



EMPLOYMENT TRIBUNALS

Claimant: Miss Michelle Smith
Respondent: Neilson Financial Services Limited
Heard at: Reading **On: 23, 24, and 25 January 2018**
Before: Employment Judge Gumbiti-Zimuto
Members: Ms P A Breslin and Mrs F Betts

Appearances

For the Claimant: In person
For the Respondent: Mr J Mitchell (Counsel)

JUDGMENT

1. The claimant's complaint about equal pay is well founded and succeeds.
2. The claimant's complaint of direct or alternatively indirect discrimination arising from the claimant's application for the post of Training Manager is dismissed.
3. The respondent is ordered to pay to the claimant the sum of £14,673.42.

REASONS

1. In a claim form presented on the 19 January 2017 the claimant made a complaint about equal pay. The claimant complained that she had not been paid equal pay with the comparator Mr John Tucker (JT). By its response, the respondent accepted that the claimant and JT at all material times undertook like work; that there was disparity in pay; and relied on a material factor defence. At the case management preliminary hearing on the 11 April 2017 the claimant was allowed to amend the complaint to include a claim of direct or alternatively indirect discrimination arising from events around her application for the post of Training Manager. The claim of direct or indirect discrimination has not been advanced by the claimant as a discreet claim in these proceedings.
2. The issues that the Tribunal has had to determine were described in the case management summary as follows: "The main issue is that the

claimant claims equal pay with Mr John Tucker only and no other comparator. The period of comparison is 1 July 2014 to 20 October 2016, when both were employed by the respondent as Sales Performance Coaches.”

3. The claimant gave evidence in support of her own case. The respondent relied on the evidence of Mr Christopher Dawson and Ms Claire King. All the witnesses produced statements which stood as the evidence in chief. We were provided with a trial bundle of 129 pages of documents. From these sources we made the following findings of fact.
4. JT was employed by the respondent as a Sales Manager in February 2013. The claimant was employed by the respondent as a Sales Manager in May 2013.
5. The claimant’s Service Agreement provided that her basic annual salary as a Sales Manager (SM) was £30,000. When JT started employment, he was employed on a basic annual salary of £32,000. According to the respondent the salary varied between the claimant and JT because of the individual skills and experience of the claimant and JT. There was no evidence produced to illustrate the comparative difference between JT and the claimant. We were told that JT had a great amount of skill and expertise but were not shown anything to allow us to judge how it compared against the claimant.
6. On 9 August 2013 there is an email exchange that takes place between Mr Dawson and Mr Gavin Donnelly. The upshot of the email exchange is that an offer was made to JT the effect of which was to greatly enhance the terms on which he was employed by the respondent.
7. The first email from Mr Dawson to Mr Donnelly read as follows:

“Keen to give John some added fuel to encourage him to keep the feathers flying. He’s on £32K and his contract amended on day one to have that reviewed after 6 months (probation) – which is now. I have and will structure the commission scheme on-going so that he constantly earns circa £1K in commission per month if he keeps results at where they are at; whilst others will only earn circa £500 on KPI. It will be aimed at above and beyond.

I know he is going to question base salary and I am keen for a guide or your view on it please. Either a “no” with justification/rationale or perhaps a standard raise in line with inflation but in recognition of job well done thus far. That, coupled with a serious chance to earn great commission will no doubt keep him fuelled.” (p39)
8. The reply to that email was as follows:

“You need to give him enough to keep him engaged, but not so much that he starts to feel the sales manager role is beneath him.

We also want to be careful about him talking and other managers seeing his salary as their right after X service.

Any scope to change his title to “Senior Sales Manager” along with some added responsibilities that clearly elevates him above his peers, but still keeps him responsible for a team? That would give licence for a new base say £40K and leave commission where it is. Just thought as I have not thought through much.

Let’s discuss on Monday?” (p38)

9. There were further emails on 21 August 2013 (p35 and p36) in which Mr Dawson set out the scope of a Senior Sales Manager (SSM) role.
10. In September 2013 JT was given the role of SSM. There is no job description or person profile for this role. The exchange of emails between Mr Dawson and Mr Donnelly set out the role. The role was not advertised within the respondent and no one else was considered for the SSM role.
11. The claimant says that there were no additional duties undertaken by JT when he took up this role. During questioning the claimant accepted, when it was put to her, that what JT did in the role may not have been transparent to her. She stated that *“there was no visibility around the extra duties/responsibilities, he did not have direct line management responsibility. It would be impossible to know what is in the role without that.”* The claimant also accepted that there had been one 1-2-1 session with JT of which she said the meeting was *“very informal”* and that he was only stepping in while Mr Dawson was away.
12. Mr Dawson said of JT that: *“My intention was that he was to be my second in command and someone I could lean on when it came to supporting sales teams and managers. John would take responsibility for some of my day to day work he would have some key deliverables that he needed to work to which put him over and above a regular Sales Manager role.”*
13. JT’s pay increased to £40,000 when he took up the SSM role. In addition, JT was given a further five days annual resulting in total annual leave of twenty-five days a year. The claimant remained on twenty days annual leave until 1st July 2014 when she took on the role of Sales Performance Coach (SPC) and her annual leave entitlement increased to twenty-five days.
14. In June 2014 Mr Dawson decided that the operations structure needed to be revised. In an email dated 23 June 2014 the changes were

announced. The SSM and two SM roles were disbanded and the role of Sales Performance Coach (SPC) was created.

15. The claimant states that the SPC role was advertised as a more senior role than the SM role and therefore attracted a higher salary. The respondent says that the SPC role had less management responsibility than the SSM role and attracted a lower salary.
16. The claimant applied for the SPC role and was successful. The claimant commenced working in the SPC role from 1 July 2014. The other successful candidates were JT and Mr Saminder Matheru. From this point on the claimant and JT were engaged in like work.
17. The claimant's basic salary was increased to £34,000. JT's basic salary at this point was £41,200.
18. The claimant became aware that JT's pay was higher than her pay. The claimant was told by Ms Tara Stewart that the reason for the pay differential was the fact that JT's salary from SSM role was protected. Mr Matheru was on a lower salary to the claimant because he had been promoted from the position of Sales Agent. At this stage the claimant took no further action.
19. Explaining the decision to protect JT's salary, Mr Dawson described JT as having *"demonstrable success as a high performer"* and then went on to say that: *"I was concerned that reducing his salary would mean he would be at risk of leaving the company, or at the very least be demotivated."*
20. In January 2015 SM roles and SPC roles merged into the role of Sales Coaching Manager (SCM). The claimant and JT were each, like all other SCM's, given a team to manage.
21. The claimant asked Ms Stewart if she could be paid the same basic salary as JT. The claimant was told that she could not be paid the same as JT as his salary was not based on his skills and experience but was based on the legacy of the promotion to the SSM role. JT's higher salary meant that he also received enhanced benefits.
22. In March 2015 the claimant applied for a Training Manager role, she was unsuccessful. In feedback the claimant was told that she could not be appointed to the role because the role could not sustain her salary. The respondent says that is not correct; the claimant was not appointed because there was a better candidate who was appointed to the role. However, the respondent says that even if Ms Stewart, the hiring manager, said this to the claimant it was not true. The respondent relied on an email which showed that in the case of internal applicants that the

respondent was willing to allow Sales Managers to be appointed to roles on their current terms (p70). We have not needed to resolve this dispute but note that the correspondence relied on by the respondent relates to Sales Managers and not Sales Coaching Managers, i.e. the SCM role that the claimant occupied and further that her full-time basic annual salary at this time was £36,267 and outside the salary range for the role of £30-35,000.

23. The claimant was told she was to be moved from her team to a web-based team. The claimant objected and asked why she was to be moved when the two men had not been moved to new teams. The explanation was that the two men, who included JT, had a tough year professionally and personally and needed stability. In the end the claimant was not moved to a new team.
24. On 6 November 2015, the claimant had a 1-2-1 with Mr Dawson about her salary and requested the same basic salary as JT. The claimant was told that JT's pay was a result of legacy and there was no prospect of the claimant's basic salary being increased to the same level as JT.
25. Following the 1-2-1 meeting the claimant and Mr Dawson exchanged emails on the topic of the claimant's salary. While the meaning of the content of Mr Dawson's email at 16:19 on the 6 November 2015 (p78) is not entirely clear to the Tribunal the claimant in her email in reply appeared at that time to accept it and said: *"it all makes sense and the subject is now closed."*
26. On 12 October 2016, the claimant raised a grievance about her pay. On the 13 October 2016 the claimant received a response to the grievance. The claimant was not happy with the outcome and on 17 October 2016 raised an appeal. The claimant's grievance and appeal were not upheld.
27. The claimant's employment with the respondent came to an end on the 20 October 2016.

Law

28. Section 69 (1) (a) of the Equality Act 2010 provides that 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 does not involve treating A less favourably because of A's sex than the responsible person treats B, and if the factor is within section 69 (2), is a proportionate means of achieving a legitimate aim.

29. In approaching this case on the narrow point in dispute we have had regard to the guidance in the case of Glasgow City Council v Marshall [200] IRLR 272 where it is explained that the scheme of the Equal Pay Act 1970, (now Chapter Three of the Equality Act 2010) is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. (In this case it is accepted that the claimant and JT did like work and that there was a disparity in pay.)
30. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters.
31. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence.
32. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. The factor must be a 'material' factor, that is, a significant and relevant factor.
33. Third, that the reason is not 'the difference of sex'. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect.
34. Fourth, that the factor relied upon is a 'material' difference, that is, a significant and relevant difference, between the woman's case and the man's case.
35. The Tribunal have also been referred to the case of Haq & Others v The Audit Commission [2012] EWCA Civ 1621. In paragraph 44 of Lord Justice Mummery's Judgment he states: "Thus undisputed inequality in pay between the Claimants and the comparators gives rise to a rebuttable presumption of discrimination on the grounds of sex. It is then for the Audit Commission to rebut that by the GMF defence showing that the inequality in pay is due to a genuine material factor which is not a difference of sex. If that defence is established, that is the end of the case and the claims are dismissed."

Conclusions

36. The respondent relies on the legacy of an increase in pay for JT from £32,000 to £40,000 in September 2013 as a material factor which does not involve treating the claimant less favourably because of sex.

37. How the increase in salary for JT came about is explained in the emails between Mr Dawson and Mr Donnelly on 9 August 2013 (p38).
38. The emails show that Mr Dawson wanted to give JT a financial incentive. We take this to be the meaning to be derived from the sentence: *“Keen to give John some added fuel to encourage him to keep the feathers flying.”* This is contrasted to the way that the claimant and others are to be treated with lesser financial incentive.
39. The treatment of JT begins more favourably as *“on day one”* his contract was amended to have a review after six months. In contrast the claimant’s contract at clause 5 was not amended and provided for an annual review.
40. The email exchange shows that Mr Dawson wanted to give JT a financial incentive. However, in his witness statement Mr Dawson says: *“In August 2013 John had successfully passed his 6-month probationary period and had demonstrated his success in the Sales Manager role. With the demands on my time in a growing business evident, I decided to promote him into a Senior Sales Manager role. My intention was that he would be my second in command and someone I could lean on when it came to supporting sales teams and managers. John would take responsibility for some of my day to day work and he would have some key deliverable that he needed to work to which put him over and above a regular Sales Manager role.”* There is no evidence before us of the *“key deliverable”* referred to by Mr Dawson.
41. The witness statement passage suggests business need determined the requirement for a Senior Sales Manager and JT fitted the role. In our view this is not true. The emails demonstrate that this was a device to provide JT with a financial incentive.
42. On the evidence given by Mr Dawson in which he said: *“I leant on John he took on a lot of additional responsibility”*. However, what we heard of these additional responsibilities is scant. It was said that they were not *“overly transparent”* to the claimant. The claimant was able to give evidence about JT’s extra duties. She spoke of one meeting that took place when Mr Dawson was on sick leave. The meeting was described as *“very informal”* and that he was only stepping in while Mr Dawson was away. JT had no line management responsibility in relation to the claimant.
43. We also note that when the respondent reorganised, it employed Ms Tara Stewart who took on all the activities which it is claimed were being done by JT in support of Mr Dawson.

44. We have come to the conclusion that the claimant is in substance correct when she says that the role of SSM *“did not carry any additional responsibilities”*; to the extent that there were additional responsibilities it was made to give licence for a new base salary of £40,000 for JT. The desire to increase JT’s salary goes back to the commitment *“on day one to have that [i.e. JT’s contract] reviewed after 6 months.”*
45. We also note that part of the respondent’s explanation for the increase in pay for JT was that he had achieved completion of his probation period and was a higher achiever. The claimant was taken to commission figures in the period June, July and August 2013. This is treated with some caution by the Tribunal because the email of 9 August 2013 includes the following comment by Mr Dawson: *“I **have and will** (our emphasis) structure the commission scheme on-going so that he constantly earns circa £1k in commission per month if he keeps results at where they are at; whilst others will only earn circa £500 on KPI.”*
46. The respondent says that the pay differential arose as a result of pay protection and was legitimate. The Tribunal view is that this was not real pay protection or ‘red circling’; had it been there would not have been the increases which not only maintained the differential but in fact increased it, as the same percentage increase in pay will result in the pay gap between the claimant and JT increasing with every similar percentage increase.
47. The Tribunal consider that there is an inadequate explanation for the difference in pay between the claimant and JT. The very large difference between the claimant’s salary of £30,000 and the £40,000 salary that JT received in his role as SSM is not explained by the additional duties. The additional duties revealed by the evidence do not provide an objective justification for the very large difference between the claimant and JT. We are unable to accept that there was a legitimate aim being pursued by the respondent that discharges the burden on the respondent to show that the variation in pay was not tainted by sex.
48. When from the 1st July 2014 the claimant and JT are both carrying out the role of SPC there is enshrined in the pay arrangements a disparity in pay. It has not been shown that the disparity was due to a material factor that was not sex.
49. In protecting the pay of JT the respondent contends that it was carrying out a legitimate aim of providing pay protection in order to retain JT as an employee. The Tribunal note that the claimant and JT applied for the SPC role. When the SSM role was removed JT could have remained in a Sales Manager role and retained his pay protection. A desire to retain JT may have been behind protecting his pay however for the reasons we have set out above this was not proportionate. The pay disparity between the

claimant and JT was never objectively justifiable when they were respectively in the SM and SSM roles, there can be no justification for it when the claimant and JT are doing like for like for like work.

50. The conclusion of the Tribunal is that the respondent has not discharged the burden upon it to prove that the differential in the pay of the claimant and JT was because of a material factor which does not involve treating the claimant less favourably because of the claimant's sex than the respondent treats JT.

Remedy

51. The parties have agreed that the claimant is entitled to recover from the respondent the sum of £12,854.42.
52. The Tribunal makes an award of interest in this case. Regulation 3 of the Employment Tribunals (Interest on awards in Discrimination Cases) Regulations 1996 provides that interest shall be calculated as simple interest which accrues from day to day. The rate of interest to be applied is the rate fixed by section 17 of the Judgments Act 1838. The rate of interest currently prescribed under the Judgments Act 1838 is 8%. Regulation 6 provides that in the case of all sums of damages or compensation (other than injury to feelings or future losses) and all arrears of remuneration, interest shall be for the period beginning on the mid-point date and ending on the calculation date.
53. The 8% simple interest on £12,854.42 is the sum of £1028*. The daily rate of interest is therefore £2.82. There are 645 days between the mid-point and the calculation date. The interest on the award is therefore £1819*¹.
54. The respondent is therefore ordered to pay to the claimant the sum of £12,854.42 and interest in the sum of £1819. A total of £14,673.42.

Employment Judge Gumbiti-Zimuto

Date: 25 January 2018

Sent to the parties on: 15 February 2018

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For the Tribunals Office

1. The sums marked with * have been rounded up to the nearest pound.