



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103678/2019 (A)

10

Heard on 8 September 2020

Employment Judge: L Doherty

15

Mr S Alasheni

Claimant

Greater Glasgow Health Board

Respondent

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgement of the Employment Tribunal is that the claim is struck under Rule 37 (1) (a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules) on the grounds that has no reasonable prospects of success.

REASONS

Background

1. The claimant presented a claim on 19 September 2018 in which he made a claim of inequality and pay against the respondents. A Preliminary Hearing (PH) took place on 25 September 2019 for case management purposes, further that which the claimant was required to provide further information.

2. Thereafter the respondent's made an application for strike out of the claim under Rule 37 of the Employment Tribunals (Constitution and Rules of the Procedure) Regulations 2013 (the Rules) on the grounds that the claim had no reasonable prospects of success failing, which the order of deposit under Rule 39 of the Rules on the grounds that it had little reasonable prospect of success. A PH took place to determine that application in March 2020.
3. The claim was not struck out, and an unless order was issued in the following terms
 1. *What is a statutory basis of his claim of discrimination in relation to pay?*
 2. *Who is the comparator upon whom the claimant relies for the purposes of this claim?*
 3. *What is the comparators role/job title?*
 4. *Under what terms and conditions is the comparator employed?*
 5. *What is the term of the comparators contract on which the claimant relies, which is it to give rise to inequality pay?*
 6. *In the event the claimant relies upon a comparator employed by a health board other than Greater Glasgow Health Board, on what basis is it said that the claimant and comparator are employed at the same establishment ?*
 7. *On what basis is said by the claimant is entitled to claim inequality and pay going back to 2007?*
4. The claimant responded to the unless order, however the respondents renewed their application to strike out, failing which the order of a deposit. This Preliminary Hearing was fixed to determine that application.
5. The claimant appeared in person, and was accompanied by Mr Forsyth, who he indicated he wish to call as a witness .Mr Reeve, solicitor, appeared for the respondents.

6. At the commencement of the hearing Mr Reeve confirmed that as in their last application for strike out, for the purposes of this hearing only, the respondents accept the claimant's position. The basis of their application is that the claimant's position, even taken at its highest does not disclose a claim which has reasonable prospects of success, and should be struck out.

7. In consequence of the respondents position it was unnecessary for the tribunal to hear evidence (other than as to the claimants means) in considering this application, and it was explained to the claimant that the Tribunal did not have to hear from Mr Forsyth.

10 **Findings in Fact**

8. Albeit the Tribunal did not hear oral evidence as to the facts, as a result of the respondents accepting the claimant's case as pled for the purposes of their argument, it remains relevant for the tribunal to record the relevant information which is before it in the form of statements from the ET 1, the PH note from September, and additional information supplied by the claimant, in response to the tribunal's order, and the unless order.

9. The Tribunal also made updated findings of fact as to the claimants means.

10. The claimant is employed by the respondents as a Safety Operative, his employment commencing on 30 May 2007. The claimant works at Rowanbank clinic.

11. In his ET1 the claimant stated;

'I want to put Equal pay complaint against NHS Greater Glasgow and Clyde Rowanbankbank Clinic. First complain done 2015 then 2016 to a line manager. He confirm and saying HR informed and soon as after agenda pay process finished will be taken care of. However higher banding granted only backdating two years. First raised complain was may 2015 so by rules should be backdating minimum 2010. Because other job same and similar getting paid since 2007 (Carstairs and Ahallion clinic) we work for the same Employment.'

The claim also stated; 'By the law I want my backdating money from 2007. I don't know how much money we should get paid per year.'

12. At the PH in September 2019 the claimant confirmed that his claim related to payment of back pay at Band 3 applicable to his post for the period from June 2007 (when he commenced employment) to May 2017 (paragraph 3 of the note following the PH).
13. When the claimant commenced his employment, he was paid at Band 2 level. Both the claimant and respondent accept that the claimant's post was upgraded to a Band 3 in May 2018.
14. It is the respondent's position that payment of salary at Band 3 level was backdated to May 2016. It is the claimant's position that payment of salary at Band 3 level was backdated to May 2017. For the purposes of this application the respondents take no issue with the claimant's position as to the date of backdating at Band 3 level.
15. The note following the PH in September stated the following;
- 'It appeared from discussions that the claimant's claim is one of equal pay.*
1. *However, if his claim is based on breach of a term of his contract of employment in relation to payment of wages, and non-payment of wages then he should confirm this.*
 2. *If that is the case the claimant should identify the contract term on which he relies, and how that contract term was made?*
 3. *If the claimant's claim is based on inequality in pay (an Equal Pay claim) then he requires to provide the following information;*
 - (i) *What is the statutory basis of his claim (i.e. is it like work, work of equal value, or work rated as equivalent under a valid job evaluation scheme)?*

- 5
- (ii) *Who is his comparator (i.e. the person who he is comparing himself with the purposes of his equal pay claim)? If the claimant can name his comparator then he should do so. If comparator is identified by post at this stage then the claimant should identify the comparators post, the band of the post, and the terms and conditions under which the comparator is employed.*
- (iii) *What term in the comparators contract does the claimant rely upon in claiming inequality in pay?*
- 10
- (iv) *Why is said by the claimant that this inequality in pay is on the grounds of sex?*

The claimant responded to the questions asked as follows;

- 15
1. *'Equal Pay has been a statutory entitlement since 1970, when the Equal Pay Act came into force. The Agenda for Change pay system was introduced in October 2004 to ensure that pay in the NHS was consistent with the requirements of equal pay law.*
- Agenda for Change, and its national job evaluation scheme, complies fully with antidiscrimination legislation. I believe that the scheme has not been implemented correctly. NHSGGC recognises that in order to achieve equal pay for employees doing the same or broadly similar work, work rated as equivalent, or work of equal value, it should operate pay systems which are transparent, based on objective criteria and free from unlawful bias.*
- 20
- 25
2. *NHS Rahallion Clinic and NHS Carstairs hospital. Job description attached. Also Furthermore, since 2007 some Safety Operatives did get paid Band 3 while working alongside other Safety Operatives who did the exact same work, with the same uniform*

et cetera were classed as Band 2 and were paid less (Names can be provided if needed)

5 3. *Equality 2010 (Specific Duties (Scotland) Regulations. In 2013, the NHS sign an EU Equal Pay Policy which ensures that those doing the same job get equal pay. Additionally, it calls for review of band matching to be carried out every two years to ensure staff are all on the band.*

10 4. *Job advertised band 3 but paid lower level. Safety operative job never been matched until now which Band 3 as advertised 2008/2013 job not matched on fair ground as no one informed never been implemented. Staff got legal right to appeal the decision which did not inform the staff cannot exercise their right.'*

15 16. On 24 October 2019 the claimant produced two job descriptions to the respondents. One was for a Security Officer AFC Band 3 for the in NHS State Hospital Carstairs. The second was for a Security Reception Operator Band 3 at Rahallion Secure Care Clinic Murray Royal Hospital, Perth. The claimant submitted that NHS Scotland was the main employer with different sub boards, Tayside, Highland, and Greater Glasgow and Clyde.

20 17. The claimant also produced a job description for a Security Operative – Helipat Fire and Rescue Operative from Greater Glasgow and Clyde, but no pay Band was identified in that document .

18. In response to the Unless order, the terms of which are set out above, the claimant stated;

25 1. *Equal pay for employees doing the same or broadly similar work, work rated as equivalent, or work rated as equivalent and work equal value, less of their age, ethnicity or race, religion or belief, sex. NHS Scotland and NHS GG&C should operate pay system which are transparent, based on objective criteria and free from unlawful bias.*

30 2. *NHS Carstairs hospital. The Security officer. NHS Rahallion Clinic Security-Receptionist. NHS GG&C Security-Helipat operator. NHS*

Rahallion Clinic Safety Operative (David Welsh, Archibald Gray, Cheryl Nisbet, Roseanna Haigh). Employees doing the same or broadly similar work, work rated as equivalent, or work rated as equivalent for work equal value, regardless of age, ethnicity or race, religion or belief, sex.

5

3. *NHS Carstairs hospital, Safety officer, NHS Rahallion Clinic Security – Receptionist, NHS GG and See Security – Helipat operator, NHS Royal Bank Clinic Safety operative.*

10

4. *Job descriptions already attached to submitted files NHS terms conditions are broadly same or similar (Link attached)*

5. *Job descriptions already submitted within file. Employees doing the same or broadly similar work, work rated as equivalent or work which is equivalent and work with equal value, regardless of their age, ethnicity or race, religion or belief, sex .*

15

19. The respondents responded to that information, setting out the reasons why they considered the claim had no reasonable prospects of success. Those reasons included that the claimant has identified two male comparators.

20. The claimant responded to 14 June, stating ;

20

On my previous email I attach information regarding comparable jobs within NHS Scotland.. Mr Archibald (Archi) Gray who was worked within Larch ward before then he started working within Safety team and alongside myself. Also he became a team leader within the safety team about over a year then back to Larch Ward. David Welsh worked alongside myself within safety team from 2007 I believe about four – five year then he moved 11 Leverndale hospital.

25

Rosena Haigh who started to work with me about 2008 as safety operative then became safety operative team leader. Mrs Haigh then moved back to the Douglas Inch Clinic worked there until 2017. 2017 moved back to the Rowanbank bank clinic since working alongside myself.

30

My response to Comparators;

I worked with this people alongside myself doing same job, wearing same uniform, was the same rota. However they get paid higher grade band three. My equal pay complain not based on sex also equal pay for the same or broadly similar work or work rated as equivalent for work of equal value regardless of their age, disability, ethnicity or race, gender reassignment, marital or civil partnership status, pregnancy, political beliefs, religion or belief, sex or sexual orientation.

The Claimant's Means

10 21. The claimant updated the tribunal as to his means There was no challenge to his evidence by Mr Reeve The claimant's income and expenditure remains largely as reflected in the Hearing note following PH in March 2020, however he confirmed that in addition to the outlays narrated there he now incurs rent of £400 per month, and council tax of children £231 per month. His loan
15 repayment to NHS credit union is £251 per month and £263 to Amigo.

Submissions

22. For the respondents Mr Reeve took the tribunal to the case set out in the claimant's original claim form, and the information provided in response to the tribunal's initial directions, and the unless order.

20 23. Mr Reeve submitted that the claimant compares himself to broadly two groups . The first was employees of other NHS Health Boards. This, Mr Reeve submitted was a very general claim of inequality in pay on the grounds of a general comparison, and there was no attempt to identify any basis on which it could be said that the reason for any inequality was sex.

25 24. The second group were employees of the respondents, and the claimant has identified four named comparators, two males and two females. The identity of the comparators had emerged in submissions at last PH, and had also been provided in response to the unless order.

25. The claimant was asked in the unless order to identify the basis on which he said the claimant inequality and pay was on the ground of sex, but there was no attempt to do this. The claimant sought to compare himself equally with male and female members of staff. No distinction was made between male and female comparators. Furthermore, it was apparent from the information provided that this complaint was on the general basis of inequality. The claim is said to be made not just made on the grounds of sex, but on the grounds of a number of other protected characteristics.
26. Mr Reeve referred the tribunal to the case of *Leverton v Clwyd County Council 1989 ICR 33* and the judgement of Lord Bridge, who cautioned tribunals to the possible abuse of equal value proceedings by claimants who cast their net to widely across a range of comparators. That, Mr Reeve submitted, was the case here.
27. Mr Reeve also referred to the case of *Chandhock v Tirkey (2015) ICR 527* in which the EAT stated that the ET1 was not something just to set the ball rolling. Mr Reeve submitted that in this case the claimant had had multiple opportunities to properly specify his case but had been unable to do so.
28. The Tribunal should be able to take into account the inherent improbability of the claimant's case and considering whether to strike it out (Lord Underhill in *Ahir v British Airways Plc (2017) EWCA Civ 1392.*). In that case Lord Underhill stated; *Employment Tribunal's should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment.*
29. Mr Also referred to the case of *Rolls Royce PLC v Riddle UKEAT/0044/07* in which Lady Smith stated ; *'it is important to avoid reading the warnings (against striking out) in the authorities regarding its severity as indicative of*

never being appropriate to use it. To do so would ignore his inclusion in the Regulations, evidently for good reason’.

30. Mr Reeve submitted that the claimant’s case amounted to no more than conjecture. He referred to the case of *Madarassay v Nomura International PLC (2007) ICR 867* as authority for the proposition for the fact that the claimant was treated less favourably than an actual or hypothetical comparator is not sufficient, itself, to establish that discrimination has occurred unless there is something more from which the Tribunal can conclude that the difference in treatment was because of the claimant’s protected characteristic. There was nothing in this case to suggest that any difference in pay was on the grounds of sex.

31. Mr Reeve’s primary submission was for a strike out of the claim, however in the event it was not struck out, he submitted that the claim had little reasonable prospects of success and a deposit should be ordered. He cited at the expense to which this case would occasion to claimant and in particular the respondent’s, pointing out the increased financial burden on the NHS as a result of the pandemic.

Claimant’s Submissions

32. The claimant submitted that he had trusted his line manager Stephen Smith who was also his Trade Union representative to deal with this matter for him. Others had also trusted Mr Smith, but the claimant had not received the backpay which he was entitled to.

33. The claimants submitted that his post was advertised as a band three, but he was paid as a band 2. The respondent sent paperwork to him at the start of their job evaluation exercise (Agenda for Change), and the job was eventually banded at Band 3. The claimant had received backdated pay, but only to 2017. Others who were working alongside him doing the same job were paid more. The claimant cited David Welsh, who he submitted was working right next to him. He submitted that Mr Smith worked with Mr Welsh, Cheryl Nisbet, and others, including Mrs Haigh and they stuck together. This he inferred may have been the reason they were paid at Band 3 and he was not.

34. The claimant complained that Mr Smith has told him that he would get everything sorted out, the claimant had trusted him, but Mr Smith had not done this. This, the claimant submitted was an abuse by the NHS.

35. The claimant submitted it was not his issue if the NHS did not have the funds to pay him because of the pandemic.

Consideration

36. Section 64 Equality Act 2010 (the EQA) provides;

(1) *Sections 66 to 70 apply –*

(a) *a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does.*

(b) *.....*

Section 65 provides;

(2) *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*

(c) *of equal value to B's work*

Section 66 of the Equality Act 2010 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 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.

(3) Subsection (2)(a) applies to a term of A's relating to membership of or rights under an occupational pension scheme only in so far as a sex equality rule would have effect in relation to the term.

5 (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

37. Rule 37 (1)(a) of the Rules provides;

10 (1) *At any stage of proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of the claim or response any of the following grounds –*

(a) that this is scandalous or vexatious or has no reasonable prospect of success.

15 38. As indicated above, this application for strike out is made on the grounds that the claim has no reasonable prospects of success.

20 39. The Tribunal reminded itself that it has to be satisfied the claim has no reasonable prospects of succeeding before it can exercise its powers to strike it out. The Tribunal also reminded itself that this is a high test. It will only be an exceptional case where the central facts are in dispute, where the claim could be struck out on this basis. The Tribunal also took into account that in considering such an application the Tribunal has to have regard to all the material before it, not just the respondent's case.

25 40. In determining this application, the Tribunal has to have regard to the extent to which there is a material dispute on the facts. It is therefore relevant to take into account that in advancing their argument the respondent's position is that the claimant's case, even taken at its highest, has no reasonable prospects of success. The success of the respondent's argument is therefore not contingent on the resolution of a factual dispute at this stage in their favour.

41. The claimant's case is set out in his ET1, the documents which has produced, and the responses to the Tribunal's orders, the relevant parts of which are set out above.
- 5 42. The Tribunal considered that it was highly relevant in this case that the claimant sought to compare himself with male and female comparator without distinction . In answer to question 2 of the unless order which asked the claimant to identify his comparators the claimant stated; *NHS Carstairs hospital. The Security officer. NHS Rahallion Clinic Security-Receptionist. NHS GG&C Security-Helipat operator. NHS Rahallion Clinic Safety Operative (David Welsh, Archibald Gray, Cheryl Nisbet, Roseanna Haigh). Employees doing the same or broadly similar work, work rated as equivalent, or work rated as equivalent for work equal value, regardless of age, ethnicity or race, religion or belief, sex.*
- 10
- 15 43. The Tribunal also consider it highly relevant that the claimant stated in terms *My equal pay complain not based on sex also equal pay for the same or broadly similar work or work rated as equivalent for work of equal value regardless of their age, disability, ethnicity or race, gender reassignment, marital or civil partnership status, pregnancy, political beliefs, religion or belief, sex or sexual orientation.*
- 20
44. It appeared to the Tribunal that those two elements made clear that the claimant's complaint is, as submitted by Mr Reeve, of a very general nature relating to what he perceives to be inequality in pay between employees, as opposed to a claim of inequality in pay on the grounds of sex.
- 25 45. The Tribunal was assisted by the guidance given by Lord Bridge in the case of *Leverton* referred to above. The example given by Lord Bridge in that case is of a woman who claims equal pay with two men, the first of whom A ,earns £x and the second, B earns £2x. In Lord Bridge's view the claimant could hardly complain if the tribunal concluded that her claim of inequality with A
- 30 itself demonstrated that there were no reasonable grounds of her claim of inequality with B.

46. While not exactly the same, the situation in this case is not dissimilar to that analysed by Lord Bridge in *Leverton*. The claimant compares himself to male and female comparators within the respondent's organisation without distinction. The essence of an equal pay claim is that the difference in pay between a male and female employee carrying out the same or similar work, work of equal value, or work rated as equivalent, is on the grounds of their sex. The claimant's claim against his male comparators itself, demonstrates that there are no reasonable grounds for his claim against his female comparators.
47. The claimant's claim is further undermined in that he states specifically that he relies not just on sex, but on a number of other protected characteristics in making his complaint. This very strongly suggests that his claim is of inequality or perceived inequality in in pay generally.
48. In addition, in the submissions before the Tribunal at this PH the claimant suggested that a potential reason for the fact that his comparators were paid more than he was could be inferred from the fact that they had a close working relationship with Stephen Smith, his line manager and Trade Union representative and that perhaps they 'stuck together'. It seemed to the Tribunal that this also highlighted the degree to which the case which the claimant seeks to advance does not rest on a breach of the equality clause implied by section 66 of the Equality Act 2010, but on other perceived injustices.
49. As indicated above Tribunal takes into account that it has to apply a high test in considering whether a claim has no reasonable prospects of success and striking it out on those grounds. The claimant's case taken at its highest is that that he was paid at Band 2 level for a period prior to 2017 during which periods other male and female employees doing the same or similar work, work of equal value, or work rated as equivalent were paid at Band 3. The claim is advanced without distinction between male and female comparators. Given the essential components of a successful equal pay claim is that sex is the reason for the difference in pay, Tribunal was satisfied that this claim had

no reasonable prospects of success and should be struck out under Rule 37 (1) of the Rules on that basis.

50. Having reached that conclusion, it was not necessary for the Tribunal to consider the application for a deposit order.

5

10 **Employment Judge:**
Date of Judgment:
Date sent to parties:

L Doherty
21 September 2020
21 September 2020

15

20