

IN THE HIGH COURT OF JUSTICE

**Claim No: QB-2019-
001158**

QUEEN'S BENCH DIVISION

BEFORE THE HONOURABLE MR JUSTICE MARTIN SPENCER

BETWEEN

HXR

**(A protected party proceeding by her
Litigation Friend QXR)**



QB-2019-001158
Claimant

And

EAST SUSSEX HEALTHCARE NHS TRUST

Defendant

ORDER

BEFORE The Honourable Mr Justice Martin Spencer via a remote hearing on 12 March 2021 pursuant to Practice Direction 51.

UPON HEARING Harry Trusted, Counsel, on behalf of the Claimant and Simon Readhead one of Her Majesty's Counsel, on behalf of the Defendant

WHEREAS the Claimant has made a claim (the “Claim”) against the Defendant for personal injuries suffered by her arising out of the Defendant’s negligence on or about April 2007 and in respect of which proceedings were commenced by the Claimant against the Defendant in the High Court of Justice Queen’s Bench Division on 1 April 2019

AND WHEREAS the Claimant is a Protected Party and brings the Claim by her Litigation Friend, QXR

AND WHEREAS the National Health Service Litigation Authority (“NHS LA”) shall be responsible for and make the payments set out in the Schedule to this Order and for the benefit of the Claimant (referred to below as “periodical payments”)

AND WHEREAS the NHS LA has entered into an agreement with the Defendant which permits the NHS LA to be responsible for and make the periodical payments under this Order

AND WHEREAS the NHS LA is a Special Health Authority within the meaning of section 70 of the National Health Service Act 2006

AND WHEREAS the Defendant and the NHS LA agree with the Claimant that in the event of any failure to make the periodical payments or any alteration in the method or change in the identity of the source of

payment the same shall give rise to a direct right of the Claimant to enforce the Order and all rights arising under it against the NHS LA in consideration of the Claimant agreeing to the terms of this Order

AND UPON READING the Advice from Counsel for the Claimant dated 8th March 2021 and the documents contained within the bundle for this hearing

AND UPON the Court being satisfied that:

- (a) The continuity of payment under the Order is reasonably secure pursuant to section 2(3) of the Damages Act 1996 and/or pursuant to section 2(4)(c) of the Damages Act 1996 and under the terms of the Order as herein set out
- (b) The periodical payments are to be paid free of taxation under section 731-734 of the Income Tax (Trading and Other Income) Act 2005
- (c) The Order set out below is agreed by the Claimant and the Defendant as being the preferred Order that should apply
- (d) The form of the Order is that which best meets the Claimant's needs and CPR 21 and 41 have been complied with

AND UPON the Claimant having given the following undertakings to the Court

1. A Deputy has been appointed for the Claimant
2. The Claimant whether acting by her Litigation Friend or her Deputy will take all necessary steps to seek to stay the Claim and any proceedings which have begun or have been threatened against the Defendant in connection with the Claim
3. The Claimant, her Litigation Friend and/or her Deputy will not institute any proceedings against the Defendant or any other party or person whomsoever in connection with the Claim save by way of enforcement of this Order

AND UPON the parties having agreed in full and final settlement of the claim that the Defendant shall pay to the Claimant the sum of £1,000,000 (one million pounds) inclusive of interim payments of £71,682.65 (seventy one thousand six hundred and eighty two pounds and sixty five pence) and CRU understood to be £28,317.35 (twenty eight thousand three hundred and seven pounds and thirty five pence) (but subject to an updated calculation and/or a mandatory reconsideration) and interest to 28 days after the date of the Order approving the agreement together with the periodical payments contained in the Schedule annexed to this Order.

AND UPON the Court having approved the terms of this Order and the Schedule annexed to this Order

BY CONSENT

- (1) **IT IS ORDERED** that the Defendant shall make payments to or for the benefit of the Claimant as follows in full and final settlement of the claim
- (a) By the 9th of April 2021 the Defendant shall pay (having taken into account any interim payments and/or CRU and/or interest to that date, and/or payment in respect of gratuitous care and expenses, and / or retention for costs) the net sum of £669,342.99 (Six hundred and sixty nine thousand, three hundred and forty two pounds and ninety nine pence) into the Account of the Deputy (Irwin Mitchell Trust Corporation Ltd as Deputy for the Claimant, Bank: Lloyds; Sort code 30-97-51; Account number: 70347160).
- (b) The Defendant have paid to the Department of Work and Pensions the CRU benefits in the sum of £28,317.35 (twenty eight thousand three hundred and seventeen pounds and thirty five pence) in July 2019.
- (c) The Claimant having applied for a mandatory reconsideration of the CRU certificate is owed any refund payable by the Department of Work and Pensions. In the event, payment is made directly to the Defendant, the Defendant shall send to the Claimant's Solicitors the refund within 28 days of receipt.

- (d) By the 9th April 2021 the Defendant shall pay to the Claimant's solicitors (Irwin Mitchell client account; Sort code; 40-41-07; Account no; 43262340) free of any statutory charge the sum of £56,000 (Fifty six thousand pounds) which sum shall include interest thereon to 28 days after the date of this order in respect of damages to be held on trust for the Claimant's husband in respect of gratuitous past care and expenses and a further £174,657.01 (One hundred and seventy four thousand, six hundred and fifty seven pounds and one pence) for retention of costs pending resolution of the Detailed Assessment or approval of costs issues.
- (e) Further, the sums as specified in the attached Schedule be paid by the Defendant as stipulated in the Schedule and be funded in accordance with section 2 (4) (c) of the Damages Act 1996 with the sums payable to comprise damages for future care and case management, such that the NHS LA shall be responsible to the Claimant for and make such payments to the Claimant.
- a. **AND IT IS FURTHER ORDERED** that the Defendant do pay the Claimant's costs on the standard basis such costs to be the subject of a detailed assessment, if not agreed and paid within 28 days of assessment or agreement.
- b. **AND IT IS FURTHER ORDERED** that there shall be a detailed

assessment hearing to determine what costs, shall be payable by the Claimant to her solicitors; such costs shall be assessed on the indemnity basis pursuant to CPR 46.4 and shall take place following the conclusion of the assessment or agreement of the Defendant's liability for the Claimant's legal costs.

- c. The Claimant's Solicitors do retain £174,657.01 from the Claimant's approved damages pending resolution of the Detailed Assessment or approval of costs issues.
- d. **AND IT IS FURTHER ORDERED** that by 1st April 2021 the Defendant shall pay to the Claimant's solicitors £215,000 (two hundred and fifteen thousand pounds) as a further payment on account of costs
- e. **AND IT IS FURTHER ORDERED** that all further proceedings in this action be stayed except for the purpose of implementing the terms of this Order and the terms set out in the attached Schedule, for which purpose there be permission to apply to the Claimant, the Defendant and to the NHS LA, and if necessary to add the NHS LA as a party to enforce the terms of this Order
- f. **AND IT IS FURTHER ORDERED** that there be permission to restore

Dated 12 March 2021

SCHEDULE TO THE ORDER

Part 1 of the Schedule to the order

Each sum payable under part 2 of this schedule is a “periodical payment” subject to the conditions set out in paragraphs 1-8 of this part

1. Unless specifically stated, all the periodical payments under part 2 of this schedule will continue during the lifetime of the Claimant
2. No minimum number of periodical payments under part 2 of this schedule shall be made
3. Payment of the periodical payments under part 2 of this schedule will cease on the death of the Claimant
4. The final periodical payment under part 2 of this schedule will be pro-rated for so much of the final year that the Claimant had survived and any balance owing to the NHS LA or its successor will be repayable to it out of the Claimant’s estate, subject only to deduction by the Claimant’s estate of such sums as the Claimant’s estate may be liable for in respect of the termination of the employment of any persons employed to care for the Claimant

5. The NHS LA shall be entitled to require the Claimant to produce evidence in a form reasonably satisfactory to the NHS LA that the Claimant remains alive before making any periodical payment
6. The periodical payments under part 2 of this schedule are to be made by BACS into the Account of the Deputy (Irwin Mitchell Trust Corporation Ltd as Deputy for the Claimant, Bank: Lloyds; Sort code 30-97-51; Account number: 70347160) for the benefit of the Claimant under reference provided to NHS LA
7. Under part 2 of this schedule the NHS LA shall provide to the Claimant and/or the Deputy in writing:
 - 7.1 At the time of each periodical payment an explanation of how it has been calculated;
 - 7.2 If reclassification or a change of methodology occurs within the meaning of part 2 of this schedule then when a periodical payment is made or in the event of a deferred periodical payment as soon as practicable following such a reclassification or a change of methodology, the relevant calculation(s) under paragraph 6 and the numerical value of 'AR' as defined in paragraph 7.1.4 of that part applicable to any current and/or future periodical payment to be made under that part

8. The NHS LA shall pay the relevant annual sums set out in part 2 of this schedule on the 15th of December of each year, save that:
 - 8.1 If the Office for National Statistics ['ONS'] does not publish by the 17th of November in the relevant year all the relevant data and as a result the NHS LA is unable to perform the relevant calculations under part 2 to recalculate the periodical payment due to the Claimant before the 15th of December of the relevant year, the NHS LA shall on the 15th of December of the relevant year make the periodical payment: (a) in the same sum as that paid in the previous year; or (b) in the increased/decreased sum recalculated in accordance with the relevant data for the previous year where in the relevant year the annual sum was due to be increased or decreased or commenced under the relevant sub-paragraph of paragraph 1 of part 2
 - 8.2 Any balancing payment due to the Claimant or the NHS LA shall be made within 28 days after the publication of all the relevant data by the ONS
 - 8.3 The NHS LA shall pay interest at the then applicable Judgment Act rate on any outstanding periodical payment or part of a periodical payment not paid on the 15th of December in any year from the 16th of December in that year until full payment is made, except that in the circumstances contemplated in paragraphs 8.1-2 interest due on

any balancing payment shall only be payable by the NHS LA from 28 days after publication of all the relevant data until full payment is made

9. For the period from 15th December 2021 to 14th December 2022 to represent the periodical payment under part 2 of this schedule for that period the Defendant do pay the sum of £105,000 (one hundred and five thousand pounds) due as the balance of the periodical payment for the above period and that sum shall be paid by 4.00 pm on the 15th December 2021

Part 2: The ASHE 6115-Linked Periodical Payments

1. The following present value annual sums as recalculated in accordance with paragraphs 3-10 shall be paid in advance
 - 1.1 The annual sum of £105,000 (one hundred and five thousand pounds) payable on the 15th of December in each year from 2022 with the first such payment to be made on the 15th of December 2022
2. The relevant earnings data are the gross hourly pay for “all” employees given by the present Standard Occupational Category [‘SOC’] for (Care assistants and home carers) [‘6115’] at the relevant percentile shown below (currently in table 26.5a at the tab for “all” employees) of the Annual Survey of Hours and Earnings in the United Kingdom [‘ASHE’] published by the ONS. The original relevant percentiles are:
 - 2.1 80 percentile shall be applied to paragraph 1.1 above

First payment of periodical payments under each step

3. Unless paragraphs 5-10 below apply, the annual periodical payments referred to in paragraph 1.1 above shall be recalculated in November prior to payment on the 15th of December of the same year from November 2022 in accordance with the following formula

$$PP = C \times \frac{NP}{A}$$

3.1 Where

3.1.1 'PP' = the amount payable by way of periodical payment in each year being calculated in November and paid on the 15th of December the first 'PP' being the payment on the 15th of December 2022

3.1.2 'C' = the relevant annual sum set out in paragraph 1.1 above respectively

3.1.3 'NP' = the "*first release*" hourly gross wage rate published by the ONS for the relevant percentile of ASHE SOC 6115 for "*all*" employees for the year in which the calculation is being carried out, the first NP being the figure applicable to the year 2022 published in or around October 2022

3.1.4 'A' = the "*revised*" hourly gross wage rate for the relevant percentile of ASHE SOC 6115 for all employees applicable to 2021 and published by the ONS in or around October 2022. In the event of a correction by the ONS it will be the replacement "*revised*" figure issued by the ONS

Subsequent payment of periodical payments under each step

4. Unless paragraphs 5-10 below apply, the annual periodical payments referred to in paragraph 1.1 above shall be recalculated annually in subsequent years in November in each year prior to payment on the 15th of December of the same year from November 2023 in accordance with the following formula

$$PP \square C \square \frac{NP \square (NF \square OP)}{A}$$

4.1 Where in addition to the definitions previously set out

4.1.1 ‘NF’ = the “revised” hourly gross wage rate published by the ONS for the relevant percentile of ASHE SOC 6115 for “all” employees for the year prior to the year in which the calculation is being carried out, the first NF being that applicable to the year 2022 and published in or around October 2023

4.1.2 ‘OP’ = the “first release” hourly gross wage rate published by the ONS for the relevant percentile of ASHE SOC 6115 for “all” employees for the year prior to the year in which the calculation is being carried out, the first OP being the figure applicable to the year 2022 published in or around October 2022

Payments upon reclassification of the SOC or a change of methodology by the ONS

5 Reclassification for the purposes of paragraphs 6-9 below, and subject to paragraph 6.1.2, occurs when the ONS publishes for the same year “revised” hourly gross wage rates for both:

5.1 the previously applied SOC (for which the “revised” wage rate is defined as ‘AF’ in paragraph 6.1.1 below) and

5.2 for a new SOC (for which the “revised” wage rate is defined as ‘AR’ in paragraph 7.1.4 below) that includes those currently defined as “home carers” in ASHE SOC 6115

Or alternatively, where the ONS publishes AR for a new SOC that includes those currently defined as “home carers” in the previously applied SOC but does not publish AF for the same year, then reclassification is nonetheless deemed to have occurred

Unless the Court otherwise orders pursuant to paragraph 11 below, in either event the new SOC shall be applied

6 The relevant annual sum referable to the sums at paragraph 1.1 above following reclassification shall be known as ‘CR’ and shall be calculated only in each year of reclassification, in accordance with the following formula

$$CR = C \times \frac{AF}{A}$$

6.1 Where in addition to the definitions previously set out

6.1.1 'AF' = the final published "revised" hourly gross wage rate for the relevant percentile of the previously applied SOC for "all" employees

6.1.2 If, for the year of reclassification, the ONS does not publish AF, then the "first release" hourly gross wage rate published for the relevant percentile of the previously applied SOC for "all" employees (which is defined as 'OPF' in paragraph 7.1.3 below) shall be applied in its place

6.1.3 If reclassification has previously occurred then C will be the numerical value of CR calculated when reclassification last occurred

7 When reclassification occurs the first payment only shall be

$$PPR \left[\frac{CR}{AR} \frac{NPR}{A} \frac{AF - OPF}{A} \right]$$

The second bracket of the above formula shall not apply where at the time of reclassification, either (a) there has been no periodical payment made in the previous year or (b) where at that time a step change in the annual sum is due under paragraph 1 above and in those circumstances the first payment shall be calculated in accordance with the following formula

$$PPR \left[\frac{CR}{AR} \frac{NPR}{A} \right]$$

Where reclassification has occurred on more than one occasion prior to the first payment then successive applications of paragraph 6 above must be carried out first to arrive at the present numerical value of CR and C shall represent the numerical value of CR previously calculated

7.1 Where in addition to the definitions previously set out

7.1.1 '*PPR*' = the amount payable by way of periodical payment in each year following reclassification

7.1.2 '*NPR*' = the "*first release*" hourly gross wage rate published for the relevant percentile of the new SOC following reclassification for the year in which the calculation is being carried out

7.1.3 '*OPF*' = the final "*first release*" hourly gross wage rate published for the relevant percentile of the previously applied SOC for "*all*" employees

7.1.4 '*AR*' = the "*revised*" hourly gross wage rate for the published percentile of the new SOC, which, when first published, is closest to *AF*, and the relevant percentile of the new SOC shall be the percentile to which *AR* corresponds

8 Until further reclassification the formula for calculating subsequent values of *PPR* shall be

$$PPR \square CR \square \frac{NPR \square (NFR \square OPR)}{AR}$$

- 8.1 Where in addition to the definitions previously set out
- 8.1.1 ‘NFR’ = the “revised” hourly gross wage rate published for the relevant percentile of the new SOC following reclassification for the year prior to the year in which the calculation is being carried out
- 8.1.2 ‘OPR’ = the “first release” hourly gross wage rate published for the relevant percentile in the new SOC following reclassification for the year prior to the year in which the calculation is being carried out
- 9 Further reclassifications shall be dealt with in the same way by the application of paragraphs 5-8 above
- 10 For the purposes of this part a change of methodology occurs when the ONS publishes two sets of data for the applied SOC. In that event, the same process as set out in paragraphs 6-9 above shall be undertaken. However, in these circumstances references to
- 10.1 ‘reclassification’ shall be treated as being a reference to ‘a change of methodology’,
- 10.2 ‘the new SOC’ shall be treated as being a reference to ‘the existing SOC using the new methodology’, and
- 10.3 ‘the previously applied SOC’ shall be treated as being a reference to ‘the existing SOC using the old methodology’

Miscellaneous

- 11 In the event of a dispute between the parties arising out of the application of this part, there be liberty to apply.

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