

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 17 March 2015
Judgment handed down on 22 April 2015

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MS J MOSS

APPELLANT

RELIANCE MUTUAL INSURANCE SOCIETY LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant

MS JANET MOSS
(The Appellant in Person)

For the Respondent

MS JUDY STONE
(of Counsel)
Instructed by:
Irwin Mitchell LLP
40 Holborn Viaduct
London
EC1N 2PZ

SUMMARY

EQUAL PAY ACT - Material factor defence and justification

SEX DISCRIMINATION - Direct

UNFAIR DISMISSAL - Constructive dismissal

The Employment Tribunal upheld the Respondent's genuine material factor defence to the Appellant's equal pay claim. No error of law shown. The sex discrimination claim failed on the facts and on limitation grounds. The Employment Tribunal found permissibly that the Respondent was not in repudiatory breach of contract so that the constructive unfair dismissal claim also failed. Accordingly, appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Ashford Employment Tribunal. The parties are Ms Moss, Claimant, and Reliance Mutual Insurance Society Ltd, Respondent. By a Reserved Judgment with Reasons dated 15 August 2013 an Employment Tribunal chaired by Employment Judge Wallis, sitting with Ms C Cannar and Ms A Stanworth, dismissed the Claimant's equal pay claim and claims of sex discrimination and constructive unfair dismissal. Against that Judgment this appeal is brought. At a Preliminary Hearing held before HHJ Richardson on 23 July 2014 the appeal was permitted to proceed to this Full Hearing on Amended Grounds of Appeal. Judge Richardson later permitted a conditional cross-appeal by the Respondent to be joined in this hearing by order dated 23 September 2014.

Background

2. The Respondent is a life insurance and pension provider. It is a mutual society based in Tunbridge Wells. At all relevant times Mr Cameron Mills was the Respondent's Chief Actuary.

3. In early 2011 the Respondent decided to recruit a permanent reporting actuary. A recruitment agency, Star Actuarial, put forward the Claimant for the role. Her CV showed that she had not worked since February 2009 apart from some work as a marker and examiner.

4. Mr Mills took charge of the recruitment exercise. He spoke to the Claimant by telephone and followed that up with a face to face interview. The Claimant was a qualified actuary and Fellow of the Institute of Actuaries.

5. Although Mr Mills had some reservations about the Claimant's recent experience in aspects of the proposed role (see paragraph 13) he was sufficiently confident to offer her the role at a salary of £67,500 per annum. She accepted and commenced her employment on 20 June 2011.

6. Later that year Mr Mills recruited a Mr Cheema to a new post of Asset Liability Management and with profits support actuary at a salary of £87,000 per annum. He was said by his agent to have enjoyed a salary of close to £70,000 plus strong benefits and bonus with his then employer, the Pheonix Group. There were other interested parties and his agent was looking at a salary range of £75,000 to £90,000 (paragraph 22).

7. In their careful fact-finding the Employment Tribunal noted that during her employment Mr Mills formed the view that the Claimant had an inflexible approach which created tension in the team with whom she worked (paragraph 31) and that her behaviour demonstrated an element of over-sensitivity (paragraph 33). It seems that she and Mr Cheema had difficulty working together and Mr Mills was trying to address that (paragraph 40).

8. She tendered her resignation first on 20 February 2012 but then withdrew it with the Respondent's consent. She finally resigned on 4 July 2012 on three months notice expiring on 3 October 2012. She worked out her notice.

The Employment Tribunal Decision

9. Dealing with the claims advanced by the Claimant, then appearing in person, the Employment Tribunal held:

(1) Equal Pay

10. The Claimant compared herself with Mr Cheema, a man earning more than her (her salary had increased to £73,000 per annum by the end of her employment). The Employment Tribunal approached the issue on the basis it was arguable that the Claimant was engaged on work broadly similar to that done by Mr Cheema (like work); see paragraph 74 and on that assumption proceeded to consider the Respondent's genuine material factor ("GMF") defence.

11. They concluded that the Respondent had made out the GMF defence, notwithstanding that the Respondent's pay system was not transparent (paragraph 79), for two reasons unrelated to sex. First, that the Claimant, unlike Mr Cheema, did not have recent experience, having not been in actuarial employment for nearly two years prior to appointment and secondly that unlike him, her skills were not in demand (paragraph 90).

(2) Sex Discrimination

12. The claim failed on the facts and was in any event time-barred (paragraph 93 to 99).

(3) Constructive Unfair Dismissal

13. The Respondent was not in breach of the implied term of trust and confidence relied on by the Claimant. There was no repudiatory breach of contract so that the Claimant was not constructively dismissed. It followed that her complaint of unfair dismissal necessarily failed.

The Appeal

14. Although the Claimant has presented her appeal before me in person, the Amended Grounds of Appeal were settled by counsel, Ms Anna Beale, appearing on her behalf under the ELAAS pro bono scheme at the Preliminary Hearing and she had assistance in preparing a

cogent skeleton argument. Her case has been fully argued. Ms Judy Stone now represents the Respondent.

15. I shall deal with the challenges to the Employment Tribunal Judgment in the order taken by Ms Moss; sex discrimination, equal pay and constructive unfair dismissal.

Sex Discrimination

16. The issues were identified at a Case Management Discussion held before Employment Judge Wallis on 8 March 2013. They are set out at paragraphs 1 to 6 of the Wallis Employment Tribunal Reasons. In relation to (direct) sex discrimination the Claimant raised five separate allegations of less favourable treatment on grounds of her sex (paragraph 6.1). The Employment Tribunal considered each allegation (paragraphs 93 to 99) and rejected them for the reasons there given.

17. The first criticism made of the Employment Tribunal's reasoning is that it took a fragmented approach to the individual acts complained of, contrary to the principle established by Mummery P in **Qureshi v Victoria University of Manchester** [2001] ICR 863 (Note) as approved by the Court of Appeal in **Anya v University of Oxford** [2001] IRLR 377. Further, the Employment Tribunal failed to make findings on background allegations said to be relevant to the overall picture of sex discrimination painted by the Claimant.

18. As to the two particular instances of background matters to be found at paragraphs 4.44 and 4.68 of the Claimant's witness statement to which the Claimant has referred me I agree with Ms Stone that those incidents do not materially advance the Claimant's case. There is no obligation on an Employment Tribunal to resolve every conflict of fact or recite every piece of

evidence before them in their Reasons; see Associated Society of Locomotive Engineers and Firemen v Brady [2006] IRLR 576, paragraph 55, per Elias P.

19. On the wider question of whether the Employment Tribunal took a holistic approach to their findings on the individual incidents complained of it is necessary to look at the Employment Tribunal's Reasons as a whole which present a picture of the Claimant as someone perceived by Mr Mills to adopt an over-sensitive approach to relatively trivial matters which arose from time to time during her employment. That, justifiable, view in the Employment Tribunal's opinion was the reason why the Claimant received the treatment complained of; it had nothing to do with her sex.

20. As to the five incidents, the Claimant focuses on allegation (c); Mr Mills' remark to the Claimant on 12 May 2012, when she suggested that he paid more attention to Mr Cheema than he did to her, that she could not have failed to notice that they were men and she was a woman (see paragraph 37). Although Mr Mills did not recall making that remark the Employment Tribunal found (paragraph 95) that he did. The Employment Tribunal found that it was difficult for it to conclude that such a comment amounted to less favourable treatment on grounds of sex, or that the remark concerned any detriment to the Claimant.

21. I am not persuaded that it was not open to the Employment Tribunal to find that very little turned on that comment (paragraph 37) and thus was entitled to conclude that the remark, of itself, did not amount to less favourable treatment amounting to a detriment.

22. For completeness I should also refer to allegations (d) and (e). The Claimant was not invited by Mr Houlston to his leaving lunch in July 2011, she having only just joined the

Respondent on 20 June that year. That was his choice. Conversely, the Claimant was invited to the MVIP dinner on 8 August 2012 along with male colleagues; see her witness statement, paragraph 4.88. The facts found demonstrate, in the Employment Tribunal's permissible view, that there really was nothing in those complaints of sex discrimination.

23. Further, the Claimant faced the difficulty that her complaints arose outside the three month primary limitation period ending with presentation of her form ET1 on 2 January 2013 and the Employment Tribunal found that even if they had upheld some or all of those complaints, which they did not, it would not be just and equitable to extend time (paragraph 98). That finding is, in my judgment, unassailable and disposes of this head of complaint.

Equal Pay

24. As I read the Employment Tribunal's Reasons (see paragraph 74) they proceeded on the assumption, without finally deciding the question, that the Claimant was engaged in like work to that performed by her comparator, Mr Cheema. On that footing they proceeded to consider the genuine material factor ("GMF") defence which had been raised by the Respondent in their form ET3, had been identified as an issue at the Case Management Discussion (see Reasons, paragraph 3.3) and was considered in counsel's written submissions as to the law (paragraph 14 to 25) below. That seems to me to be a permissible approach.

25. As to the GMF defence the Employment Tribunal accepted that two factors relied on by the Respondent, the Claimant's absence from employment for two years and that Mr Cheema was in demand elsewhere, amounted to genuine factors explaining the difference in salary levels between the Claimant and her comparator which were not tainted by sex.

26. In challenging that finding, reliance is placed on the proposition that more women than men are likely to take career breaks thus giving rise to a *prima facie* case of indirect sex discrimination which required objective justification by the Respondent.

27. Ms Stone takes the point that no argument was advanced by the Claimant below to the effect that reliance by the Respondent on her career break was indirectly discriminatory. I have read the Claimant's detailed original Grounds of Appeal and the point, taken by Ms Beale in the Amended Grounds, does not appear there, supporting Ms Stone's submission. It is for the parties to advance their case below, see **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531. In these circumstances, I shall not permit the Claimant to advance this new point for the first time on appeal, applying the principles set out by the Court of Appeal in **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719. The point requires further fact-finding by the Employment Tribunal in order to determine whether or not a career break taken by a female Claimant, other than for the reasons considered by the Employment Tribunal at paragraph 88, was *prima facie* indirectly discriminatory. Ms Moss told me that her evidence on the subject to the Employment Tribunal was simply that she was made redundant by her previous employer and had taken a career break.

28. More generally, I am satisfied that the Employment Tribunal was entitled to conclude that the Respondent had successfully raised a market forces GMF defence. I note that in his written submissions below counsel, Mr Edge, specifically referred the Employment Tribunal to the judgment of Underhill P in **Armstrong (No 2)** [2010] ICR 674, reviewing the Court of Appeal decision in **Armstrong v Newcastle upon Tyne NHS Hospital** [2006] IRLR 124, which in turn considered the scope of the House of Lords learning in **Ratcliffe v North Yorkshire County Council** [1995] IRLR 439. In my judgment the Employment Tribunal was

entitled to conclude (paragraph 91) that the difference in pay was in no way tainted by consideration of gender.

Constructive Unfair Dismissal

29. Having failed to make out her case on sex discrimination, including equal pay, it was for the Claimant to show first that the Respondent was in breach of the implied term of mutual trust and confidence. That she failed to do (paragraphs 100 to 109) on the facts found. I can see no basis in law for interfering with that conclusion. Indeed the Amended Grounds of Appeal, paragraph 12, depends upon the Claimant succeeding on the sex discrimination challenge and she has not done so. For completeness, I accept Ms Stone's submission that the Employment Tribunal's finding as to the final straw relied on, the room booking incident on 4 July 2012, was wholly innocuous on the facts found; see paragraph 106.

Disposal

30. It follows that this appeal fails and is dismissed. Consequently the cross-appeal is moot and I make no order upon it.

Strike-out and Costs Order

31. Following the Employment Tribunal's substantive Judgment a further hearing was held before the Wallis Employment Tribunal on 21 March 2014 at which the Claimant's alternative equal value claim was struck-out on the basis that the GMF defence, upheld by the Employment Tribunal and now on appeal, applied equally to that alternative claim. The Claimant was also ordered to pay the Respondent's costs in the sum of £3,000 and a half-share of copying charges, £75. Against that Judgment, promulgated with Reasons on 17 April 2014, the Claimant appealed (EATPA/0550/14/DM). That appeal was rejected under Employment Appeal

Tribunal Rule 3(7) by HHJ Eady QC by letter dated 7 August 2014. An oral application for permission to proceed came before HHJ Serota QC on 14 January 2015. That Judge adjourned the application to come on with this substantive appeal with a time-estimate of 1½ days. The second day of hearing (18 March) was not convenient to the Claimant and consequently the Deputy Registrar directed that the Rule 3(10) Hearing be stayed pending the outcome of the present appeal.

32. In these circumstances I shall direct that within 14 days of the date on which this Judgment is handed down the Claimant shall indicate in writing whether or not she wishes to maintain her Rule 3(10) application in EATPA/0550/14/DM. If so, it will be listed for further hearing in the usual way.