EMPLOYMENT TRIBUNALS

Claimant: Mr N Vaswani

Respondent: The Royal Liverpool and Broadgreen University Hospitals NHS Trust

HELD AT: Liverpool **ON:** 9 December 2016, 2, 3 April 2017 & 4 April 2017 (In Chambers)

BEFORE: Employment Judge Shotter
Ms F Crane
Mr A Wells

REPRESENTATION:

Claimant: In person
Respondent: Mr G Powell, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that –

1. On balance of probabilities the claimant would not have been awarded points in relation to the 2011/2012 and 2012/2013 applications made under the Operational Policy for Awarding Discretionary Points to Associate Specialists and no award of damages for breach of contract.

2. .The respondent is ordered to pay to the claimant the sum £2487.41 gross, less lawful deductions of tax and national insurance for accrued unpaid holiday totalling 7 days.

3. The claimant is given leave to present late a bundle of documents marked "C1 remedy" in the interests of justice.

REASONS

Preamble

1. This is a remedy hearing following promulgation of the Judgment on liability 16 December 2015 ("the promulgated judgment") in which the Tribunal held it was an implied term of the claimant's contract of employment the respondent would convene and hold an awards panel in respect of his applications for discretionary points for the periods 2011/2012 and 2012/2013, the respondent failed to do so in breach of contract, and the claimant's claim for breach of contract was well founded.

2. The Tribunal found the claimant's claim for outstanding holiday pay as an unlawful deduction from wages brought under Section 13 Employment Rights Act 1996 was well founded. On behalf of the respondent a request was made that the Tribunal refrain from entering judgment on remedy in relation to accrued unpaid holiday pay until after the costs application listed with the agreement of the parties 25 & 26 September 2017 on the basis that the respondent's costs exceed the holiday pay claim. The Tribunal, having considered the matter, decided it is not just and equitable for the claimant to wait any longer for holiday pay that accrued under statute at the effective date of termination and should have been paid then. Given the fact the respondent has now agreed the claimant's gross (and not net) figure, it is incomprehensible that payment remains outstanding. The Tribunal appreciates there may be difficulties in enforcement if the respondent's application for costs succeeds and the claimant retires abroad; nevertheless, this is not a sufficiently good reason for the claimant's remedy judgment to be withheld. Accordingly. The respondent is ordered to pay to the claimant accrued unpaid holidays equalling seven days for the holiday period 1st August 2013 to 20th June 2014. Following the remedy hearing this has been agreed at £2487.41 gross, the net sum was not capable of agreement and accordingly the Tribunal enter judgment for the agreed amounted less lawful deductions of tax and national insurance.

Evidence

3. The Tribunal heard oral evidence from the claimant on his own behalf, and Dr Farokh Jal Setna, associate specialist in radiology at Wirral Teaching Hospital. The Tribunal found Dr Setna to be an honest and generous witness who gave limited evidence due to the insufficient information put before him and his lack of knowledge relating to the respondent's Operational Policy that should have been applied, and was not, when an application for discretionary points is made. It is notable Dr Setna did not have before him the 2010 application that gave rise to an award of one discretionary point, he would have been unaware of the substantial amount of duplication and the issues higher management had with some of the information provided by the claimant .

4. On behalf of the respondent the Tribunal heard oral evidence from Kay Louise Carter, Assistant Director of Medical HR and Education and Joanne Henshaw, directorate manager and divisional head of performance for the surgical division. The

Tribunal found both witnesses to be credible, and conflicts of their evidence with that of the claimant's have been dealt with below. On balance the Tribunal preferred the evidence of Kay Carter and Joanne Henshaw in preference to that of the claimant, who despite his experience in sitting on panels considering discretionary points application, was not sufficiently distanced from his own application to be in a position to assess them objectively, unlike Kay Carter. As was the case in the liability hearing the Tribunal did not find all aspects of the claimant's to be credible, for example, his statement that the respondent had back-paid him because he had met his contractual obligations by undertaking ad hoc clinics. The Tribunal preferred to rely on Joanne Henshaw and Kay Carter's evidence supported by undisputed contemporaneous documentation there was an issue with the claimant being paid for more hours than he had worked and he had refused over a period of time to agree a job plan with an increased number of hours to make up the contractual hours he should have worked.

5. The Tribunal was referred to an agreed bundle of core documents from the liability hearing and the separate bundle prepared by the claimant, documents attached to witness statements and a bundle of documents produced last minute by the claimant marked "C1 remedy", which he was given leave to introduce on application following which oral judgment was given. In short, having considered arguments from both sides, the Tribunal took the view that despite the claimant having had since December 2016 at least to find and produce the documents, and despite their late disclosure, given the claimant's status as a litigant in person and the balance of prejudice that swung in his favour, it was just and equitable to allow the claimant to refer to the bundle on cross-examination, which he did. It is notable the claimant's statement on remedy did not refer to the documents in bundle C1 remedy, and there was no explanation as to why some dates appeared to be irrelevant falling before and after the period in question 2011-2012 and 2012-2013. The claimant was given time before closing submissions to finalise his submissions and invited by the Tribunal to deal with the fact that the claimant appears not to have produced much by way of contemporaneous documentation to show he was making an "above average contribution" or "outstanding contribution," the criteria set out in the respondent's Operating Policy. The claimant did not take up the opportunity, and it appears to the Tribunal there is very little by way of documentation to substantiate his assertion that a varying number of discretionary points, including the maximum, should be awarded.

6. Details of the claimant's discretionary points applications have been set out below, and the Tribunal considered in detail their interrelationship and the earlier 2010 application that was successful following which a discretionary point was awarded. In addition, the Tribunal were referred to a written submissions and oral submissions together with references to case law, which has been dealt with below. The Tribunal does not intend to repeat the oral submissions in their entirety and has attempted to incorporate them into this judgment with reasons. The Tribunal has also revisited the promulgated judgment. For ease of reference a number of the facts (not all) as found by the Tribunal and set out in the promulgated judgment were relevant to the consideration of remedy have been extracted.

The relevant facts for consideration of remedy

4 On 5 December 1995 the NHS Executive sent to all regional authorities. including the respondent, an "advance letter (MD) 7/95" notifying employers of new arrangements for the payment of Discretionary Points to Associate Specialists employed on the national terms and conditions of service for hospital medical and dental staff. The arrangements effective from 1 April 1996 and applied to all associate specialists on national terns and conditions of service (clause 3). It is not disputed the claimant was eligible to make his applications for payment of 1 or more discretionary points and by the effective date of termination the claimant, who remained on the "old contract" was the only associate specialist eligible to apply for discretionary points.

5 The respondent had discretion on the number of points to be granted, if any, in any individual case in any particular year notwithstanding the fact the claimant was the only applicant. This was an important consideration in the Tribunal's assessment of whether damage flowed from the respondent's breach and having considered the factual matrix and evidence before it, the Tribunal determined the claimant had not discharged the burden on the balance of probabilities the discretion would have been used in his favour.

6 It is not disputed the respondent was to put in place the provision for a panel of professionals convened to assess an application for discretionary points, and from 1996 to 2011 a panel was convened annually until 2008, and thereafter the panel was appointed to consider applications for 2008/2009 and 2009/2010.

7 It is not disputed the claimant was awarded one discretionary point in the 2008 and one in 2010. He was unsuccessful in 2005, 2007 and 2009 because he failed to evidence anything new over and above his previous applications, and the evidence of Kay carter was accepted on this point. The criteria guidelines were set out in Annex B attached to the "advance letter (MD) 7/95" and provided at clause 3; "To warrant payment of a discretionary point, associate specialists will be expected to demonstrate skills and expertise beyond what would normally be expected of a practitioner in the grade and make an outstanding contribution in one or more of the following fields: the service of patients, teaching, research and development of the service." Clause 4 provided "progression at each step up the discretionary point scale will reflect the increasing quality and range of the contribution made by the associate specialist…" Clause 5 set out the areas to be taken into account e.g. professional excellence and national contribution.

8 Clause 6 provided the arrangements for deciding payment and mechanism for professional input should be considered and approved by the authority or trust. The associate specialists should be informed of these arrangements. The authority or trust should satisfy itself that the arrangements will enable decisions on payments to be made on an equitable and fair basis in all cases, with the appropriate degree of professional input necessary to support judgments on the professional aspects of an associate specialist's work [clause 7]. It is not disputed the respondent issued an Operational Policy for awarding discretionary Points to Associate Specialists ("the Operating Policy"). The panel was required to adhere

to the Operating Policy when considering individual applications for discretionary points, including the 2011/2012 and 2012/2013 applications made by the claimant had a panel been convened. The panel was not required to follow different policies produced by other Trusts, such as Wirral, and each Policy differed. Finally, the British Medical Association guidelines relied on by the claimant is irrelevant; the panel was not required to have recourse to them relying exclusively on the respondent's Operating Policy.

9 Accordingly, the Tribunal has considered the claimant's applications for discretionary points under the respondent's Operating Policy exclusively, and in doing so, has taken into account the comments made by all witnesses appearing before it, before arriving at a decision.

<u>The respondent's Operational Policy for awarding discretionary Points to Associate Specialists ("the Operating Policy")</u>

10 It is not disputed the claimant was employed on the "old" 2008 contract and his points were to have been calculated under the respondent's Operational Policy for awarding discretionary points to associate specialists dated 2 March 1999. This is the relevant policy for this remedy hearing; this underlines the process by which the claimant's discretionary point's application would have been considered, and no other Operational Policy from any other Trust or BMA guidelines is relevant. It is notable Dr Setna, whom the Tribunal found to have been an honest witness, was unaware of the respondent's Operating Policy, and in his capacity as a member of The Wirral University Teaching Hospital, had experience of assessing applications for discretionary points but not in compliance with the respondent's Operating Policy. Dr Setna formed his assessment on the additional information provided by the claimant that would not have been before the panel had one been convened, and he could only take on face value what was written by the claimant both on the application forms and the additional information provided. The Tribunal accepts Dr Setna scored honestly, but his scores did not take into account citations from the clinical director or senior manager who, on the balance of probabilities, would have pointed out the information provided by the claimant was incorrect, there was duplication and equally important, the respondent's had taken a justified view the claimant was not working to his contract during the relevant period. These are all key matters Dr Stena had not been in a position to take into account, through no fault of his own, and the Tribunal found this has skewed his generous point scoring.

11 The Operational Policy provided the following:

11.1 All eligible associates' specialists will be circulated with the agreed criteria for determining awards and invited to submit a standard CV questionnaire to the chairman of the local trust awards panel (medical director) by an agreed date. The chairman of the awards panel will make submissions available to panel members at least 2 weeks before the first meeting. Citations from senior managers, clinical directors and outside reputable bodies, such as royal colleges and faculties should be submitted to the chairman of the awards panel…by an agreed date." – Clauses 2, 3 & 6. The claimant's senior manager Joanne

Henshaw would have produced a less than favourable citation that would not have benefitted the claimant and so the Tribunal finds.

11.2 Clause 4 set out the composition of the local trusts award panel of 6, which included the medical director, director of human resources and associate specialist from outside the respondent. It was provided substitutes may be nominated. It is more likely than not Kay Carter would have sat on the panel to advise and give guidance as she had a considerable amount of experience, and had she done so, her advice to panel members concerning the claimant's performance would not have been favourably to him.

11.3 The Tribunal found Joanne Henshaw and Kay Carter possessed a considerable amount of knowledge relating to the claimant's performance and duties, and both were involved in discussions concerning increasing his working hours to avoid payment of hours not worked that arose when on call duties were stopped, and the claimant's access to theatre limited to ad hoc surgery. The claimant raised an objection to Kay Carter's input into the award panel on the basis that she did not have the medical expertise to score his applications, and as a consequence her scoring as set out in the written statement could not be relied upon. The claimant also criticised the fact Kay Carter used Joanne Henshaw's statement before this Tribunal to score. The Tribunal did not accept these claimant's objections in this regard were valid.

11.4 At the liability hearing the Tribunal found it was for the panel consisting of the claimant's professional peers to decide whether the claimant's application was successful or not, and this was not a decision within the ambit of Kay Carter or the Peter Williams, the medical director, who could have formed part of the panel. The Tribunal has had evidence since at this remedy hearing that Kay Carter scored in one consultants round for discretionary points, and had been designated to sit on behalf of the director of HR (who had already carried out the scoring). The Tribunal accepted Kay Carter ran the associate specialist rounds for discretionary points, and she had been involved in 6 rounds which entailed not scoring but her advising on scores and giving guidance. She also had experience of running the Consultants Excellence Awards at national and local level. Part of her role requires consultation with other staff members, such as the clinical director and senior managers e.g. Joanne Henshaw, the directorate manager and divisional head of performance for the surgical division, who would provide feedback on the accuracy of an application. Kay Carter, on the balance of probabilities, would have advised and assisted the panel by making the comments she did in her witness statement before the Tribunal, and relaying the comments of Joanne Henshaw with the result that the claimant's application would not have succeeded and no points awarded bearing in mind the panel's discretionary power. The Tribunal took the view given Kay Carter's role in the discretionary points process, and the fact that a valid panel could not reasonable be recreated for the purpose of these proceedings, her evidence was persuasive. She has considerable experience and knowledge not limited to the discretionary point's applications, but also of the claimant's performance at meetings and committees. In her capacity as assistant director of medical HR and education, within the respondent, she possessed knowledge of educational matters and the claimant's performance in regard to this also. In addition, Kay Carter was fully

appraised on the Operating Policy itself, and had the benefit of Joanne's Henshaw's statement, who herself was an appropriate person given her status and detailed knowledge of the claimant.

11.5 The Tribunal accepted the additional information produced by the claimant for the purpose of these proceedings would not have been put before a full panel, either at the initial consideration stage or on appeal. The reasons Kay Carter gave for this rule was credible; it was an attempt to ensure parity between applicants by limiting their written application to a box within a specific domain. The claimant's evidence that his additional information would have been considered by the panel was misconceived; he had no experience of appeals and could not say one way or another given the fact that the Operating Policy was silent on this point.

11.6 Clause 5 of the Operating Policy provides a provision for an appeal. An appeal had never been sought by any applicant in the past or carried out by the respondent in this regard. Clause 5 set out the following; "Any eligible associate specialist who is nominated for an award…may appeal. The jurisdiction of the appeal panel will be to ensure that the decision arrived at was fair and reasonable in the circumstances." Despite the clear wording of this clause, the evidence before the Tribunal was that the claimant, if no award had been made, could have appealed. The appeal would not be a re-scoring, the scoring and ranking would be looked with a view establishing fairness of scoring and ranking and decisions based on ranking. Kay Carter confirmed the appeal panel would have to refuse to consider the additional information provided by the claimant, over and above that set out in his application forms. In short, an appeal panel considered the original information before the original panel only and would have refused to consider any additional information over and above that, and so the Tribunal finds.

<u>The criteria for awarding discretionary points</u>

11.7 The relevant criteria is as follows:

11.7.1 Discretionary points are neither seniority payments nor automatic increments.

11.7.2 To warrant payment of discretionary point associate specialists will be **expected to demonstrate an above average contribution** [my emphasis] is respect of service to patients, teaching, research and the management and development of the service.

11.7.3 Progression at each step of the discretionary points scale will reflect the increasing quality and range of the contribution made by the associate specialist. To attain the maximum of the discretionary point scale associate specialist will be **expected to have demonstrated an outstanding contribution** [my emphasis] to services.

11.7.4 The criteria for payment of discretionary points should allow for contributions made in the following areas to be taken into account :

i) professional excellence, including

- quality of clinical care of patients,
- service development,
- professional leadership
- contribution to professional and multi-disciplinary team working
- research, innovation and improvement in the service,
- clinical audit
- administrative or NHS management contributions
- teaching and training
- Wider contributions to the work of the NHS nationally.

The claimant's applications for discretionary points 2011/2012 & 2012/2013

12 Both applications were completed by the closing date of 23 July 2013. On the front page a number of key points for applicants were set out. The Tribunal has extracted the following relevant key points:

12.1 Point 2 warns applicants "Do not be repetitive. You cannot gain a score for an achievement which has received a score in another area.

12.2 Points 4: "try to give an idea of the level of significance of an achievement."

12.3 Point 5: "It is not enough to say you are on a number of committees or that you are a Lead Clinician. **You must demonstrate what you have achieved on those committees, how much time they taken up, what you have achieved as lead clinician that is over an above expectations of that role** [my emphasis].

12.4 Point 6: "When describing your role in an achievement makes it clear what you actually did: being involved with an initiative is different from leading, developing and proactively implementing."

12.5 Point 8: "If you received points last year, **only include achievements since that date. Rewards can not be made repetitively for the same work** [my emphasis].

12.6 Point 9: "If you are paid additional sessions for carrying out a role you may still receive a score for achievements' in that role if the committee considers that although you are paid, your commitments and achievements are over and above what you are paid for."

Associate Specialists Discretionary Points CV Questionnaire 2011/2012 ("the 2011/2012 application")

13 It is highlighted in the preamble that "points are awarded for service over and above that which will be normally expected."

14 The Tribunal accepted Kay Carter's evidence that 0.35 was normally the maximum allocation of points awarded, but as the claimant was the only applicant

and had he merited a point allocation it could, but may not have been, rounded up to one point per application in accordance with discretion. The Tribunal accepted the claimant's application would have been scrutinised in detail given the ongoing dispute concerning the claimant being paid for less sessions that he worked. Kay Carter's evidence that the claimant would have scored insufficiently to gain a point was accepted by the Tribunal on the balance of probabilities.

15 The Tribunal has extracted the following sections from all of the evidence before it:

15.1 Section 3 for which there were a maximum 50 points available in total. In section 3.1 "development and evolution of clinical services to date (maximum 10 points)" the claimant wrote; "started a new general urology/pentoscrotal clinic on 1 December 2011 and since then the number of slots have increased by 20%...I have increased the number of patients from my theatre list from 7 to 10 from April 2011…and sometimes carry out extended evening theatre session without any extra payment…now I have 2 evening clinics…"

15.2 Had the claimant's application been considered by a panel, the Tribunal found on the balance of probabilities, it would have been made aware of Joanne Henshaw's view the claimant had not started a new Pentoscrotal clinic in December 2011, the clinic had already been in place, the increase of patients by 20% related to the Urology department as a whole and not the claimant's workload alone and there was no increase in the claimant's clinical workload. Further, in accordance with the oral evidence of Kay Carter on cross-examination, the expectation of the claimant was 10 and not 7 patients on his theatre list, and the panel would have been advised of this also. Joanne Henshaw gave oral evidence at the remedy hearing that a theatre list comprises of 10 patients in a theatre session. The respondent's view was 10 patients was the minimum in respect of vasectomies, a simple surgical procedure. Joanne Henshaw had known the claimant since 2005 and had been involved in performance targets. In 2012 she was responsible for Urology and had day-to-day management of the claimant. It is more likely than not her observations on the claimant's application would have been accepted by the panel, particularly her belief during the relevant period that the claimant was short of sessions, overpaid, did not do the extra clinics as claimed, and had been paid for clinics and to work until 8pm. She would have denied the claimant's clinics were overbooked and that he regularly stayed beyond his work finish time. Further, the claimant was earning family planning fees and a sum of money for each vasectomy in addition to his normal salary; this evidence was not disputed save for the actual amounts earned which the Tribunal were not concerned with.

15.3 Kay Carter's evidence that the claimant would have scored 4 for being on call up to September 2011 is accepted by the Tribunal on the balance of probabilities. The 4 points were allocated to recognise intensity at work whilst on call. After this date the on call work stopped to meet the Working Time Directive. The information provided by Kay Carter would have been persuasive to the panel. As a result of the loss of on call work the claimant's clinical sessions were short on his job plan, the claimant was aware of this and the need to replace the lost work with additional sessions.

15.4 The claimant completed section 3.2 “audit/clinical governance” referring to the following; “I regularly audit my work and contribute to the monthly audit.” Had the claimant’s application been considered by a panel Kay Carter and Joanne Henshaw’s view was that the claimant did not actively participate in meetings; his attendance was rare as the claimant was often in London covering his SAS role, and an infrequent attendee at the audit meetings. The audit point was included in the claimant’s 2010 audit and was a duplicate claim. Clinical audits were a professional expectation of normal practice and the claimant had failed to evidence the percentages he claimed.

15.5 The claimant completed section 3.3 “leadership” claiming he led the andrology services, and wrote; “lead chairman SAS doctors of Mersey Region 2011-2012, chairman BMA policy and procedural committee, member of deanery panel for the management of SAS development fund…evaluate and sanction finds for the personal development of SAS doctors”. It was accepted by Kay Carter at the liability hearing the claimant was the SAS link, the hospital’s lead for the Staff and Associate Specialist responsible for coordinating educational activity for SAS doctors. It was a Deanery appointment for which the claimant received remuneration as set out in the promulgated judgement. Kay Carter took the view the claimant had not provided evidence of the time commitment showing it was over and above what was expected in the claimant’s role, however, she awarded 2 points to reflect “it was good he undertook the role.” The Tribunal took the view the claimant was not specific, despite a requirement to provide detailed information, as indeed the claimant had done in his 2007 and 2010 applications. Point 5 is clear; it is insufficient for the claimant merely to list committees or state he was lead clinician, and must demonstrate achievements and the time spent over an above expectations. Point 6 clarifies “When describing your role in an achievement makes it clear what you actually did: being involved with an initiative is different from leading, developing and proactively implementing.”

15.6 In relation to section 3.3 Kay Carter scored a maximum of 2 out of 10, and for the reasons given by her on the balance of probabilities, the Tribunal finds this score was more likely than not to have been reached by a panel. It is notable Kay Carter and Joanne Henshaw denied the claimant was a surgical lead maintaining there was no surgical leads, and it is likely the panel would have taken the view the claimant was exaggerating in order to enhance the likelihood of his application succeeding.

15.7 The claimant completed section 3.4 “Magnitude and Intensity of Service Work” maintaining he had 10 patients booked on his theatre. This is a duplication of section 3.1, as indeed was the repeated reference to a 20% increase in patients booked, generating an increase in income for the respondent. The increase in patients has already been dealt with above. The claimant maintained the additional number of patients/clinical work resulted in additional administration. It was accepted by the respondent the claimant had no junior support, and was required to carry out administrative duties, and had been so for a considerable period of time. Joanne Henshaw’s view was that the claimant chose to work intensively over a period of 3-days rather than 5, hence increasing the intensity of the work and at his own choosing his lunch break may have

become a working lunch. In these circumstances it is unlikely on the balance of probabilities the claimant would have been awarded any points for 3.4.

15.8 The claimant completed section 4.1, 4.2 & 4.3 "Grants in the last 5 years" with reference to there being no opportunities for him. The claimant in his additional information referred to a number of matters which he deemed relevant to 4.1. These matters are irrelevant as they have not been included within the application form and thus could not have been taken into account as the further information would not be before the panel. The claimant also indicated the medical director and the local negotiating committee had agreed section 4 in its entirety would not be included; the Tribunal had no evidence apart from the claimant's word and preferred that of Kay Carter, who would have been aware had such an agreement been reached, that there was none. The claimant would not have been awarded points for section 4.

15.9 The claimant completed section 5 "teaching activities" (maximum 25 points) maintaining he taught postgraduates once a fortnight, "certain surgical procedures to final year registrars" teaching the "tricks of the trade." In the claimant's 2010 application he referred to teaching "SHO's in clinics and hands on surgical work in theatre. Demonstration and direct supervision of juniors to carry out video flexible cystocscopy and supervision of nurses every Thursday…" Joanne Henshaw indicated the claimant was not certified to teach, and there was an issue as to whether the claimant required certification or not. The Tribunal preferred the claimant's evidence that he had been teaching in the past and certification was not required. Kay Carter was unconcerned with whether or not the claimant was certified, and as assistant director of education the Tribunal would have expected her to have known whether certification was necessary. Her view was that teaching and mentoring of undergraduates, postgraduates and nurses was part of the claimant's normal day-to-day work, and took the view teaching nurses about consent was a "vital" part of the day-to-day job and not meritorious in a claim for discretionary points. The claimant gave no indication of time commitment and further, he was already receiving payment for the SAS tutor role. The reference to SAS tutor role and member of deanery panel in 5.2 was duplication within the form at 3.3. Joanne Henshaw denied the claimant was an SAS tutor, this was not denied by Kay Carter who maintains he was paid, she was involved in what he was doing and he "had contributed little." Kay Carter was cross-examined on this point by the claimant, who did not agree, however the Tribunal accepted her evidence was an accurate assessment of how she perceived the reality of the claimant's teaching contribution and it is this assessment that would have been before a panel. The claimant would not have qualified for any score under section 5 on the balance of probabilities and so the Tribunal finds.

15.10 The claimant completed section 6 attracting a maximum 25 points. In section 6.1 the claimant confirmed he was a member of the local negotiating committee ("the LNC") and met every 2 months, a duplicate claim to that made in the 2010 application. Kate Carter's undisputed evidence was that the LNC met once every 2 months for no more than 1.5 hours, no real work outside of this was required, and the claimant often did not attend. The Tribunal noted that the claimant had not attended the LNC meeting in January 2015, albeit this was not within the

relevant time period, it is evidence the claimant did not attended each and every LNC meeting and on balance, Kate Carter's evidence is accepted.

15.11 At section 6.2 the claimant claimed he was chair of regional SAS committee, a duplication of section 3.3 and a position for which he received remuneration. With reference to 6.3 the claimant would have been awarded points, in accordance to Kay Carter, despite failing to set out what he had achieved as opposed to attending committee meetings. Kay Carter recognised the value of the claimant's contribution to the reputation of the respondent and it was her view, accepted by the Tribunal on the balance of probabilities, that 2 points out of 5 would have been awarded. The Tribunal noted the claimant was not on an international committee; he was on a national committee where international issues were discussed and Kay Carter may have analysed his contribution incorrectly when she made reference to him taking part in international committees.

15.12 At section 6.4 there was a repetition of lead in surgical andrology and a reference to being lead in day care surgery, the former was denied. Joanne Henshaw's position was that she led the programme, not the claimant, who worked day care but not develop it, and she was not challenged on this evidence.

15.13 At section 6.5 the claimant referred to "work with colleagues and managers to achieve statutory targets and improve the finances…" Kay Carter's view was that it was a basic part of the claimant's job, and not over and above. The claimant does not say what the statutory targets were aimed at or how he had helped to improve finances and by how much. The Tribunal took the view that this was also a repetition as the claimant at 3.4 referred to increasing finances. In relation to section 6 as a whole the claimant would have scored a maximum of 4 on Kay Carter's account, and the Tribunal accepted this evidence on the balance of probabilities.

15.14 In relation to section 7 the claimant set out "other contributions" attracting a maximum 25 points, referring to committees he had sat on in section 7.1, Kay Carter's view was that she would have scored the claimant 10 points due to reputational benefit to the trust, despite the claimant failing to identify the benefit of him sitting on these committees. The 10 points was awarded for the whole generic section 7. Joanne Henshaw disputed the claimant developed the vasectomy pathway, as maintained by the claimant at section 7.2 point 3. The claimant produced documents at A3 and A4 of C1 remedy bundle comprising of an exchange of internal emails. It is apparent from these emails the document dealing with pathway to vasectomy was already a draft at the point the claimant was being asked to contribute, which he did when his expertise was sought, and it cannot be said he was responsible for its development. Joanne Henshaw gave evidence it was not used in the end by the respondent, the Tribunal found this is not a relevant fact the issue being whether or not the claimant had demonstrated an above average contribution. Joanne Henshaw and Kay Carter does not deal with 7.2 in any detail, other than to say 10 points would have been awarded for section 7 in its entirety and so the Tribunal finds would have happened on the balance of probabilities had the panel considered the matter with input from Kay Carter, who would in turn have referred to Joanne Henshaw's view.

16 In relation to the entire application for 2011/2012 Kay Carter would have recommended the claimant received a total score of 24 out of 150, an insufficient scoring to merit an award of discretionary points. On the balance of probabilities the Tribunal finds no points would have been awarded due to the duplication with the 2010 application, the claimant's application failing to demonstrate work over and above what was normally expected and which on close scrutiny appears to be in part "misleading," against a backdrop of the claimant being involved in meetings and discussions concerning his work plan and paid salary for hours not worked.

<u>The second application - Associate Specialists Discretionary Points CV Questionnaire 2012/2013 ("the 2012/2013 application")</u>

17 In 2011/2012 the claimant would not have received a discretionary point. The 2012/2013 application was largely a duplication of the 2011/2012 application and it must follow as a matter of logic that he would not receive scores for the duplication. In addition, some of 2011/2012 was duplicated through to the 2010 application when the claimant received one discretionary point, and that duplication continued i.e. the 20% increase, evening sessions worked and so on. The Tribunal has observed the following:

17.1 There was a reference in section 3.1 to the claimant initiating 2 extra clinics in 2012, however, this was considered to be not above and beyond the claimant's contractual clinical requirements by the respondent, especially bearing in mind the claimant was still being paid for more sessions than he worked. The new sessions introduced were designed to alleviate the problem, and yet, during this period there was still an ongoing dispute concerning the claimant's job plan and his reduced working hours for which he was still being paid.

17.2 In section 3.2 there is a reference to the claimant auditing his theatre work; this was expected as part of his role and Kay Carter took the view it did not evidence a significant achievement that went over and above what was expected of the claimant complying his contract. It is notable the claimant's application lacks evidence, and he continued to claim in section 3.3 that he was lead for andrology and penile corrective surgery. Kay Carter would have awarded 2 points in respect of the penile corrective surgery, on the basis that whilst the claimant was incorrect in stating "no one else [could] carry out this type of corrective surgery" but he had carried it out. In relation to section 3 the claimant would have scored a total of 2 points in accordance with Kay Carter. The same point was made in relation to section 3.4 as in the previous application, namely, that it was the claimant's choice to see more patients over a reduced number of days.

17.3 Section 4 was identical to section 4 in the 2011/2012 application.

17.4 Section 5 was similar in effect to the 2011/2012 application, the claimant confirming he "continued" to be an examiner, suggesting this was not an additional responsibility he had taken on since the previous applications for discretionary points. It is notable the claimant's application in 2010 is far more detailed than the 2012/2013 application, and there was much duplication

although not verbatim. The claimant had at times, changed his description, but the effect was largely the same and so the Tribunal finds. For example, in the 2012/2013 application the claimant referred to "trained nurses to obtain consent…" In the 2011/2012 application he referred to "teach nurses to obtain consent…" and "training certification of nurses taking consent for…" in the 2010 application. The claimant cited certifying and training nurses on consent from 2010 through to 2013 with no appreciable change, the claimant having been awarded his point in 2010.

17.5 No points were scored for teaching activities, Kay Carter being of the view the claimant was required to teach under his contract.

17.6 In section 6 "administration and management" duplications were present; some parts were verbatim such as "represent SAS doctors on LNC" in comparison with 2011 "A member of LNC to raise issues concerning SAS doctors" and 2010 "a member of LNC to discuss policies and issues with management" for which the claimant received one discretionary point. Kay Carter's view that the claimant would have scored 4 in recognition of the reputational effect for the Trust, a view repeated in the 2011/2012 application and on the balance of probabilities, the Tribunal found a panel would have reached the same decision.

17.7 In section 7 "other contributions", the claimant referred to being members of committees that appear to be largely duplicated in that they are a selection of committees. Just sitting on committees was insufficient and the claimant had not evidenced what he had achieved, nevertheless, a score of 7 would have been awarded in Kay Carter's assessment. No clarification was given as to why she would have scored a 7; the Tribunal noted the achievements set out in box 7.2 "organising and chairing a SAS conference on 6 March 2013 and achieve agreement at GMC postgraduate board to accept and put in place the regulatory framework for credentialing." This was claimed in 2011/2012. Points were given for an equivalent section 7 in 2011 /2012. There was no duplication of this in the 2010 application. The claimant produced document A8 in the bundle marked "C1 remedy" a letter dated 2 December 2015 from the director of medical education in which it was confirmed the claimant had been a member of the SAS funding panel since May 2012. This fact would not have been relevant to the 2010/2011 application, but was relevant to the 2012/2013 application section 7 for which the claimant, according to Kay Carter, would have scored 7. The Tribunal are unable to gainsay this score.

18 Kay Carter's evidence that she would have recommended a total score of 13 for the 2012/2013 application, largely due to duplication, lack of evidence, untrue statements and the absence of "anything" which showed the claimant had exceeded the normal expectation of his role. On the balance of probabilities the Tribunal accepts a panel would not have awarded the claimant a discretionary point bearing in mind bearing in mind Kay Carter's analysis and her theoretical input into the panel had it been convened. The claimant's second application also took place against a backdrop when he was allegedly not working his contractual hours, let alone working above and beyond.

19 On the balance of probabilities, taking into account the fact the claimant was not allegedly fulfilling his contractual hours, and the existence of an ongoing dispute concerning this, his work plan and the substantial amount of duplication going as far back as 2010, the claimant was not going to attract a high enough cumulative score to be awarded a discretionary point or points and so the Tribunal finds. The fact the claimant was the sole applicant under the old contract did not lead to an automatic point being awarded; the criteria had to be met. The claimant needed to show he had gone above and beyond his contractual duties, including those he had already been awarded discretionary points for and additional remuneration received for roles undertaken. For example, the claimant from the 1 April 2009 the claimant was appointed SAS Lead for 3 year duration and he received extra payment for this. In an email dated 4 September 2009, approximately 5 months into the claimant's new role as SAS lead, the claimant wrote to the respondent as follows; "let me clarify the situation for you. I am being paid 3 sessions for my on-call commitments since my appointment in 1996 therefore my associate specialist contract is 11 plus 3 sessions. Now I have been appointed as SAS lead and I am entitled to be paid one further extra session for this work therefore my payment should be 11 plus 4."

20 The Tribunal has referred to a backdrop involving a dispute over hours worked and payment received. The promulgated judgement refers, and for clarity the Tribunal reminded itself of the basic facts surrounding this dispute.

21 For a number of years prior to the claimant submitting his applications on 23 July 2013, there had been an issue with the claimant's "light timetable" and meetings had taken place concerning this as early as May 2010 with Joanne Henshaw, and these meetings continued until March 2014 until an agreement was reached on the job plan issue. This period covers the entire period the claimant was maintaining he was "going over and above." The Tribunal are of the view this would have been a difficult hurdle for the claimant to have successfully navigated in order to persuade a panel to use their discretion in his favour. The claimant submitted at this remedy hearing the fact the respondent backdated his pay from 15 May 2013 to end of December 2013 was evidence he had met his contractual hours because it says "in recognition of sessions being worked and lists/clinics having been covered during this period." The email in question is dated 14 March 2014 and it cannot be reasonably interpreted to read the claimant had fulfilled his contractual obligations and should receive back-pay previously withheld from 15 May to 31 December 2013. The email puts beyond doubt the fact there was an issue with the claimant's working hours that resulted in payment being withheld, and the evidence accepted by the Tribunal following the liability hearing was the claimant had prevaricated resolving the issues surrounding his job plan, to which a reference was made in the 14 March 2014 email to an "agreement…recently been reached with regard to a new job plan." Contrary to the claimant's evidence, the contemporaneous documentation points to a longstanding dispute over the claimant's job plan and working hours, and this would not have held the claimant in good stead when he applied for further remuneration by way of discretionary points for a period when he allegedly received more pay than the hours he worked merited.

22 The Tribunal is satisfied this matter would have been raised with the panel. Kay Carter had been querying with the claimant the number of sessions worked, and she had been pressurising him to agree a job plan with a view to the claimant receiving payment commensurate for the work he actually carried out, as she believed he was being overpaid, and had been so for some time, due to sessions not worked. Limitations had been placed on the claimant in respect of his access to theatre sessions and this had impacted on some of his work, although Kay Carter believed there was other work for the claimant to carry out in addition to the theatre. In short, Kay Carter was concerned the claimant was not working 11 plus 3 sessions and being paid for these sessions, stating in a letter dated 20 February 2013 sent to the claimant; "as we can at the moment identify only a possible maximum of 9.5 sessions, and I know that you have a 1 session additional duty for being SAS representative, I have agreed…to give you 3-months notice that your salary will be reduced to 11 plus 1 sessions. I informed you this may happen last Thursday and therefore the date of reduction will be 14 May…You must however agree an appropriate job plan because currently you are not fulfilling your whole time obligations….If after 3 months you have not agreed an appropriate job plan it may be that the additional session is stopped and that session of work (Trust SAS lead) incorporated into your 11 session job plan."

23 The claimant applied to the respondent on 23 July 2013 in 2 separate application forms relating to 2011/2012 and 20012/2013. In accordance with the procedure he was required to demonstrate that what he had achieved was over and above expectations of that role. The application provided at paragraph 2 for details of the sessions paid to be inserted, and the claimant confirmed he had standard 11 sessions and 3 sessions "for taking up extra sessions in the evening." The standard 11 sessions was in dispute, Kay Carter's view being the claimant did not work all of them. It is undisputed in September 2012 the claimant's theatre was cancelled without consultation. The claimant referred the Tribunal to his complaint concerning this, particularly the email sent 10 September 2012 to Mark Fordham. It is not for the Tribunal to comment whether cancelling the claimant's theatre list was fair or not. The evidence before the Tribunal was that there had been a 30% cut in theatre allocation, the core business of the Trust was carrying out cancer operations, and work more aligned with business agreements and service objectives. Vasectomy was not the respondent's priority, and the claimant was offered training in TRUS prostate biopsy in or around 4 July 2011 via email from Mark Fordham, clinical director, which he refused with the result that all he could carry out were ad hoc vasectomy operations as and when the theatre was vacant. This in turn reduced the number of operation carried out, and it cannot be the case, as now argued by the claimant, the panel would have found all of that work had been replaced by the ad hoc surgery and he was demonstrating an above average or outstanding contribution. It is notable the claimant also refused to take on worked supervised by a consultant he had trained in the past. It was the claimant's view his status was equivalent to that of a consultant, and this position was made clear to the Tribunal throughout both the liability and remedy hearings.

24 This remedy hearing has not been straightforward. In its promulgated judgment the Tribunal expressed its concern with assessing the claimant's performance

going as far back as 2011 given issues concerning whether the claimant had performed his contract, let alone over-performed in accordance with the Operating Policy. The Tribunal noted the majority of the documents set out within bundle "C1 remedy" were not relevant, falling before April 2011 and after April 2013. The Tribunal concluded there was no satisfactory independent documentary evidence before it, in addition to the claimant's applications, that he had demonstrated an above average contribution in respect of service to patients, teaching, and research and the management and development of the service that would merit a discretionary point being awarded. In contrast, there was considerable evidence by way of contemporaneous correspondence and documents, that the claimant were not working his full contractual hours.

25 In oral and written submissions Mr Powell, on behalf of the respondent, conceded the Tribunal had jurisdiction to assess damages for breach of contract arising out of the claimant's lost opportunity to have a discretionary point(s) awarded. He continues to maintain all evidence points to the fact the claimant would not have received any points; the Tribunal agreed for the reasons set out above. It was submitted the case was a "classic case of loss of chance or a loss of opportunity" and the Tribunal were referred to Chaplin v Hicks [1911] 2 KB 786 per Fletcher Moulton LJ at 798, McGregor on Damages 19the Edition paragraphs 10-93 and Chitty on Contracts 32nd Ed Loss of chance at Paras 20-26.

26 Chaplin v Hicks established that damages were recoverable in contract for the loss of a chance, and the principle applies in tort. The claimant must prove on the balance of probabilities that he has lost a real or substantial chance, as opposed to a speculative one, and if he does the court will assess damages according to the degree of probability that the chance would have occurred. The claimant's loss may be of the chance of earning profits or a capital gain. It is notable many of the loss of chance cases referred to in McGregor and Chitty relate to solicitors negligence, personal injury cases and the like. There are no cases remotely similar to the situation the claimant had found himself in, other than possibly Chaplin v Hicks which was not a case of personal injuries – damages were given for the loss of an opportunity to be considered (on a competitive basis) by women for a theatrical engagement. At page 798 Farewell LJ held "the two words chance and probability may be treated as being practically interchangeable, although it maybe that one is somewhat less defined than the other. The necessary ingredients of such an action are all present; the defendant has committed a breach of his contract, the damages claimed are a reasonable and probable consequence of that breach, and loss has accrued to the plaintiff at the time of the action. It is obvious…that the chance or probability may in a given case be so slender that a jury could not properly give more than nominal damages…but in the present competition we find chance upon chance, two of which the plaintiff had succeeded in passing; from being one of six thousand she had become a member of a class of fifty, and …was first in her particular division by the votes…out of those fifty there were to be selected 12 prize winners, if the plaintiff had never been selected at all the case would have been very different. In my opinion, the existence of a contingency, which is dependent on the volition of a third person, is not enough in justifying us in saying that the damages are incapable of assessment."

6 Farewell LJ at page 799 referred to the judgment of Best CJ in Richardson v Mellish; "It is clear that the plaintiff could only be appointed for one voyage…But though that is the case may not look to what which is the practice of the East India Company…the plaintiff is entitled to have compensation for being deprived of that which almost to a certainly happens…" Farewell LJ held "almost to a certainly means the contemplated event is very probable…It is clear…that damage resulting from a loss of a chance in winning a competition is assessable…"

7 Mr Powell submitted the very object and scope of the convening of a panel was to give the claimant the chance of being awarded discretionary points; the breach of contract deprived the claimant of this, and it was suggested the Tribunal awarded no damages to reflect the fact the claimant would not have succeeded and the lost chance was wholly speculative.

8 Mr Powell to his credit also pointed out that as the opportunity to have been awarded discretionary points lies in the past, the question of whether the claimant would have been awarded any discretionary point is to be determined on the balance of probability, a burden of proof well known in the Employment Tribunal.

9 The claim before the Tribunal is one brought under a common law one for damages for breach of contract, although the Tribunal had jurisdiction to hear it under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Where the employer's breach of contract consists of a failure to follow a contractual procedure damages are calculated on the basis of putting the employee back into the position he or she would have been in if the employer had not been in breach of contract. In other words, the claimant must be put in the position he would have been in if the respondent had complied with the contractual procedure and convened a panel to consider the claimant's applications for discretionary points. It is for the claimant who alleges that he has been caused damage by the respondent's failure who has the burden of proving not only that he has suffered the damage, but also the extent or amount of that damage. The claimant has failed to discharge this burden, the respondent having establishing facts, on the balance of probability, confirming no discretionary points would have been awarded and thus monetary damages do not flow form the breach.

10 It is the Tribunal's view that there is no requirement for it to evaluate the chance of the claimant being awarded discretionary points. There is sufficient historical information for the Tribunal to compile a factual matrix and reach a decision, on the balance of probabilities, as to what would have happened had the panel been convened. This it has done. If the Tribunal is wrong on this point, and the correct analysis would have been, as suggested by Mr Powell, to consider whether the claimant's lost opportunity was wholly speculative or not, taking into account imponderables, the Tribunal would have arrived at the same decision, namely, the claimant's loss of a chance to be awarded a discretionary point was wholly speculative given the factual matrix as set out above. His applications were hopeless from the outset as submitted by Mr Powell and borne out by evidence given by managers who would have affected how that discretion was used, and it would not have resulted in any award as the claimant has not established he had

a reasonable, as distinct from a speculative, chance of suffering such loss or damage.

11 In conclusion, the tribunal found on balance of probabilities the claimant would not have been awarded points in relation to his 2011/2012 and 2012/2013 applications made under the Operational Policy for Awarding Discretionary Points to Associate Specialists and no award of damages for breach of contract is ordered.

CASE MANAGEMENT ORDERS

1. The respondent seeks its costs of the application to strike out the claimant's case heard on 18 June 2015 and of the claims advanced by the claimant, including the claim of race discrimination. It was agreed the application for costs involved the Tribunal considering without prejudice material that should only be viewed after remedy has been dealt with. Accordingly, it was agreed a cost hearing would take place on 25 and 26 September 2017. At present, no cost application has been made by the claimant. If the claimant intends to apply for costs these case management orders will be followed, failing which the application could be adjourned or struck out.

2. The following case management orders were agreed to assist the parties prepare for the costs hearing:

2.1 The parties, if so advised, will within 14 days of promulgation of this Judgment and Reasons, serve on each other a detailed cost assessment together with a full and coherent explanation of the basis on which the cost application is being made. The claimant is ordered to send to the respondent full disclosure of his finances supported by documentary evidence i.e. employment contract, payslips, bank statements etc, relating to earnings (including investments) properties owned and savings and outgoings in order that the Tribunal can make an assessment for the purpose of considering the respondent 's cost application.

2.2 No later than 35 days after promulgation of the Judgment and Reasons the parties will respondent to each other's cost application by preparing and serving a counter-schedule of costs clearly indicating those costs which can be agreed, and giving cogent reasons as to why they are in dispute plus a response to the costs application cogently setting out why costs should not/should be awarded.

2.3 The parties will confirm to the Tribunal that these case management orders have been complied with immediately upon compliance. It is in accordance with the overriding objective and in the best interests of the parties to insure all the relevant information relating to costs is obtained well before the hearing, in preparation for which an agreed bundle will be produced containing all the relevant documents and supporting evidence.

3. The case is listed for a cost hearing before a full Tribunal on 25 **and 26 September 2017** at Liverpool Employment Tribunal, Liverpool Civil & Family Courts, 3rd Floor, 35 Vernon Street, Liverpool, L2 2BX.

Employment Judge Shotter

11 May 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 May 2017

FOR THE SECRETARY OF THE TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2403798/2014

Name of case(s):	Mr N Vaswani	v	The Royal Liverpool & Broadgreen University Hospitals NHS Trust

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: 16 May 2017

"the calculation day" is: **17 May 2017**

"the stipulated rate of interest" is: 8%

MISS K MCDONAGH
For the Employment Tribunal Office