



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms AV Arnold

v

**UK Power Networks (Operations)
Limited**

Heard at: Norwich

On: 30 & 31 October and 1 & 2 November 2017

Before: Employment Judge Postle

Members: Miss L Feavearyear and Mrs L Gaywood

Appearances

For the Claimant: Mr Renton, Counsel.

For the Respondent: Mr Waite, Counsel.

JUDGMENT

The unanimous judgment of the tribunal is:-

1. The claimant was victimised under s.26 of the Equality Act 2010.
2. The claimant was subjected to less favourable treatment on the grounds of her sex (direct discrimination).
3. The parties having reached an agreement on compensation to include injury to feelings, loss of opportunity and interest agreed to pay to the claimant the sum of £24,000.
4. The parties have also agreed the following recommendation "Training in the Equality Act 2010 for all members of the UK Procurement Team", such training to take place within 12 months of this order, namely from 2 November 2018.

REASONS

1. The issues in this case are two claims, one of direct discrimination under s.13 of the Equality Act 2010 and that is, the failure to appoint the claimant to the position of Tactical Procurement Lead in 2016, and a further claim

that the claimant was victimised under the Equality Act 2010, the protected act being the raising of a complaint about her pay. The respondent asserts that the best person was appointed to the position after a fair interview, being a Mr Downing a male.

2. The evidence in this tribunal has been from the claimant, and for the claimant Mr Bye a Trade Union Representative both giving their evidence through prepared witness statements. For the respondent we heard evidence from Miss George, Category Specialist and Mr Waring, Head of Operational Procurement, again both giving their evidence through prepared witness statements. The tribunal has had the benefit of a bundle of documents consisting of 275 pages.
3. So far as the law is concerned, that appears to be uncontroversial between the parties and is set out in the claimant's skeleton argument from Counsel at paragraphs 2 to 8.
4. The tribunal's findings of fact are as follows:-
 - 4.1 It is important in this case to recite the background in order to get effectively from A to B. The claimant was initially employed as a contractor on 11 September 2013 she entered as a permanent employee with the respondent as a Category Specialist on 1 April 2014 which involved management of procurement categories such as traffic management and general inventory. She was responsible for writing category plans, tender strategies, tendering events, implementing contracts and post award contract management in line with EU Utilities Regulation. Her starting salary as a permanent employee was £35,000, that appears notwithstanding that Mr Coatsworth had originally given the claimant to understand when she was a contract worker that when she moved into a permanent role it would warrant a salary of £40,000. Initially the claimant had been offered £22,000, but managed to negotiate a starting salary of £35,000. The respondent's appear to have no transparent wage structure unless you are on a collective agreement contract.
 - 4.2 In late December 2014 the claimant became aware following discussions with her male colleagues that she was not being paid in line with those males. In January 2015 though the claimant was offered a role outside the respondent on a higher salary she declined it believing that her career progression and prospects was best served with the respondent. This was despite the claimant raising concerns with Helen Wain that she felt she was not being treated fairly on salary and development opportunities. In January 2015 the claimant as other staff received a standard pay increase which took the claimant's salary to £35,700. The claimant on 26 January 2015 by email (at page 138) following up a conversation she'd had with Helen Wain who was her then Line Manager raised her concerns over pay, training opportunities and the fact that she

had been offered a role outside the respondent, and was seeking guidance. Particularly in her email she records:-

“It has also come to my attention that there are individuals in the procurement team that are seemingly less capable than me but are on better packages. While I appreciate that everyone has negotiated their individual salaries when joining the business it doesn’t seem appropriate that these individuals who come to me for guidance and advice on a regular basis that are earning a higher wage.”

- 4.3 On 27 January 2015 the claimant spoke to Mr Waring and Miss Wain to discuss the issues she had raised with Miss Wain and was informed Mr Waring would look at them particularly with reference to pay and get back to her. On 29 January an email from Mr Waring (at pages 143 to 144) advised the claimant’s salary would be uplifted but could not commit to a figure and would have to reflect her progression with reference to gaining her CIPS status; that is the Chartered Institute of Procurement and Supply having entered as a graduate at level 3 CIPS she was now taking level 4 to 6 exams. The claimant was comforted by the position and the email from Mr Waring believing that matters would be progressed.
- 4.4 On 23 February 2015 the claimant emailed Mr Waring (at page 151) requesting a meeting as she had heard nothing further regarding the question of her pay. On 10 March 2015 the claimant further emailed following a meeting with Mr Waring where discussions had taken place over the fact that she had to take her CIPS exams in order for this to be aligned to her salary increase (at page 152). The claimant perceived following discussions with Mr Waring that his attitude towards her appeared to have changed and was either reluctant to meet the claimant or was avoiding her, failing to delegate matters properly to the claimant’s line manager if he were too busy. On occasions ignoring the claimant’s emails and appeared to be frustrated by the claimant’s concerns about what she perceived was unequal treatment. Mr Waring admitted he did have some frustration with the claimant over the pay issue and her belief that she was not being treated equally to that of males.
- 4.5 On 4 June 2015 the claimant emailed Mr Waring (at page 154) as he had still not progressed the pay issue. Clearly if Mr Waring was not responsible to the claimant or for the pay issues then he should have made that absolutely clear to her at that stage and where to direct her enquiries or issues.
- 4.6 On 26 June 2015 (at page 155) the claimant advised Mr Waring that she’d completed four and five of her CIPS exams as he had suggested re pay, and had heard nothing about her pay review. Further between March and June 2015 the fact that she had taken responsibility for leading a sub team in materials procurement and

feeling that her role had progressed yet the salary issue was no nearer to being resolved. It appears there was no response. Another five months passed and there is no mention of the claimant's pay review. The claimant has a new line manager, a Mr Bird. The team structure is changed, the claimant discusses in her first 1to1 meeting with Mr Bird the ongoing issue of her pay review and was informed that he would discuss this with Mr Waring.

- 4.7 On 10 December 2015 her performance review was rated as four out of five being good, no one seemingly attains five being excellent as it is believed there is always room to improve. For some reason without consultation with the claimant she is told in a meeting on 17 December 2015 by Mr Bird that her performance review score had been changed to three out of five without any justification. It is fair to say that ultimately after further representations it was reinstated to four.
- 4.8 There was a meeting with Mr Waring on 18 December 2015 regarding discussions about outstanding salary review which had been promised in January 2015. The claimant was now told that it would be discussed with Mr Bird and arranged for an increase to be included in her January 2016 pay, and this would be confirmed to her by the end of December. Unfortunately nothing happened, so by now a comparator of Mr Downing with less experience and qualifications was earning at various times between £800 and £3,000 more than the claimant (at page 251 to 251c), and there appears to have been little justification for this pay disparity.
- 4.9 Given again nothing happened in the New Year re the pay review, the claimant on 8 March 2016 had a meeting with Mr Bird who now told her effectively the goal posts had been moved again, she would be given a salary increase to £40,000 on achieving level 6 CIPS. The claimant was concerned she was now being asked to achieve qualifications beyond most of her colleagues and certainly beyond that of Mr Bird and Mr Waring in order to be paid fairly. The claimant complained in an email (at page 156 to 157) on 9 March 2016 amongst other things about her treatment and pay with reference by implication to her male peers.
- 4.10 On 15 March 2016 an example of perhaps Mr Waring and Mr Bird's annoying frustration with the claimant, she noticed a job advert in internally, she emailed them about this and together with the email of 9 March 2016 no response whatsoever was received.
- 4.11 On 1 April 2016 there was a 1to1 with Mr Bird at which the claimant was asked to prove she had achieved level four and five CIPS so he could now give consideration to her salary increase. As it had been agreed a £40,000 salary aligned to level five CIPs and not level six. The claimant emailed her certificates following the meeting and still nothing is done re her pay.

- 4.12 On 4 May 2016 the claimant enquires with Mr Bird about the pay update as noting has been heard following previous meetings, and particular the meeting of the 8 March 2016. Mr Bird now confirmed the pay would rise to £40,000 per annum if targets were achieved at mid year performance review, and once again the goal posts appear to have been moved yet again.
- 4.13 On 8 July 2016 there was a meeting with Mr Bird to discuss the mid year performance review. Mr Bird advised the claimant had achieved her mid year targets and would get a salary uplift. The claimant had raised the issue of male graduates who were earning more despite being less experienced and qualified. It appears that Mr Bird accepted this was the case, however was unable to confirm when the claimant's pay increase would take effect.
- 4.14 On 13 July 2016 the claimant emailed Mr Waring (at page 164) and reiterated male graduates in procurement were currently earning more than the claimant and were less experienced and qualified given her level of CIPS attainment. Targets were constantly moving and the fact that she was now being discriminated against as a female, clearly it would have been obvious to Mr Waring and Mr Bird that there was a potential problem that needed to be addressed. The claimant took advice from her Trade Union Representative and that was to move from a personal contract to a collective agreement which might be more favourable. The claimant requests in an email to Mr Waring to be transferred to that type of contract Mr Waring forwarded the email to Mr Bird (at page 163), confirms his frustration and suggests the claimant is earning less effectively because of the value of London Waiting to other members of staff which clearly was a separate payment. He appears to criticise the claimant regarding her successful qualification in CIPS four to five level for not informing him, despite the fact that the claimant did so in April of that year!
- 4.15 To clarify the respondent has two pay structures, most procurement personnel are 'personal contract holders' where there is no published banding on pay progression and salaries are based on individuals. There is a second pay structure and that is the 'collective agreement' – two scales and that is negotiated by the Trade Union.
- 4.16 On 13 July 2016 an email from Mr Waring (at page 165) to the claimant, now claims he is unable to make any salary changes as he has no mandate. If that is correct why not explain that at the outset upon being informed by the claimant of potential inequalities and refer the matter to HR given his obvious frustrations. His email in fact tries to justify pay differentials by suggesting location and graduate program is to a degree an accelerated path. Some 18 months have now passed and Mr Waring now says he cannot

make salary changes despite previous indications, assurances that he could or was within his power to certainly make the recommendation to the appropriate person.

- 4.17 The claimant was awarded a mid term pay increase of 6% taking her salary to £39,167, still not the £40,000 promised given that she had fully qualified to CIPS.
- 4.18 On 12 September 2016 there is an email to a number of staff including the claimant from Mr Waring to advise a position of tactical procurement lead job vacancy was to be advertised, and in that email (at page 179) oddly states:-

“NB There is no predetermined result with this vacancy.”

A rather odd comment to make if it is generally an open forum.

- 4.19 The job description is at page 180 to 180 which sets out key responsibilities, knowledge, skills, experience and qualifications. The claimant applied as do three other, two males and a female. The claimant had now obtained her level six CIPS, so effectively was fully qualified. She was short listed together with three other internal candidates, two male and one female.
- 4.20 The interview was to be conducted by Mr Waring and Miss George, Miss George being Mr Waring's affective number two and worth noting had recently negotiated or been awarded a pay increase from Mr Waring recommending her salary rise from £72,450 to £76,800.
- 4.21 The interviews were to take place on 26 October 2016. They were one hour each back to back, there were to be ten questions and an ice breaker question at the start. Candidates were to be marked between one and five for their answers, however there is no guidance from HR or any other as to how to mark and assess each answer. There is no weighting for marking, and the marking of each question is marked out of five but not necessarily is each question of equal value.
- 4.22 It is clear there was no obvious link between the job description and the questions, and no thought process in marking the answers against the personal specification outlined in the job description. Looking at the section, job description knowledge, skills, qualifications and experience the interview panel appeared not to base questioning on many of those aspects. It is clear the claimant's qualifications and experience were effectively marked down. The question looking at continuous improvement clearly the claimant having obtained her full CIPS qualifications should have been marked up as against the successful male candidate who had not. Same for experience where the claimant clearly had more experience than the successful male candidate.

- 4.23 The respondent's knew what they wanted from the job description but appeared to depart from it in some of the questioning. Mr Waring seems to have used extraneous matters to try and justify Mr Downing being the successful candidate and his marking. There was a suggestion that Mr Downing should be given extra marks for entrepreneurial skills, however that was never part of the job description, and Mr Waring in his evidence seemingly failed to explain or justify it.
- 4.24 If there were no model answers to mark against, clearly the respondent has to stick to the questions, the relevant job description and the answers given. They should not depart from it. In some answers there appears to be no difference in those provided by the claimant to that of the successful candidate, yet the claimant attains less marks. Again Mr Waring tries to justify that by saying that the successful candidate gave broader answers or is more motivated but was unable to expand upon that in his evidence. Mr Waring seems to have marked the claimant on his own preconception of her rather than the actual answers, and we see that at page 220 – he puts the comment “desire to progress rather than the attractiveness of the role”. The successful candidate had provided with his application form a strategy document which he had been given credit at the short listing stage, and despite not being requested as part of the interview process it appears that he has been positively marked up for this document, indeed Miss George confirmed that was a positive part in her scoring for Mr Downing.
- 4.25 Following the interviews, Mr Waring and Miss George say they departed without discussion which the tribunal have some doubts as to the credibility of, as they also indicated prior to the interviews they had no discussions about the form the interview was to take, how they would assess the answers with reference to marking, which seems extremely odd for an experienced interview panel to embark upon. It is frankly difficult to believe no discussions took place at all particularly as Miss George is Mr Waring's number two. Miss George claims to have had no knowledge of the claimant's issues she has had, over the last 18 months with regard to pay and general treatment. The tribunal find that hard to believe. More likely it was raised than it was not and even if it was not it seems unlikely that Miss George would not have been aware of issues through the office working closely with Mr Bird and Mr Waring who both had been involved with the pay issue with the claimant.
- 4.26 The claimant is notified by Mr Waring as to the outcome of the interview on 22 November 2016, that she is not successful and that Mr Downing has been appointed. Mr Waring inferred to the claimant that she only wanted the position because of the salary and that was all that she was focussed on. Which again is bourne

out by Mr Waring's perception of the claimant in his marking of the interview at page 220.

- 4.27 On 30 November 2016 the claimant emailed (at page 244) Messrs Waring and Bird to advise that she had taken advice from the Trade Union and confirmed she felt she had been discriminated against in respect of pay and gender, and further by the outcome of the job application was further evidence of her discrimination.
- 4.28 On 2 December 2016 (at page 249) the claimant's Trade Union representative emails Brian Sloane, Head of Employee Relations about difficulties going back over two years, plus emails requesting pay differential, discrimination and unsuccessful application for job. Brian Sloane involves Nicola Diggle from HR, she provides an analysis on pay and concludes at point 2e of her email of 7 December 2016:-

“Michael appears to have been most favourably treated based on length of service and average salary increase over the 3 years and having read the interview notes considered it does appear Michael gave better answers and so scores ?.”

- 4.29 However, the tribunal find that hard to accept that she could come to that conclusion without further investigation of the interview scoring and the interviewers herself. Mr Waring comments on the salary analysis as saying “there was no favourability, it was because of a collective agreement which Downing had, Brian Sloane then notes at page 246 “whilst at point 2e there appears no intended favourability in this situation indirectly there is a difference in pay which represents a potential risk to the respondent”.
- 4.30 On 3 January 2017 there is an informal grievance meeting to discuss the concerns where Mr Bird, HR and Mr Bye the Trade Union representative are present. At that meeting the claimant is offered a salary increase of £42,000 effective from 1 July 2016 and told that a full investigation had been completed, although there is no evidence of a full investigation before this tribunal and it does not appear that the claimant was spoken to, and nor does it appear that Miss George or Mr Waring were spoken to or interviewed about the interview process and their justification of their marking. The suggested full investigation seems a sham.
- 4.31 There is a letter confirming the outcome of the informal grievance meeting which oddly was signed Mr Bird, junior manager to Mr Waring. He reports there has been a detailed review of the scoring sheets undertaken, although there is nothing to support that statement. There is no questions over interview process and he does not seem to have taken on board the job description and how the questions at the interview and the marking appeared in some parts to depart from the job description. On the pay review Mr Bird

suggested “now scope to review taking account past level six exams and expectation was set of an enhanced salary progression” and trying to justify difference in pay by asserting that salaries within a team can vary due to the skills and experience that new appointments bring to the role. The salary was now to be back dated finally to January 2015 bringing her in line with male colleagues”.

5. Conclusions

Victimisation

- 5.1 The protected act initially was made in January 2015 and repeated on a number of occasions in 2015 and throughout 2016 at pages 138, 156, 164, 214 and 244, and that was that she was doing work that she believed was the same as her male colleagues and not being paid at the same rate. If there was any ambiguity that she was complaining about pay and inequalities and males that was clearly stated in her letter of 13 July 2016 reference to male colleagues were earning effectively more.
- 5.2 With regard to the complaints complained of unequal treatment it is accepted she applied for the vacancy and that Mr Downing was appointed. The respondent says his appointment was based purely on his performance at the interview as against the claimant. So the question is, is the reason the respondent did not appoint the claimant to the position of Tactical Procurement Lead because as the claimant asserts either her sex or because she made a complaint about unequal pay or is the reason for which the respondent's assert that Mr Downing was the better candidate?
- 5.3 The tribunal are faced with 18 months of a background of complaints by the claimant towards Mr Waring and effectively the respondent that she was not being treated fairly, and that male colleagues were being treated more fairly particularly with regard to pay. It is clear that Mr Waring and Mr Bird were equally frustrated, they were annoyed that this matter would not go away. There was a total lack of movement by Mr Waring and Mr Bird seemingly passing it backwards and forwards. The goal posts were changed. The claimant was clearly perceived as a thorn in their side and when the job vacancy came about she clearly was not going to be preferred under any circumstances.
- 5.4 We repeat Mr Waring admitted he was frustrated by the complaints the claimant was making that she was not paid the same as males, there was failure by him to accept that when the evidence was before him. He constantly moved the goal posts. The tribunal do not accept that prior to the interview there was no discussions between Mr Waring and Miss George, and equally we do not accept there were no discussions following the interview between Mr Waring and Miss George as to marking and who Mr Waring's

favoured candidate was. It is clear on the balance of probability there would have been discussions about how the interview would take place, how the marking would be assessed and likely who his preferred candidate was. It is inconceivable to believe that his number two Miss George would go against him. It is also surprising that a senior manager when announcing a job vacancy would then put in an email for all to see that, "there is no predetermined candidate". His written comments on the interview sheets at page 220 "more desire to progress in reference to pay rather than the attractiveness of the role itself" and the feedback comments "she only wanted the job because it was a pay rise and that was all that she was focussed on". Shows some preconceived bias toward the claimant by Mr Waring.

- 5.5 The way the complaint was dealt with over such a long and protracted period with the goal posts changing, we repeat the claimant was clearly seen as a nuisance and a thorn in the side of Mr Waring and again it seems amazing that if he could not deal with her pay he did not tell the claimant at the start when she first raised the issue of her pay.
- 5.6 The claimant comes to the interview and frankly never stood a chance of an equal playing field set against the background of Mr Waring's attitude towards her, he was frustrated, she would not go away. If one looks at the interview process itself similar if not the same answers were given by the claimant as the successful candidate and yet she was marked down. The interview process itself it appears that the goal posts moved from the job description, the way questions focussed and scores particularly on experience and qualifications the claimant is not marked up. The fact that the claimant clearly did have a lead role, she is given no credit for that, the suggestion that entrepreneurial skills were now a new factor and relevant factor in the job was not part of the job description, and yet both Mr Waring and Miss George seemed to give credit for that. Furthermore there is weighting for the document the successful candidate Mr Downing produced the 'tactical strategy document' which was weighted at the short listing and then on Miss George's own evidence was given positive weighting at the interview. All these points to inference that the reason the claimant did not get the job was she was being victimised because of the complaints she had previously made over the previous 18 months.
- 5.7 The justification put forward by Mr Waring that Mr Downing was a better candidate seems to comprise of; he was more motivated and expanded on the answers, but when Mr Waring was asked to expand on that he seemingly was unable to do so before the tribunal. Even if the tribunal were wrong on the victimisation the tribunal would nevertheless conclude on the facts we have found that the reason for the claimant's treatment was her sex in not being offered the position. The tribunal repeat the facts we found on the

victimisation claim in summary; the marking process, lack of transparency, experience, qualifications, additional factors taken into account such as entrepreneurial skills which were not put in the job description and the strategy document produced which the successful male candidate was given positive marking for. The fact that there is no regulation of the marking by a third party, and there is no clear guidance as to how the marking of the questions should be point to the fact that the claimant was treated less favourably also on the grounds of her sex.

Employment Judge Postle

Date: 11/1/2018

Sent to the parties on:

.....
For the Tribunal Office