



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Asani

**Respondents:** 1. Dr Anant Prasad t/a Shanti Medical Centre  
2. Dr Shaista Hanif t/a Shanti Medical Centre

**HELD AT:** Manchester

**ON:** 28 February 2018  
(in chambers)

**BEFORE:** Employment Judge Franey

## SUPPLEMENTARY JUDGMENT ON REMEDY

1. In addition to the amounts awarded in the judgment sent to the parties on 24 January 2018, the respondents are also ordered to pay to the claimant the following additional sums as part of the compensatory award for unfair dismissal:

- (a) Compensation for loss of pension rights (after an uplift of 20% for failure to follow the ACAS Code of Practice) in the sum of **£99,036.08**; and
- (b) An additional amount by way of grossing up (so as to take account of the impact of tax) in the sum of **£112,380.17**.

2. The total amount payable to the claimant by the respondents is therefore as follows:

Awarded in previous judgment	£80,513.96
Awarded in this judgment	<u>£211,416.25</u>
Total	<b>£291,930.21</b>

3. The recoupment regulations do not apply.

# REASONS

## Introduction

1. This judgment and reasons should be read after the judgment and reasons sent to the parties on 24 January 2018. References to paragraph numbers are references to those reasons unless otherwise indicated.
2. That judgment was promulgated following a hearing on 10 and 11 January 2018 in which I determined that the claimant was unfairly dismissed by reason of a protected disclosure contrary to section 103A Employment Rights Act 1996 (“the Act”), and that he was dismissed in breach of contract.
3. The judgment also addressed remedy. I made awards in respect of notice pay and the basic award for unfair dismissal. I also made an award as part of the compensatory award for unfair dismissal, to which I applied an uplift of 20% because of an unreasonable failure by the respondent to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.
4. For reasons set out in paragraphs 93-95, however, there were two elements of the compensatory award which I could not determine:
  - (a) The appropriate award in respect of pension loss; and
  - (b) The grossing up required in order to ensure that the net amount received by the claimant after tax was the appropriate amount to compensate him for his losses.
5. The parties were informed that those matters would be determined in chambers on 28 February 2018.
6. I had a written submission on behalf of the claimant as to the appropriate awards for pension loss and in respect of grossing up.
7. Dr Hanif and Dr Prasad also had the opportunity to make any written submissions. Dr Prasad indicated at the hearing that he did not wish to make any such submissions. Dr Hanif had until 16 February 2018 to make any submissions but none had been received by the time of the hearing on 28 February 2018.
8. Accordingly when the hearing reconvened in chambers on 28 February 2018 I determined pension loss and grossing up on the basis of the factual findings recorded in the January reasons, and on the basis of the submissions made on behalf of the claimant as to the appropriate awards. I also had regard to the Presidential Guidance to Employment Tribunals issued on 10 August 2017 attaching a document setting out the Principles for Compensating Pension Loss (“the Principles”).

## Relevant Legal Framework

9. I recorded in paragraph 102 the primary provision in section 123(1) of the Act. My task was to award such amount as I considered just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal insofar as that loss was attributable to action taken by his employer. Because this was a whistle-blowing dismissal there was no cap on the amount which could be awarded.

10. For reasons set out in the earlier judgment I rejected the contention that there should be any reduction to the compensatory award by reason of contributory fault, bad faith in the making of protected disclosures, or because employment would have come to an end in the future in any event.

11. I determined, however, that the compensatory award should be increased by 20% because of an unreasonable failure by the respondents to follow the ACAS Code of Practice. Under section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 I considered it just and equitable to apply the uplift to the pension loss element of the compensatory award too, but not to the amount awarded by way of grossing up to compensate for the impact of tax.

## Relevant Facts

12. As recorded in paragraphs 149-151, I found that the claimant was employed by the respondents on a gross annual salary of £31,363.89 at the time he was unfairly dismissed.

13. He was a member of the 1995 section of the NHS pension scheme, having commenced pensionable service on 1 July 2001. That scheme is a defined benefit scheme based on 80<sup>ths</sup> of final salary, with an additional lump sum of three times the annual pension. The claimant's membership of that scheme was evidenced by a reward statement issued by the scheme for the financial year 2015/2016.

14. I found that had the claimant not been unfairly dismissed he would have remained in employment at Shanti Medical Practice (including any successor to the current partnership) until his retirement at age 66 in August 2025.

15. Having been dismissed the claimant managed to find alternative employment with the Deane Medical Practice. That was a similarly stable position and it enabled him to retain membership of the same pension scheme. However, his gross annual salary is £21,898.80. This means that although in broad terms he will have accrued the same length of service at retirement, the final salary on which his pension will be based (and the annual pension on which his lump sum will be based) will be smaller at age 66 than if he had not been unfairly dismissed.

16. I considered it appropriate to adopt the "seven steps model" for calculating pension loss in complex cases advocated by paragraphs 5.54 - 5.61 of the Principles. It seemed to me this was more likely to lead to a just and equitable figure for pension than simply adopting a percentage of gross salary as an approximate measure of the value of pension scheme membership. It was the approach for which the claimant advocated and no one opposed that suggestion.

17. I set out below the calculation of compensation for loss of pension rights on that basis.

### **Pension Loss Calculation**

#### Step One

18. Step one is to determine what the claimant's net annual pension would have been from age 66 had he not been dismissed but remained in employment with the respondents. By that stage he would have accrued 24.1452 years of pensionable service. There was no evidence that his salary at dismissal would have been likely to have increased (as the perception was that he was overpaid). His final salary was therefore taken as the current value, £31,363.89. The gross annual pension would therefore have been  $31,363.89 \div 80 \times 24.1452 = £9,466.09$  per annum.

19. This is a gross figure, but the use of the online calculator provided by HMRC (Principles paragraph 5.55(g)) shows that no tax will be payable. This is therefore the net figure for annual pension income at step one.

#### Step Two

20. Step two is calculating what pension the claimant will now receive at retirement age given his dismissal. There was no suggestion that he would receive any increases in his current salary. I proceeded on the basis that his entitlement to annual pension will be calculated on a final salary of £21,898.80. The calculation is therefore  $21,898.80 \div 80 \times 24.1452 = £6,609.39$ .

21. Once again the online HMRC calculator showed that no tax will be payable so this is the net figure at step two.

#### Step Three

22. Step three is simply the calculation of the difference between the two figures, which in this case is £2,856.70. The claimant's pension will be lower by that amount each year from age 66 for the rest of his life.

#### Step Four

23. Step Four is to identify the period over which that net annual loss is to be awarded and to ascertain the appropriate multiplier.

24. I decided to use the current statutory discount rate applicable in personal injury cases in the civil courts (- 0.75%) as recommended by paragraph 5.50 of the Principles. The claimant argued for that and no one suggested any different approach.

25. I considered it just and equitable to adjust the claimant's age for these purposes downwards by two years to reflect the fact that in broad terms members of occupational pension schemes can expect to live for about two years longer than the population as a whole (Principles paragraphs 5.53 (e) and (f)). The Ogden table multipliers are based on the whole population, not this specific subset. I treated the

claimant as aged 56 rather than 58, and reduced his retirement age for these purposes from 66 to 64. I will call this “the mortality adjustment”.

26. There is no Ogden table for retirement at age 64. Table 19 deals with retirement for males at age 60 and table 21 with retirement for males at age 65. It was therefore necessary for me to carry out the interpolation calculation recommended by paragraph 13 of section A to the explanatory notes of the 7<sup>th</sup> edition of the Ogden tables. That sets out six steps which can be summarised as follows:

- (1) The retirement age from table 19 is 60 (“A”) and the retirement age from table 21 is 65 (“B”). The claimant's actual retirement age (after the mortality adjustment) is 64 (“R”).
- (2) Four years must be subtracted from the actual retirement age of 64 to get to figure A, and therefore four years are taken off the claimant's (adjusted) age of 56 to produce an age for these purposes of 52.
- (3) In table 19 the multiplier for a person aged 52, using the discount rate of minus 0.75%, is 30.74 (“M”).
- (4) One year must be added to R to get to B and therefore the claimant's age is treated in this section as 57.
- (5) In table 21 the multiplier for a person aged 57, using the discount rate of minus 0.75%, is 24.68 (“N”).
- (6) The interpolation calculation is then  $(B - R) \times M + (R - A) \times N$  divided by  $(B - R) + (R - A)$ . Using the values set out above this translates to  $30.74 + 98.72 = 129.46$  divided by 5 giving a multiplier of 25.89.

27. I did not consider it appropriate to make any further adjustments to that multiplier to reflect contingencies other than mortality because there was no evidential basis for any such approach in this case. Any such considerations would have been reflected in a withdrawal factor but for reasons set out in the earlier judgment I was satisfied that the claimant would have remained in employment with the respondent until retirement age, and will do so in his new role.

#### Step Five

28. Step five is simply the application of the multiplier at step four to the multiplicand at step three. This is as follows:

$$25.89 \times 2,856.70 = \text{£}73,959.96.$$

29. This represents the capital value today of the annual loss of £2,856.70 which the claimant will suffer each year from retirement at age 66 for the rest of his life.

#### Step Six

30. Step six is concerned with separate treatment of the lump sum.

31. Had the claimant remained in employment with the respondent his lump sum would have been  $3 \times \pounds 9,466.09 = \pounds 28,398.27$ . Instead his lump sum will be  $3 \times \pounds 6,609.39 = \pounds 19,828.16$ . The lump sum loss at age 66 is therefore  $\pounds 8,570.11$ .

32. In his written submission the claimant did not seek any adjustment to this figure to reflect the effect of a negative discount rate and therefore I made no adjustment. I awarded this figure as compensation in 2018 for the lump sum loss which will occur in 2025.

### Step Seven

33. Step seven is to add the two figures together and then deal with grossing up. I will address grossing up in a separate section below. The total award for pension loss before grossing up was therefore as follows:

Compensation for annual loss	£73,959.96
Compensation for lump sum loss	<u>£8,570.11</u>
Total	<u>£82,530.07</u>

34. For reasons set out in the previous judgment I determined that the compensatory award should be increased by 20% because of the unreasonable failure by the respondents to follow the ACAS Code of Practice. Applying this 20% increase to the award in respect of pension loss added a further  $\pounds 16,506.01$ , making a total award for pension loss of **£99,036.08**.

### **Grossing Up**

35. Before the effect of tax on the Tribunal awards can be taken into account, the total award to the claimant from the previous judgment of  $\pounds 80,513.96$  is to be added to the award in respect of pension loss of  $\pounds 99,036.08$ . This produces a total award of  $\pounds 179,550.04$ .

36. I anticipate, however, that  $\pounds 30,000$  of that will be exempt from tax as a termination payment and therefore the taxable element of the award is  $\pounds 149,550.04$ .

37. Identifying the amount of tax to be paid on this figure is complicated by a number of factors. Firstly, the tax will not be charged at a single rate but will cover all three tax bands in the tax year of receipt, which I took to be the current year ending on 5 April 2018. Secondly, the figure will mean that the claimant loses his personal allowance because each  $\pounds 2$  of income above  $\pounds 100,000$  of taxable income reduces the personal allowance by  $\pounds 1$ . Thirdly, the claimant will have other taxable income in the tax year in question, which I took to be his gross annual salary of  $\pounds 21,898.80$ .

38. It seemed to me just and equitable to approach the matter as follows.

39. The total taxable income in the tax year in which the Tribunal award ought to be paid (2017/2018) is  $\pounds 149,550.04$  (tribunal award) +  $\pounds 21,898.80$  (salary) =  $\pounds 171,448.84$ .

40. The personal allowance will have been lost so the basic rate of 20% will apply to the first £33,500 of that income. That will mean that tax of £6,700 will be payable, leaving net income of £26,800. That accounts for the first £26,800 of the award, leaving £144,648.94.

41. The next tax band of 40% applies for gross income up to £150,000, being the next £116,500.00 of gross income. The tax is £46,600 and the income after tax £69,900. That accounts for a further £69,900 of the award, leaving £74,748.94.

42. That figure is the net amount to be left once tax at 45% of the higher gross figure has been paid. It is 55% of the gross amount, which is therefore  $(74,748.64/55 \times 100)$  £135,906.61. This means that tax of £61,157.97 will be payable leaving a net sum of £74,748.94.

43. Adding these figures for tax together (6,700 + 46,600 + 61,157.97) means that the total amount of tax which will be payable by the claimant is £114,457.97.

44. A summary appears in this table:

	<b>Rate</b>	<b>Gross (£)</b>	<b>Tax (£)</b>	<b>Net (£)</b>
<b>Personal allowance</b>	Not applicable due to the personal allowance taper			
<b>Basic rate</b>	20%	33,500	6,700	26,800
<b>Higher rate</b>	40%	116,500	46,600	69,900
<b>Additional rate</b>	45%	135,906.61	61,157.97	74,748.64
<b>TOTAL</b>		<b>285,906.61</b>	<b>114,457.97</b>	<b>171,448.64</b>

45. It is appropriate to reduce this, however, by the amount of tax the claimant would be paying in the current year if no Tribunal award were made to him.

46. Using the HMRC online calculator and a taxable figure of £21,898.80 shows that would be £2,077.80.

47. This is deducted from the additional tax figure of £114,457.97 leaving £112,380.17 as the amount of tax the claimant seems likely to have to pay which he would not have had to have paid had no Tribunal award been made to him.

48. To compensate the claimant for the extra tax which he will have to pay as a consequence of the Tribunal awards, therefore, I awarded him a further **£112,380.17**.

Employment Judge Franey

1 March 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

8 March 2018

FOR THE TRIBUNAL OFFICE





## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2401645/2017

Name of case: Mr N Asani v 1. Dr Anant Prasad t/a Shanti Medical Centre  
2. Dr Shaista Hanif t/a Shanti Medical Centre

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 8 March 2018

"the calculation day" is: 9 March 2018

"the stipulated rate of interest" is: 8%

MR S ARTINGSTALL  
For the Employment Tribunal Office