



# THE EMPLOYMENT TRIBUNALS

**BETWEEN**

**MRS BUKOLA OSINUGA**

***Claimant***

**and**

**BPP UNIVERSITY LTD**

***Respondent***

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT:** London Central

**ON:** 9, 10 and 11 January and (in chambers)

8 March 2019

**EMPLOYMENT JUDGE:** Mr Paul Stewart  
Maheswaran

**MEMBER:** Mr Ratnam

### ***Appearances:***

**For Claimant:** Mr A Osinuga, husband of the Claimant

**For Respondent:** Mr R. Jones of Counsel

## **JUDGMENT**

The unanimous judgment of the Tribunal is that all the claims brought by the Claimant are dismissed

## **REASONS**

### **Preamble**

1. This case, heard over three days, began with a Tribunal of three. Ms Carole Ihnatowicz sat as part of the Tribunal for the first two days of the hearing. Unfortunately, she became ill and could not attend the third day of the hearing on 11 January 2019. This was explained to the parties on the morning of the third day and they were given the option, with a short adjournment to discuss it privately, of adjourning the hearing to a date when Ms Ihnatowicz would have recovered and be able to participate fully. Both parties indicated they were happy to continue the hearing with a Tribunal of

two, notwithstanding the case entailed a claim of sex discrimination made by a woman and the two remaining members of the Tribunal were men.

2. That allowed the remaining two members of the tribunal to meet in chambers. The initial date set was 1 February but it transpired that Mr Maheswaran was double booked on that day so we met on 8 March 2019. We discussed the case and reached the judgment that is recorded above. However, there was not enough time for these reasons to be drafted and the two of us parted that day intending that I would write up the reasons and send them to Mr Maheswaran for him to approve.
3. However, I had not yet drafted the reasons for our judgment when, on 4 May 2019, Mr Maheswaran died. Therefore, these reasons have not been approved by him but represent the reasons why the tribunal of two reached this judgment. I apologise for the length of time the parties have awaited judgment. It is entirely my fault.

### **The Claims**

4. By a claim form presented on 9 April 2018, the Claimant brought complaints of unfair dismissal, sex discrimination and unlawful deductions from wages. At a Preliminary Hearing (Case Management) conducted on 3 August 2018, Employment Judge Goodman refused an application to add a claim of race discrimination and set out the issues between the parties that fell to be determined by this Tribunal. That list of issues should be considered to be incorporated into these reasons although, for reasons of space, not set out.

### **Witnesses**

5. We heard from two witnesses called on behalf of the Respondent: Mr Stuart Kay who currently occupies the position of Director of Marketing and Recruitment and Mr Khayrul Alam, currently the International Admissions Director within the Respondent's International Team (*the IT*). The Claimant gave evidence herself but called no other witnesses.

### **The Facts**

6. The Claimant started work for the Respondent in August 2011 as a temporary staff member working in the Students Records officer. Her work impressed such that she both became a permanent member of staff and was promoted several times. After a period of maternity leave, she was promoted to the role of International Commercial Manager within the IT.
7. In February 2017, the Claimant's line manager, Stefanie Esswein, who occupied the position of Director of International Sales, went on a period of parental leave and the Claimant agreed to a temporary variation of her terms and conditions accepting the position of Deputy Director of International Recruitment (Interim) for a fixed term of six months effective from 13 February 2017. The parental leave Ms Esswein sought was to allow her to adopt a child. Ahead of the start of her leave, she thought she would be able to consider working 15 hours per week or 40% of the time she would normally spend on the job. As a result, the Respondent decided to offer the Claimant that temporary arrangement on the basis that the Claimant would

work alongside Ms Esswein doing 60% of her job. The Claimant signed this first variation of her contract on 13 February 2017.

8. For this increase in responsibility, the Respondent offered the Claimant an additional £20,000 on top of her existing salary for the role of International Commercial Manager of £45,450. The Claimant also was entitled to certain commission in her existing role and she retained the right to that commission.
9. Ms Esswein discovered that she was not able to do 40% of her old job while performing the parental role she had chosen and, in March 2017, she informed the Respondent that she was withdrawing from doing the 40%. As a result, the Claimant was offered a further variation of her contract providing for her to do 100% of Ms Esswein's job. The letter confirming the oral agreement for a variation to the contract was signed by the Claimant on 31 March 2017. Although she was now being required to do 100% of the role that Ms Esswein did, the only changes from the variation letter signed on 13 February 2017 were the job title – the role was described as Interim Director International Sales as opposed to Deputy Director of International Recruitment (Interim) - and the person to whom the Claimant now reported. Whereas it had been Ms Esswein who was the Claimant's immediate manager, now it was Ms Lil Bremermann-Richard.
10. A further variation was proposed to the Claimant on 5 April 2017. This was to provide an extension to the Claimant's interim role taking her to 12 February 2018. Nothing was said in the letter about the identity of the person to whom the Claimant reported. The Claimant did not sign this letter because the job title that was specified in the letter had reverted to Deputy Director of International Recruitment (Interim). When the Claimant got that sorted out, a new proposed variation to provide an extension was put forward on 17 May 2017 with the Claimant's role being specified as Deputy Director International Sales (Interim). The Claimant signed this proposed variation on 20 May 2017.
11. On all the proposed variations of contract letters, it was specified that, once the interim period was over, the Claimant would return to her original role of International Commercial Manager and her salary of £45,450 under her existing terms and conditions.
12. There were other changes which occurred within the organisation. On 5 May 2017, Ms Lil Bremermann-Richard resigned and, as a result, the following changes occurred in the IT:
  - a) Mr Stuart Kay took on responsibility for the IT as the Director of Marketing and Recruitment, a role that previously had been undertaken by Ms Bremermann-Richard as International Commercial Director. Mr Kay had previously been the Chief Marketing Officer. Part of his remit in his new role was make efficient the IT which had been identified as inefficient;
  - b) Mr Khayrul Alam was promoted, on an interim basis, to the position of Team Coordinator for the IT, reporting directly to Mr Kay; and

- c) Mr Alam was granted line management responsibility of the Visa Compliance Team although, within a short time, that responsibility was given to a Ms Alison Wells (Director of Legal and HR) .
13. Before this promotion, Mr Alam had been the International Admissions Director. In this role, he earned £65,000 per annum. When asked to take on the role of Team Coordinator for the IT on an interim basis, he was effectively acting up in the role formerly occupied by Ms Bremermann-Richard although some of her role was absorbed by Mr Kay. Ms Bremermann-Richard had earned a salary of £142,800. Mr Alam was given a salary increment of £24,000 making his salary £89,000.
  14. The Claimant, from a salary that was lower than Mr Alam, received a salary increment for acting up in the more senior role of £20,000. It is of note that her increment represented 44% of her existing salary. Mr Alam's increment represented 37% of his existing salary. Furthermore, when the Claimant took over Ms Esswein's role 100%, she started doing a job that was on the same management level as Mr Alam's original role. The Claimant, therefore, in that role received £65,450 per annum whereas Mr Alam had, in his original role, been receiving £65,000.
  15. In their original roles, the Claimant, Ms Esswein and Mr Alam were entitled to commission. The Claimant's commission related to the numbers that were recruited for the Respondent's dentistry programmes. Ms Esswein and Mr Alam were both on a commission structure that was not as favourable as that enjoyed by the Claimant in her original role. Rather than move onto the commission structure which Ms Esswein had been on, the Claimant made representations which resulted in her continuing to receive commission on the more favourable basis she had enjoyed as International Commercial Manager.
  16. The commission structure applicable to the dentistry programmes was 15% commission on the threshold of 80% of the target achieved and 20 % commission on the target achieved. In comparison, the commission structure that Mr Alam and Ms Esswein were on was 4% commission. The commission the Claimant received during 2017 amounted to £17,550. Had she moved onto the scheme Ms Esswein and Mr Alam had been on, she would have received 4% of her salary in May 2017. That would have been £1,818 with the possibility of another payment of a similar magnitude in September.
  17. Mr Kay had not been involved in setting the Claimant's salary for the period she was performing the interim role. However, on 21 August 2017, the Claimant made a request to her line manager, Mr Alam, that there be formal acknowledgement that she was now looking after two full-time roles – and had been since March 2017 – with no commensurate increase in salary. She contended that, while the initial arrangement had been that she and Ms Esswein would share Ms Esswein's role, the job share had never happened and she had been doing Ms Esswein's role along with her old role since March. Three days later, Mr Alam referred her request to Mr Kay.

18. Mr Kay knew the Claimant worked hard in her role and he had no concerns about her performance. When he received her request, he took time to review her workload and role to assess whether a pay rise was justified.
19. After obtaining detail concerning the Claimant's pay from Human Resources, Mr Kay took the view that, while the Claimant had taken on the interim role on the basis of a 60 / 40 split in duties with Ms Esswein, she had signed the variation on 31 March agreeing to take on Ms Esswein's salary without any further increase in salary. He also took heed of the fact that Mr Alam, who had a more senior role and whom Mr Kay regarded as having a heavier workload, was receiving an increment of £24,000.
20. Against a background where the Respondent organisation had recognised that the IT was inefficient in terms of its internal cost versus revenue generated and Mr Kay had been tasked with the job of reorganising the IT to improve efficiency, he considered he could not justify awarding the Claimant extra salary at a time when he was being asked to make cost savings across the IT.
21. The Claimant in her evidence spoke of how she had initiated discussions with management to obtain what she regarded as commensurate compensation for the increased responsibilities she was taking on. In her written evidence, she wrote:

*14. Not once during my conversations as I told to expect less than a positive response to my request. In fact, I was encouraged to continue to carry on my responsibilities and that my request very reasonable and being looked into upward review in remuneration.*
22. We noted that the encouragement that the Claimant reported having been given fell short of any promise that she would receive a salary increase. That there was some encouragement, we do not doubt. The Claimant had a respectable argument that she had been given an increment based on her doing 60% of her line manager's job but, very soon thereafter, had found herself doing 100% of the job. In her oral evidence, the Claimant had attributed to Mr Alam the words "Yes you are taking on 100% and you should be rewarded". But Mr Alam did not have the authority to take a decision to award a pay increase himself. He could only pass up to his senior the request for a pay increase. On the balance of probabilities, we find that Mr Alam did provide such encouragement. Indeed, it is difficult to envisage any line manager in the position of Mr Alam – not having the authority to take any decision himself and wishing to maintain a degree of enthusiasm on the part of the employee seeking a pay increase – acting differently to the way the Claimant suggests Mr Alam acted. But that is a far cry from making a promise that that the Claimant would receive a pay increase.
23. Mr Kay had the authority to award a pay increase and we have no doubt that he did not hold out promises to the Claimant. He was, as he told us, tasked with reducing inefficiency in the IT. To that end, he investigated the roles that people were doing in the IT. He found the roles were not clearly defined and it was unclear which day to day responsibilities were allocated to which job role. The team had poor profit margins. The business was accepting too

many discounts on international student admissions and it was maintaining presence in international regions that were performing poorly in terms of their recruitment targets.

24. The impetus for reducing inefficiency in the IT had come from the purchase of the Respondent's parent company, Apollo Education Group, by a private investment firm. As a result, there were a large number of management changes to the management structure of the Respondent, including the appointment of a new CEO, Mr Graham Geddes. Once in place, the new management team started looking at how the Respondent might be made more profitable. One of the ways it was decided this could be achieved was to focus on the Respondent's core areas (accountancy and law) and move away from areas which were not as profitable – and those areas included international admissions.
25. This conclusion was emphasised in September 2017 when university admissions were completed. Mr Kay told us that it then became apparent that the Respondent had missed its target revenue in respect of international admissions by a considerable sum. Factors which contributed to this were:
  - a) High visa refusal rates in key countries (such as Columbia);
  - b) The Respondent has closed its School of Foundation and English Language Studies resulting in fewer international student applications; and
  - c) The Respondent had recently moved out of lower performing countries such as Vietnam, Nigeria and Brazil, resulting in fewer international student applications.
26. Making the IT more efficient meant redundancies. Mr Kay was asked by both Mr Tim Stewart (the Interim Deputy Vice-Chancellor of the Respondent) and the Chairman of the Respondent to review the structure of the IT. He began formulating a new structure for the IT at the start of October 2017. At that time, there were 72 people in the IT. Some of the 72 were on short term contracts [they were described as "free lance"] and the new structure envisaged their contracts would not be renewed. In addition, Mr Kay's new structure reduced the employed head count by 8.
27. Mr Kay took us through documentation concerning the redundancy process. He asserted – and we accepted - that the documents demonstrated the following:
  - a) There was a clear business strategy behind the restructure of the IT rather than any attempt to target individuals;
  - b) In addition to the IT, the proposed changes also affected the Respondent's Student Management Centre (*the SMC*) which Mr Kay managed as there was duplication in processes and functions across the IT and the SMC;
  - c) There was a proposed structure which reflected the proposed strategy. Again, the proposed changes reflected the business need (to increase

efficiency) and were not implemented to target individual roles or individuals.

- d) The proposed strategy put several roles at risk and the risk related to the roles being performed, and not to the individuals performing those roles;
  - e) Both the Claimant's interim role (Interim Deputy Director International Sales) and her original role (International Commercial Manager) were at risk of redundancy;
  - f) The proposed consultation process made it clear that, for those whose roles were at risk, the process would be to ascertain whether there were any new roles available in the structure or other vacancies available within the Respondent's organisation. If there were not, the individual face redundancy; and
  - g) The proposals went through several iterations and were carefully considered to ensure any changes reflected the desired business strategy. The proposals were in no way designed to target the Claimant specifically or any other individual.
28. An announcement was made on 13 November 2017 to the workforce setting out the rationale for the changes in the IT structure, the proposed new structure and the roles that were at risk of redundancy. A number of consultation meetings were held – to which the Claimant was invited but unable to attend because she was undertaking a period of business travel. Further meetings were arranged for her.
29. Mr Kay reviewed both the Claimant's original role as International Commercial Manager and Ms Esswein's role as Director of International Sales. His conclusion was that these roles should be removed from the staffing structure and the duties performed in these roles be absorbed by other roles. Thus, both Ms Esswein and the Claimant were selected for redundancy.
30. The majority of the 8 individuals to be made redundant had leaving dates of 31 December 2017 but, because the Claimant had been travelling and had missed certain consultation meetings, her termination date was delayed until 31 January 2018. Because of the redundancy restructuring that was going on, she was asked to suspend some of her duties, such as carrying out appraisals and conducting team meetings, these being matters that require a settled structure within which to operate.
31. Mr Kay made clear that the selection for redundancy did not relate to any concerns he had about the Claimant's performance. He regarded the Claimant as a hard worker – “a top performer within the IT” – and had no complaints regarding her work ethic.
32. The Claimant related her redundancy to her request for increased salary to reflect the additional responsibility she had taken on after Ms Esswein had decided she could no longer manage to perform 40% of her job during the period of parental leave she was taking. We were satisfied by Mr Kay's

evidence that, had he been concerned about her request for increased salary during the Claimant's period of acting up, he could simply have waited until she returned to her original role – or have given her one month's notice to terminate her interim role – and the problem would have thus been resolved.

33. As it was, we perceived the Claimant to have a wholly unrealistic perception of what her entitlement to remuneration in her interim role should be. At the time she was made redundant, she perceived herself to be performing the duties of the roles performed by four people: Ms Esswein, Ms Bremermann-Richard, Ms Nicole de Caires (the Director of International Partnerships who had gone on maternity leave since April 2017) and herself as International Commercial Manager. She added up the salaries the Respondent paid all four people when they performed their original roles. Her contention was that her enhanced salary – that is, her salary in the role of International Commercial Manager plus the agreed addition of £20,000 – was seriously deficient: she contended she actually should be paid the total of the four salaries that the four had been paid.
34. As we say, we found this entirely unrealistic. In the first place, after agreeing an initial variation of her contract so as to act up and perform 60% of the duties that Ms Esswein had been doing for an extra £20,000, she agreed (by signing) further variations of contract whereby her interim duties changed for no further additional payment. And, secondly, she continued to work the same number of hours as she had done when in the role of International Commercial Manager. While her responsibilities might have enlarged when other people were away on leave, she physically was not able to do as much in a week as four people.
35. The Claimant did not have to agree to act up for the whole of work being undertaken by Ms Esswein for no further reward. She did not have to agree further variations of her duties for no further reward. In the circumstances, her request for an addition to her uplift of £20,000 was made at a time when she had already agreed to undertake whatever extra level of responsibility those variations entailed and thus Mr Kay was under no contractual pressure to accede to her request.
36. We did not think the Respondent – in the shape of Mr Kay – therefore found the request for additional remuneration made by the Claimant in any way embarrassing or, in some way, only capable of being resolved by dismissing her.

### **The Law**

37. The statutory provisions relating to unfair dismissal, in particular, section 98 of the Employment Rights Act 1996 and relating to direct discrimination on grounds of sex, in particular section 13 of the Equality Act 2010 are to be taken as incorporated into these reasons albeit that, for reasons of space they are not set out.



### **Unfair dismissal**

38. It is for the Respondent to prove the reason for dismissal. It did so to our satisfaction: the reason for the dismissal was redundancy.
39. We were further satisfied that the Respondent acted reasonably in treating redundancy as a sufficient reason for dismissal having regard to the matters set out in section 98(4) of the ERA 1996.
40. In particular, we were satisfied on the evidence of Mr Kay that the Claimant's original post was made redundant as was that of Deputy Director of International Recruitment, the role occupied ordinarily by Ms Esswein, notwithstanding that, in the consultation documentation, the Claimant's original post was not mentioned in the context of the role that was being made redundant.
41. The Claimant had argued that the dismissal was unfair in that the manager who heard her appeal against her selection for redundancy had been involved in the initial decision to dismiss. We found that the Claimant's appeal was heard by Mr Garry Buick who held the post of Director of Business Efficiency. We were satisfied that, while he had assisted Mr Kay by providing costs modelling in respect of the IT because he had oversight of areas of expenditure (including the IT) within the Respondent's organisation, he was not involved in selecting which roles or individuals would be made redundant.
42. We did not accept that the reason for dismissal was, as contended for, by the Claimant, her request for enhanced pay. Nor did we consider that the Respondent resented the Claimant's request for enhanced pay: that request played no part in the selection of Claimant (or her original or her interim acting up role) for redundancy.
43. We regarded the decision to dismiss to be a fair sanction, that is to say, it was within the range of reasonable responses open to a reasonable employer.
44. In the event that we are wrong about our finding that the procedure adopted by the Respondent in treating redundancy as sufficient reason for dismissal was fair, we consider that a fair procedure would have resulted in the same outcome and at the same time.

### **Direct discrimination on the grounds of sex**

45. We concluded that the Respondent did not fail to pay the Claimant the proper rate for the job when she was acting up in another role. She had agreed a series of variations to her contract, only one of which provided her with an increase for acting up. Further, we do not accept she was dismissed because she disputed her pay with the dismissal being disguised as a dismissal for redundancy.
46. We do not accept the contention that the Respondent treated the Claimant less favourably than it treated Mr Alam, it being contended by the Claimant that Mr Alam was paid more than was the Claimant for acting up. Mr Alam did receive more than the Claimant for acting up but he acted up from a

position that commanded a higher salary than the position from which the Claimant acted up. His percentage increase for acting up was 37% whereas that for the Claimant was 44%. No other evidence was provided as regards the increases in salary awarded to males for acting up therefore we do not accept that the Respondent treated the Claimant less favourably than it treated a hypothetical male.

47. Having regard to section 136 of the Equality Act, we are not satisfied that the Claimant has proved facts which, in the absence of any other explanation, establishes that the Respondent has discriminated against her on the grounds of sex. If we are wrong about that and the mere fact that Mr Alam received a higher amount of additional salary for acting up than did the Claimant establishes a *prima facie* case that the Respondent did discriminate, then the explanation provided by the Respondent - that Mr Alam started from a higher salary than did the Claimant and his percentage increase was smaller than that for the Claimant - dispels the *prima facie* case and establishes a non-discriminatory reason for Mr Alam receiving more than the Claimant for acting up.

**Breach of contract / Unlawful deductions**

48. We find there to have been no agreement outside of the first variation of the Claimant's contract of employment to increase the Claimant's pay. We do not accept there to have been any concession by inference on the part of the Respondent on 29 March 2017 (through Ms Bremermann-Richard) or on 4 April 2017 (through Mr Alam) that the Claimant would be paid at a higher rate of pay. Such additional pay for acting up as was agreed was paid by the Claimant.

**Conclusion**

49. All the claims should be dismissed.

**EMPLOYMENT JUDGE - Stewart**

**15 July 2019**

**DECISION SENT TO THE PARTIES ON**

**16<sup>th</sup> July 2019**

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**FOR SECRETARY OF THE TRIBUNALS**