



Neutral Citation Number: [2013] EWHC 229 (QB)

Case No: HQ07X00737 (5BS50782)

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 01/03/2013

**Before :**

**THE HONOURABLE MRS JUSTICE SWIFT DBE**

**Between :**

**R H**  
**(A child proceeding by his Mother and Litigation**  
**Friend, L W)**

**Claimant**

**- and -**

**UNIVERSITY HOSPITALS BRISTOL NHS**  
**FOUNDATION TRUST**  
**(formerly UNITED BRISTOL HEALTHCARE**  
**NHS TRUST)**

**Defendant**

**Mr Robin Oppenheim QC** (instructed by **Barcan Woodward, Solicitors**) for the **Claimant**  
**Mr Paul Rees QC** (instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing date: 11 February 2013

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**THE HONOURABLE MRS JUSTICE SWIFT DBE**

**The Honourable Mrs Justice Swift :**

**The history of the model periodical payments order**

1. The claimant in this case, *RH*, suffers from cerebral palsy as a consequence of admitted negligence by the defendant in the management of his birth. By his mother and litigation friend, he brought a claim against the defendant for damages consequent on its negligence. The parties reached agreement on the overall award of damages; that agreement was approved by the Court in February 2007. Subsequently, there was a trial before Mackay J as to:
  - i) the form of the award, i.e. whether it should be by way of lump sum and/or periodical payments;
  - ii) the heads of future loss that should be the subject of any periodical payments order; and
  - iii) whether any such periodical payments should be varied by reference to the Retail Prices Index (RPI) pursuant to section 2(8) of the Damages Act 1996 (the 1996 Act) or whether the order should contain a provision and, if so, what provision, modifying the effect of sub-sections (8), pursuant to section 2(9) of the 1996 Act.
2. In June 2007, Mackay J handed down judgment in *RH* in which he held that future damages for care and case management should be paid by way of a periodical payments order. He accepted the claimant's argument that the periodical payments should be index-linked, not by reference to the RPI, but instead by reference to the Annual Survey of Hours and Earnings (ASHE) 6115, published by the Office for National Statistics (ONS).
3. ASHE 6115 is a standard occupational code which tracks the earnings of the category of workers described as "care assistants and home carers". The ASHE 6115 data consist of gross hourly rates for median, mean, and various percentiles of earnings of care assistants and home carers. Mackay J found that indexation by reference to ASHE 6115 would provide the best available indicator of growth in the earnings of the type of carer to be employed by the claimant.
4. Mackay J granted the defendant in *RH* permission to appeal from his decision. Meanwhile, three other cases involving the issue of indexation of periodical payments had been decided at first instance. All three cases were claims against health authorities and were therefore, like *RH*, being dealt with by the National Health

Service Litigation Authority (the NHS LA). In all three cases, the judge had held that indexation of the periodical payments payable to the claimant should be by reference to ASHE 6115, rather than the RPI. Leave to appeal had been granted in those three cases also.

5. In November 2007, the Court of Appeal dismissed the defendants' appeals in the four 'test' cases. Subsequently, the House of Lords granted leave to appeal. However, in May 2008, the Petition was withdrawn. The four cases were then referred back to Mackay J for the purpose of approving a 'model order' to be used in the test cases and in every future case in which the NHS LA was involved and a periodical payments order for care and case management was made. The object of having a model order approved by the Court was to avoid the necessity for orders to be drafted individually from scratch in every case, with the inevitable expenditure of unnecessary time and costs and the obvious risk of error that would thereby be entailed. It was recognised that the model order would have to contain a Schedule incorporating the various formulae based on ASHE 6115 to be used to calculate the annual increases in periodical payments for care and case management. It was recognised also that the order would have to provide for changes that might occur during the currency of the order which would affect the calculations to be made.

6. A hearing took place before Mackay J on 30-31 July 2008 and the orders in *RH* and two of the other three 'test' cases were approved. In his judgment, Mackay J said:

“... I believe it [*the model order*] should be followed in all cases where the NHSLA is the paying party, unless there are specific features of a particular case which make it inappropriate...

I cannot and do not attempt to dictate future decisions by my brother and sister judges on settlement of such cases, but I can, I think, make this statement, designed to ensure that litigation involving the NHSLA is conducted in a just and economical way. If in future cases claimants' advisers wish to ignore the model and devise their own forms of order, they will necessarily incur expense in doing so, both in re-writing the order and, probably, having available at court the advisor who assisted them to explain it to the court and to justify preferring it to the model. While all matters of costs are entirely for the judges who hear applications, it seems to me that they are likely, if they do that, to do so at their client's risk as to costs should the court conclude that the expense was unnecessarily incurred.”

7. As practitioners began to use the model order, it became clear that certain modifications to it were required. Therefore, by agreement between the parties, the case of *RH* was brought back before the court and came before Sir Christopher Holland for hearing on 2 December 2008. He approved minor modifications to the order in *RH* and the Schedule thereto. Henceforth, I shall refer to Sir Christopher

Holland's modified order as the 'model order'. It is to be noted that, at the time the modifications were made, Sir Christopher expressed doubt as to whether any drafting could anticipate and cater for every change in circumstance that might occur during the currency of a periodical payments order which could be in place for decades to come.

8. Ever since the conclusion of the appeal in the four 'test' cases, periodical payments for care and case management awarded in cases involving the NHS LA have been index-linked by reference to the gross hourly rates taken from the ASHE 6115 data, usually at the 75<sup>th</sup>, 80<sup>th</sup> or 90<sup>th</sup> percentile of earnings. Since that time, the model order has been used in every such case. The NHS LA is currently dealing with 643 claims in which periodical payments orders for care and case management have been made. In all those cases, the date on which periodical payments fall to be recalculated is 15 December each year.

### **The ASHE 6115 data**

9. The formulae for calculating the annual indexation of periodical payments by reference to ASHE 6115 are based on data produced by the ONS. The survey which gives rise to the earnings data contained in ASHE 6115 is carried out in April each year and the "first release" data resulting from the survey are published in November of the same year. The "first release" data are the initial results produced from the survey returns. Those data are later revised in order to take account of any late returns, together with any errors that may have been detected. The "revised" data are published the following year. The model order provides formulae by which the calculation of each year's indexation of periodical payments can take account of any change between the "first release" data published in November of the previous year and the "revised" data published during the current year. The relevant formulae are contained in paragraph 3 of Part 3 of the Schedule (Part 3 deals with the ASHE 6115-linked periodical payments) to the model order.
10. The model order anticipates that there might from time to time be changes in the methodology employed by the ONS. It also takes account of potential changes in the occupational classifications used by the ONS. These occupational classifications are revised by the ONS every ten years to reflect changes in the occupational composition of the population. Any reclassifications made by the ONS as a result of one of its ten-yearly revisions are reflected in the data published two years after that revision has taken place. The Schedule to the model order contains formulae which were specifically designed to meet both changes in ONS methodology and reclassification of occupational groups by the ONS. Those provisions are set out at paragraphs 5-10 of Part 3 of the Schedule to the model order.

### **The current problem**

11. In 2010, the ONS carried out its ten-yearly revision of occupational classifications, the first such revision since the model order had been in operation. ASHE 6115 was

reclassified by splitting it into two separate new Standard Occupational Codes (SOC), ASHE 6145 (“care workers and home carers”) and ASHE 6146 (“senior care workers”). For reasons that it is unnecessary to rehearse here, neither of those SOCs is considered suitable for use as an alternative to ASHE 6115. Since the ONS was aware of the significance of ASHE 6115 to claims for personal injury generally and for periodical payments in particular, it agreed to continue publishing data for ASHE 6115, notwithstanding the 2010 reclassification.

12. In November 2011, the ONS published the “first release” data for ASHE 6115. In 2012, it published the “revised” 2011 data for ASHE 6115 and the 2012 “first release” data for ASHE 6115. On the face of it, therefore, it might appear that, despite the reclassification that had taken place, the ONS was providing the same data as previously. However, this was not the case. In fact, there was an important change in the 2012 data which resulted from the 2010 reclassification.
13. In 2010, as well as the reclassification, there had been a change in the methodology used by the ONS. This change meant that, whereas the “first release” ASHE 6115 data published in November 2011 had been derived, as with data in previous years, from a weighted average of the SOC 2000 classifications, the “revised” 2011 ASHE 6115 data (and the “first release” 2012 ASHE 6115 data) were derived from a weighted average of the new SOC 2010 classifications. As a result of the change in methodology, the “revised” 2011 gross hourly rate was 11 pence less than the “first release” rate which had been published in November 2011. This size of discrepancy had not occurred in previous years. Between 2006 and 2011, there had been no variation at all between the “first release” and “revised” gross hourly rates at the 80<sup>th</sup> percentile of ASHE 6115. The largest variation upwards or downwards across all the published percentiles during that period had been only 2 pence
14. Paragraph 5 of Part 3 of the Schedule to the model order sets out the method of calculation to be used when the ONS has revised its classification of the relevant occupational group. The calculations require the use of a value, “AF”, where “AF” is the “revised” hourly gross wage rate for the previously applied SOC. The SOC applied by the ONS up to 2011 was SOC 2000. The ONS has not published the “revised” 2011 ASHE 6115 data based on SOC 2000 methodology and has said that it is unable to do so. As a result, when the NHS LA was preparing to calculate the annual periodical payments due to claimants under the terms of the model order in December 2012, the value of “AF” could not be determined.
15. The NHS LA was therefore obliged to write to all claimants (or their Deputies), explaining the position, providing details of the calculations that had been possible and of the revised amount of the periodical payments to be made on the basis of those calculations, and informing them that balancing payments, if due, would be made once the problem had been resolved.

## Solving the problem

16. Meanwhile, the NHS LA, through their solicitors, had set about trying to solve the problem that had arisen. Mr Richard Cropper, an independent financial adviser who gave evidence on behalf of *RH* together with the claimants in two of the other ‘test’ cases at the original trials of the indexation issue, provided assistance on this issue. Mr Cropper had been involved at all stages of the development of the model order and the formulae contained in the Schedule to the model order originate from work carried out by him. He was clearly the right person to consider what could be done to solve the problem caused by the missing data.
17. Mr Cropper produced two Briefing Notes, dated 23 and 30 November 2012. At the time he wrote those Briefing Notes, it was not clear whether the ONS would be able to publish the missing data. Mr Cropper suggested a solution that might be adopted in the event that the missing data could not be provided. He proposed that, in paragraphs 6 and 7 of Part 3 of the Schedule to the model order, the value “AF” (the final published “revised” hourly gross wage rate for the relevant percentile of the previously applied SOC) should be replaced by the value “OPF” (which is defined in the model order as the “first release” hourly gross wage rate for the relevant percentile of the previously applied SOC). He commended his proposed solution as being the most straightforward way to resolve the problem using the ASHE 6115 data that was available.
18. Mr Cropper acknowledged that, in the absence of the “revised” 2011 data for ASHE 6115 based on SOC 2000 weighting, it was not possible to determine the magnitude or direction of the discrepancy between the “first release” and “revised” data for 2011. He noted, however, that in the past the discrepancy between the “first release” and “revised” hourly rates had been very modest indeed and had fluctuated both upwards and downwards. Mr Cropper considered that his suggested solution provided the lowest potential margin for inappropriate variance and that any variance that did occur would not be intentionally biased towards either claimants or defendants. He pointed out that, under paragraph 7 of Part 3 of the Schedule to the model order, a similar approach is applied in a year when a “step change” occurs in the amount of the periodical payment due to a claimant. Subsequently, he confirmed his opinion in a Report dated 10 February 2013.
19. The NHS LA’s solicitors also obtained a Report from Professor Gerald Makepeace, a statistician in the field of labour economics at the Cardiff Business School, commenting on Mr Cropper’s Briefing Notes and his proposed solution. Professor Makepeace had contributed to the development of the model order in 2008. In his Report of 3 January 2013, Professor Makepeace concluded that the solution proposed by Mr Cropper was both acceptable and workable and would achieve its objective.

## The hearing

20. The next step was to determine how Mr Cropper's solution should be implemented. It was decided that this should be done by bringing the case of *RH* back before the court and seeking to amend the modified order made by Sir Christopher Holland in December 2008. The case of *RH* duly came before me for hearing on 11 February 2013, when I heard oral submissions from leading counsel for both *RH* and the defendant/NHS LA. It should be noted that Mr Robin Oppenheim QC, who appeared for *RH*, very properly made clear that he was acting for *RH* alone and was not instructed to represent other claimants who might be affected by changes to the model order. The object of the hearing was not only to formalise the amendments to the order in *RH*'s case. The defendant/NHS LA also wanted to seek my general approval to proposed amendments to the model order.

## *The proposed amendments*

21. The proposed amendments to the model order have been designed primarily to deal with the problem which arose in 2012.
22. Paragraph 5 of Part 3 of the Schedule to the model order provides that "reclassification" occurs when the ONS publishes for the same year "revised" hourly gross wage rates for both the previously applied SOC and the new SOC. That provision reflects the process which, at the time the model order was drafted, it was believed that the ONS would follow after its ten-year revision of occupational classifications.
23. Since, in 2012, the ONS did not publish the "revised" ASHE 6115 data for both the previously applied SOC and the new SOC, no "reclassification" within the meaning of paragraph 5 of Part 3 of the Schedule to the model order had occurred and paragraph 5 was not triggered. It was clear, therefore, that the circumstances in which paragraph 5 was triggered required some extension. Accordingly, paragraph 5.2 of Part 3 of the Schedule to the proposed amended model order provides for reclassification to be deemed to have occurred in circumstances such as those which arose in 2012.
24. The original model order stated that, when reclassification occurs, the new SOC shall be applied. The proposed amended model order provides that the new SOC will be applied whether reclassification actually occurs or is deemed to have occurred. That provision is subject to a new proviso:

"Unless the Court otherwise orders pursuant to paragraph 11 below..."

Paragraph 11 states that:

“In the event of a dispute between the parties arising out of the application of this Part [*i.e. Part 3*], there be liberty to apply.”

The object of the proposed new proviso is to make quite clear that, if there are specific factors (as yet unforeseen) which would or might make it inappropriate to apply the new SOC, the matter can be referred back to the Court.

25. It is proposed that paragraph 6.1.2 of Part 3 of the Schedule to the model order should be amended to provide that if, for the year of reclassification, the ONS does not publish “AF”, then the value “OPF” shall be applied in its place. That amendment implements the solution proposed by Mr Cropper.
26. A further objective of the proposed amendments has been to ensure that, whenever a reclassification or change in methodology occurs, the consequent calculations are performed, and the results reported to the relevant claimant or Deputy, as soon as possible, even in cases where the order provides for the making of deferred periodical payments *i.e.* periodical payments which are not due to start until some time in the future. By carrying out the calculations and notifying the claimant or Deputy immediately, it is intended to avoid the possibility of the effects of a reclassification or change in methodology being overlooked when payment under a periodical payments order starts in the future. The introduction of a proposed new paragraph 7.2 in Part 1 of the Schedule to the model order is intended to ensure that the effects of reclassification or change in methodology are ‘captured’ in this way as soon as they occur.
27. Other proposed amendments to the model order are merely consequential upon the substantive changes to the model order or to the ONS data. In particular, the proposed amendment to paragraph 2 of Part 3 of the Schedule to the model order reflects the fact that the SOC data for “care assistants and home carers” (6115) is now contained in Table 26.5a (rather than, as previously Table 14.5a) of the ASHE. I shall not enumerate the other proposed amendments, which are minor in nature.



## **Conclusions on the proposed amendments**

### ***The case of RH***

28. A great deal of time and effort has gone into finding a solution to the problem that has arisen as a result of the failure by the ONS to publish the data required to carry out the indexation calculations set out in the model order. The process of formulating the proposed amendments to the order in *RH* (which proposed amendments are replicated in the proposed amended model order) has been a collaborative affair, involving leading counsel and solicitors for both parties, together with Mr Cropper, Professor Makepeace and Dr Victoria Wass, labour economist, who gave evidence for the claimants at the original trials of the indexation issue. The wording of the proposed amendments has been the subject of careful consideration by experts and lawyers and is agreed between the parties. I am entirely satisfied that the proposed solution is fair and reasonable and will achieve justice as between the parties. I am satisfied also that the proposed amendments to the model order are both necessary and appropriate to meet the problem which has arisen in giving effect to the existing order.

### ***Future periodical payments orders involving the NHS LA***

29. It is the NHS LA's intention to use the amended model order in all future cases where periodical payments orders for care and case management are made.

### ***Existing periodical payments orders involving the NHS LA***

30. The question however arises as to what is to be done with the 642 other cases involving the NHS LA in which periodical payments orders for care and case management are already in existence. Those cases are not before me and it is not therefore open to me to impose upon the claimants in those cases the terms of the amended model order. It is, however, necessary that the amended provisions should be applied to all cases involving the NHS LA in which there are existing periodical payments orders for care and case management so as to enable the periodical payments made in December 2012 to be recalculated and any balance owing to claimants to be paid, and also so as to ensure that there is a process in place to deal with any similar problems that might arise in the future.
31. I am satisfied that, in a case where the claimant is a child or protected party, acceptance by a Deputy of the application of the amendments to the model order would not constitute a "settlement", "compromise", "payment" or "acceptance of money paid into court" for the purposes of CPR 21.10(1) and CPR 21PD.6. There is therefore no necessity for the approval of the Court of such an acceptance to be sought pursuant to CPR21 in a case where there is an existing periodical payments order for care and case management and the claimant is a child or protected party.

32. Nor do I consider it necessary or proportionate for the periodical payments orders in each of the existing 642 cases to be formally amended. That would be an extremely time-consuming and expensive exercise, the costs of which would have to come out of public funds. All that is required is an acceptance by a claimant or Deputy that the amended provisions of the model order will be applicable to his/her case. It is not proposed that claimants or Deputies should have to register their acceptance positively; rather that, if a claimant or Deputy does not accept that the amended model order should be applied to his/her case, he/she should register an objection.
33. I would strongly encourage all claimants and Deputies to accept the NHS LA's proposal that the amended provisions of the model order should be applied to their cases. Whilst it is open to an individual claimant or Deputy to object to that course and to contend that the problem that has arisen should be solved in some other way, he/she should be aware of the implications of doing so.
34. If an objection is raised, the claimant or Deputy will have to be prepared to demonstrate, to the satisfaction of a Court and on the basis of sound expert evidence, circumstances such as:
- a) the existence of some technical or other flaw in the solution that has been adopted in the case of *RH*, which has gone undetected and will affect the future operation of the model order; and/or
  - b) an alternative proposed solution to the problem of the missing data which has very significant advantages over the solution adopted in *RH* such that a further amendment to the model order would be just and proportionate; and/or
  - c) some specific feature of the claimant's case that makes the solution adopted in *RH* unworkable.

In the event that the objection is dismissed, the claimant will be at risk of paying the costs of what may have been a very expensive exercise.

***The action to be taken***

35. The NHS LA proposes to write to the claimant or Deputy in every case in which the NHS LA is involved and where there is an existing periodical payments order for care and case management:
- a) identifying the problem that has arisen and explaining the way in which it intends to solve it;

- b) enclosing and explaining the revised calculation and the financial consequences for the claimant ;
- c) enclosing a copy of the amended model order, with track changes so that the amendments can be clearly seen; and
- d) informing him/her that the NHS LA intends to apply the provisions of the amended model order to the claimant's case in the future unless, within 28 days of receipt of the letter, the claimant or Deputy gives notice in writing to the NHS LA's solicitors that he/she disagrees with the proposed solution and/or the amendments to the order, setting out his/her proposed alternative solution, together with any relevant calculation(s) and/or proposed technical adjustments.

Leading counsel for the defendant/NHS LA told me that Mr Cropper would be invited to review the proposed content of the letters in order to ensure that they accurately set out the technical problems that have arisen and the intended solution.

36. These proposed steps appear to me to be entirely appropriate.

#### **Further observations**

37. The proposals set out above do not of course apply to claims in which periodical payments orders for care and case management have been made and the NHS LA is not involved. I am told that there are many such cases currently in existence. The compensators in those cases include government and public bodies, insurers, the Motor Insurers' Bureau and Lloyd's syndicates. I am told that the form of periodical payments orders used in non-NHS LA claims vary, some being based on the NHS LA's model order and others not.
38. I would urge compensators in all cases where a periodical payments order for care and case management has been made and the NHS LA is not involved to review the terms of their existing order(s) and, in the event that the terms of the order(s) require it and the same problem of calculation arises, to seek acceptance by claimants and Deputies to amendments similar to those which have been made to the NHS LA model order in this case.
39. Work of the kind that has been necessary to deal with what was, for the ONS, a minor change in its methodology is extremely time-consuming and expensive. I would hope that, in the future, the ONS will take this into consideration when contemplating changes to the way in which it publishes and presents the ASHE data required for the indexation of periodical payments. What compensators need are data produced in the same standardised form every year. If there are changes in methodology, these should

be clearly indicated. Otherwise, there is always a risk that subtle changes will be overlooked with consequent injustice to one of other of the parties.

40. Finally, I must pay tribute to the spirit of co-operation and joint endeavour which has characterised the parties' recent work on this case and which reflects the greatest credit on all who have been involved.