure his accreditation in Medical Psychotherapy.

59. One of the difficulties in arranging the Claimant's return to work from his sickness absence, as set out in the liability judgment, was that the Claimant claimed that it was unclear to him what role he was going back to. However, the Tribunal had found (liability judgment paragraph 582) that on 4 February 2016, Dr Clark and Ms Kruppa had made it clear that he would be returning to half MD and half PD post and it was clear what the role would be, even if this was a temporary job plan.

60. The Claimant's evidence at this remedy hearing, is that his role that he was doing previously for the Respondent before his dismissal, was that of a Consultant Forensic Psychiatrist but in terms of the job plan (including which Directorate he would work in) this would be a matter which would have to be agreed between him and the Respondent and that accords, the Tribunal accept, with the findings at the liability hearing in terms of how the role of a Consultant is structured.

61. The evidence of Dr Wallace before this Tribunal, is that the Claimant's former role as a Consultant Forensic Psychiatrist had been filled and that there are currently no vacancies.

62. The Claimant does not dispute that his position has been filled and the Claimant does not challenge the need to have filled the role nor does he dispute that there are no substantive Consultant Forensic Psychiatrist post currently available at Rampton Hospital as at the date of this Remedy Hearing.

63. Dr Wallace gave evidence that he is due to retire in September 2024 and a current Forensic Psychiatric Consultant is also planning to retire in February 2025, it is a part time position 0.7 fte position in Mental Health Service and that there is another Consultant Forensic Psychiatrist talking about retiring in April 2025 and that is a 0.8fte role. His unchallenged evidence is that whether they are replaced will have to be considered by the Medical Director having regard to the bed occupancy and financial pressures on the Respondent, therefore it is not clear at present, whether they will be replaced or not.

64. Dr Taylor accepted, in oral evidence, that roles can be made up of part clinical duties and part management responsibilities as and when those part time management positions arise.

**CQC Review**

65. The Claimant produced a copy of the special review of the Mental Health Services at the Respondent dated 26 March 2024 (pages 734 to 829). This review was carried out following the conviction of Valdo Calocane in January 2024, following which the Secretary of State for Health and Social Care commissioned the Care Quality Commission to carry out a rapid review of the Respondent under Section 48 of the Health and Social Care Act 2008.

66. Dr Taylor accepted that coming out of the urgent CQC review there may be other roles but that will need to be considered by the Care Review team at the Respondent and the Executive Team and that exercise is yet to be carried out. Dr Taylor in cross examination accepted that there had been a recommendation for staff to provide reflective practice at Rampton, something the Claimant alleges that he could provide if reemployed, however, there are no roles currently for this type of practice and it not been decided yet whether or not there will be.

67. The undisputed evidence of Dr Wallace is that since the Claimant had left the Respondent's employment, there have been significant changes to the Personality Disorder and Mental Health Directorate. The DSPD Unit was decommissioned nationally. The Personality Disorder Service had consisted of 60 DSPD beds and 70 Personality Disorder beds. That has since been reduced to 66 beds in the Personality Disorder Directorate, which consists of 6 wards. The Mental Health Service has been reduced from 134 to 98 beds and they now utilise some of the wards from the vacated Personality Disorder wards (when they moved across to the former DSPD wards). Because of these changes, the number of Responsible Clinicians has reduced and he gave unchallenged evidence that the Respondent currently have 4 consultant Forensic Psychiatrists (the role the Claimant performed) working in the Personality Disorder Unit and 6.5 Responsible Clinicians (the person with overall responsibility for a patient's case) working in the Mental Health Service at Rampton.

68. When the Claimant was working for the Respondent, the Personality Disorder Service and DSPD Unit consisted of 130 beds and about 5.6 Consultant Forensic Psychiatrists working in Personality Disorder and about 6.5 to 7 working in Mental Health.

69. The Respondent no longer has split posts between Mental Health and Personality Disorder. The only split posts are between Mental Health and the National Deaf Service. The Service has reduced in size and therefore the posts have been reconfigured.

70. The evidence of Dr Wallace, which was not challenged by the Claimant, is that the specific post that the Claimant held therefore no longer exists.

71. The Claimant does not challenge that the post and job plan that he had before he was dismissed no longer exists, but he argues that he would be flexible in terms of the departments that he would work in as a Consultant Forensic Psychiatrist although any job plan ( i.e. in what department and on what precise terms, hours etc), would have to be subject to discussion and agreement between himself and the Respondent.

72. Dr Taylor had produced a list of current vacancies appended to his witness statement which include 3 roles in General Adult Health, 4 in MHSOP (General and old age psychiatry), 2 in CAMHS and 1 in Transgender Health/CAMHS. His undisputed evidence is that Consultants need a CCT to work in MHSOP and CAMHS, the Claimant does not have those but has a CCT for Forensic Psychiatry and Public Health. (A CCT is a Certificate of Completion of Training which confirms that a doctor has completed an approved training programme in the UK and is eligible for entry onto the GP Register or the Specialist Register). Dr Taylor's unchallenged evidence which the Tribunal accept is that the Claimant's qualifications mean that he could work in General Adult Health however, this would be different work to the roles he had done before at the Respondent. Two of MHSOP roles are community based which are quite different roles to those the Claimant held previously and the transition according to Dr Taylor, could be 'complicated'. The environment is very different to working in a secure unit and involves a significantly higher number of patients and the Claimant would require supervision and a period of shadowing in order to transition into this work. The Claimant did not challenge this evidence.

73. Dr Taylor accepted that there are secure units in Leicester and Rotherham and community service spans Nottinghamshire and 3 care groups; forensic services, mental health and community services employing about 40 Consultant Forensic Psychiatrists across the Respondent trust.

74. The Claimant mentioned that an option would be for him to be reemployed by the respondent, submit an application for work related Injury Allowance and if granted he could then retire (as it would remedy the shortfall in his pension) and consider a part

time role with the Respondent. However, he was not sure if he was going to make the application, he was not sure if he would get it or what impact it would have on his pension but he said it was something he could discuss as an option in 'parallel' discussions about his return to work. He has not however made an application.

75. Turning to the relationship between the Claimant, his colleagues and the Respondent more widely, at the liability hearing it was the Respondent's case that the reason for dismissal (paragraph 946 liability judgment) was the Claimant's failure to undertake any clinical work on his return to work and the lack of progress which was being made to getting back to perform his role. The Tribunal concluded however, that the Respondent dismissed the Claimant because of his personal conduct in not performing a fundamental part of his role and that a refusal to carry out clinical duties fell within the definition of personal rather than professional conduct. The real reason for dismissal is very relevant in this case because in not identifying the correct reason, there was a failure to carry out a process which complied with the Respondent's contractual policy and procedures. The Tribunal concluded that the contractual process to be followed in conduct cases such as this (which involved issues of personal conduct) is set out in the MHPS and Conduct Policy and that important steps had not been taken as set out in the policy. The Tribunal concluded that this was a conduct issue for reasons set out in the liability judgment (paragraphs 982 to 996). The Tribunal were of the view that the Claimant was at fault, that he was capable of returning to clinical duties but did not want to, that he was stalling his return and providing spurious reasons for doing so. The Tribunal concluded that it was his deliberate behaviour (his conduct) in what was seen as a refusal to carry out work with patients (which was the main reason) and the length of time this refusal had continued for.

76. Applying Polkey, the Tribunal found that had the matter been dealt with through the correct contractual disciplinary policy, it would have taken about 3 months to complete. It also concluded (paragraph 1042) that the Tribunal considered how likely it was that the Claimant's conduct would have altered and the prospects that he would have remained resistant at the end of that process to carrying out his clinical duties and whether therefore he would have been dismissed fairly at that stage when the procedures had been complied with. The Tribunal made the following relevant observations and findings.

77. Paragraph 1044: "*We have reminded ourselves of the conduct of the Claimant at the last meeting* on *21 April 2017, the circularity of the discussions and the lack of any real progress towards the Claimant's return to clinical duties; …"*

78. Paragraph 1045: "*However, it was not just the bullying issues; He indicated his role had been in* medical *psychotherapy and research , roles which had been taken away from him without following appropriate policy and this didn't appear to be recognised*"

79. Paragraph 1046: "*The Claimant had of course already been through a long job plan mediation process and there was no psychotherapy role available for him to return to; "Ms Bussell clarified that she was offering what had been discussed when he first indicated he could return to his post and that was the split MD/ PD post and she asked if he would be available to start on site doing this role from next week".*

   *"Dr Ijomah acknowledged what Ms Bussell was saying but felt the issue was the word 'agreed'"*

80. Paragraph 1049: "*Taking into account* ***how intractable the position*** *remained as at the meeting on the 21 April 2017, and the history in the many months leading up this hearing, during which the Claimant had repeatedly revisited past issues and continued referring to the need to bring people to account, we find that there is a 50 % chance that, even after completion of a contractual disciplinary procedure, the position would*

*have remained intractable. The Claimant would have remained unwilling to commit to a date when he would return to his full contractual duties, continued to deliberately breach his contract of employment and his employment would have as a consequence, been terminated." Tribunal stress*

81. Taking into account the degree of the ***Polkey*** deduction, the Tribunal considered contributory fault and a further percentage deduction was applied.

82. *Paragraph* 1054, liability Judgment: "*The Claimant's actions undoubtedly contributed to his dismissal and those actions were blameworthy. …*"

83. The Tribunal has considered in making this provisional assessment about reinstatement, whether there remains a lack of trust on the Claimant's part which may make re-employment impracticable and how likely it is that he will exhibit the same behaviours and conduct as he did when attempts were made to get him back to work in 2017 and therefore in terms of practicable whether reinstatement would be capable of being carried into effect with success.

84. At the liability hearing, the Tribunal found that the Claimant had made a number of protected disclosures as defined by section 43A ERA, but had also found that the treatment that he complained about had not been because of those disclosures and nor had the termination of his employment. Part of the difficulty of getting the Claimant back to work was that the Claimant still considered that the allegations he had made of bullying and harassment remained and that he remained unwilling to accept the decision to remove his role in Medical Psychotherapy and research.

85. In terms of the Claimant's position now, whilst in submissions he maintains that he accepts the findings of the liability judgment and does not seek to challenge them, he produced a copy of a letter which he had sent in June 2024 headed as urgent information for the Respondent's Board.

86. In this letter to the Trust he states: "*I am writing urgently to you the Board of Director of NHST to bring to your attention wrongdoing committed by the previous Board of NHFT so you can take urgent action to remedy this wrongdoing*"

    "*In March 2013 in light of new guidance on whistleblowing emanating from the Francis enquiry, (report of the Mid Staffordshire NHS Foundation Trust Public Enquiry), I* informed *the then prescribed NHS Regulator of specific and serious safety concerns involving a patient that were not being addressed by Rampton Hospital.*

    *These concerns were initially denied by NHFT, never addressed, no lessons were* drawn *from them, and as a result, the patient's safety concerns needlessly reoccurred.*

    *In the subsequent period,* ***I endured a catalogue of victimisation*** *leading up to my subsequent dismissal in NHFT in 2017.*

    This ***campaign of intimidation/retaliation continued at my current employer*** *(Humber Teaching NHS Foundation Trust) …*

    ***NHFT <u>continues</u> to deny the patient safety concerns and have continued to single me out for retaliation and a campaign of smears.*" Tribunal stress**

87. The Claimant goes on to make various other allegations in this letter:

    "*Mills & Reeves* [the Respondent's solicitors in these Tribunal proceedings] *the legal team representing NHFT has been provided with documentation about which members of the previous Board knew what and when. The healthcare individual(s) were*

*instructing your legal team ……. disclosing these documents to you and are covered up wrongdoing by the previous Board of Directors*".

88. This letter had been prompted, we understand, by the Claimant reading the urgent CQC review report.

89. The review looked at 3 specific areas: (1) a rapid review of the available evidence related to the care of Valdo Calocane; (2) an assessment of patients' safety and quality of care provided by the Respondent; (3) an assessment of progress made at Rampton Hospital since the most recent CQC inspection activity.

90. There are a number of concerns raised in general terms about various issues in terms of reporting and learning from patients' safety issues it concludes (page 788):

    "*We also found that the Trust did not learn from serious incidents well and make rapid changes to services to improve safety and reduce the chance of them reoccurring. During our review we saw evidence that suggests that there are previous cases where mental health play a factor in harm to others. …*"

91. There are also the following comments (page 791):

    *"We also found concerns around transparency, accountability and ethical standards. For example some staff reported issues including*

    - *misrepresentation to external organisations like CQC, this included for example, changing things in people's rooms so they appeared a certain way (causing distress to the individual) or preventing us from speaking to individuals, and changing staffing levels during our inspection;*

    - *alteration of clinical records;*

    - *ongoing inappropriate practices despite identified breaches of guidance, this included for example instances of staff misconduct, often related to allegations of abuse/bullying and falsification of documents, which are known but no action was taken.*"

92. The observations are serious. However, what that urgent review does not do is go into the detail of each of the safeguarding concerns, and certainly not the specific matters that are the subject of the liability judgment in the Claimant's case and the issues that he personally raised about patient safety are not specifically covered by that report.

93. The Claimant sees that review and the Respondent having a new Chairman and/or new Board as hope that there will be a different attitude by the Respondent and a willingness he hopes to address the patient safeguarding concerns including those he had personally raised, as set out in the liability judgment.

94. What became clear throughout the Claimant's evidence at this remedy hearing, is that how successful any re-employment at the Respondent would be, would in turn depend upon whether his trust could be repaired, which would be dependent upon the Claimant's perception of (in his words), whether the Respondent's approach now fits within with what he considers to be the fit and 'proper person' test and from his evidence that appears to relate not only to dealing with the issues in the urgent review, but the issues that were addressed in the liability judgment (including what he alleges happened to him and which he still considers to amount to victimisation). There was no finding by this Tribunal however, that he had suffered any detrimental treatment as a consequence of whistleblowing. The evidence of Dr Wallace is that he believes it to be unlikely that a new Chairman would agree with the validity of the Claimant's previous

concerns which were contrary to those of the Respondent's managers, clinicians, the Broadmoor Review and the determination of this Tribunal. The Claimant under cross examination explained that to accept a decision not to reinvestigate his previous complaints, the Chairman would have to give him reasons, be transparent, perhaps have a meeting so the Claimant could understand, and allow the Claimant to give him documents which the Claimant believes he may not have.

95. In evidence, the Claimant gave evidence that he has not yet had a response to the June 2024 letter and that he is really waiting to see what that response is . The Tribunal find that whether the Claimant can trust the Respondent going forward is conditional on the response he receives to that letter.

96. In cross-examination, the Claimant stated: "*There is hope, especially after the CQC review, that the Chairman and new Trust members will change the culture*".

97. The Claimant set out his history of the working and wider relationship with the Respondent since 1993 and his favourable appraisal in March 2014 (p.640-664) in the supplemental evidence he was permitted to give under oath and refuted that the relationship of trust had broken down.

98. The Claimant confirmed however, that he still holds the belief that he had been subjected to unfair treatment because he had whistle blown. In terms of that being an ongoing wrongdoing, the Claimant gave evidence as follows: "*No question, it is better to say that it is a moment for the new Trust Board members to be accountable for the wrongdoing, under the fit and proper person test*".

99. Despite the findings of the Tribunal at the liability hearing, the Claimant still remains of the view that he has been subjected to a conspiracy by the Respondent in concealing documents, in misleading the Employment Tribunal and falsification of documents. He refers to the finding of the CQC of 26 March 2024 as validation for those concerns, albeit the CQC report speaks in general terms about the issues and not about any specific cases or incidents. He confirmed under cross examination that he still believes, (7 years after his employment had ended), that his former line manager, Dr Wallace, had lied to this Tribunal during the liability proceedings, denying in court that he knew since 2012 about patient safety concerns the Claimant had raised.

100. The Claimant was asked in cross-examination what his view would be if the response to the June 2024 letter from the Respondent was that it was not prepared to carry out a further investigation, that it felt that the matters had been dealt with by the 'Employment Tribunal' and already adjudicated upon and he confirmed that he would be dissatisfied with such a response.

101. The Claimant was asked by the judge to clarify his oral evidence that there needed to be '*simply a decision that something had gone wrong so that the Trust* could *learn from it',* and he confirmed that the learnings he was referring to include what he alleges happened to him when employed by the Respondent and learning from the treatment he received, meant:

"*If anonymised and turned into case examples they can be used as a teaching aid to say '**These things happened**'. It would help others not to do the same thing. It does not need to identify which hospital, just that this was someone's experience and if it was brought to you, what would you do. A no fault investigation if you like.*" Tribunal stress

102. What he said he wanted to see was something done to show that the Respondent was learning from what had happened to him for the benefit of others and that that would be "*ideal"* for him.

103. It was apparent to the Tribunal from the oral of evidence of the Claimant that although he says he is not challenging the findings of the liability judgment, that he still genuinely believes that he had been treated unfairly by the Respondent for the reasons set out in his claim, and that he continues to want to see from the Respondent some acknowledgement that he had been treated unfairly and some sign that they would do things differently going forward. The Claimant considers that because of the outcome of the CQC urgent review and because of the new Chairman; and a new Board, that he has "*hope*" that there is going to be different approach and an admission of wrongdoing. This is despite the findings by this Tribunal that the complaints of detrimental treatment were not well founded (paragraph 910 liability judgment) or the claim of automatic unfair dismissal . The Claimant has only written to the new Board following the CQC review very recently and has had no response from them. However, in light of the findings of the Employment Tribunal on the matters concerning the treatment of the Claimant, the Tribunal consider it unlikely that the Claimant is going to be satisfied by the response that he receives. Dr Wallace gave evidence that while he was aware the Respondent had a new Chief Executive he did not know if there was new Chairman.

104. The Claimant has been off work from his current employing NHS Trust, from July 2023 to March 2024 due to PTSD. He has now returned to work from sick leave although he was currently taking annual leave due, he says, to the stress of these proceedings. He has not seen patients clinically since July 2023.. The Claimant produced no medical evidence for the purpose of these remedy proceedings.

105. The Claimant's oral evidence is that he has PTSD which is triggered by environmental factors such as undue pressure, bullying, discrimination and where he feels powerless and not being listened to. The Tribunal consider that there is a very real risk, that if he is reinstated and later not satisfied with the Respondent's response to the June 2024 letter, he may suffer (according to his evidence about his medical condition) with effects, including potential absences from work, due to PTSD and this will fundamentally undermine his trust in the Respondent.

Revalidation

106. His revalidation is due for renewal in June/July 2024. He is due to speak with Humber's Medical Director but believes it will be deferred to allow him to do the necessary CPD and appraisal. His licence to practice is up to date (subject to renewal every 5 years along with revalidation and the licence cannot be extended if the Claimant does not revalidate). The Claimant could not say when he wounldbe able to return to clinical duties at present, it depends on following the back to work guidance and OH advice.

Is it Just to order reinstatement ?

107. It is incumbent on the Tribunal to also consider whether it would be just to order his reinstatement, taking into account the Claimant's contributory conduct at the liability hearing.

108. The Tribunal had concluded that applying Polkey, had the matter been dealt with through the correct contractual disciplinary policy, it would have taken about 3 months to complete and that there was a 50% chance that at the end of a fair process, he would have remained resistant to a return to work and the situation would have remained intractable. The Tribunal on hearing the Claimant's evidence at this hearing, find that it is likely that the parties would find themselves in a similar situation if he were reinstated ,with difficulties agreeing a job plan including whether, for example, it would include support for Medical Psychiatric accreditation, and that it is likely that it would become intractable, impacting potentially on patient care.

109.The Tribunal had found at the liability hearing, that the Claimant had deliberately breached his contract of employment by not returning to his clinical duties and there is a very real risk that a similar situation would develop. The Tribunal had, (taking into account that a 50% Polkey deduction had already been made), reduced his compensatory and basic award by a further 20%, a total reduction of 70%, which is considerable but reflects that his actions *" undoubtedly contributed to his dismissal and those actions were blameworthy. …*" (paragraph 1054, liability judgment).

110.The Respondent also raised allegations during this remedy hearing, about race discrimination by an employee of the Respondent during his employment with Humber. This relates to an incident in September 2021 but the Claimant did not present this as a claim before the Tribunal. It concerns a Consultant Forensic Psychiatrist employed by the Respondent who commented that a patient may find a 'black man in a powerful position triggering' because of their past experiences (p.834-835). The incident was reported to the Respondent by Humber in January 2024 and the Claimant became aware, he says, only recently of a letter sent on 21 May 2024, in which the Respondent informs Humber that it has dealt with the matter, does not provide details but states they would be happy to discuss it, but he complains that this was not mentioned to him. He alleges in his June 2024 letter to the Respondent that Dr Wallace has turned a 'blind eye' to what he alleges to be race discrimination. In cross examination the Claimant stated that he did not consider this matter had been resolved to his satisfaction. This Tribunal was not prepared to determine, during this remedy hearing, an unrelated complaint of discrimination which was not part of the liability hearing (page 834). The Claimant attempted to ask questions of Dr Wallace however, he stated he had no knowledge about the incident. The Tribunal makes no finding on the merit of that complaint of race discrimination.

**Submissions on reinstatement and reengagement**

**Respondent's submissions**

111.Ms Barney produced written submissions and augmented those with oral submissions. In her submissions, she made reference to the following cases, which have been considered:

- *Union of Shop, Distributive & Allied Workers (USDAW) v Tesco Stores Ltd [2022] EWHC 2001 (Queen's Bench) [2022] IRLR 407*
- *Port of London Authority v Payne [1994] IRLR 9*
- *Coleman and Stephenson v Magnet Joinery Ltd [1974] IRLR 343 [1975] ICR 46*
- *Lincolnshire County Council v Lupton [2016] IRLR 576*
- *Nothman v London Borough of Barnet (No. 2) [1980] IRLR 65 CA*
- *Phoenix House v Stockman [2019] IRLR 960 EAT*
- *Central & North West London NHS Foundation Trust v Abimbola [2009] All ER (D) 188*
- *United Lincolnshire Hospitals NHS Foundation Trust v Farren [UKEAT/0198/16] [2017] ICR 513*
- *Kelly v PGA European Tour [2021] IRLR 575*
- *King v Royal Bank of Canada Europe Ltd [2012] IRLR 280*
- *CA in Kelly v PGA European Tour [2021] IRLR 573*
- *City & Hackney Health Authority v Crisp [1990] IRLR 47 [1990] ICR 85 EAT*
- *Arriva London Ltd v Eleftheriou [UK EAT/0272/12] [2013] ICR D9*

112.On the issue of reinstatement, in brief, it is submitted in oral evidence that the post of Clinical Forensic Psychiatrist is not available, there is no longer split of 50/50 between Personality Disorder and mental health which was the job the Claimant held and no such posts exists.

113.On the issue of reengagement it is submitted that the Claimant has not identified a post

which is suitable, he had not set out in order what he is seeking and what he has identified is purely speculative and cannot satisfy section 115 ERA.

114. The issue has to be considered as at the date of his hearing, it is not a 'continuum' and there is no certainty that those who plan to retire will be replaced and the same is said of the possibility of any roles as a result of the CQC review.

115. In terms of vacancies, in General Mental health the Claimant has not advanced a post he could or should be placed into and the Respondent's evidence is that it is not simply a case of slotting him into those roles, it would be a different ' arena' for the Claimant. The Claimant had not undertaken this type of role for many years. The Claimant is focused on Forensic Health and if he were to express interest in General Mental Health the Tribunal is invited to question the genuineness of that interest.

116. Counsel addressed the issue of trust and confidence, highlighting the allegations the Claimant has made about Dr Wallace and his evidence during this hearing that there is a continuing campaign of victimisation against him. This Tribunal ' carefully' considered the alleged protected disclosures and the detriments and reason for dismissal and concluded that the Claimant had not been treated unfairly because he 'blew the whistle' and yet the Claimant still maintains even now, after that hearing and detailed judgment, that he had been. It is 'unrealistic' to think the Claimant would go back to work in any post and has said he would need a risk assessment to be carried out before he returned to work which counsel submits is a euphemism for another full investigation into his historical allegations.

117. Counsel submits it would 'defy rationality' to order reemployment and that there is ' no hope of it being a success.

**Claimant's submissions on reinstatement or reengagement**

118. The Claimant handwrote some bullet points for his submissions and produced a diagram which he spoke to and made some oral submissions. He did not in material respects engage with the Respondent's submissions.

119. In brief he submits that he does not seek to challenge the findings of the liability hearing, and that the outcome of reinstatement or reengagement would be '*clearly* dependent *on the new Board of the Trust's response'*.

120. The Claimant then referred to his diagram where he had set out a process that may need to be followed from the date of the tribunal hearing onwards and in essence the purpose of it was to explain that what happened going forwards would require the input of other people/bodies and they would have to be involved in discussion about when he could return to work, what would happen about his revalidation and what role he could return to. He did not identify any specific role but talked about being flexible and open to suggestions. He referred to his current absence from work and that after these proceeding he was due to meet with his current employer's Medical Director and he would have to decide what the next steps would be, that the Respondent if they offered him reengagement would have to follow the return to work guidelines and involve Occupational Health who will need to provide their advice on when he can return. There would have to be a discussion at some stage about his CPD validation and whether it should be deferred.

121. The Claimant referred to the decision about whether it was safe for him to return to that environment, being one that would need to be taken by the Respondent with OH advice and that would determine if it was safe for him to return to the Respondent . He did not identify any specific post but referred to being flexible and that there are a variety of options which could be explored, including, he suggested, a partial redeployment

situation whereby he continues to work for his current employer (Humber) splits his time with the Respondent, and if that could be arranged, there would have to be a decision over whether Humber or the Respondent would act as his designated body. In his written note he referred to the options for reengagement depending upon a discussion between Humber and the Respondent. He did not produce any evidence that Humber would be prepared to consider accommodating a split role with the Respondent or suggest that Humber had indicated agreement to that.

122. He referred to there being at this time so much change and uncertainty, including over a possible change of government and what the outcome of the CQC review may be.

123. He also in submissions described a 'parallel process', which the Tribunal understands him to mean that steps taken to get him back to work in accordance with return to practice guidance could be carried out at the same time the Respondent was looking at his concerns (as per his Tribunal complaints). He explained that he would need the Chairman of the Respondent to look at what had happened with his progress with Medical Psychiatric accreditation when he worked at the Trust and outstanding issues over his pay progression back in 2014, and why it was not awarded. All these issues he says could be looked at so he can ' move on' and at the same time as sorting out his return in terms of OH advice, shadowing another Consultant, agreeing his job plan, putting in place a risk assessment etc.

124. In his written submissions he also referred to wanting to apply for costs (although he did not proceed to make an application during this hearing) and set out a number of reasons; the Respondent misleading the courts and NHS regulator, defending a case they had no prospect of winning (the Respondent did successfully defend the whistleblowing complaints including automatic unfair dismissal and in terms of the ordinary unfair dismissal, compensation was reduced by 50% for Polkey and 20% for contributory fault ) and 'behaviour toward the Claimant'.

**Conclusion on reinstatement and reengagement**

125. In deciding whether to make an order for reinstatement, the Claimant has expressed his wish to be reinstated.

126. The Tribunal has considered, on a provisional assessment at this first stage, whether it is practicable for the employer to comply with an order for reinstatement.

**Reinstatement**

127. For reasons set out in the findings of fact, the Tribunal conclude that the role that the Claimant performed before dismissal no longer exists. He was employed as a Consultant Forensic Psychiatrist (CFP). His job plan spilt his duties between PD and MD. Further, the Tribunal find that the Respondent's decision to fill any need for a Consultant Forensic Psychiatrist on a permanent basis appears to have been a reasonable step, taking into account that the Claimant's employment was terminated back in 2017, approximately 7 years ago, a considerable period of time.

128. The Claimant did not challenge the respondent's witnesses with regards to the need to fill the requirement for a Consultant Forensic Psychiatrist and nor did he make any submissions in response to the Respondent's submissions that it was a reasonable step to fill those posts .

129. In any event the Tribunal find that the actual post the Claimant undertook no longer exists given the restructuring of the departments. There are roles as per Dr Taylors statement, but not in roles the Claimant is familiar with and he would need to go through a process of transition . Moreover, the Claimant does not positively assert that he would

want those roles, although he talks of flexibility. His case is that what duties he would perform and on what terms, would have to be a matter of discussion, negotiation and agreement.

130. While there may be impending retirements of those in CFP posts, whether or not those roles are replaced is unclear and speculative at this stage. At the date of this hearing, there are no vacancies.

131. Further, the Claimant in submissions mentioned an interest in a job share with his current employing trust, however for the purposes of reinstatement, we are concerned only with whether it is practicable to make an order that treats him in all respects as if he had not been dismissed. Taking a broad common sense view, it is not only a matter of the Respondent having no vacancies for a Clinical Psychiatrist, the hospital has been restructured and the work he had been employed to do before is not available, there would also have to be agreement on what work he would do. Further, the Tribunal is not persuaded that it would be practicable to reach agreement on a job plan, not least given the difficulties the parties had reaching an agreement on the work he would do on his return from sick leave, when employed by the Respondent, as set out in the liability judgment ( and which he still does not accept as 'agreed').

132. The Claimant also in submissions referred , as part of what he described as a parallel process, to wanting the Chairman of the Respondent to look at what had happened with his funding to support him get Medical Psychiatric accreditation, a matter which is clearly still an issue for him but (as set out in the liability judgment) the decision had been made not to fund the training for this accreditation from 2012 (paragraph 227 – 257 liability judgment). The Tribunal consider that the Claimant is still not accepting of that decision and this would be a further stumbling block to reaching any agreement over a job plan.

133. The Respondent submits that the lack of trust on the Claimant's part makes reinstatement impracticable. Further, it would not be just because of the Claimant's conduct which resulted in a finding of contributory conduct at the liability hearing which has soured the working relationship and diminished trust and confidence.

134. Despite the Claimant in submissions stating on a number of occasions that he is not looking to challenge the findings of the liability hearing, we find that in his evidence it was clear that he remains unhappy and unconvinced that the way he was treated in terms of the various detriments and his dismissal, was not related to those issues that he had raised around patient safety. In order for him to trust the Respondent going forward and for any re-employment to be successful, it is clear that he would need to see not only in his view a different approach to dealing with safeguarding issues and the historical safeguarding concerns he originally raised but also what he sees as the victimisation he was subjected to and he alleges he continues to be subjected to.

135. The Claimant had, as counsel for the Respondent raises in her submissions, raised serious allegations that the Respondent had mislead the Tribunal by falsifying documents in respect of the tribunal liability proceedings, but no such findings were made. Further he has made extremely serious allegations against Dr Wallace about misleading the Tribunal about failing to act on patient safety concerns and he maintains that belief even though no such findings about misleading the Tribunal were made. Dr Wallace remains an employee of the Respondent and he would be someone with whom the Claimant is likely to come into contact. The evidence of Dr Wallace and Dr Taylor is that the relationship of trust is, and remains, broken and the Claimant's return to work for the Respondent would not be successful.

136. The Tribunal take notice that even during these remedy proceedings, the Claimant put it to Dr Taylor that the Respondent was misleading the Tribunal over the situation with

his pay progression from 2014, and again alleged that the Respondent misled the NHS regulator in the past when the previous Chair had told the Regulator that he had looked into the Claimant's concerns. He went on during his cross examination of Dr Taylor, (when directed by the judge to focus on what he says he would have been paid but for the dismissal), to assert that; "*it is more serious than that … it is denying knowledge of detriments, of protected disclosures, things about pay, it's all about denial …*"

137. The Tribunal have not taken into account the allegation against a CFP at the Respondent in 2021 committing an act of race discrimination and the impact on the Claimant's relationships with employees of the Respondent, because this remains unresolved and if the Claimant has a valid complaint, it would not be appropriate to find that it would be impracticable for the Respondent to reengage him because of that complaint. That has not formed part of our decision making process.

138. It is also unclear when the Claimant could return to work, he was unable to suggest a date, explaining that it would depend on a number of factors, including the advice of OH, whether the environment was deemed safe for him and when agreement could be recached on his job role and job plan.

139. The Tribunal, on a provisional assessment conclude that there is little hope of his return being successful, even just taking into consideration the Claimant's stance of needing some acceptance of wrongdoing against him (contrary to the Tribunal's findings). The Claimant himself made the observation in his submissions, that the success of his return would depend on this perception of the view of the new Board/Chairman towards his treatment and what he sets out in his June 2024 letter. Treatment which the Tribunal have already adjudicated upon. He has yet to receive a response to his June 2024 letter and therefore he is not in a position to confirm whether he is satisfied that there are in place the changes he feels he needs to see to trust the Respondent going forward.

140. For the reasons set out in the findings of fact the Tribunal accept that in the circumstances of this case, even if it was possible to return the Claimant to his previous role, it would not be practicable or indeed just to do so.

**Reengagement**

141. In terms of reengagement, the Claimant submits that he would be flexible about what job he would do, without being prepared it seems to express a positive interest in the available vacancies. He wants it seems to negotiate a role to include elements he is interested in such as Medical psychotherapy and or reflective practice, without such opportunities existing at this time and no certainty they ever will be.

142. While the Claimant mentions the possibility of some sort of job share with Humber, that sort of arrangement, as he has presented it, is highly speculative. It is unclear what that type of role would be and whether his current employer would be able or willing to accommodate whatever the requirements of the Respondent and the Claimant may be. Humber Trust is also not an associated employer.

143. In any event, for the same reasons set out with regards to practicability and whether it would be just, the Tribunal conclude that it would not be practicable to reengage the Claimant, it concludes that reengagement would not be a success, and the Tribunal do not consider it therefore appropriate to exercise its discretion to make an order.

## Compensation

### Legal Framework

144. Section 123 ERA sets out the approach to compensatory awards:

*(1)Subject to the provisions of this section and sections 124, 124A and 126 the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the* ***loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.***

*(2)The loss referred to in subsection (1) shall be taken to include—*

*(a)any expenses reasonably incurred by the complainant in consequence of the dismissal, and*

*(b)subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*

*(3)The loss referred to in subsection (1) shall be taken to include in respect of any loss of—*

*(a)any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or*

*(b)any expectation of such a payment,*

*only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.*

*(4)In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland…*

*(6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

145. The compensatory award is strictly limited to making good the employee's financial loss. The purpose of the compensatory award is confined to compensating only proven financial loss: ***Morgans v Alpha Plus Security Ltd 2005 ICR 525, EAT***.

## ACAS Code

146. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) provides that: *This section applies to proceedings before an employment tribunal* relating *to a claim by an employee under any of the jurisdictions listed in Schedule A2.*

147. Section 207A(2) TULR(C)A provides that: 'If, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'

148. The potential for adjustment to the compensatory award under S.207A only applies if the employer's *or employee's* failure to comply with the provisions of the Code was 'unreasonable'

149. In ***Lawless v Print Plus*** **UKEAT/0333/09/JOJ** Underhill P acknowledged that the relevant circumstances to be taken into account by tribunals when considering uplifts

would vary from case to case but should always include the following: whether the procedures were applied to some extent or were ignored altogether, whether the failure to comply with the procedures was deliberate or inadvertent, and whether there were circumstances that mitigated the blameworthiness of the failure to comply.

150. Furthermore, the size and resources of the employer were capable of amounting to a relevant factor in the tribunal's consideration of whether an uplift was appropriate and, if so, by how much.

151. In ***Slade and* anor *v Biggs and ors 2022 IRLR 216, EA****T*, the EAT set out a four-stage test to be applied.

152. The EAT further held that any uplift must reflect 'all the circumstances', including the seriousness of and/or motivation for the breach.

## Findings of fact relevant to compensation

### Loss of Earnings

153. Revalidation is a process for doctors to confirm to the GMC (General Medical Council) that they are fit to practice. It applies to all licenced doctors in the UK working in all specialties in the NHS, and the private sector. Doctors need to meet the standards set by the GMC to maintain their licence to practice. Doctors take part in annual appraisals and collate a portfolio of evidence to show they meet the necessary standards. Revalidation runs over a five-year cycle and doctors will need to revalidate only once in the cycle.

154. Most doctors will have a connection to a Responsible Officer (RO) or suitable person. The RO or suitable person will assess the outputs of appraisal and clinical governance information. They will then make a revalidation recommendation to the GMC. Following that, the GMC decides if the doctor can retain their licence to practice.

155. The Claimant was due to revalidate in **July 2017 .** His employment was terminated by the Respondent on **21 April 2017** (with a payment in lieu of notice pay). Once terminated the Respondent could not act as his RO and carry out his appraisal for revalidation.

156. The Claimant states in his schedule of loss that it took him until **10 September 2019,** a period of **59 weeks** to get another job because he needed to renew his licence to practice.

157. A Responsible Officer (RO) can recommend that a revalidation is deferred by up to 12 months and a deferral has no impact on the licence to practise. The doctor would normally agree an action plan with the RO to obtain the revalidation.

158. The Claimant accepted under cross examination that there was at least at the time he was applying for work, a national shortage of mental health staff and this applied across the UK.

159. The NHS terms and conditions provide that a consultant may be paid in lieu of notice, and payment in lieu is at the discretion of the employer (p.523).

160. The Claimant's contractual entitlement, as at the date of termination, was salary at Threshold 6. The Claimant did not have a claim for breach of contract or unlawful deduction of wages determined by the Tribunal in these proceedings.

Revalidation

161. The Claimant was informed by the GMC by letter of the **16 May 2017** that the Respondent had removed him from their list of doctors for revalidation and he was asked to provide the GMC with the name of his new designated body or to confirm he did not have one (p.375). The letter provides a link for advice on what he can do to revalidate where he has no employer or otherwise no designated body who can support the process including carry out the appraisal.

162. There is also a guidance document produced by the GMC (p.274) which includes a link to find an appraiser from a registered list of medical practitioners. The Claimant does not assert that he explored that option. He referred to Counsel's interpretation of the guidance as incorrect but did not explain to the tribunal in what way this was incorrect or why arranging an appraiser from this list was not an option for him. The Tribunal find on balance, that the guidance appears to be clear and such an option is available.

163. On **29 July 2017** (p.377) the GMC wrote to him again asking him to book an assessment to revalidate. The Claimant accepted that this was an option for him. He decided not to book an assessment but find an agency to become his designated body. The agency could then apply to extend the date for revalidation and during the deferral, the Claimant would retain his licence and could work and practice. He did not want to sit an assessment because it is a 'type of examination' and he was concerned about passing it because it had been a long time since he had sat this type of examination.

164. The Claimant then sought a position as a locum via Pertemps Medical. There is an email from them dated **30 August 2017**, that is 4 months after his dismissal. The Claimant alleges contact was made before this however there are no documents to evidence that and his evidence was vague about when he first contacted them; " *I have no idea,, they replied on that date".* The appraisal did not take place until **January 2018** i.e. 5 months later.

165. On 30 August 2017 Pertemps asked the Claimant to provide certain information including references and serology reports to check he has immunity against various disease/infections. He was asked to provide these **as soon as possible.**

166. On the **18 September 2017,** Pertemps was still chasing the Claimant for a number of pretty basic documents e.g. passport, CV, GMC licence letter and asking him to complete basic documents including a health questionnaire and application form (p.381). The Claimant intended to take the documents with him to the CPD training held by Pertemps, planned for **7 October 2018.**

167. On **2 October 2017** a reference request was sent out (p.383).

168. On **14 October 2017**, the Claimant was still sending in documents to Pertemps (p.385).

169. On **16 October 2017** (p.385) Pertemps medical informed the Claimant that he needed a hep b booster and further titre level information to evidence his immunity.

170. This is not dealt with in his evidence in chief but under cross examination the Claimant gave evidence that the reason it took so long to get a new job was because doctors require to show they have immunity from infection and viruses and he needed to have a blood test. A blood test is required every time a job is applied for with a new employer, as part of the recruitment process. When he started with the Pertemps, they carried out the necessary health screening. The

Tribunal accept that the Claimant needed to establish the required immunity however, the Tribunal do not accept his explanation for why it took so long for him to have the necessary checks completed.

171. The Claimant was aware that he had this issue and explained that while other doctors may need further boosters, he has natural immunity and therefore rather than a booster, he needs a specialist to confirm that he has immunity after checking his bloods. The Claimant's evidence is that he needed to give another blood sample but could not recall when that was. He alleges that a nurse came to his home to do it but did not know the date. He says it was sometime between October 2017 and March 2018 and that he had at least two blood tests. He also gave evidence that it has in the past only taken **one month** to complete this process and could not really explain why it appears to have taken so many months on this occasion. The Claimant could not recall when he explained he had this issue to Pertemps. The Claimant however, did not mention any of these difficulties in his evidence in chief and there are no documents or emails where this issue with his immunity is mentioned.

172. There is a certificate which confirms that his CPD from 1 October to 30 September 2017 is fine; "is *in good professional standing for CPD.*" (p.382). Therefore it appears that CPD was not a barrier to getting another job, at least not from September 2017.

173. The Claimant had his appraisal with Pertemps in **January 2018** (p.418) but informed the judge in response to a question, that the appraisal did not have to be done before he could be put forward for roles. A completed appraisal was therefore not a barrier to finding work either.

174. On **21 March 2018** the Claimant was asked to send in the hep booster and titre levels and it seems he had still not sent back the health questionnaire. In answer to questions from the panel, he gave evidence that he was sure he completed all the other documents on 7 October 2017 but the health questionnaire would need to include the vaccinations (p.386).

175. The Claimant was put forward for positions in **July 2018** (p.388).

176. There are various advertisements in the bundle for organisations with vacancies for Psychiatrists and the Claimant accepts there was a shortage of Psychiatrists to fill the positions. He did not however formally register with any other agencies although he gave his details out to some.

177. On **10 September 2018 to 2 April 2019,** the Claimant commenced a locum role with Humber Teaching and NHS foundation Trust (Humber) which was part time. He seeks 29 weeks loss of earnings of a total of £5,087.71 for the shortfall in pay.

178. The Claimant was then out of work from **2 April 2019 to 26 September 2019** and claims 25 weeks losses at £36,069.25 however, he has given no evidence whatsoever regarding attempts to mitigate his losses during this period.

179. On **27 September 2019 to 23 March 2020** he commenced a new locum role with Leeds and Yorkshire HS Foundation Trust (Leeds) and has no losses during this period.

180. There is no evidence presented by the Claimant of attempts to find work from March 2020.

181. The Claimant obtained a new full time permanent post as at the Humber Teaching NHS Foundation Trust (Humber) from **1 September 2020.** He claims no losses from September 2020.

182. The Claimant accepted in cross examination that other than the contract with Humber and Leeds, there are no documents disclosed which demonstrate that he actually applied for any other jobs; " *I agree, not in the bundle but quite a lot to say phone calls made about enquires about other jobs".* The Claimant accepted that when taken to a number of job advertisements he had not applied for them. He had included adverts for jobs in the bundle but confirmed that he had not applied for them but included them only because he had retained copies of the adverts. He could recall applying only putting in one formal application for the Humber role although in re-examination, he referred to having recalled that he applied to Global Medics, another agency, although he could not recall if he sent his CV to them (p.455).

**Injury Allowance**

183. The claimant during the remedy hearing, made reference to his potential entitlement to Injury Allowance.

184. Injury Allowance scheme involves making payments that topsup sick pay, or reduced earnings for those covered by the NHS terms and conditions of service handbook and is payable when an employee is on authorised sickness absence or on a phased return to work with reduced pay or no pay due to an injury, disease or other health condition that is wholly or mainly attributable to their NHS employment, which includes physical or psychiatric injury sustained.

185. The Claimant complained at the liability hearing and mentioned during this hearing, an entitlement to Injury Allowance. However, as set out at paragraph 489 of the liability judgment, the Claimant had accepted that he had been told what the steps were for applying for Injury Allowance but he did not provide the relevant information and no application for this benefit was ever made by him. He does not set out why he believes he would be entitled to it and he does not set out what amount he believes he would have received had he applied. When cross examining Dr Taylor the Claimant suggested that this was something if he could have a discussion with the respondent about outside of these proceedings when arranging a return to work.

186. The Claimant has not established any entitlement to this payment and no award is made in respect of it.

**Pay Threshold/ Progression**

187. The Claimant was on Pay Threshold 6 at the time his employment was terminated. There was a lack of clarify over whether he should have been moved to Pay Threshold 7 in October 2014, however this was dealt with in the liability judgment paragraphs 440 to 460. The Tribunal found that for Consultants, which would include the Claimant, appointed on or after 31 October 2003, the NHS National Terms and conditions for consultants 2003 apply and schedule 14 provided for eight pay thresholds for which there are specified time intervals before eligibility for incremental pay progression. In their first post consultants start at Threshold 1 and Threshold 5 is achieved after competing 4 years and thereafter pay progression through the remaining 3 Thresholds occurs at a maximum of 5 yearly intervals.

188. The Claimant had received incremental pay progression on 1 October 2009 however, it appeared that he had not received incremental pay progression on 1 October 2014 and remained therefore at Pay Threshold 6.The Claimant however had no claim for breach of contract or unlawful deduction of wages and no determination was made that he was entitled to salary under Pay Threshold 7. However, there was an issue over whether the Claimant had submitted an agreed Job Plan which needed to be submitted with the Pay Progression Form. It was not clear whether the Chief Executive had made a decision not to make the award to the Claimant in 2014, if he had, Dr Taylor accepted

in cross examination that the Claimant would have had the right to appeal and Dr Taylor did not dispute that he had not been told of the right to appeal.

189. The Tribunal determined during the course of this hearing, and explained to the Claimant, that there had been no claim for breach of contract or unlawful deduction of wages as part of these proceedings in connection with pay progression in 2014. He could not therefore base any claim for compensation on an alleged failure to pay him at a higher rate of pay, since 2104 but he could make representations that he would have been paid at a higher rate after the date of dismissal, had he not been dismissed. His calculations in the schedule of loss were based on Pay Threshold 6. The Respondent's case is whether or not he would have got incremental progression In 2018 is speculative, he has presented no evidence that he would have met the criteria in 2018 to get an increase to Pay Threshold 7 in next pay review cycle.

190. As at the date of dismissal, in 2017, the Claimant remained at Pay Threshold 6. The Claimant maintains that he should have been put on Pay Threshold 7 in October 2014 and gone up to Threshold 8 in October 2019. This is information set out in his Pension Report (51 para 6.2). Had he remained employed, he may have received a pay increase in line with the Pay Thresholds however, it is not automatic, it is subject to certain criteria being met which are set out in the NHS Terms and Conditions (pages 9512 – 513).

191. In submissions counsel for the Respondent argues that given the findings at the liability hearing over the difficulties of agreeing a return to work with the Claimant, had he not been dismissed, it is highly unlikely he would have been awarded a Pay Progression

**Clinical Excellence Awards**

192. The National Clinical Impact Award (NCIA) scheme in England and Wales (formerly the National Clinical Excellence Awards (NCEA) scheme), aims to reward those who contribute most to the delivery of safe and high-quality care and the improvement of NHS services. This includes consultants.

193. Dr Taylor gave evidence, unchallenged, that previously the system required an application to be made. It was a competitive process and applications were reviewed by a panel and given a score and a recommendation was then forwarded to the Chief Executive.

194. The process changed in the financial year 2020/21. Under the new system, all Consultants share the financial 'pot' which is available.

195. The Claimant had never made an application because he sat on the panel that determined local applications (there is also a national awards scheme) but invites the Tribunal to find that he would have applied from 2018 if not dismissed. The Claimant did not however present evidence about this in his witness statement or while giving evidence under oath, he simply made this observation during his cross examination of Dr Taylor.

196. The Claimant did not set out in evidence what points he believes he would have been awarded had he applied, why he says he would have been awarded that number of points and what sum he says he would have been entitled to.

197. The Claimant presented no evidence to support a finding that in 2017 or 2018 or in any year before the scheme changed, the Claimant would have applied and been granted an award.

**Expenses**

198. The Claimant claims a contribution towards his CPD, appraisal, revalidation and renewal to practice costs. In his schedule he sets out a total figure of £3,000 however, he led no evidence about these expenses and why they are recoverable from the Respondent and submitted no documents evidencing the cost of any of these items.

**Pension**

199. The Claimant had produced a pension report (p.131 -216). No pension report was produced by the Respondent who simply advocates a simplified approach to pension loss.

200. The Claimant's report provides that the (para 2.10) Claimant is 56 years of age and has continued to work beyond his intended retirement age of 55. He cannot retire 'until this situation is resolved' and the author provides the report on an assumption that the Claimant will continue in employment until June 2023. In summary it sets out past loss of pension to 31 March 2023 to be calculated at £53,817 at Pay Threshold 6 or £58,928 at Threshold 8.

201. There is no past loss of pension lump sum at Threshold 6 but £5712 is calculated at on the basis of pay at Pay Threshold 8.

202. Futures losses are reported of £56,155 at Pay Threshold 6 and £64,640 at Threshold 8.

203. The report provides an alternative calculation on the basis that the Claimant would have moved up the pay scales to 7 in 2014 and 8 in 2019.

204. The Claimant was a member of the MHSPS Scheme, which is a final salary scheme that closed to most members on 31 March 2015. He was then moved to the Career Average Revalued Earnings (CARE) scheme, a defined benefit scheme.

205. The Respondent submits that the proper approach, given this is not a career loss case, is to use the Simplified Approach The Respondent submits that based on the Claimant's final pay at Threshold 6, his net past loss pension figure is calculated to be £38,880 based on 136 weeks loss period, as set out in the Claimant's schedule of loss, this averages out to be **£285.88** per week. The Claimant did not challenge the accuracy of that calculation.

**Submissions**

206. The parties made further submissions on compensation should reinstatement or reengagement not be ordered and those have been taken into account

**Conclusions**

**loss of earnings**

207. The Tribunal accept the Respondent's submissions that the Claimant was not diligent in the steps that he took to sort out his revalidation and secure another role. His employment ended in April 2017 and despite a national shortage and difficulty filling vacancies for Psychiatrists, it took him until September 2018 to start a locum role, a period of 17 months, an unfathomable period in the circumstances.

208. The Tribunal conclude that, on the evidence as presented, the Claimant did not respond to requests for information from Pertemps in a timely manner. Even allowing

for his preference not to sit an assessment and go through a revalidation process with Pertemps, he did not have to wait for an appraisal to be carried out to find work. The revalidation process was in any event deferred but he knew or should have known, what he needed to do to revalidate and yet it took him until 2 October 2017, a period of 5 months from his dismissal, to even request a reference.

209. His evidence about the problems about getting a certificate to confirm his immunity status was not documented or dealt with in his statement, this was not put forward in his statement as a reason why it took so long to get work. Even accepting, as on balance the Tribunal does, that he did require a specialist to check his blood samples, his evidence is that it normally takes no more than a month to sort this out. The Claimant was vague about when the blood samples were taken and how many he had. Knowing he had an issue with his immunity, he does not appear to have forewarned Pertemps and he appears to have been slow at responding to requests for documents.

210. The clear impression the Tribunal formed from the Claimant was that he had adopted a somewhat laissez faire attitude to pushing on and sorting out his validation and actively being put forward for roles. He found job advertisements but he never expressed any interest in them, identifying one other agency he made enquiries of but did not send his CV to them.

211. The Claimant is a highly skilled individual in a profession where his skills are needed and in short supply, and for it to take such a long period to find work is quite inexplicable.

212. The Claimant does not allege that ill health was the cause of the delay in finding new work and there is no evidence that he was chasing up Pertemps at any stage whether to organise blood samples, a specialist or about finding him work.

213. The Tribunal consider that had the Claimant acted as a reasonable person would who had no hope of seeking compensation from their employer (*Sir John Donaldson: in Archbold Freightage Ltd v Wilson 1974 IRLR,10 NIRC)*, he would have secured other work by October 2017. He has also produced no evidence to support a finding that he should be awarded any further amounts during periods after he secured work and was then out of work again. There is no evidence of the steps he took to try and secure another position, locum or full time while he was in work. Knowing his work was temporary or fixed term, a reasonable person would have continued to look for other roles while in a temporary or fixed term position, but he has presented no evidence that he did so . The Tribunal consider that had he taken those steps, he would not have had further periods out of work, given the undisputed need for his skills and experience.

214. He should receive a payment for the failure by the Respondent to carry out a fair contractual process. That should not be reduced and is for a period of 3 months loss.

215. He should then receive a further payment for a period of 3 months taking the period to October 2017. That further 3 month period should be reduced by the appropriate Polkey and compensatory reductions.

216. He did receive a payment in lieu of notice as a lump sum and that should be taken into consideration when calculating his losses over that 6 month period.

217. The Court of Appeal in *Addison v Babcock FATA Ltd 1987 ICR 805, CA* held that a notice payment is not an independent right to which an employee is entitled in addition to, and apart from, any compensation from the ex-employer for lost earnings during the period of notice. Accordingly, the employee had to give credit for the notice

payment by offsetting it against such part of a compensatory award as covers the notional notice period.

218. The salary loss is calculated at Threshold 6. That was his contractual entitlement at the date of termination. He has not proven that by October 2017 his pay would have been increased to Pay Threshold 7.

**Pension loss**

219. The Tribunal have had regard to the guidance in the Employment Tribunals Principles for Compensating Pension Loss which provides as follows:

*Simple DB cases: issues for the Employment Tribunal*

*5.30 Where the period of loss to be compensated is relatively short, a tolerably accurate assessment of the net value of lost DB pension benefits can be done using the contributions method. As with using that method in DC cases, it is enough to aggregate the employer's pension contributions for all relevant pay periods covered by the award of compensation (without recoupment). There are several points, however, needing emphasis.*

*5.31 Just as with DC schemes, members of contributory DB schemes may be entitled to a refund of their contributions if they leave with less than two years' qualifying service; this will be subject to the scheme's rules. A claimant who has chosen a refund of their contributions must give credit for them when compensation is assessed.*

*5.32 The first type of DB case we consider appropriate for the contributions method is where the tribunal decides that the claimant's dismissal would have been very likely to occur within a relatively short period, bringing an end to their loss of earnings and loss of DB pension rights. For example:*

*(a) A tribunal finds that a dismissal for redundancy was procedurally unfair but that a fair process, which might have taken longer, would almost certainly have led to the same outcome. In other words, the dismissal would still have occurred, but it would have only been delayed69. An illustration is given at Appendix 3 (see George).*

*(b) Another example is a procedurally unfair dismissal for gross misconduct that would still have occurred at a later point if a proper procedure had been followed.*

*Such scenarios are perhaps rare, but they provide a terminal point for all losses which, even for a claimant who was formerly in a DB scheme, point towards use of the contributions method. They represent what we might call, later in this chapter, a very high "withdrawal factor". However, if the tribunal is satisfied that there is a significant element of ongoing DB pension loss, the contributions method is unlikely to be appropriate. The contributions method is a better choice where, for example, the reduction under the "Polkey" principle, or because of contributory fault, is high*

220. The Tribunal conclude that the simplified approach in this case is appropriate and that the calculation for losses should be based on Pay Threshold 6.

**Basic Award**

221. The calculation of basic award is agreed between the parties.

**ACAS**

222. Claimant seeks a 25% uplift. The Claimant in submissions was invited by the Tribunal

to explain his basis for seeking a 25%. His submissions were rather unclear but in essence he submits that he did not know what procedure was being followed, he asked the Chairman at the appeal to mediate before it went to court. He refers to his grievance not being dealt with and the Respondent went straight to mediation and the mediator shouted at him. There was inadequate investigation about the job plan and there was confusion, he referred to lots of breaches but was not clear what they were and it was unclear if the appeal was quorate.

223. Respondent in its schedule put the appropriate level at 15%.

224. The Tribunal determined at the liability hearing that there had been a disciplinary hearing and the Claimant was offered and had an appeal. There was however a failure to follow in full the contractual disciplinary policy for cases of personal conduct and there was no separate investigation and disciplinary stage and no separation of the roles of those conducting those stages in the process.

225. The Tribunal have had regard to the findings of the liability judgment, including the failings in the procedure (paras 1001 – 1006 of the judgment). The Tribunal found that there were meetings with the Claimant to attempt to resolve his concerns and he was warned that his employment may be terminated . He had the right to have a companion attend meetings with him however, the process was not compliant with the Respondent's policies in fundamental respects (para 1007).

226. By virtue of S.124A ERA, it is clear that, for the purposes of unfair dismissal compensation, any adjustment made in accordance with S.207A only applies to a compensatory award i.e. not the basic award.

227. On balance, the Tribunal take into account that a process was followed, there were hearings, the Claimant had the opportunity to put forward a response, he was warned about possible dismissal but the correct process was not followed and that was unreasonable. There were some mitigating factors in terms of just how difficult it was to engage in discussion with the Claimant to get him back to work and the circularity of the discussions with him.

228. The Claimant did not refer to the ACAS code in his submissions and identify the paragraphs he alleges were breached.

229. The Tribunal consider however that the following provisions of the ACAS code were not complied with:

*2. Fairness and transparency are promoted by developing* ***and using*** *rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear. Employees and, where appropriate, their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used.*

*6. In misconduct cases, where practicable,* ***different people should carry out the investigation and disciplinary hearing.***

*9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the* ***alleged misconduct*** *or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification. Tribunal stress*

230. The Tribunal considers that an uplift of 15 % should be made to the compensatory award. A full uplift of 25% is not appropriate but more than the nominal percentage is.

231. The Tribunal concludes that the following compensation is payable to the Claimant:

**<u>Sums to be awarded:</u>**

**Basic Award**

232. The parties agree the calculation of the basic award which is **£7,579.50**

**Compensatory Award**

**Loss of earnings and pension:**

**21 April 2017 to 22 October 2017:**

233. The loss for this period (salary and pension) less the 3 month payment in lieu of notice received: equates to £18,756.01 plus pension loss £3,716.44 ( based on the average of £285.8 pension loss per week)

**Loss of statutory rights**

234. The Tribunal award the Claimant the sum of £500 to reflect the loss of his statutory rights in terms of statutory notice and protection from unfair dismissal, taking into account his length of service.

235. The above sums equate to: £22,972.45

**Adjustments**

236. The basic award is reduced for 20% to reflect the Claimant's contributory fault which reduces it down to : **£6063.60**

237. The ACAS award is then added to 3 month **compensatory** award to give a figure of **£25,482.42**

238. The sum for the loss of statutory rights of £500 less 50% Polkey deduction is £250

239. The 15% Acas uplift is £37.50

240. Further, 20% reduction for contributory fault : £57.50

241. Compensatory sub-total: £230.

**Grossing up**

The £25,712.42 sum plus the £6,063.60 basic award = £31,776.02

£30,000 is a tax free sum

The amount over £30,000 is £1,776.02

Applying 40% tax to £1,776.02 = £710.41

£710.41 plus £31,776.02 = **<u>£32,486.43</u>**

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**Employment Judge R Broughton**

**Date: 17 September 2024**

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

**"Recordings and Transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/"