



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

(1) MRS J HANKS
(2) MRS R JARMAN

V

WILKO RETAIL LIMITED

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 5 & 6 MARCH 2020

BEFORE: EMPLOYMENT JUDGE W BEARD

MEMBERS: MRS BISHOP
MR CHARLES

REPRESENTATIONS:-

FOR THE CLAIMANT: MISS ASHWORTH (COUNSEL)

FOR THE RESPONDENT: MS HOSKIN (COUNSEL)

PRELIMINARY JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The first claimant's claim of like work to that of David Pope, Gareth Morgan and Ceri Irvine is well founded from 14 February 2016 until 16 October 2019.
2. The second claimant's claim of like work is well founded from 14 February 2016 until April 2017.

REASONS

PRELIMINARIES

1. This preliminary hearing has been listed to consider two matters. Firstly, whether the claimants were engaged in like work with any of the comparators named by them? Secondly, whether there is a genuine material factor, other than gender, which the respondent can rely on as a defence.

THE ISSUES

2. At the outset of the claim, the respondent provided a list of issues document. The claimants, through Miss Ashworth, accepted that the document accurately set out the issues which the tribunal would be required to resolve: these were identified as follows:
 - 2.1. Considering “like work”:
 - 2.1.1. On a general consideration of the type of work done by the claimants and the skills and knowledge they applied was the work the same or broadly similar?
 - 2.1.2. On more detailed consideration were any differences of no practical importance in relation to the terms and conditions of employment
 - 2.2. Considering the genuine material factor defence can the respondent show that the reason relied upon:
 - 2.2.1. Is genuine and not a sham or pretence?
 - 2.2.2. Is the cause of the disparity?
 - 2.2.3. Is not the difference of sex?
 - 2.2.4. Is a significant and relevant difference between the case of the man and that of the woman?
 - 2.3. If the respondent establishes those matters can the claimants prove that women are at a particular disadvantage in comparison with men because of the reason for the difference?
 - 2.4. If the claimants establish disadvantage, can the respondent show that the reason was objectively justified?
3. The respondent concedes, in respect of both claimants, that they were engaged in like work for a period. In the case of Mrs Hanks that concession is that, throughout her employment since appointment as department leader, she was engaged in like work to that undertaken by David Pope, Gareth Morgan and Ceri Irvine. In respect of Mrs Jarman the respondent concedes that she was engaged in like work as the same three named comparators but only whilst she was engaged in the “pick operation” up to December 2016.

4. During the course of the evidence the claimants indicated, after discussions with the tribunal judge, that they no longer relied upon Alan Brehony as a comparator for like work (but not in respect work of equal value) on the basis that their own position was that his work was different to that carried out by them and of a lesser value.
5. The tribunal make it clear that we have limited our fact finding to those matters specifically necessary for us to reach a conclusion. We do not intend that any of our factual findings should intrude on issues that will be dealt with later in these proceedings.

THE FACTS

6. The claimants were employed at the respondent's warehouse. The staffing system at the warehouse was arranged in the following hierarchy starting from the lowest: operative, team leader, section leader, department leader, shift leader, operation leader and general manager. Different labels were sometimes applied internally but it is clear that both claimant's substantive position in the hierarchy was as department leader. Mrs Hanks contends that during a period of acting up she was engaged in like work to the shift leader who had held the role prior to her acting up. In Mrs Jarman's after a period of illness adjustments were made to her work and she took on projects. We deal with the details below.
7. The tribunal consider it is necessary to make this point with regard to the evidence that was given by Mr Cusick. We considered that Mr Cusick was a reliable witness insofar as his direct knowledge was concerned. However, significant parts of his evidence, both in content and importance to the issues, was hearsay. Whilst we view his evidence as accurate reporting of what was said to him we do not consider that the accuracy of what was said to him on these matters is either credible or reliable for reasons we explain below.
8. David Pope was a long-term employee of the respondent, but the respondent has not retained all records relating to his employment. There is no documentary evidence as to when he was first appointed to the role of department leader other than a list of dates in a computer record which point to the 27 January 2013. There is no evidence of how his payrate was set though the list shows a fluctuating rate of pay over a five-year period. Reference in the documents pointed to assumptions being made about night pay and ringfencing of pay by the respondent's HR department, however that does not tie in with the evidence of his hourly rate rising and falling in 2016. The tribunal consider there is no explanation as to why his rate of pay should be above that of the claimants' rate given the concession of the respondent on like work.
9. Both Gareth Morgan and Ceri Irvine were recruited in September 2015. Mr Cusick's evidence was that these were external recruits to the business. He asserted that they were offered terms intended to entice them to join the business. Mr Cusick's evidence was that the advertisements for roles would

not contain an indication of the salary package and that the package would only be given as part of the offer of employment, that is after interview and in the offer letter. In addition, he told us that his knowledge of the need to entice these individuals came from his line manager, that this was during a conversation at a meeting which discussed the claimant's complaints that they were being paid less. There is no documentary evidence in support of this assertion. Mr Cusick could give no explanation for the lack of documentation or as to why his line manager, or those who made the decision as to salary packages were not present to give evidence.

10. In May 2017 Jamie Higgs, a shift leader, who was managing the nightshift began working on the dayshift (we do not consider it is necessary for the tribunal to adjudicate upon the reasons for him doing so). In terms of the roles on a day to day basis the claimant and Jamie Higgs both managed the staff on the night shift. Both would have had responsibility for assessing health and safety issues, both would have been doing a level of collating figures for reports. Both would have liaised with the agency about agency staff. Both would have been engaged in performance management of staff. However, there were two key differences in the level of responsibility of the claimant in comparison to Mr Higgs: Mr Higgs was in a position where he was responsible for profit and loss on the night shift and the strategic planning that went along with that and he also had the level of responsibility which allowed him to dismiss for conduct reasons. The first of those differences involved Mr Higgs, along with other shift leaders, to engage in meetings which would forward plan for key events such as preparation towards the Christmas period. The second had involved Mr Higgs in actually dismissing an employee for a conduct matter.

11. The department leader role was based on working a continental shift pattern. The respondent divides the warehouse into three main sections: inward, pick and outward. Essentially that is the throughput of goods into and out of the warehouse (there are other functions). On a day to day basis each department leader would spend the majority of their time engaged in staffing issues. Mrs Jarman told us, and we accept, that in an average eight-hour shift two hours would be spent on operational matters and six hours on staffing matters e.g. performance reviews, absence management, health and safety and grievances. The operational side was tactical planning, collating/collecting data etc. and instructions given to section leaders to run the operation. In the latter part of 2016 Mrs Jarman became ill, she returned to work in January 2017. Her return was phased (in line with medical advice) and as a means of managing this the respondent required the claimant to be working on projects and not carrying out her usual duties. In April 2017 the claimant was given a training and developmental role. This role did not involve the duties she had been carrying out on operational matters at all. Mrs Jarman became responsible for a complete overhaul of the training department. The variety of duties this involved are all set out in her witness statements at paragraphs 9 to 11 inclusive of her witness statement. Whilst we accept Mrs Jarman's evidence that she still had staffing responsibilities, we consider that these were at a vastly different level to those carried out previously, given the amount of work that the training role involved her in.

THE LAW

12. The Equality Act 2010 provides at sections 64, 65 and 66 as follows:

Section 64

(1) Sections 66 to 70 apply where—

- (a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;*
- (2) The references in subsection (1) to the work that B does are not restricted to work done contemporaneously with the work done by A.*

Section 65

(1) For the purposes of this Chapter, A's work is equal to that of B if it is—

- (a) like 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.*

Section 66

(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 B, 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.*

12.1. In terms this means that the tribunal has to look at two aspects, firstly

whether the work is the same or similar, and secondly where there are differences they are not of practical importance to her terms and conditions.

12.2. A broad similarity should not require a minute examination, and it is clear that it is the similarities that should be considered and not the differences. In ***Dorothy Perkins Ltd –v- Dance [1977] IRLR 226*** it is made clear that the first step is to examine the nature of the contractual employment, consider what is actually done and the frequency with which they are done and then, only if the work is broadly similar, go on to examine the differences see also ***E Coomes (Holdings) Ltd –v- Shields [1978] IRLR 263***

12.3. ***Capper Pass Ltd –v- Allan [1980] IRLR 236*** which makes it clear that whether the claimant is employed on like work as her comparator and whether there are differences of practical importance are matters of fact. It is clear that work may be broadly similar, but different levels of responsibility may mean that there is a difference of practical importance see ***Eaton Ltd –v- J Nuttall [1977] IRLR 71***.

13. Section 69 Equality Act 2020 provides a defence as follows:

(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.

13.1. Where the claimant has established that the equality clause is engaged the defence is available to the respondent to show circumstances which explain the difference in pay. The equality clause will operate in a claimant's favour unless the employer can demonstrate that the difference in terms is due to a material factor other than sex. This requires the respondent to provide an explanation see ***National Vulcan Engineering Insurance Co Ltd v Wade [1978] IRLR 225*** and ***Glasgow City Council v Marshall [2000] IRLR 272***, at para 18

"[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 the difference of sex."

13.2. All that is needed to place this burden on the respondent is proof of a

difference in pay and the establishing of equal work between claimant and comparator. This leads to a process of analysis per Lord Nicholls:

"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. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a "material factor", that is, a significant and relevant factor. 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. Fourth, 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."

ANALYSIS

14. Dealing first with Mrs Hanks' claim that from July 2017 she was engaged in like work with Jamie Higgs. In our judgement on a day to day basis the work was broadly similar in nature. However, in our judgment the two differences we have pointed out were of practical importance. The difference between strategic and tactical planning is the level of responsibility involved. A tactical planning mistake could result in short term problems but is capable of short-term resolution. Strategic planning for the long term puts much more at stake. A mistake can mean overspend on resources or the under-provision of needed resources e.g. contracting for too many or too few staff at key times. In addition to this the responsibility involved in conduct dismissals, as opposed to absence dismissals, is the importance of the long-term impact of such decisions e.g. a dismissal for dishonesty has significant implications which are less pronounced in dismissals for absence due to illness. In our judgment it is these differences in responsibility which mean that this is not like work. We make it clear that the claimant contends that she was conducting her department leader role in concert with role we have examined, we make no findings on that as it is an issue for the next stage of this case.
15. In Mrs Jarman's case we consider that her return to work in January 2017 was part of her normal contractual arrangements which would apply to those returning from an illness with advice as to a phased return. However, the April 2017 was in our judgment a significant change of role. There are clear differences in Mrs Jarman's work in creating training matrices, re-organising the training function and the day to day work of the comparators; this was not broadly similar work. We make it clear that we limit our findings so that it does not impact on any view of a future tribunal on equal value or whether the period of unequal from April 2017 was caused by the earlier inequality.

16. We do not consider that respondent has proved that the difference in pay between the claimants and comparators was due to a material factor. In respect of the argument that the pay of Mr Pope was ring fenced (more generally known as red circled), we consider this to be an attempt at forensic accounting by the respondent based on extremely limited data. In any event the changes in Mr Pope's rates of pay do not, in our judgment, support such a contention. Red circling is generally accompanied by a period of static pay rates, the volatility of Mr Pope's pay is in complete contrast. The evidence in support of the need to entice outside candidates is that external candidates were appointed, they were paid more and that Mr Cusick's line manager said that was the reason after the issue of equal pay was raised. We consider this comes nowhere near the level of evidence which would prove that the need to entice was a material factor in the decision. There is no contemporaneous evidence which points to this underpinning the decision. We would expect such evidence to be present, if only in the form of communication between those involved about the reasons for a higher level of pay being offered.
17. The respondent has conceded that the three individuals named as comparators are all engaged in like work with both claimants in respect of department leader role. In our judgment this means that the claimants are entitled to rely on the protection of the equality clause in respect of the highest paid comparator. In the case of Mrs Jarman this is from the date of appointment to department leader until taking up the traing role in April 2027; in the case of Mrs Hanks this is from the date of her employment as department leader to the date of her dismissal on 16 October 2019.

EMPLOYMENT JUDGE W BEARD

Dated: 17 March 2020

**Judgment entered into Register
And copies sent to the parties
On 18 March 2020**

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for Secretary of the Tribunals