



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr Adrian Mudge

AND

Respondent

Ministry of Defence

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter

ON

21 November 2019

EMPLOYMENT JUDGE N J Roper

MEMBERS

Mrs S Richards

Ms R Clarke

Representation

For the Claimant: In Person

For the Respondent: Mr R Moretto of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claim is dismissed.

RESERVED REASONS

1. In this case the claimant Mr Adrian Mudge brings a claim for equal pay under the provisions of the Equality Act 2010. The respondent denies the claim.
2. The claimant did not give evidence but did address the tribunal by way of submissions. For the respondent we have heard from Mr Tim Henretty, who is Deputy Head of the MoD's Civilian Reward Team. The claimant did not challenge Mr Henretty's evidence, and agreed that it was factually correct. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
3. Background: The claimant Mr Adrian Mudge was born in 1967. He commenced employment with the respondent Ministry of Defence on 7 February 1994. On 1 March 2013 he was promoted to his current role as a Senior Craft (Mechanical) Station Engineer. This role involves carrying out maintenance, testing and repair of Typed Air Station aircraft

- ground support equipment, functional machinery, and staging equipment. He works at RNAS Culdrose in Helston in Cornwall.
4. The claimant complains that he has been paid less than his comparator since 2013 when he was promoted to Skill Zone 3, at which level he has worked alongside his comparator since 2013. This is against a background of changes to the respondent's pay structure from 2010 during which time the respondent has been trying to simplify its pay structure and the multiple variations within it.
 5. Comparator: The female comparator identified and relied upon by the claimant is Mrs Christina Dandy. She is also employed by the respondent as a Senior Craft (Electrical) Station Engineer. She commenced that role on 26 April 2011. Her role involves carrying out maintenance, testing, installation and repair of aircraft ground support equipment including runway barrier equipment, functional machinery, intercoms systems, low power electrical workshop equipment and approved portable and domestic appliances.
 6. Job Evaluation System: The respondent has a Job Evaluation System. In the first place it has an Industrial Grading Guidance which provides an outline summary of the requirements of the work in each level, which is intended as a guide for managers when grading a particular role. The factors assessed in the Grading Guidance are those used in the respondent's Job Evaluation and Grading Support system ("JEGS"), and have a significant influence in determining the appropriate grade or level of a post. The JEGS method assigns a point score to each factor and aggregates the scores to give a total score for the post. This means that jobs of different types can be compared with the one another in terms of their total value (that is to say job weight).
 7. Both the claimant's role and Mrs Dandy's role have been rated as equivalent under the JEGS system since March 2013, that is to say from the time when they have both been in Skill Zone 3 ("SZ3"). The knowledge and skills relevant to SZ3 are set out in detail in a table at page 5 of the Grading Guidance.
 8. With effect from 1 April 1996 the responsibility for grading and setting pay and other terms and conditions was delegated to individual Departments and Agencies with the exception of the Senior Civil Service. This replaced centralised pay bargaining between HM Treasury and trade unions. All Departments and Agencies (including the respondent Ministry of Defence) were required to undertake pay and grading reviews so that they arrived at a pay and grading system that was best calculated to suit their particular business requirements but remained compliant with public sector pay policy. A broader banded structure was adopted within the respondent in accordance with the recommendations of a review report in 1995.
 9. In February 2000 the respondent simplified its grading structure. The structure was based on previous job evaluations of a significant number of posts. The current broader banded structure and salary for AA (Administrative Assistant), AO (Administrative Officer), and EO (Executive Officer) for Skill Zones 1 to 4 is as follows: Non-Industrial Pay band E2 (previous grade equivalents AA/TG2) equated to (industrial) Skill Zone 1 with a minimum salary in 2018 of £16,336, and a maximum salary in 2018 of £16,864. On promotion to Skill Zone 2 the salary range increased to £17,853 to £18,427. Non-Industrial Pay band E1 (Group E) with previous grade equivalents AO/TG1 in Skill Zone 3 had a higher pay range for 2018 between £19,531 and £22,664. Non-Industrial Pay Band D (Group D) with previous grade equivalents EO/PTO in Skill Zone 4 had a higher salary band for 2018 between £23,980 and £25,507.
 10. Both the claimant and Mrs Dandy are employed as Industrial Workers and are paid according to SZ3. During the relevant times there were eight "spinal points" within SZ3 (which were spinal points 6 to 13 inclusive). The claimant was employed in SZ3 with effect from 1 March 2013, and Mrs Dandy from 26 April 2011. Promotion from Skill Zones 2 to 3 attracts advanced terms.
 11. Historical Errors: The respondent has a Craft Entry Point ("CEP") which is the effective pay range minimum for Qualified Craft Persons. The respondent's pay policy permits Qualified Craft Persons to enter the SZ3 pay range at the CEP, rather than having to start at the minimum of the pay scale (at which an individual with no experience or lesser experience would have been placed). The CEP is equivalent to spinal point 9. On 1 August 2013 the

- claimant raised a grievance relating to his pay following his advancement to SZ3. His grievance was successful and determined that his salary of £18,551 (which increased to £18,737 in August 2013 because of a 1% increase) was incorrect and he should have been paid at the CEP level (that is spinal point 9) following the 2013 pay award, namely £19,877. The claimant was then paid this salary from January 2014 and he was paid an additional £850.40 representing backpay for the period from March 2013. His salary increased again in August 2014 by £199.00 to £20,076 because of a 1% flat rate pay increase as a result of the 2014 pay award.
12. This same error had been made by the respondent in respect of other colleagues, including the claimant's comparator Mrs Dandy. In January 2014 Mrs Dandy's salary was adjusted upwards to £20,474, and she was paid an additional £4,541.51 representing backpay for the period from April 2011 when she advanced to SZ3.
 13. Minimum and Maximum Salary: Following the rectification of these errors, the minimum and maximum salary levels for SZ3 for the relevant years were as follows: 2013 - £18,190 up to £22,372; August 2014 - £18,480 up to £22,372; August 2015 - £18,742 up to £22,372; August 2016 - £18,977 up to £22,372; August 2017 - £19,186 up to £22,484; and August 2018 - £19,531 up to £22,664. Both the claimant and his comparator Mrs Dandy received pay within these ranges.
 14. Pay Scale Changes 2011 and 2012: The respondent changed its pay scale and grading during 2011 and 2012 which coincided with the general freeze on Civil Service pay. In 2011 Mrs Dandy was promoted to SZ3 at the Craft Entry Point which was spinal point 9 at a salary of £19,680. There was a national exception to the Civil Service pay freeze, namely that all satisfactorily performing staff earning £21,000 or below received a Consolidated Pay Rise of £250. This was not applied in the case of Mrs Dandy, because she was promoted to CEP spinal point 9 which gave rise to a pay rise in her case of more than £250. Similarly, in 2012, the Civil Service pay freeze continued, save that all staff earning £21,000 per annum or below received a further £250 Consolidated Pay Rise. Mrs Dandy was entitled to this award, which increased her pay above CEP spinal point 9, and triggered a pay rise of more than £250 to spinal point 10 or £20,271. This is the background reasoning as to why Mrs Dandy was at spinal point 10 or £20,271 in SZ3 in 2013 which was the time when the claimant was promoted to SZ3.
 15. Actual Pay Received: The actual pay received whilst at level SZ3 by the claimant and his comparator Mrs Dandy, and the rationale for that level of pay is as follows.
 16. As explained above, Mrs Dandy was promoted to SZ3 on 26 April 2011 at a rate of £19,107. In August the CEP was increased by one scale point to spinal point 9 which resulted in a salary increase to £19,680. In 2012 Mrs Dandy progressed to spinal point 10 and her salary increased to £20,271. The claimant had not yet been promoted to SZ3.
 17. 2013: The claimant was promoted to SZ3 on 1 March 2013 at a salary of £18,551. This increased to £18,737 in August 2013 and then to £19,680 when the CEP (spinal point 9) was applied. In December 2013 the CEP (spinal point 9) increased from £19,680 to £19,877 when there was a 1% uplift in pay. This compared with Mrs Dandy who earned £20,474 in 2013 following a 1% uplift in her pay, with no progression from spinal point 10. The difference in annual pay in Mrs Dandy's favour therefore increased from £591 to £597 during that year.
 18. 2014: During 2014 there was a 1% flat rate pay increase at both spinal point 9 for the claimant and spinal point 10 for Mrs Dandy. This claimant's salary increased to £20,076, and Mrs Dandy's salary increased to £20,673. There was thus a differential in Mrs Dandy's favour of £597.
 19. 2015: During 2015 there was a 0.93% flat rate pay increase at both spinal point 9 for the claimant and spinal point 10 for Mrs Dandy. This claimant's salary increased to £20,260, and Mrs Dandy's salary increased to £20,857. There was thus a continuing differential in Mrs Dandy's favour of £597.
 20. 2016: During 2016 there was a 0.89% flat rate pay increase at both spinal point 9 for the claimant and spinal point 10 for Mrs Dandy. The claimant's salary increased to £20,437, and Mrs Dandy's salary increased to £21,034. There was thus still a continuing differential in Mrs Dandy's favour of £597.

21. 2017: In August 2017 the respondent made further changes to its pay scales in an attempt to simplify the number of different pay grades, and began to apply four salary bands in SZ3 described as four quartiles, rather than the previous eight different spinal points. The claimant was awarded a 1.1% pay award increase and his salary increased to £20,662. On the other hand, Mrs Dandy only enjoyed a pay increase of 0.7% which was the consolidated award for those in quartile 2 of SZ3. Her salary increased to £21,181, which meant there was a continuing differential in her favour that year of £519.
22. 2018: In August 2018 there was a 1.3% pay award which applied to both the claimant and Mrs Dandy. The claimant's salary increased to £20,931, and Mrs Dandy's salary increased to £21,456. This was thus a differential in pay in Mrs Dandy's favour of £525.
23. The Respondent's Rationale: The respondent asserts that in summary the difference between the claimant's pay and Mrs Dandy's pay (which as we have seen above varied between £519 and £597 per annum in Mrs Dandy's favour) was entirely the result of Mrs Dandy having been the beneficiary of the changes in 2011 and 2012, under which as a quirk of the two successive £250 pay awards she was able to enter SZ3 at spinal point 9, and then obtain promotion to spinal point 10. As a result of her earlier promotion, Mrs Dandy had been in their respective grades in SZ3 for two years longer than the claimant. This means that Mrs Dandy enjoyed two more annual pay rises than the claimant. In addition, since 2011 Mrs Dandy also progressed from spinal point 8 to 10 whereas the claimant has retained spinal point 9 since his promotion in 2013. Mrs Dandy had already advanced to SZ3 spinal point 9 because of the terms of the earlier 2011 pay award.
24. The 2011 and 2012 pay arrangements were not replicated in 2013 or subsequently. This means that neither the claimant nor Mrs Dandy have moved to a higher spinal point in SZ3. In addition, the respondent is currently in discussions with the relevant trade unions to change its pay structure further within the next three years, and to remove all differentials within its bands, with the intention that there will be one "spot rate" for SZ3 moving forwards. If this is agreed and implemented, then those in the claimant's position will have the salary increase gradually, more so than the likes of Mrs Dandy, so that they all eventually receive the same pay at the same spot rate.
25. The respondent asserts for these reasons that all of the pay increases to the claimant and Mrs Dandy are said by the respondent to be entirely in accordance with its pay structure and not related to the fact that the claimant is male or that Mrs Dandy is female.
26. Mr Horwood: The claimant also complains about the pay of Mr M Horwood who was recruited four years after him but is on the same pay. Mr Horwood was recruited by the respondent with effect from 15 May 2018 at which point he should have been placed at the CEP for SZ3 in the sum of £20,662 (which is the rate at which the claimant was paid as at that time). There was apparently a typographical error on the advertisement which suggested that the salary was £26,682, in other words £20 more. This error has been carried through past August 2018 and Mr Horwood is still paid £20 more at the level of £20,951, rather than the £20,931 paid to the claimant.
27. The respondent contends that Mr Horwood should be on the same salary as the claimant. Although the claimant progressed through the pay scales to his current salary since his promotion from 2013, Mr Horwood entered SZ3 in May 2018 and therefore started at the level of the 2018 CEP (spinal point 9). The CEP had been increased at the same pace as the claimant received his pay awards and the relevant pay provisions do not permit the respondent to move the claimant above the relevant CEP.
28. In conclusion the respondent asserts that the claimant, Mrs Dandy and Mr Horwood have all been paid in accordance with the MoD's pay structure and their difference in salary is entirely due to the date of their advancement to SZ3 and has nothing whatsoever to do with their sex. On that point we would add that we have heard no evidence that there has been any sex discrimination or differential treatment of the claimant or any other person on the grounds of his or her sex.
29. Having determined the above facts, we now apply the law.
30. This is a claim seeking equal pay under the provisions of the Equality Act 2010 ("the EqA").
31. Section 65 EqA provides: (1) For the purposes of this Chapter, A's work is equal to that of B if it is – (a) like B's work, (b) rated as equivalent to B's work, or (c) of equal value to B's

- work. (2) A's work is like B's work if – (a) A's work and B's work are the same or broadly similar, and (b) such differences as there are between their work are not of practical importance in relation to the terms of their work. (3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to – (a) the frequency with which differences between their work occur in practice, and (b) the nature and extent of the differences. (4) A's work is rated as equivalent to B's work if a job evaluation study – (a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or (b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system. (5) A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women. (6) A's work is of equal value to B's work if it is – (a) neither like B's work nor rated as equivalent to B's work, but (b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.
32. Section 66 EqA provides: (1) if the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one. (2) a sex equality clause is a provision that has the following effect – (a) if a term of A's is less favourable to A than a corresponding term of B's is to be, A's term is modified so as not to be less favourable; (b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term. (3) subsection (2)(a) applies to a term of A's relating to membership of all rights under an occupational pension scheme only insofar as a sex equality rule would have effect in relation to the term. (4) In the case of work within section 65(1)(b), a reference in subsection (2) above to a term includes a reference to such terms (if any) as have not been determined by the rating of the work (as well as those that have).
33. Sections 67 and 68 EqA provide for a sex equality rule for occupational pension schemes.
34. Section 69 EqA provides: (1) 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. (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's. (3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim. (4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex. (5) "Relevant matter" has the meaning given in section 67. (6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.
35. We have been referred to and we have considered the cases of Strathclyde Regional Council v Wallace [1998] IRLR 146 HL; Glasgow City Council and Ors v Marshall and Ors [2000] ICR 196 HL; and King's College London v Clark EAT/1049/02.
36. We apply the judgment of Lord Browne-Wilkinson in Strathclyde Regional Council v Wallace and in particular that paragraphs 20 and 21: "There is no question of the employer having to "justify" (in the Bilka sense) all disparities of pay. Provided that there is no element of sexual discrimination, the employer establishes a [material factor] defence by identifying the factors which he alleges of caused the disparity, proving that those factors are genuine and proving further that they were causally relevant to the disparity in pay complained of ... The purpose of [the Equality Act 2010] is to eliminate sex discrimination in pay not to achieve fair wages. Therefore, if the difference in pay is explained by genuine factors not tainted by discrimination that is sufficient to raise a valid defence ... In such a case there is no further burden on the employer to "justify" anything."
37. That judgment was expressly approved by the House of Lords in Glasgow City Council and Ors v Marshall and Ors. Lord Nicholls stated that the material factor defence will succeed if the employer can show that the factor put forward as the reason for the pay differential

- at issue is: (i) genuine and not a sham or pretence; (ii) a material factor, i.e. one which is significant and relevant and caused the variation; (iii) not “the difference of sex” – i.e. not due to sex discrimination, whether direct or indirect; and (iv) a material difference – i.e. a significant and relevant difference between the woman’s case and the man’s case.
38. In paragraph 29 of King’s College London v Clark the EAT (HHJ Peter Clark) held that in the absence of discrimination, even a mistake as to the correct grading of an employee giving rise to a mistaken but genuine belief is capable of amounting to a material factor for the purposes of the defence.
 39. In conclusion, we are satisfied that the respondent has explained the reasons for the differential in pay between the claimant and his comparator Mrs Dandy, and there is no evidence of any sex discrimination and no suggestion that the claimant has been treated unfavourably or paid less than Mrs Dandy on the grounds of sex. Her historically higher pay was caused by the combination of her promotion to SZ3 two years before the claimant was promoted to the same grade, and the fact that she benefited from two limited pay rises which triggered an increase to spinal point 10. The claimant benefited from an increase to the new CEP rate at spinal point 9 in 2013. Thereafter they benefited from the same pay rises, except in 2017 when Mrs Dandy was given a lower pay rise when the respondent introduced for quartiles. The respondent seeks to move to one “spot payment” for everyone within SZ3 within the next three years.
 40. Mr Horwood benefits from the system introduced in 2013 to the effect that any promotion to SZ3 will be at the Craft Entry Point at spinal point 9, the same level as the claimant, barring his extra £20 as a result of the typographical error, which is de minimis.
 41. The claimant does not pursue any claim of indirect sex discrimination, and relies upon direct discrimination only. Applying s69(1)(a) EqA, the respondent will have the defence of material factor if the difference in pay is because of a material factor reliance on which does not involve treating the claimant less favourably because of the claimant’s sex than the respondent treats Mrs Dandy. We find that the respondent has given a clear explanation as to the causative reasons for the differential in pay, and that there has been no differential treatment on the grounds of sex. We find that the respondent has satisfied the material factor defence.
 42. Accordingly, the tribunal dismisses the claimant's complaint.
 43. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 3 to 28; a concise identification of the relevant law is at paragraphs 30 to 35; how that law has been applied to those findings in order to decide the issues is at paragraphs 36 to 42.

Employment Judge N J Roper

Dated 21 November 2019

Judgment sent to parties: 5 December 2019

FOR THE TRIBUNAL OFFICE