



THE EMPLOYMENT TRIBUNAL

SITTING AT: CROYDON

BEFORE: EMPLOYMENT JUDGE MORTON

BETWEEN:

Miss M Czapska

Claimant

AND

Winshuttle UK Limited

Respondent

ON: 24 November 2017

Appearances:

For the Claimant: Mr Martin, Counsel

For the Respondent: Mr C Stone, Counsel

JUDGMENT

The Respondent's application for the Claimant pay a deposit as a condition of continuing with her claim of equal pay is refused.

REASONS

1. The Claimant claim to the Tribunal was presented on 10 April 2017. Her claims are of unfair dismissal, sex and pregnancy discrimination, including victimisation and harassment, arrears of pay and breach of contract. Her particulars of claim include a claim for equal pay. She seeks compensation and a recommendation.
2. The Respondent applied under Rule 39 of the Tribunal Rules for the Claimant

- to pay a deposit as a condition of continuing with her claim of equal pay. The matter was listed for a three hour hearing, but in fact took considerably longer as both parties wished to call witnesses – the Claimant herself and on behalf of the Respondent, Mr Hallam.
3. I was referred by both parties to the EAT decision in *Hemdan v Ishmail and anor EAT 0021/16* in which Simler P discouraged tribunals for treating deposit applications as mini-trials and described the deposit jurisdiction as one involving a summary assessment of the matters in issue.
 4. Despite this guidance, I was to some extent drawn into a minitrial of the facts at the hearing. Equal pay law, despite the apparent simplicity of the statutory provisions, is complex and it is understandable why a Respondent in what is already a complex dispute might wish to discourage a Claimant from pursuing this particular aspect of a claim if it perceives the claim to have obvious weaknesses.
 5. I do not however think that in general equal pay disputes are susceptible to the sort of summary assessment that is envisaged by the deposit regime under Rule 39. I heard a significant amount of evidence from the Claimant and Mr Hallam, and succinct and helpful submissions from both Counsel. At the end of the hearing however I was left with many questions in my mind about the merits of the Claimant's claim to have been doing like work and the Respondent's defence that there were material factors justifying the differences in pay that were unrelated to her sex. The facts and issues are further complicated by the fact that the Claimant compares to herself not to one, but to three different employees of the Respondent.
 6. Mr Stone invited me to conclude that the Respondent would inevitably succeed in establishing a defence to the equal pay claim, but does so by asking me to focus not on what the Claimant did but on what she was recruited to do. If I were to focus on the latter the Respondent's arguments seem to have considerable merit. The Claimant was recruited to a particular role, she was not formally promoted, her experience differed from that of Mr Coleman, her quotas were lower, her job was graded three grades below those of the two territory managers with whom she seeks to compare herself.
 7. But even at its highest, the Respondent's approach has some problems. For example, the Claimant received three separate documents during her employment describing her as a Regional Account Executive. I find it implausible that that was merely a typographical error, as Mr Hallam said in his evidence. The first of these documents, at page 128, applies to the calendar year 2014, during the first half of which C avers that she was doing like work with Mr Coleman, it now appearing to be the case that the Respondent concedes that Mr Coleman was promoted on 1 January 2014. That being so, the Respondent's argument that the Claimant was not doing like work to Mr Coleman, must in my view to be subject to a full trial of the facts as on the face of it the two employees had the same job title but different salaries. Was the differential justified by the higher quota given to Mr Coleman? Perhaps - but that is not self-evident.

8. I also preferred Mr Martin's submission that what matters in an equal pay case is not what the job title says, but what the Claimant actual does on a day to day basis. There are substantial disputes of fact about that in this case, particularly as the Claimant's case is that she did in practice carry out all of the responsibilities of the Regional Account Executive role. She also gave evidence, disputed by the Respondent, that she was at times in practice operating at the level of a territory manager. The evidence needed to establish the relevant facts was not available to me and the relevant witness of fact, Mr Town, was not at the hearing. What was clear to me was that there is a complex question at large about how comparisons should be made between employees operating in regions with very different economies, how short, medium and long term value should be measured, and how the different levels of support the Claimant says were offered to her comparators should be factored in. The levelling exercise carried out by the Respondent may ultimately help in determining this question, but if, as seems the case, the Claimant was not consulted during the levelling exercise about the actual constituents of her role, its value as a probative tool may be limited. Besides, that process was not undertaken until 2016.
9. For the purposes of the application I was dealing with – the Respondent's application for a deposit, I was not prepared to say on the basis of the evidence I heard that the Claimant had little prospect of establishing the necessary facts in relation to any of the comparators relied on, to show that she was carrying out like work but receiving lower pay.
10. As regards the Respondent's defence, the Respondent relied on a range of matters, including the economic value of the various post holders to the Respondent. However I was again unable to arrive at the view on the basis of the evidence I heard that the Respondent was very likely to establish its defence. The question of whether the Tribunal should look at the actual job or the job as described on paper seemed to me to be relevant both to the question of whether like work was established and to the question of whether the Respondent had shown that there were material factors that justified the differential in pay that were not related to sex. It seemed to me no answer to say that the higher pay was justified by higher quotas – quotas are expectations, not indicators of performance. It would be easy to avoid the effects of the legislation if a Tribunal could simply ignore how a Claimant and her comparators were actually performing and what their actual value to the business was, as distinct from how the employer was saying on paper that it hoped they would perform.
11. I therefore concluded that it could not be said on the basis of the evidence I heard that the Claimant had little prospect of succeeding in her equal pay claim. That claim is apt for a full trial of the facts and the application for a deposit is therefore refused.

Employment Judge Morton
Date: 4 December 2017