

**IN THE HIGH COURT OF JUSTICE**

**Claim No:** [REDACTED]

**QUEEN'S BENCH DIVISION**

[REDACTED]

**BEFORE** [REDACTED]

**BETWEEN**

[REDACTED]

(A child/protected party proceeding by her  
Mother and Litigation Friend [REDACTED])

**Claimant**

**And**

[REDACTED]

**Defendant**

## **ORDER**

**BEFORE** [REDACTED] sitting as a High Court Judge in [REDACTED]

[REDACTED] on the 19 February 2010

**UPON HEARING** [REDACTED] of Counsel, on behalf of the Claimant and [REDACTED] one  
of Her Majesty's Counsel, on behalf of the Defendant

**AND UPON** reading the Order of this Court made on the 7<sup>th</sup> of September 2009

**AND UPON** it being agreed that this Order shall stand in substitution for paragraphs 2-6 of the Order of this Court made on the 7<sup>th</sup> of September 2009

**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 the 1<sup>st</sup> of November 1997 and in respect of which proceedings were commenced by the Claimant against the Defendant in the High Court of Justice Queen’s Bench Division, [REDACTED] [REDACTED] on the 4<sup>th</sup> of February 2008

**AND WHEREAS** the Claimant is a child and a Protected Party and brings the Claim by her Mother and Litigation Friend, [REDACTED]

**AND WHEREAS** judgment has been entered on the 4<sup>th</sup> of April 2008 for damages to be assessed

**AND WHEREAS** the National Health Service Litigation Authority (“NHSLA”) 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 NHSLA has entered into an agreement with the Defendant which permits the NHSLA to be responsible for and make the periodical payments under this Order

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

**AND WHEREAS** the Defendant and the NHSLA 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 NHSLA in consideration of the Claimant agreeing to the terms of this Order

**AND UPON READING** the Advice from Counsel for the Claimant dated 18 February 2010 and the report of [REDACTED] dated 27 May 2009.

**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
4. The Claimant, her Litigation Friend and those acting on her behalf (including her Deputy from time to time) will make no application for public funding of the Claimant's care pursuant to Section 47 of the National Health Service and Community Care Act 1990 or section 21 of the National Assistance Act 1948 (or such comparable legislation as may hereinafter be enacted) without further order, direction or authority from this Court (provided always and for the avoidance of doubt this undertaking shall not apply to any listed benefit as defined and specified in section 29 of and Schedule 2 to the Social Security (Recovery of Benefits Act) 1997); and if any application is made to release the Claimant, her Litigation Friend and those acting on her behalf (including her Deputy from time to time) from this undertaking it is agreed that the Claimant may be released in whole or in part from the aforesaid undertaking provided that this Court is satisfied that the Claimant does not have sufficient resources to meet her reasonable needs and provided that the Claimant, or those acting on her behalf, give the Defendant and the NHSLA (or its successor) reasonable notice in writing that she intends to ask this Court to exercise the above discretion together with the

information which will be considered by the Court and the opportunity to make representations

**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 £1,956,466 (one million nine hundred and fifty six thousand, four hundred and sixty six pounds) inclusive of interim payments of £610,000 (six hundred and ten thousand pounds) and CRU of £15,826.20 ( fifteen thousand, eight hundred and twenty six pounds and twenty pence ) 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 have made or shall make payments to or for the benefit of the Claimant as follows in full and final settlement of the claim
- (a) The Defendant has paid by 4pm on the 21<sup>st</sup> of September 2009 (having taken into account any interim payments and/or CRU and/or interest to that date) the sum of £1,219,228.80 (one million, two hundred and nineteen thousand, two hundred and twenty eight pounds and eighty pence) into the Court the said sum then to be transferred immediately to the Court of Protection subject to a first charge pursuant to Section 16(6) of the Legal Aid Act 1988 or Section 10(7) of the Access to Justice Act 1999, there to be dealt with as a fund of a protected beneficiary and as that Court in its discretion shall think fit
- (b) The Defendant shall make no further payment to the Department of Work and Pensions the CRU benefits having already been paid in the sum of £15,826.20 (fifteen thousand, eight hundred and twenty six pounds and twenty pence) on the 11<sup>th</sup> of March 2008
- (c) The Defendant has paid by 4pm on the 21<sup>st</sup> of September 2009 to the Claimant's solicitors free of any statutory charge the sum of £150,000 (one hundred and fifty thousand pounds) which sum included interest in respect of damages to be held on trust for the Claimant's parents in respect of gratuitous past care
- (d) 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 and for future loss of earnings, such that the NHSLA shall be responsible to the Claimant for and make such payments to the Claimant

- (2) **AND IT IS FURTHER ORDERED** that the Defendant do pay the Claimant's costs of this action on the standard basis such costs to be the subject of a detailed assessment, if not agreed and in respect of which the Defendant has paid by the 4pm on the 5<sup>th</sup> of October 2009 the sum of £200,000 (two hundred thousand pounds) as a payment on account of those costs
- (3) **AND IT IS FURTHER ORDERED** that there be permission to have a detailed assessment of the Claimant's costs in accordance with Regulation 107 of the Civil Legal Aid (General) Regulations 1989 as amended, Article 5 of the Access to Justice Act 1999 (Commencement No.3) Order 2000, Article 4 of the Community Legal Service (Funding) Order 2000 and the Civil Legal Aid (General) (Amendment) Regulations 2000 as amended, save that in the event that the Claimants' solicitors waive any claim to any further costs beyond those referred to above, they have permission to dispense with any Legal Aid Assessment
- (4) **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 NHSLA, and if necessary to add the NHSLA as a party to enforce the terms of this Order

(5) **AND IT IS FURTHER ORDERED** that there be permission to restore

Dated this 19 day of February 2010

## **SCHEDULE TO THE ORDER**

### **Part 1 of the Schedule to the order**

Each sum payable under parts 2 and 3 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 parts 2 and 3 of this schedule will continue during the lifetime of the Claimant
  
2. No minimum number of periodical payments under parts 2 and 3 of this schedule shall be made
  
3. Payment of the periodical payments under parts 2 and 3 of this schedule will cease on the death of the Claimant
  
4. The final periodical payment under parts 2 and 3 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 NHSLA 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 NHSLA shall be entitled to require the Claimant to produce evidence in a form reasonably satisfactory to the NHSLA that the Claimant remains alive before making any periodical payment

6. The periodical payments under parts 2 and 3 of this schedule are to be made by BACS to the Court of Protection (or its successor) for the benefit of the Claimant under reference [REDACTED].
7. At the time of each periodical payment under parts 2 and 3 of this schedule the NHSLA shall provide to the Claimant and/or the Deputy details in writing explaining how the periodical payment has been calculated
8. The NHSLA shall pay the relevant annual sums set out in parts 2 and 3 of this schedule on the 15<sup>th</sup> of December of each year, save that:
  - 8.1 If the Office for National Statistics [‘ONS’] does not publish by the 17<sup>th</sup> of November in the relevant year all the relevant data and as a result the NHSLA is unable to perform the relevant calculations under parts 2 and 3 to recalculate the periodical payment due to the Claimant before the 15<sup>th</sup> of December of the relevant year, the NHSLA shall on the 15<sup>th</sup> 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 parts 2 and part 3
  - 8.2 Any balancing payment due to the claimant or the NHSLA shall be made within 28 days after the publication of all the relevant data by the ONS

- 8.3 The NHSLA 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 15<sup>th</sup> of December in any year from the 16<sup>th</sup> 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 NHSLA from 28 days after publication of all the relevant data until full payment is made
- 9 For the period from the 15<sup>th</sup> of December 2009 to the 14<sup>th</sup> of December 2010 to represent the periodical payment under part 2 of this schedule for that period the Defendant do pay the sum of £145,000.00 (one hundred and forty 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 20<sup>th</sup> of October 2009 together with the sum of £38,589.00 (thirty eight thousand five hundred and eighty nine pounds) which represents care and case management pro rata for the period from settlement until the 14<sup>th</sup> of December 2009 that pro rata sum having been paid by the Defendant by 4pm on the 21<sup>st</sup> of September 2009 within the lump sum payment referred to at paragraph (1) (a) of this Order

## **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 £145,000 (one hundred and forty five thousand pounds) payable on 15<sup>th</sup> December in each year from 2010 until 15<sup>th</sup> December 2017 inclusive, with the first such payment to be made on 15<sup>th</sup> December 2010
  - 1.2 The annual sum of £190,000 (one hundred and ninety thousand pounds) payable on 15<sup>th</sup> December in each year from 2018

The expiry of one period and the commencement of another period under the above sub-paragraphs constitutes a “step change” under this Schedule

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 14.5a 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<sup>th</sup> percentile shall be applied to paragraphs 1.1 and 1.2 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 to 1.2 above shall be recalculated in November prior to payment on the

15<sup>th</sup> December of the same year from November 2010 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 15<sup>th</sup> of December the first ‘PP’ being the payment on the 15<sup>th</sup> of December 2010

3.1.2 ‘C’ = the relevant annual sum set out in paragraph 1.1 to 1.2 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 2010 published in or around October 2010

3.1.4 ‘A’ = the “*revised*” hourly gross wage rate for the relevant percentile of ASHE SOC 6115 for all employees applicable to 2009 and published by the ONS in or around October 2010. 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 to 1.2 above shall be recalculated annually in subsequent years in November in each year prior to payment on the 15<sup>th</sup> December of the same year from November 2011 in accordance with the following formula

$$PP = C \times \frac{NP + (NF - OP)}{A}$$

- 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 2010 and published in or around October 2011
- 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 2010 published in or around October 2010

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

5. Reclassification for the purposes of paragraphs 6-9 below 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.

In that event the new SOC shall be applied.

6. The relevant annual sum referable to the sums at paragraph 1.1 to 1.2 above following reclassification shall be known as ‘*CR*’ and shall be calculated only in the 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
7. When reclassification occurs the first payment only shall be

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

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

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

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 relevant percentile of the new SOC, when first published, which is closest to *AF*, and the new percentile shall be the percentile to which *AR* corresponds

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

$$PPR = CR \times \frac{NPR + (NFR - OPR)}{AR}$$

- 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

### **Part 3: The ASHE Median -Linked Periodical Payments**

1. The following present value annual sum as recalculated in accordance with paragraphs 3-9 shall be paid in advance
  - 1.1 The annual sum of £25,200 (twenty five thousand two hundred pounds) payable on 15<sup>th</sup> December in each year from 2018 until 15<sup>th</sup> December 2057 inclusive, with the first such payment to be made on 15<sup>th</sup> December 2018
2. The relevant earnings data are the gross annual pay for all female full time employees in the United Kingdom at the median (currently in table 1.7a of the Annual Survey of Hours and Earnings published by the ONS at the tab for "female full-time")

#### **First payment of periodical payment**

3. Unless paragraphs 5-9 below apply, the annual periodical payment referred to in paragraph 1.1 above shall be recalculated in November prior to payment on the 15<sup>th</sup> December of the same year from November 2018 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 15<sup>th</sup> of December the first 'PP' being the payment on the 15<sup>th</sup> of December 2018

- 3.1.2 'C' = the relevant annual sum set out in paragraph 1.1 above respectively
- 3.1.3 'NP' = the "first release" annual gross pay published by the ONS for "female full-time" employees (using the series defined in paragraph 2) at the median for the year in which the calculation is being carried out, the first NP being the figure applicable to the year 2018 published in or around October 2018
- 3.1.4 'A' = the "revised" annual gross pay for "female full-time" employees (using the series defined in paragraph 2) at the median applicable to 2009 and published by the ONS in or around October 2010. 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**

- 4. Unless paragraphs 5-9 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 15<sup>th</sup> December of the same year from November 2019 in accordance with the following formula

$$PP = C \times \frac{NP + (NF - OP)}{A}$$

- 4.1 Where in addition to the definitions previously set out
  - 4.1.1 'NF' = the "revised" annual gross pay published by the ONS for "female full-time" employees (using the series defined in paragraph 2) at the median for the year prior to

the year in which the calculation is being carried out, the first *NF* being that applicable to the year 2018 and published in or around October 2019

4.1.2 '*OP*' = the "*first release*" annual gross pay published by the ONS for "female full-time" employees (using the series defined in paragraph 2) at the median 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 2018 published in or around October 2018

### **Payments upon a change of methodology by the ONS**

5. A change of methodology for the purposes of paragraphs 6-9 below occurs when there is a discontinuity in the series in paragraph 2 and the ONS publishes for the same year "*revised*" annual gross pay for both:

5.1 the annual gross pay for all "female full-time" employees at the median using the old methodology (for which the "*revised*" pay is defined as '*AF*' in paragraph 6.1.1 below) and

5.2 the annual gross pay for all "female full-time" employees at the median using the new methodology (for which the "*revised*" pay is defined as '*AR*' in paragraph 7.1.4 below)

In that event the new methodology shall be applied

6. The relevant annual sum referable to the sums at paragraph 1.1 above following a change in methodology shall be known as ‘CR’ and shall be calculated only in the year of a change in methodology, 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” the annual gross pay for all “female full-time” employees at the median using the old methodology

7. When a change of methodology occurs the first payment only shall be

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

The second bracket of the above formula shall not apply where at the time of a change of methodology, there has been no periodical payment made in the previous year and in those circumstances the first payment shall be calculated in accordance with the following formula

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

- 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 a change of methodology

7.1.2 '*NPR*' = the "*first release*" annual gross pay published for all "female full-time" employees at the median using the new methodology for the year in which the calculation is being carried out

7.1.3 '*OPF*' = the final "*first release*" annual gross pay published for all "female full-time" employees at the median using the old methodology

7.1.4 '*AR*' = the "*revised*" annual gross pay for all "female full-time" employees at the median using the new methodology, for the same date as *AF* in paragraph 6.1.1.

8. Until further change of methodology the formula for calculating subsequent values of *PPR* shall be

$$PPR = CR \times \frac{NPR + (NFR - OPR)}{AR}$$

8.1 Where in addition to the definitions previously set out

8.1.1 '*NFR*' = the "*revised*" annual gross pay published for all "female full-time" employees at the median using the new methodology for the year prior to the year in which the calculation is being carried out

8.1.2 'OPR' = the "first release" annual gross pay published for all "female full-time" employees at the median using the new methodology for the year prior to the year in which the calculation is being carried out

9. Further changes in methodology shall be dealt with in the same way by the application of paragraphs 5-8 above

**Miscellaneous**

10. In the event of a dispute between the parties arising out of the application of this Part, there be liberty to apply

**IN THE HIGH COURT OF JUSTICE**

**Claim No:** [REDACTED]

**QUEEN'S BENCH DIVISION**

[REDACTED]

**BEFORE** [REDACTED]

[REDACTED]

**BETWEEN**

[REDACTED]

(A child/protected party proceeding by her  
Mother and Litigation Friend [REDACTED]

[REDACTED])

**Claimant**

And

[REDACTED]

[REDACTED] **TRUST**

**Defendant**

**ORDER**

[REDACTED]

Solicitors for the Defendant