Case Number: 3324911/2017

EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Prof P Ewart	**v**	The Chancellor, Masters and Scholars of the University of Oxford

Heard at: Reading **On:** 7 September 2020

Before: Employment Judge Anstis
Mrs A E Brown
Mr J Appleton

Appearances:
For the Claimant: Mr A Sugarman (counsel)
For the Respondent: Mr S Jones QC (counsel)

REMEDY JUDGMENT

1. The claimant shall be reinstated to the position of senior researcher on a 0.8 FTE contract for a fixed maximum term to expire on 30 September 2021 with effect from 1 October 2020. For the avoidance of doubt, the order is not intended to create any fixed minimum term of appointment nor to create any additional power for the respondent to terminate the appointment earlier than 30 September 2021.

2. The respondent shall pay to the claimant such salary as he would have received had he been employed from 1 October 2017 until 30 September 2020 as a senior researcher on a 0.8 FTE contract, remunerated at point 6 on grade 10.

3. The respondent shall pay to the claimant £22,500 by way of compensation for injury to feelings, together with an additional £7,110.00 interest on such payment.

Employment Judge Anstis
7 September 2020
1st Oct 2020

Sent to the parties on: .....
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.....
For the Tribunal Office

Note:
Written reasons for this decision were requested at the hearing and will be provided separately.

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WRITTEN REASONS FOR REMEDY JUDGMENT

A. INTRODUCTION

1. These are the written reasons for our remedy judgment of 7 September 2020. They were requested by the respondent at the end of the remedy hearing.

2. In a liability judgment dated 29 November 2019 we found that the respondent had unfairly dismissed the claimant and had unlawfully discriminated against him because of age. The full findings are in our reserved judgment, which contains full reasons for our decision.

3. At the conclusion of our liability hearing we listed the case for a provisional remedy hearing to take place on 7-9 September 2020. At the time it was listed it was not known if the claimant would succeed in his claim or whether the remedy hearing would be needed. The listing was provisional, in order that there was a date reserved in the tribunal's diary in case any remedy hearing was necessary.

4. It was clear from the liability judgment that the remedy hearing would be necessary, and at the same time as issuing the liability judgment the tribunal made a case management order. We set out extracts from this case management order below:

> *"2.1 The claimant must provide to the respondent and tribunal by 28 February 2020 a updated document – a "Schedule of Loss" – setting out as at that date what remedy is being sought and how much in*

compensation and/or damages the tribunal will be asked to award the claimant ...

2.3 To the extent that the respondent does not accept the amounts claimed in the schedule of loss (or other non-financial remedy claimed) the respondent must provide to the claimant and the tribunal by 27 March 2020 a counter-schedule of loss setting out the respondent's calculations or statement of what (if any) financial or non-financial remedy the claimant is entitled to ...

3.1 On or before 30 April 2020 the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the remedy hearing or which are relevant to any issue in relation to remedy. They shall send each other a copy of any of these documents if requested to do so.

4.1 By 29 May 2020, the parties must agree which documents are going to be used at the remedy hearing. The respondent must paginate and index the documents, put them into one or more files ("bundle"), and provide the claimant with a 'hard' and an electronic copy of the bundle by the same date ...

5.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give in respect of remedy matters and must provide copies of their written statements to each other on or before 31 July 2020. No additional witness evidence will be allowed at the remedy hearing without the Tribunal's permission."

5. The respondent has appealed against our liability decision. At the date of the remedy hearing we understood that this appeal was to be considered by the Employment Appeal Tribunal at a preliminary hearing on 22 September 2020. Mr Jones confirmed at this hearing that the appeal is confined to our decision on age discrimination and not our decision on unfair dismissal.

6. On 5 August 2020 the claimant made an application (copied to the respondent) to debar the respondent from participating in the remedy hearing, for it not to be permitted to rely on a counter-schedule or any further evidence, or for an unless order, in respect of the respondent's non-compliance with the case management order. This application was not considered by the tribunal prior to this hearing, by which time the application for an unless order had been overtaken by events.

7. On 19 August 2020 the respondent applied to postpone this remedy hearing, essentially on the basis that any remedy decision should await the outcome of the appeal against our findings on liability. That application was rejected by Employment Judge Gumbiti-Zimuto.

B. PRELIMINARY ISSUE

8. The first point we had to consider in the claim was the claimant's application in respect of the respondent's non-compliance with the case management order.

9. Mr Sugarman took us through events following receipt of our liability decision. The claimant applied for and was granted an extension of time in respect of the initial provision of his schedule of loss. This was provided in within the extended period, and the claimant proceeded to do everything within his power to comply with the various elements of the tribunal's order even, in the face of the respondent's apparent refusal to produce a hearing bundle, producing the hearing bundle himself.

10. The respondent did absolutely nothing in response to the order and has not complied with any element of it. This was despite the claimant on multiple occasions pointing out the respondent's non-compliance and calling upon it to comply with the order.

11. It appears that all that had been done by the respondent in the period following the liability judgment was to appeal the liability judgment, following which nothing at all had been done until,

    (i) the unsuccessful application of 19 August 2020,

    (ii) a brief commentary on the claimant's schedule of loss, sent on 2 September 2020, and

    (iii) production of a witness statement and some further documentary evidence which were only provided to the claimant on (respectively) the Friday and Sunday before this hearing (which took place on a Monday).

12. Despite the claimant having previously made a written application, and despite the obvious issues that may flow from this non-compliance, Mr Jones had not been briefed by his instructing solicitors on this point and was unaware until the morning of the hearing that there was an issue regarding compliance with the order. He said that he had been able to take instructions on being notified of the point by Mr Sugarman on the morning of the hearing, and that by way of explanation his instructing solicitors had said that they had not expected today's hearing to go ahead, either because of Covid-19 restrictions or because the hearing would be postponed pending resolution of the appeal. It was not suggested that they had formed this view following any conversation with the tribunal or had in any way been led to think this because of actions on the part of the tribunal.

13. As Mr Jones properly accepted, while this may be the explanation for the non-compliance, we cannot regard this as being any sort of excuse for the non-compliance. The tribunal continues to hold hearings (whether in person or by other means) despite the Covid-19 pandemic, and has been doing so since the first days of lockdown in March. An appeal would not routinely be considered a good reason for a remedy hearing not to proceed, and that is particularly so where, as in this case, the appeal is only against part of the judgment. Beyond that, even if the respondent's solicitors had been correct in their assessment of the situation, that would not of itself have meant that they

did not have to comply with the tribunal's order. An order is in force until varied or revoked by the tribunal. No application has been made by the respondent for any variation in the order.

14. Mr Jones went on to say that on instructions, he could offer not to oppose (but also not to consent to) any application by the claimant for reinstatement, provided the respondent was not later limited in its arguments on the practicability of reinstatement if a hearing under section 117 of the Employment Rights Act 1996 was later necessary. We are not quite sure what the status of that offer was by the end of the hearing, as in his closing submissions Mr Jones argued against reinstatement. We have made our decision in this case without the need to rely on this point.

15. The respondent has offered no good reason for its failure to comply with the tribunal's order. The respondent has made no effort to comply with the tribunal's order, and did not take any steps to seek to vary or revoke the order. The best that can be said is that the respondent appeared to be taking a chance that this hearing would not happen and that therefore its non-compliance would not have any substantial effect. This is not a proper way to proceed. We regard this as a case of deliberate non-compliance by the respondent.

16. What we should do about this non-compliance is a separate matter. This is not a jurisdiction in which non-compliance with orders carries an automatic sanction (see rule 6 below). We must consider the broad interests of justice (in particular the overriding objective) in responding to such non-compliance. We must also consider the consequences of non-compliance in relation to the individual applications made by the claimant and the individual elements of non-compliance, when read against the terms of our order.

17. Our powers to address this non-compliance and its consequences are set out in rules 6 and rule 37 as follows:

> *"6 A failure to comply with … any order of the Tribunal … does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following:*
>
> *(a) waiving or varying the requirement;*
>
> *(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;*
>
> *(c) barring or restricting a party's participation in the proceedings;*
>
> *(d) awarding costs in accordance with rules 74 to 84.*
>
> *37 (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out*

> *all or part of a claim or response on any of the following grounds:*
>
> ...
>
> *(c) for non-compliance with ... an order of the Tribunal;"*

The witness statement

18. The first and most obvious problem is with the witness statement of Mr Probert. This is directed at the practicability of reinstating the claimant to the respondent's Physics department. It was provided to the claimant the working day before this hearing, when the order required any such witness evidence to have been served on or before 31 July 2020.

19. Our order provided that:

> "*No additional witness evidence* [other than that exchanged in accordance with our order] *will be allowed at the remedy hearing without the Tribunal's permission.*"

20. As Mr Sugarman pointed out, with the order framed in this way it was Mr Jones who needed to make an application to admit the witness statement, rather than the claimant who needed to make an application for us to refuse the witness statement. No such application was made. We have, however, considered the point more generally. There is no good reason for the late submission of this statement. There is nothing in it that appears to relate to matters that have only arisen recently. There is no reason why it could not have been prepared and exchanged in accordance with our order.

21. Mr Sugarman has raised a number of points that he says the claimant takes issue with in the statement, and where the claimant would have wanted to produce evidence to contradict and challenge the statement, but has been prevented from doing so by virtue of have received it so late. This included historical data in relation to the Physics department's budget, which was said to show that the department had always run at a deficit so that Mr Probert's reference to the department's finances ought not to be taken as a reason to refuse reinstatement.

22. Neither side sought an adjournment of this hearing, nor would we have considered it proper to offer such an adjournment of a hearing that had been listed for almost a year – particularly where, as will become apparent, reinstatement was sought for only a limited period. If there had been any further delay in this case the delay would have thwarted the claimant's application for reinstatement.

23. We accept that the late service of this statement put the claimant at a serious and substantial disadvantage in replying to it. We accept that there were substantial points the claimant would have wanted to make against this statement but could not do so given the late exchange. There was no good

reason for the late exchange, which was in breach of the tribunal's order. Under the terms of the order the respondent requires the tribunal's permission to rely on witness evidence served otherwise than in accordance with the terms of the order. In these circumstances we do not consider it to be in accordance with the overriding objective to permit the respondent to rely on this evidence. There is no good reason for the late service of this evidence and receiving it so late has put the claimant at a considerable disadvantage.

24. We recognise that a consequence of this decision and the decision below on documents the respondent is left (at least at this stage) without any evidence in relation to the claimant's application for reinstatement. However, we consider that this disadvantage is in these circumstances of the respondent's own making on account of its deliberate failure to comply to any extent with the tribunal's order.

Documents

25. As well as attempting to rely on the witness statement of Mr Probert, the respondent had added around 27 pages to the tribunal bundle, serving these on the claimant only on Sunday. These were largely in support of the matters that Mr Probert referred to in his witness statement. While documentary evidence was not subject to the same requirement for permission as witness evidence was, we consider that for much the same reasons as given in respect of the witness evidence, we should refuse to allow the respondent to rely on the documentary evidence submitted only the day before the hearing. It was submitted in breach of the order, there was no good reason for the breach, and it placed the claimant at a considerable disadvantage.

26. One of the additional documents was the EJRA1 extension form that had previously been referred to at the liability hearing. We considered that this could properly be admitted as the claimant was well aware of it and it had previously been before the tribunal.

Further sanctions?

27. The claimant's application went far beyond the question of us ruling out this late evidence from the respondent. Mr Sugarman submitted that we should debar the respondent from further participation in this hearing on account of their non-compliance with the order. This would either be by way of a sanction for breach of the order or, to much the same effect, because the terms of the order required them to serve a counter-schedule if they were to dispute the remedy the claimant sought ("*To the extent that the respondent does not accept the amounts claimed in the schedule of loss … the respondent must …*") and they had not done so. In not doing so, Mr Sugarman said they had effectively forfeited their right to contest the remedy sought by the claimant.

28. The respondent's failure to comply with the order has been, as we have found it, serious and deliberate. That plainly opens the possibility of the sanctions sought by Mr Sugarman, but we consider that justice in this situation is done by ruling out the late evidence, not by completely denying the respondent the opportunity for further participation in the hearing. While the order said that the

respondent "must" serve a counter-schedule of loss if the remedy was disputed, this was not in the form of an unless order with an automatic sanction. We concluded that the respondent should be permitted to continue to participate in this hearing and challenge the claimant on the remedy he sought, but without the benefit of the evidence they had served very late and in breach of the tribunal's order.

Consequences for a future hearing

29. For the avoidance of doubt, we do not regard our decision on these points as having limited the evidence the respondent may call if there should be a further hearing in this case under section 117 of the Employment Rights Act 1996.

C. REMEDY FINDINGS AND DECISION

Introduction and facts

30. The parties indicated to us that they had agreed an appropriate award for injury to feelings (as set out below) and the evidence and argument before us centred on the claimant's application for reinstatement and, if reinstatement was to be ordered, what the terms of that order should be.

31. The primary remedy sought by the claimant was reinstatement. The claimant gave evidence, saying that without the EJRA he would have intended to remain working until September 2021. He said that if reinstated it remained his intention to retire from paid employment with the respondent in September 2021 (retaining Emeritus status). He accepted that on his dismissal and his period without paid work at the respondent he had both lost standing in his research field and lost the benefit of his previous team of researchers. However, he went on to describe work that he was undertaking (both paid and unpaid), including consultancy work and authoring textbooks. He had also prepared and submitted grant proposals alongside colleagues, but with him in a consultancy role rather than the more substantial role of co-investigator. He set out other opportunities that may arise, and emphasised that there appeared to be no criticism by the respondent of his abilities, academic credentials or relationships with colleagues both within and outside the Physics department. He also pointed to the respondent's willingness to retain his services and involvement with them on an Emeritus (i.e. unpaid) basis.

32. The claimant went on to say that a grant had been awarded for proposed work with colleagues on a project in Oxford and Cambridge, and that this contained an allocation of £24,000 for his work as a consultant. While this was a three-year project, in fact his work could be compressed into the initial year of work, meaning that £24,000 of funding was already available for his work in the year Sept 2020 – Sept 2021.

33. Mr Jones cross-examined the claimant on his evidence. This included discussion of a potential joint project with the chemistry department, for which the claimant accepted funding would only be approved (if at all) after a nine-month application process. However, the claimant also said it was normal for

academics to be carrying out research ahead of formal funding being arranged or approved, and that few of his peers would be carrying out work that was wholly funded in advance. He accepted that he had no students allocated to him for supervision, but said "*the work would begin if I returned*".

34. The claimant said that he had only applied for a second extension on a two-year, 0.5 FTE basis as he felt that was the best he could hope for given the restrictions on second extensions under the EJRA.

35. In re-examination he said that typically his peers would spend around only 40% of their time engaged in research work that was covered by existing grants, and that in some areas of work (particularly theoretical work) the work would typically be carried out without any grant income.

36. The claimant also gave evidence on the financial losses he had suffered, in support of an alternative argument for an award of compensation, but given our findings below that does not arise in this case.

Reinstatement?

37. Reinstatement is a remedy that applies to the claimant's unfair dismissal case, not to his age discrimination case.

38. Section 114 of the Employment Rights Act 1996 provides:

> *"(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.*
>
> *(2) On making an order for reinstatement the tribunal shall specify:*
>
> *(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,*
>
> *(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and*
>
> *(c) the date by which the order must be complied with."*

39. Section 116(1) provides:

> *"In exercising its discretion* [to order reinstatement or re-engagement] *the tribunal shall first consider whether to make an order for reinstatement and in doing so shall take into account ...*
>
> *(b) whether it is practicable for the employer to comply with an order for reinstatement ..."*

40. Neither party suggested that s116(1)(c), (5) or (6) had any application to this case.

41. In the light of our findings on reinstatement our recitals of the parties' submissions set out below are limited to their positions on the application by the claimant for reinstatement, and not the alternative submissions they made as to compensation for unfair dismissal and/or age discrimination.

Submissions – the claimant

42. Mr Sugarman said that the relevant consideration for us was "*practicability*", but that at this stage that only required a provisional assessment of practicability. Practicability meant "*capable of being carried into effect with success*" (Coleman v Magnet Joinery Limited [1975] ICR 46).

43. Mr Sugarman said that the claimant sought reinstatement to his previous role, which had been a 0.8 FTE role. Prior to his dismissal he had been doing research work, some of which was funded. Mr Sugarman said that funded work should not be confused with work that is available to be done, and it was the latter which was significant for the purposes of assessing practicability. The norm was that not all research work would have funding available immediately for it, and the claimant's former colleagues would all be doing research work that did not have funding. However, the claimant had already obtained substantial funding for some work, which would be sufficient to cover around 50% of his salary for the year.

44. Mr Sugarman said that in the absence of any evidence from the respondent (we having ruled out almost all of the respondent's evidence on account of non-compliance with the case management order), it was unchallenged that the respondent had laboratory space available for the claimant and that there was sufficient work to occupy him for his intended 0.8 FTE position. There was no evidence that the respondent could not afford to have him return to work, or that they would be overstaffed if he were to return.

45. Mr Sugarman said that the claimant was prepared to limit the scope of his reinstatement to end at the end of September 2021, which was when he intended to retire from paid work for the respondent.

46. As regards the nature of any order for reinstatement, Mr Sugarman said that the claimant had only applied for a 0.5 FTE extension to his contract because of the unlawful restrictions contained in the EJRA scheme – in particular the requirement to ensure his full salary costs were met by funded work. Similarly, he had only applied for a two-year extension on the basis of the restrictions contained in the EJRA scheme. He had originally applied for a three-year extension but was only granted a two-year extension under the EJRA scheme. Without the EJRA scheme in place it would have been his intention to work through to September 2021. He said that the claimant was not pursuing any claim for pension loss and (apart from injury to feelings) his financial claim was limited to his lost salary.

Submissions – the respondent

47. For the respondent, Mr Jones said that when looking at a remedy for unfair dismissal, such as reinstatement, the question was what position the claimant would be in if he had not been unfairly dismissed. In this case, if the claimant had not been unfairly dismissed he would have worked on under the terms of the extension he had applied for – that is, a 0.5 FTE role from September 2017 to September 2020. Anything more than that could only be dealt with by way of an award of compensation for age discrimination. Mr Jones said we should reject the claimant's evidence that he had always intended to work on to September 2021. It was inconsistent with the application he had made. The application set out an approach of graduated retirement, which could have been beneficial to both parties. The application was plainly set out as being for a transitional period through to full retirement.

48. Mr Jones said that the practicability of reinstatement was to be considered based on what is "*practicable in the circumstances of the employer's business at the relevant time*" (Port of London Authority v Payne [1994] IRLR 9). We had to work on the basis of the situation as it was now, not as it may have been if the claimant had continued to work without interruption. The role he used to perform had gone. There was now no research team for him to lead. He used to have direct supervision of students, but that was now not going to happen. He had other responsibilities which could not now apply on any reinstatement. The respondent was not obliged to create a non-existent role to reinstate the claimant to. Reinstatement to a 0.8 FTE role was not sustainable. In his extension application he had identified only sufficient work for a 0.5 FTE role. The funded work he had identified would not cover 50% of his salary. At most it would be 40%. His evidence on what other work he would do was very vague. Nothing in his evidence suggested there was sufficient work for a 0.8 FTE job, and Mr Jones suggested the claimant was taking a risk in seeking reinstatement at 0.8 rather than 0.5 FTE, since in any subsequent hearing it would be easier for the respondent to demonstrate it was not practicable to reinstate to a 0.8 than a 0.5 FTE role.

Reply – the claimant

49. In a brief reply, Mr Sugarman said that at para 313 of our previous judgment we had found the dismissal to be unfair because there was no potentially fair reason for the dismissal. He said that this suggested that any reinstatement should be to the role the claimant held at the date of his dismissal, which was a 0.8 rather than 0.5 FTE role.

50. Mr Jones then cautioned us that if we were to confuse the reason with the process we would fall into the Johnson v Unisys exclusion area.

Decision

51. In considering reinstatement the question for us at this is whether reinstatement is "*practicable*", meaning "*capable of being carried into effect with success*", and at this stage that is only a provisional assessment.

52. The effect of our earlier decision is that (except for the extension application document submitted by the respondent) we are assessing this solely based on the evidence produced by the claimant, including his oral evidence.

53. The claimant has said and, in the absence of any effective challenge to it, we accept, that he would spend almost 50% of his time if reinstated to a 0.8 FTE role working on a project for which he already had funding. For the remainder of his time he would be engaged in mentoring and (at least initially) unfunded research in collaboration with others. We accept his evidence that if reinstated to a 0.8 FTE role he would be able to occupy his time with useful work. As Mr Sugarman said, questions of how that work may be funded are a separate issue, not (or at least not in the absence of any evidence from the respondent on the point) relevant to practicability. There will be many academics in the claimant's position who will work on unfunded projects, and, more fundamentally, there is no evidence before us of financial reasons why the claimant's reinstatement is not practicable.

54. Mr Jones argued that the claimant's former role no longer exists. He said that the claimant's dismissal interrupted his research and mentoring activities, and those cannot be revived for the short period of time for which the claimant may be reinstated. We accept in principle that the work the claimant carries out on any reinstatement will not be exactly the same as the work he was doing at the time he left. That is inevitable given that we are assessing the practicability of reinstatement at the present date, with the facts as they are, not on some assumed basis that looked at how things would be if the claimant had not been dismissed.

55. Mr Jones said that the claimant's former role does not persist beyond him ceasing to perform it. We do not accept that as a reason for not ordering reinstatement. If the claimant were to be reinstated it is not disputed that he would perform his role to the standards expected of a senior academic at Oxford. His work cannot be the same as he left off, but that is not to say that he cannot be reinstated and continue to act in the role with his former distinction. Given the respondent's emphasis on cutting-edge research, the claimant's role will never at any point in his career have been the same as it was three years previously. That is not a reason to say that reinstatement is not practicable.

56. Mr Jones further submits that if there were to be any reinstatement, it would have to be at the 0.5 FTE level for which the claimant applied for an extension to his contract, not his previous 0.8 FTE level. Mr Jones reminds us that reinstatement is a remedy for unfair dismissal only, not discrimination, and therefore we have to be careful to look at the terms of our unfair dismissal decision in considering the appropriate remedy. In response, Mr Sugarman points to para 313 of our liability decision, where we find that the dismissal is unfair because there was no fair reason for it. He says this must relate to his dismissal from a 0.8 FTE role rather than relating to the 0.5 FTE extension that he applied for. We deal with other procedural reasons why the dismissal was unfair at para 317. We do not see that the unfairness in this case is limited to the handling of the application to extend his contract. This was an unfair dismissal from a 0.8 FTE role, not a 0.5 FTE role. We do not see that

we can, consistently with the statutory regime on reinstatement, reinstate him to a role he never held, such as a 0.5 FTE role. If there is to be reinstatement, it has to be on the basis of the role he held immediately prior to his unfair dismissal, which was a 0.8 FTE role.

57. There remains the question of the length of time the claimant would have worked on if he had not been unfairly dismissed. His retirement under the EJRA was originally due to take effect on 30 September 2015. He initially wanted to apply for a three-year extension, but after discussion with Prof Wheater only applied for a two-year extension (see paras 128-130 of our liability decision). He subsequently applied for a further three-year extension (see para 165). His case before us today was that but for the EJRA restrictions he would have wanted to continue for a further year beyond that three-year extension, eventually retiring from paid work for the respondent on 30 September 2021, six years after his retirement was originally due.

58. We accept the claimant's evidence that he felt limited in his previous extension applications by the (as we have found them) unlawful requirements of the EJRA scheme. They are not to be taken as demonstrating what he would have done in the absence of unlawful age discrimination. It is apparent, for instance, that he moderated his original desire for a three-year extension in order to accommodate what he had been told would be endorsed by the Physics department. His extension applications were drawn by reference to what he considered possible or likely to succeed under the EJRA scheme, rather than how he would have wanted to behave in the absence of a discriminatory scheme. We accept that in the absence of the EJRA scheme he would have wanted to remain in employment to September 2021.

59. The claimant's reinstatement is practicable. He should be reinstated to the role that he was unfairly dismissed from, which is a 0.8 FTE role. In the absence of the EJRA scheme he would not have left the respondent's employment until 30 September 2021. We make our reinstatement order on that basis.

60. If we had had to assess this on the basis of compensation for discrimination, we would have done so on the basis that the claimant's losses would be assessed by reference to 0.8 FTE to Sept 2021 rather than 0.5 FTE. We accept the claimant's evidence that he only applied for a 0.5 FTE extension given the (discriminatory) restrictions as they then were on such extensions.

Further remedies?

61. The parties agreed the figure for compensation for injury to feelings set out below.

62. In the light of our finding that the claimant should be reinstated to his previous role it was accepted by the parties that no further financial award (other than the award of injury to feelings and associated interest) needed to be made in respect of the age discrimination claim. The claimant did, however, seek a recommendation in respect of age discrimination. This was set out in his witness statement as being "*the abolition of the EJRA with immediate effect*".

63. During closing submissions Mr Sugarman accepted that given the terms of s124(3) of the Equality Act 2010 this was too widely drawn, and that given that the claimant's employment (if reinstated) was to last only one year the EJRA would not in practice be applied to him so that no individual recommendation in respect of the effect of the EJRA on him was going to be relevant to his case. In those circumstances we will not make a recommendation, either as sought or on a more limited basis restricted only to the claimant.

D. FINAL ORDER

64. Once we had given the parties our findings as set out above, we invited the parties to agree a final form of order, which they helpfully did. In order to avoid delay the terms are set out in a separate judgment issued prior to these reasons, but they are also recorded below for the sake of completeness. The provisions in relation to the end date of the period of reinstatement were agreed between the parties, along with further provisions making it clear that this end date was not intended to limit the scope for termination of the claimant's employment if, for example, the claimant's conduct during employment somehow gave cause for termination of employment under the respondent's statues. While the terms of s114 do not provide for the inclusion of an end date for the period of reinstatement, we were satisfied that s114 did not limit our ability to add in further provisions (such as an end date) in an appropriate case.

1. *The claimant shall be reinstated to the position of senior researcher on a 0.8 FTE contract for a fixed maximum term to expire on 30 September 2021 with effect from 1 October 2020. For the avoidance of doubt, the order is not intended to create any fixed minimum term of appointment nor to create any additional power for the respondent to terminate the appointment earlier than 30 September 2021.*

2. *The respondent shall pay to the claimant such salary as he would have received had he been employed from 1 October 2017 until 30 September 2020 as a senior researcher on a 0.8 FTE contract, remunerated at point 6 on grade 10.*

3. *The respondent shall pay to the claimant £22,500 by way of compensation for injury to feelings, together with an additional £7,110.00 interest on such payment.*

Employment Judge Anstis
29 September 2020

Sent to the parties on: 1st Oct 2020

For the Tribunal Office

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