



EMPLOYMENT TRIBUNALS

Claimant: Miss S J Austin

Respondent: The Leeds Teaching Hospitals NHS Trust

Mrs LJ Anderson-Coe
Mr M Brewer

UPON the application of the claimant dated 15 March 2020 to reconsider the reserved judgment on remedy sent to the parties on 2 March 2020, under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing,

JUDGMENT ON RECONSIDERATION

the reserved judgment on remedy sent to the parties on 2 March 2020 is varied to read:

1. The respondent shall pay to the claimant **£282,990.27** as compensation for disability discrimination, including interest of £6,962.30.
2. The respondent shall pay £3,394.68 to the claimant as damages for breach of contract in respect of notice.

REASONS

Application

1. The claimant applied, by email dated 15 March 2020, for reconsideration of the reserved judgment on remedy sent to the parties on 2 March 2020. Unfortunately, owing to administrative error and measures arising from the Covid pandemic lockdown, that email was not referred to a judge until the claimant sent a further email on 27 August 2020 enquiring after a response. Following written representations from the parties, the Tribunal panel met virtually on 4 November 2020 to hear the reconsideration on the papers.

Submissions

2. The grounds for the claimant's application were that one point of the Tribunal's

calculation of the compensation figure set out in the reasons to the judgment on remedy sent to the parties on 2 March 2020 was wrong. The claimant's application explained that, at paragraph 99 of the Tribunal's written reasons, the basis for the calculation of the amount of assumed future NEST pension offset from the pension losses was based on an incorrect minimum employer contribution rate. The written reasons gave the rate as 8%, but in fact the minimum employer contribution for the NEST scheme was 3%. The claimant calculated that, using the correct employer contribution rate, the value of the assumed future NEST pension to be offset would be, after tax, £4,528, rather than the £12,160 set out in the written reasons and reflected in the judgment. The claimant's application therefore asked the Tribunal to reconsider and enter judgment on remedy for an amended figure of £282,990.27.

3. The respondent submitted written representations by email dated 28 August 2020, asking that the application be dismissed because, at paragraph 99 of the judgment on remedy the Tribunal had used its best estimates in an area of obvious uncertainty. The respondent noted the Tribunal's statement that the estimate produced "*...does not take account of increases in the national minimum wage, likelihood of earnings above national minimum wage, employer contributions above the minimum 8% or various other contingencies which might increase that figure, it also does not take account of the possibility of periods of self-employment, unemployment or part time employment. We therefore consider that, on the information available to us, it is an adequate estimate of future pension accrual in the circumstances.*" The respondent submitted that the calculation was not and could not be an exact science and that, pursuant to Rule 70 of the Employment Tribunal Rules of Procedure, this was not therefore a case where the interests of justice required the judgment to be reconsidered.
4. The claimant made further representations, dated 28 September 2020, in which it was argued that the respondent's submissions related to variables of fact which were not relevant to the claimant's application for reconsideration of a specific fact on which the tribunal was not required to make an estimate. The claimant argued that the employer's minimum contribution was a very specific finding and there was no uncertainty in the Tribunal's finding that only the minimum amount would be deducted, nor any ambiguity or uncertainty about what that figure was, given that it was set out in legislation. The claimant argued that the Tribunal's statement that this was 8% appeared to be an administrative error, given that the total contribution including employee contribution would be 8%. The claimant submitted that the incorrect use of the 8% figure was of significant prejudice to the claimant.

Determination

5. Paragraphs 98 and 99 of the written reasons to the judgment on remedy sent to the parties on 2 March 2020 read:

98. Mr Lockett's report does not take account of any possible replacement pension from future employment. This was an area on which both the evidence and submissions from the parties were unhelpfully vague. We have referred to paragraph 5.56 (f) of the Principles and concluded that the best estimate we can make is that, if she is successful as a hairdresser, she may become an employee (although self-employment is also a possibility). As an employee, our best estimate of salary is national minimum wage rates, and there would be a right to automatic enrolment in a NEST pension.

99. As suggested by the Principles, we have used the NEST calculator (<https://www.nestpensions.org.uk/schemeweb/NestPublicWeb/faces/public/BE/page/s/pensionCalculationPublicAreaResult.xhtml>). Using the claimant's date of birth, the rate of national minimum wage at the date of the remedy hearing, working hours of 30 hours per week, over 52 weeks' per year, we calculated an annual gross salary of £12,807.60. Estimating a minimum employer contribution following auto enrolment of 8%, the calculator gives a gross pension estimate of £15,200 on retirement at age 67. While we acknowledge that this figure does not take account of increases in the national minimum wage, likelihood of earnings above national minimum wage, employer contributions above the minimum 8% or various other contingencies which might increase that figure, it also does not take account of the possibility of periods of self-employment, unemployment or part time employment. We therefore consider that, on the information available to us, it is an adequate estimate of future pension accrual in the circumstances. Assuming that the claimant's accrued pension benefits to date are such that she is likely to pay income tax at basic rate on any NEST pension income after retirement, we have deducted income tax at 20% from the NEST pension figure, giving an estimated deduction from overall pension loss to take account of NEST benefits gained of £12,160 net.

6. The panel considered the parties' representations. We agreed that, while there were elements of the calculation that were of necessity best estimates, the figure for the minimum employer contribution to the NEST pension was not one of them. The minimum employer contribution is defined by legislation and the Tribunal expressly intended to use that statutory minimum contribution figure. The figure of 8% was clearly an error, based on the minimum combined employer and employee contributions (3% and 5% respectively). Had the Tribunal spotted the error, we unanimously agreed that the calculation would have been based on the correct minimum employer contribution of 3%. The fact that the Tribunal concluded that a total based on an erroneous figure was an 'adequate estimate', in circumstances in which there were a number of less predictable variables of fact, does not make that total just. Nor did the panel consider that, had the figure of 3% been used in the calculation, any of the other variables would have been estimated differently.
7. We therefore agreed, unanimously, that it was both necessary in the interests of justice to reconsider the judgment, given that it was in part based on an error, and that the judgment should be varied to take account of the correct minimum employer contribution of 3%.

Conclusion

8. We adopted the calculations set out in the claimant's email of 15 March 2020. Paragraph 99 is varied to base the employer contribution on a minimum payment of 3%, giving an estimated value for the NEST pension of £5,660. After tax at 20% this gives a deduction against pension loss of £4,528. Consequently, the total pension loss is calculated as £108,860 - £4,528 = £104,332. Total taxable compensation is brought to £147,074.71.
9. The Finlay Table set out at paragraph 151 of the judgment on remedy sent to the parties on 2 March 2020 is varied to read:

	Gross	Tax	Net
PA (0%) to £12,500	£12,500.00	£0.00	£12,500.00
BR (20%) the next £37500	£37,500.00	£7,500.00	£30,000.00
HR (40%) up to £100,000	£50,000.00	£20,000.00	£30,000.00
NR (60%) from £100,001 to £125,000	£25,000.00	£15,000.00	£10,000.00
HR (40%) up to £125,001 to £150,000	£25,000.00	£10,000.00	£15,000.00
AR (45%) £150,001 upwards	£90,134.56	£40,560.55	£49,574.01
TOTALS	£240,134.56	£93,060.55	£147,074.01

10. Paragraph 152 is varied to read “An amount of £93,060.55 must therefore be added to reflect the tax payable on the compensation awarded”.

11. The total compensation payable, set out at paragraph 153, is varied to read:

Damages for breach of contract	£3,394.68
Basic award for unfair dismissal	£8,470.38
Loss of Statutory rights	£565.78
Loss of wages to date of hearing (including expenses and interest of £1,685.85)	£17,763.74
Future Loss of Wages	£16,702.86
CBT	£3,000.00
Pension Loss	£104,332.00
Injury to Feelings (including interest of £5205.27)	£32,629.10
Personal Injury (including interest of £71.18)	£3,071.18
Amount to be added for grossing up	£93,060.55
Total	£282,990.27

Employment Judge Bright
Dated: 9 December 2020