



EMPLOYMENT TRIBUNALS

Claimant: Miss K Patel

Respondent: CDS Global

Heard at: Leicester

On: Monday 20, 21, 22, 23, 24 and 25 November 2016

Before: Employment Judge Solomons (Sitting Alone)

Representation

Claimant: In Person

Respondent: Mr J Neville of Counsel

RESERVED JUDGMENT AT A STAGE 1 EQUAL VALUE HEARING

The agreed difference in pay between the Claimant and that of her comparators is because of a material factor which is not sex. In those circumstances the equal pay claims are dismissed. The Claimant's remaining claims will be listed for a Preliminary Hearing to consider case management in relation thereto.

REASONS

1. The Claimant brought a number of claims which include a claim for equal pay based on both equal value and like work. At an open Preliminary Hearing on 16 June 2016 it was ordered that there should be a Stage 1 Equal Value Hearing to determine in particular whether the difference in pay between the Claimant and her comparators is genuinely due to a material factor other than the difference of gender.

2. The Respondent relies upon the following material factors:-

- (a) experience;
- (b) skills/expertise;
- (c) the type and variety of work undertaken;
- (d) additional responsibilities;
- (e) additional duties.

3. The burden lies on the Respondent to show that the agreed difference in pay between that of the Claimant and her comparators is because of a material factor which is not sex. Section 69(1) Equality Act 2010 provides:-

“The sex equality clause in A’s terms has no effect in relation to a difference between A’s terms and B’s terms if the responsible person shows that the difference is because of a material factor reliance on which:-

(a) does not involve treating A less favourably because of A’s sex than the responsible person treats B and;

(b) if the factor is within subsection 2 is a proportionate means of achieving a legitimate aim.”

4. Indirect discrimination under Section 69(1)(b) is not an issue so the Respondent’s task is to show that the difference between the Claimant’s pay and each of her comparators:-

(a) is because of a material factor reliance on which B is not direct sex discrimination ie relied on because the Claimant is a woman and her comparator is a man.

5. If the Respondent succeeds in proving the material factor defence then the claims for equal pay fail on that ground and must be dismissed. A number of legal principles are material:-

5.1 As stated by Lord Keith in *Rainey v Greater Glasgow Health Board* [1987] ICR 129:-

“13. The difference must be material which I would construe as meaning significant and relevant and it must be between her case and his. Consideration of a person’s case must necessarily involve consideration of all the circumstances of that case. These may well go beyond what is not very happily described as the personal equation, ie the personal qualities by way of skill, experience or training which the individual brings to the job. Some circumstances may on examination prove to be not significant or not relevant but others may do so though not relating to the personal qualities of the employee.”

5.2 The range of factors is potentially unlimited so long as they are not discriminatory.

5.3 Length of service and experience may be material factors justifying a difference in pay where this does not indirectly discriminate.

5.4 The explanatory notes to the Equality Act 2010 explain the dropping of genuine from the language previously used by the Equal Pay Act 1970 as simply recognising the word is unnecessary. To be material and causative a factor must be genuine.

5.5 **Secretary of State for Justice v Bowling** [2011] UK EAT 0279-11-2911 is an example of where a person was recruited on a higher salary due to their initial experience but over time performed the same work as the Claimant. The EAT held at paragraph 7 that the continued operation of an incremental scale continued to be material and continued to explain the pay difference. This was so even where the subsequent experience of the Claimant had wiped out the benefits of the comparator's initial greater experience. Given there was no reason to suppose discrimination, the defence succeeded.

5.6 Factors which are relevant to whether or not work is like work or of equal value may still be relevant to a defence of a material factor.

5.7 In considering whether or not the Respondent has established the material factor defence, as set out in **Bury Metropolitan Council v Hamilton** [2011] ICR 655 a structured approach should be followed. That approach is:-

- (i) in relation to each comparator and the period specified, what is the explanation for the differential complained of? The burden is on the Respondent;
- (ii) the factors identified must be material meaning significant and relevant;
- (iii) all circumstances of the Claimant and the comparator must be considered.

5.8 Is that explanation tainted by sex discrimination?

6. I heard evidence on behalf of the Respondent, from each of the Claimant's comparators Adrian Ratanayake, Peter Matthews, Matthew Orpin and Shelton Masuku and also from Bhavya Nagaraja the Respondent's Head of Data Management.

7. On behalf of the Claimant I heard evidence from the Claimant herself and Ashley Browne. Each witness had provided a written witness statement and was cross examined. I had my attention drawn to documents in an agreed bundle provided for the hearing and I received and heard written submissions from both the Claimant and the Respondent which were added to orally.

8. In the light of all of that evidence I came to the following relevant findings of fact and conclusions in relation to the issue placed before me at the Preliminary Hearing. It should be noted that the parties provided a chronology of basic facts covering the period from December 2008 until July 2016, a cast list, a glossary of technical terms, all of which should be referred to. In addition in particular at pages 1572 and 1573 in the bundle, schedules were provided showing the salaries of the comparators and the Claimant at relevant dates and alleged reasons for increases in pay on those dates as well as relevant job titles and managers.

9. As the chronology shows the comparator Shelton Masuku joined the Respondent on 1 December 2008 as a Junior Business Objects Developer. The comparator Adrian Ratanayake joined the Respondent as a BI Developer on 26 October 2009. The Claimant joined the Respondent as a Junior BI Developer on 6 April 2010. The comparator Matthew Orpin joined the Respondent as a Business Objects Developer on 10 May 2010 and the comparator Peter Matthews joined the Respondent as a BI Developer on 16 January 2012. Matthew Orpin left the Respondent's employment on 10 December 2014. The Claimant was subjected to a redundancy procedure in August 2015 and was ultimately dismissed on 25 August 2015. The Claimant presented her claims to the Tribunal on 7 December 2015. I will consider each of the comparators separately but it is helpful to note that as the schedules at 1572 and 1573 show and as borne out by the evidence, the Claimant when she joined the Respondent in April 2010 as a Junior BI Developer started on a salary of £18,000. The comparator Shelton Masuku who started with the Respondent in December 2008 as a Junior Business Objects Developer, started on a salary of £18,000. The comparators Peter Matthews, Matt Orpin and Adrian Ratanayake who started in respectively in 2012, 2010 and 2009 started on salaries respectively of £31,500, £31,000 and 32,000. By the time the Claimant's employment had terminated her salary had increased to £18,450, Shelton Masuku's salary had increased to £26,000, Peter Matthews to £35,000, Matt Orpin who left the Respondent's employment in December 2014 was earning £34,000 at that stage and Adrian Ratanayake at the time of the Claimant's termination of employment was earning a salary of £41,000.

10. So far as pay increases is concerned it is clear that save in the case of a company wide pay increase decided upon by the Director Mr Judd (a relatively rare occurrence) pay increases came about as a result of recommendations from Line Managers. By May 2014 Bhavya Nagaraja the Head of Data Management was the Line Manager of the Claimant and each of her comparators. She had joined the company as an employee in the form of a BI Developer in the IT Department in April 2011. It is important to note that I found Ms Nagaraja to be an honest and balanced witness whose evidence was reliable. Equally it is important to note that I cannot make the same comment about the Claimant. Repeatedly in the course of her evidence the Claimant was not balanced in the way in which she sought to compare her experience and abilities with that of her comparators. She repeatedly made statements for which there was no evidential support and not only did she contend throughout the hearing that in respect of each of her comparators she was carrying out work which was of the same difficulty and value as that of her comparators but even went so far as to contend that at the time Mr Ratanayake joined the Respondent, although he may have had different experience to the Claimant it was not all relevant to the Respondent's organisation and she felt that for those purposes he and she both had the same experience. In fact if one looks at the two CV's (259 and 1896) it is clear from the CV's that Mr Ratanayake had vastly more experience and expertise than the Claimant at the time that they both started at the Respondent's organisation. Neither was the Claimant prepared to accept that a number of her comparators had either ownership or responsibility for large projects over and above that which the Claimant had. That was clearly an unrealistic view upon the evidence by the Claimant.

A further example of the Claimant's unrealistic view of the comparison between herself and her comparators was her statement during the course of her evidence that on the first day of her employment she was deliberately employed on a low salary because she was a woman. At that time her employment commenced on £18,000 per annum as a Junior BI Developer. It was pointed out to her that Shelton Masuku when he started with the company as a Junior Business Objects Developer was first employed on £18,000 per annum which she appeared reluctant to accept but in due course conceded that she could not say that he was paid more than £18,000 per year at the time he commenced with the Respondent. This was another example of the Claimant seeking to protest at every available opportunity that she was being paid a lower rate of pay than her male comparators because she was a woman when in fact as the evidence shows in relation to this particular comparator Mr Masuku, at the time of the commencement of employment he was paid precisely the same figure as the Claimant. This further example of a lack of realism on the part of the Claimant does not assist her case and renders her evidence unreliable.

The Comparator Adrian Ratanayake

11. The comparison involves looking at both the Claimant and the individual comparator and Mr Ratanayake represents a good vehicle against which the Claimant's overall case on her own abilities, skills and tasks can be weighed. Her positive case is that her skills, experience, expertise, the type and variety of work she undertook, her responsibilities and her duties were the equal of his for her entire employment. That case is in my view plainly absurd when Mr Ratanayake's actual characteristics are compared. At the commencement of his employment he was recruited to a patently more senior position, namely a BI Developer on £32,000 per year (page 47) than that of the Claimant.(page 376). I have to determine whether there was a causative relationship between the pay given to Mr Ratanayake on commencement and that given to the Claimant. The Respondent puts forward Mr Ratanayake's experience and skills which were plainly suited to his recruitment to his position and in my view his CV (1896) speaks for itself.

12. The Claimant seeks to contend that her CV (259) is as good as Mr Ratanayake's because she undertook much of what he had done in the workplace during her degree and industrial placement. But it is clear to me that the seniority and length of directly employed experience of Mr Ratanayake in respect of those things puts him in a different league to the Claimant at the commencement of employment. Neither is there any evidence of the Claimant's job and Mr Ratanayake's experience and skills coalescing during the currency of their employment as is clearly demonstrated by the comparison between the performance and objective section of the performance development reviews (PDR's) at pages 70 and 63, 70 and 72 and 70 and 79 in respect of Mr Ratanayake and 1850, 1856 and 1872 in respect of the Claimant. It is clear from those that the Claimant's objectives are about what she does whereas Mr Ratanayake's objectives are about what the whole team is doing, showing that he was at a more senior position than that of the Claimant. It is notable that words such as oversaw and architect (70 and 67) are commonplace in the description of Mr Ratanayake's work. Ms Nagaraja sets him as the lead on a task (1173) and he plainly instructs the Claimant in what to do (303, 1880, 1876).

13. At 62-63 the Respondent sets out in its amended response to the Claimant's grounds of complaint its case on Mr Ratanayake. There is a list of matters for which he is responsible and the Respondent points out there is a big disparity in his experience, skills and knowledge compared to the Claimant and hence the pay difference as well as setting out at a number of bullet points the senior responsibilities that he has which the Claimant does not. There is no evidence of the Claimant taking on anything like similar responsibilities or duties or exercising any similar skill or expertise. In her perception of how she worked she conflates her ad hoc assistance with his and others' tasks as equivalent to her doing it. She considers that when she works on the same projects she should be receiving the same pay. One of the documents the Claimant has produced to demonstrate this (323) demonstrates her flawed logic rather than prove she was undertaking work at a similar senior level to Ratanayake, it instead proves that she was being directed to assist him as a junior employee.

14. Mr Ratanayake's oral evidence was compelling. When he was asked about a particular worksheet (429) he said:

"I am interpreting what you're saying is the work as what we are fixing. So data stages jobs with fixing them, either one of us could make that change but to actually say well we need to go into this and fix this and actually design what we are going to do, I would have expected to do that."

15. I do not accept the Claimant's case that she was doing the same level work and had the same skill levels as Mr Ratanayake. Her appreciation of her own skills is in my view unreliable. An example is the document from Ms Nagaraja setting out her assessment of the whole team skills (1460). In that document Ms Nagaraja sets out a comparison of skills and the level of skill comparing in relation to a number of tasks, comparing the Claimant and her comparators Mr Ratanayake, Mr Matthews and Mr Masuku. In relation to Mr Ratanayake she describes his level of skill as being expert. The same for Mr Matthews and medium to expert for Mr Masuku. So far as the Claimant is concerned the Claimant has a mixture of medium and basic skills.

16. The Claimant during the course of her evidence sought to both downgrade her comparators' skill levels using those tables and to increase her own skill levels to by and large a mixture of medium and expert. I accept the Respondent's case that the Claimant is making inaccurate comparisons and has a self belief that she was more competent and capable at fulfilling her role than she actually was.

17. In relation to Mr Ratanayake he was the only comparator where she was compared to concede that two of his skills ETL and MS Stack were better than hers. All other skills between all the 3 comparators set out in the document beginning at 1416 in respect of those she refused to countenance that she was worse than them in any respect. That is wholly without foundation in my view upon the evidence.

18. In his oral evidence Mr Ratanayake made it clear that the Claimant was not “a *subject matter expert*” in any discipline or task. He said:

“There were opportunities for Kashmira to take responsibility and to be a knowledge expert but there was a fear, a tendency to say if that goes wrong I don’t want it to come back on me. I want someone to tell me what to do. I invested a lot of time trying to train and get Kashmira up to a position where she would look after that application but that was never taken on. So effectively instead of taking that on she ended up being first line support for that application.”

19. Upon all the evidence I am satisfied on the balance of probabilities that the Respondent has established the following material factors for the difference in pay between the Claimant and Mr Ratanayake:-

- 19.1 Experience.
- 19.2 Skills and expertise.
- 19.3 The type and variety of work undertaken.
- 19.4 Additional responsibilities.
- 19.5 Additional duties.

20. Mr Ratanayake’s starting pay on 26 October 2009 was clearly due to them as were his rapid pay increases. They can be seen to correspond with his increasing status and responsibility within the Respondent, culminated in a complete change of job title to Technical Architect, something which was already overdue by the time it came into effect (see page 1767, his PDR of May 2014).

21. These factors were clearly significant and relevant and therefore material and were not tainted by sex discrimination in any way. I am satisfied that the Respondent’s decisions on the comparators’ pay are explained by reference to the circumstances both in terms of pay commencement and increases and I am confident that they were applied for those reasons and not because Mr Ratanayake was male.

The Comparator Peter Matthews

22. Mr Matthews’ experience and skills as shown on his CV (1807a) clearly justify his different and superior responsibilities, duties and tasks to those of the Claimant. His job description as BI Developer, page 244 shows what his duties were at the time of his appointment in January 2012 on a very much higher salary than the Claimant. His brief evidence in his witness statement which was simply the subject of a blanket denial by the Claimant rather than any serious challenge, shows the substantial experience in business intelligence analysis and reporting which he brought to his role from British Midland where he was previously employed.

In the light of those factors he was appointed to a more senior job than that that the Claimant was in at the time and it is clear upon the evidence that over time his and the Claimant's duties, skills and responsibilities did not coalesce. See for example his PDR's at pages 1810, 1822 and 1829. The words "oversaw" and "ownership" are used repeatedly in relation to Mr Matthews (eg pages 1816 and 1825). Those words are never used about the Claimant. He developed products, (see 1884) and he is referred to by Ms Nagaraja in her witness statement at paragraph 27 as the subject matter expert in Business Objects and Fast Stats and is referred to in an e-mail from Mr Orpin as the expert in Fast Stats.

23. Again the Claimant persists in contending that as with the other comparators, as she put it in the course of cross examination, "*I am the same or better on almost all skills*". That protestation by the Claimant is simply not borne out by the evidence in the case and her evidence in that regard is I find entirely unreliable. I find that the Respondent's case that his starting pay is explained by the material factors that were plain on appointment of a more experienced and skilful candidate to a position with duties and responsibilities that call for that experience and those skills is established. The Respondent's explanation that those features are the reason for his pay increases have also not been undermined by the Claimant. Accordingly I find that the Respondent has established the material factors in relation to Mr Matthews and that it is clear upon the evidence that they are relevant and significant and are not tainted in any way by sex discrimination.

The Comparator Matthew Orpin

24. The role to which Mr Orpin was appointed (page 255 is clearly a role which has more senior duties and responsibilities than that of the Claimant and calls for the greater experience and skills disclosed by his CV (1891). There is evidence of his quick progress within the Respondent (1607) which is clearly lacking for the Claimant. A major factor in his pay rise from £31,000 to £34,000 per annum on 1 January 2013 was to keep him working for the Respondent in a situation where he may have gone elsewhere (1647). That pay rise clearly shows the value which the Respondent placed upon him bearing in mind his skills and experience. It is also clear from his PDR's (1627, 1644, 1647, 1648 and 1650) that there was no coalescing of skills and experience as between him and the Claimant. Furthermore when he left the Respondent's employment on 10 December 2014 it is clear from the e-mail at 1173 where his jobs are divided up on his departure that those jobs show the additional responsibilities and duties which he had as compared with the Claimant. I am satisfied that the Respondent has proved its 5 material factors existed in the case of Mr Orpin and were causative of the extra pay which he received as compared with that paid to the Claimant. I am entirely satisfied that the Respondent's account is in no way tainted by sex discrimination.

The Comparator Shelton Masuku

25. Unlike the other 3 comparators, Mr Masuku was originally appointed to the same position as the Claimant and on the same pay. In those circumstances, despite the Claimant's case to the contrary, she clearly cannot sustain him as a comparator for the purposes of her equal pay complaint at that point in time, namely April 2010.

That in itself is indicative of an absence of discrimination by the Respondent. In paragraphs 4-8 of his witness statement he sets out extra skills and responsibilities which he had and took on from 2010 onwards. The Claimant was not in a position to contradict that evidence and there is also evidence of good progress on the part of Mr Masuku at pages 1675 and 1677; something for which there is no evidence on the part of the Claimant. As the schedules at 1572 and 1573 show there was no meaningful pay differential between him and the Claimant prior to Mr Masuku's move to the Transformation Migration Team in October 2010. In evidence the claimant that she did not seek to use him as a comparator during his time there and her focus was upon the time after a redundancy consultation in 2015 when he rejoined the team which the Claimant was working in. It's clear that whilst he was with the Transformation Migration Team he excelled and words like "oversaw" and "driving projects forward" appear in relation to him (1692). His eventual pay rise to £26,000 per annum was within that context. The issue is thus, whether or not his increased work from early 2015 upon rejoining the team that the Claimant was in, is explained by a material factor? At this stage he had applied internally (60) for a job as a Data Developer in the light of the resignation of Mr Orpin. He was the closest fit technically for that role and was offered that job. At the time he was already earning £26,000 per annum. The Claimant did not apply for that vacancy although she could have done. Once he was in that job Mr Masuku's duties and responsibilities and his skills and experience were carried over from the Transformation Team and once back in the same team as the Claimant his skills remained superior to those of the Claimant (see 1430-31 and 1460-61). Accordingly I am satisfied that the Respondent's have established the material factors in relation to Mr Masuku. They are relevant and significant and are in no way tainted by sex discrimination.

26. It follows therefore that the Respondent's have established the material factor defence in relation to each of the alleged comparators for the purposes of the equal pay complaint. The equal pay complaint therefore fails and is dismissed. The remaining complaints brought by the Claimant will be referred to a telephone case management hearing in order to deal with the issues and arrangements for a hearing of those claims.

Employment Judge Solomons

Date 26 May 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS