



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Tong

Respondent: East Sussex Healthcare Trust

Before: Employment Judge Leith

JUDGMENT

1. The Respondent must pay the Claimant the sum of **£3,756.60**, calculated as set out below.

REASONS

2. I heard the above matter on 23 and 24 October 2025. I gave judgment for the Claimant, for the reasons I gave orally. There was insufficient time to deal with remedy, so I directed the Claimant to produce an updated Schedule of Loss.
3. In light of the relatively modest sums set out in the Claimant's Schedule of Loss, I directed the Respondent to produce a Counter Schedule of Loss commenting on what, if anything was in dispute. I noted that if there was limited dispute then I may be able to deal with the matter on papers.
4. Neither party indicated that they had any objection to me dealing with the matter on the papers, and I consider that I am in a position to do so given what remains in dispute and the findings I made at the liability hearing. I consider also that it is proportionate that I do so, given the relatively narrow dispute both in factual and financial terms, the importance of avoiding further delay, and the need to deal with the proceedings in a proportionate manner. The hearing listed for 17 April 2026 is therefore cancelled.
5. In short, the dispute between the parties is limited to the following points:
 - a. The Claimant's weekly pay (unusually, the gross figure suggested by the Respondent is higher than that put forward by the Claimant);
 - b. Whether there ought to be a payment in respect of pension loss;
 - c. The correct sum to be awarded in respect of loss of statutory rights (it is common ground that such an award ought to be made, but a dispute regarding the value); and
 - d. Whether there ought to be an ACAS Code uplift.

Law

6. A claimant who succeeds in a claim of unfair dismissal is entitled to a basic award calculated in accordance with section 119 of the Employment Rights Act 1996. A week's pay is calculated in accordance with the provisions in sections 221-224 of the same Act.
7. The compensatory award for unfair dismissal is calculated in accordance with section 123 of the 1996 Act. That provides that the Tribunal must award the compensation it considers just and equitable 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.
8. The Employment Appeal Tribunal in the case of *Whelan and anor v Richardson* [1998] ICR 318 set out a number of propositions regarding the calculation of lost earnings. Regarding the case where an claimant has obtained higher-paying employment, the EAT said this:

“As soon as the applicant obtains permanent alternative employment paying the same or more than his pre-dismissal earnings his loss attributable to the action taken by the respondent employer ceases. It cannot be revived if he then loses that employment either through his own action or that of his new employer. Neither can the respondent employer rely on the employee's increased earnings to reduce the loss sustained prior to his taking the new employment. The chain of causation has been broken.”

9. As part of the compensatory award, the Tribunal may make an award to compensate the employee for the loss of the statutory employment rights which are based on length of service.
10. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that, in proceedings in the jurisdictions set out in Schedule A2 of that Act, where it appears to the 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 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%. The adjustment is to the compensatory award only (by virtue of section 124A of the 1996 Act).

11. The reference to a Code is to a Code of Practice issued by ACAS under that Chapter of the Act. The Schedule A2 includes a complaint of unfair dismissal.
12. The relevant Code of Practice relied upon in this case is the Code of Practice on Disciplinary and Grievance Procedures.

Findings and conclusions

13. I start with the weekly pay figures. It is common ground that the Claimant was employed on Agenda for Change Band 6. The Claimant's employment terminated on 21 October 2024.
14. The Respondent's case is that the Claimant's gross weekly pay was increased by an Agenda for Change pay award which was implemented in October 2024 but backdated to April 2024.
15. Given the retrospective nature of the pay increase, I consider that the correct figure to use in respect of the basic award must be the uplifted figure, because that is the Claimant's effective average weekly pay once the backdated pay award was applied. Similarly, the figure to be used for loss of earnings post-termination must be the higher figure, as that is what the Claimant would have received if she had remained in employment. It is of course entirely proper that the Respondent, as a public authority, has drawn the higher figures to the Tribunal's attention.
16. I therefore find that the Claimant's gross weekly basis pay was **£464.77**.
17. Because the Claimant was never actually paid at that rate, there is not (and could not be) any contemporaneous evidence of the Claimant's net pay. The Respondent has presented a tax calculation showing net pay. That does not, however, account for the Claimant's personal allowance. This appears to be because the Respondent has used the tax code from a post-termination payslip, which appears to be an emergency tax code, and consequently taxes all income at the basic rate with no account being made of the personal allowance.
18. Doing the best I can with the available figures, and using the tax rates for the 2024/25 tax year:
- The personal allowance of £12,570 equates to £241.73 per week. So the first £241.73 of the Claimant's weekly pay would not have been subject to deductions for income tax.
 - The remaining £223.04 would have been taxed at the basic rate of 20%, giving a total of £44.61 income tax payable.
 - National insurance contributions of £17.84 would also have been payable (taken from the Respondent's calculation).
 - The Claimant was also paying pension contributions of 6.5%, a total of £ 30.21 per week.
 - Deducting those sums from the gross weekly pay gives a net weekly pay of **£372.11**.
19. The Claimant had five years' service at the date of termination, and was 36 years of age. Using the figure for gross weekly pay, that gives a total basic award of **£2,323.85¹**.
20. In respect of lost earnings, it is common ground that the Claimant's had two weeks lost earnings before she fully mitigated her losses, by taking on

¹ This is slightly different from the figure reached by the Respondent – I assume that the Respondent's figure of £2,232.85 is simply a typographical error.

higher-paying employment. So I award two weeks net pay, a total of **£744.22**.

21. For that period, the Claimant also lost the pension contributions her employer would have made. The Claimant was in a defined benefit scheme (the NHS Pension Scheme). She is now in other NHS employment, and the period for which she was outside the scheme is very short, so plainly the correct methodology for compensating her for the loss is the simplified one.
22. The employer's contribution rate at the relevant time, per Regulation 33(1) of the National Health Service Pension Scheme Regulations 2015, was 23.7%. That gives a contribution rate of £110.15 per week based on the gross weekly wage set out above, making a total pension loss of **£220.30**.
23. In respect of the loss of statutory rights, I consider that the Claimant's lost statutory rights are mitigated to a degree by the fact that she went relatively swiftly into other NHS employment. That does not, however, entirely extinguish her loss of accrued statutory rights. In the circumstances, I consider that the correct sum to award is **£400**.
24. The Claimant has claimed lost earnings for attending the Tribunal hearing (and prospectively for the remedy hearing). There was no evidence before me regarding how the Claimant took the time for the final hearing off work – that is, whether she took paid annual leave or unpaid leave, or whether she was simply not rota'd to be on shift on the days in question. So there is no evidence of the financial loss set out by the Claimant, and I cannot be satisfied that that is a financial loss flowing from the Claimant's dismissal.
25. In any event, bearing in mind the principle set out down the EAT in *Whelan*, the Claimant's losses must stop from the date when she obtained new (and higher paying) employment. That was approximately a year before the Tribunal hearing. So any lost earnings as a result of attending the Tribunal hearing could not be claimed as part of the compensatory award in this case. I therefore make no award in that regard.
26. That gives a subtotal for the compensatory award of **£1,364.52**.
27. I then turn to consider whether to make any uplift for failure to follow the ACAS Code of Practice. The Claimant, in her Schedule of Loss, refers to the Respondent failing to issue responses to her grievance in a timely manner.
28. I remind myself of the findings that I made at the liability hearing. I will not repeat my findings here. Those findings and conclusions were made through the lens of whether the Respondent had, without reasonable and proper cause, conducted itself in a way which had destroyed or seriously damaged the implied term of mutual trust and confidence (that being the test for constructive unfair dismissal). Of particular importance, and in short summary:
 - a. I found that the Claimant was not told the outcome of her grievance (or at least had not been told the outcome at the point that she resigned).

- b. The Claimant resigned almost eight months after her grievance had been submitted.
 - c. When she did receive an outcome of sorts, it was simply to tell her that she would not be told what had happened because of confidentiality.
 - d. Consequently, she was also not offered any right of appeal.
 - e. The Respondent was placed in a somewhat difficult situation in that the grievance the Claimant raised led to disciplinary action being taken against another employee. Plainly, they could not tell the Claimant the outcome of that disciplinary process.
 - f. Nevertheless, the effect was that the Claimant had no idea which, if any, of the concerns she had raised had been found to be well founded, or why. She was left in the dark.
29. I concluded in my liability judgment that that constituted a breach of the ACAS Code of Practice, and that the Respondent did not have reasonable or proper cause for acting as it did. Bearing in mind my findings and conclusions on liability, I conclude that the Respondent's breach of the ACAS Code of Practice was also an unreasonable one, so the threshold test for making an uplift is met.
30. Of course, the breach was not wholesale. The Claimant's grievance was investigated. It was taken seriously by the Respondent. And I do bear in mind the difficulty where the outcome of a grievance is that disciplinary action against another employee will be triggered. But it remains the fact that the Claimant was never given an outcome in respect of the matters she had grieved about. Stepping back, and bearing all of that in mind, I consider that it is appropriate to make an uplift for unreasonable failure to comply with the ACAS Code of Practice, and that the appropriate uplift is 5%.
31. That gives an uplift to the compensatory award of **£68.23** (there is no uplift to the basic award).
32. So the total sum I award is **£3,756.60**. The sum arises from the termination of the Claimant's employment and is under £30,000, so there is no need to gross up for tax.

Approved by:

Employment Judge Leith

Date: 12 March 2026

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