EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112082/2019

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Held in Glasgow on 5 March 2020

Employment Judge L Doherty

10 **Mrs M Dunn**	**First Claimant** **In Person**
15 **Mrs C Quinn**	**Second Claimant** **Represented by:** **Mrs M Dunn -** **Lay Representative**
20 **Mrs M Stuart**	**Third Claimant** **Represented by:** **Mrs M Dunn -** **Lay Representative**
25 **Barclays Bank UK plc**	**Respondent** **Represented by:** **Mr Maxwell -** **Barrister**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgement of the Employment Tribunal is that the claims presented by the first, 35 second and third named claimant are struck under Rule 37 (1) (a) of the Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules) out on the grounds that they have no reasonable prospects of success.

REASONS

1. The claimants presented a multiple claim on 31 October 2019 against the 40 respondent complaining of unfairness in relation to pay.

2. The respondents made an application for strike out of the claim under Rule 37 (1) (a) of the Rules. Their alternative position was that the Tribunal should order the claimants each to pay a deposit of £1000 under Rule 39 (1) of the Rules.

5 3. This Preliminary Hearing (PH) was fixed to consider this application. Mrs Dunn, and Mrs Stewart were in attendance; Mrs Dunn represented all three claimants. Mr Maxwell, barrister, appeared for the respondents.

4. The Tribunal heard oral submissions from Mr Maxwell and from Mrs Dunn. Mrs Dunn also provided some information in relation to the claimants means.
10 The respondent lodged a bundle of documents which comprised of documents generated by the tribunal process, relevant contractual documents, and correspondence.

Respondents Submissions

5. Mr Maxwell firstly addressed the Tribunal on the factual background to the
15 claims. His position was that there was effectively no dispute on the relevant the facts. The claimants have been employed in various roles in the respondent's Virtual Channel Division in Glasgow. He submitted that for historical reasons (reflecting the opening times of the London Stock Exchange) the claimants pay was based on full time equivalent (FTE) working
20 hours of 37.5 per week, with their actual pay depending upon the proportion of hours worked. The claimants had signed contracts to reflect the position when they took up their employment, and from time to time had signed addendums reflecting an increase in the FTE and their own salary, and/or changes to the hours they worked, and Mr Maxwell took the Tribunal to a
25 sample of these documents in the bundle.

6. Mr Maxwell submitted that following a consultation exercise with employees and the Unite trade union, the respondent varied the terms and conditions of employees in the Virtual Channel Division, so that there was harmonisation of FTE working hours to 35 hours per week. This resulted in some full-time
30 employees receiving a reduction in hours, and some part-time employees, including the claimants, receiving an increase in pay to reflect the FTE hours.

The claimant's terms and conditions were varied in this regard from 1 July 2019. Further, as part of a harmonisation exercise in May 2019, some employees, including the claimants, had their rest breaks increased from 10 to 15 minutes.

7. Mr Maxwell took the Tribunal to the procedural history of the claims. He referred to the terms of the ET1, the case management Preliminary Hearing agenda, and more recent correspondence received from Mrs Dunn, which set out the claimants' response to the respondents' grounds of resistance. He submitted that none of these documents disclosed any claim which the Tribunal had the jurisdiction to consider.

8. Mr Maxwell took the tribunal to the terms of rule 37 (1)(a) of the Rules, and the test of no reasonable prospects of success considered in the case of *North Glamorgan NHS Trust v Ezsias IRLR 603 CA*.

9. He submitted that the claimant' claims should be struck out as having no reasonable prospects of success. The mere fact of employees doing the same or similar work being paid at different rates, whether they work at the same location or not, does not give rise to a valid claim before an Employment Tribunal. Mr Maxwell submitted that at all times, the claimants were paid at the rate to which they were contractually entitled, and there is no statutory or common law right to 'fair' pay.

10. Mr Maxwell submitted that the ET1 does not include an allegation of discrimination and that the claimants would be required to apply for permission to amend the claim. He submitted however that this was academic, as in any event on the basis of what is said by the claimants there is no justiciable complaint. 'Location' is not a protected characteristic within section 4 of the Equality Act 2010 (EQA).

11. In the alternative, if the Tribunal was not with him on this, Mr Maxwell submitted that a deposit should be ordered under rule 39 (1) of the Rules on the grounds that the claim had a little reasonable prospect of success.

12. Mr Maxwell referred to the case of *Van Rensburg v Royal Borough of Kingston upon Thames (UKEAT 2007)*, and the lesser threshold of little reasonable prospects of success. The Tribunal should order deposits of £1000 per claimant.

Claimants Submissions

13. Mrs Dunn for the claimant took some issues with the factual background as narrated by Mr Maxwell. She did not accept the respondent's claim that the Glasgow business was predominantly a share dealing business, with reference to the number of staff engaged in share dealing as opposed other aspects of work carried out by Barclays at their Glasgow office.

14. Mrs Dunn also disputed that the claimant's FTE equivalent hours were amended to 35 hours per week in July 2019 as part of a harmonisation exercise involving Unite. She accepted that this had been done, but submitted that this was done in response to a Colleague Forum initiative which resulted in the reduction of FTE equivalent hours and the increase in break times.

15. Mrs Dunn also submitted that it was not correct to suggest that the claimants and employees based in the other locations identified in the claim did not carry out the same role. They had the same role profile, and same team. She cited as an example of this, that when Glasgow employee went on maternity leave, her post was covered by an Isle of Man employee.

16. Mrs Dun submitted that she did not understand why the claimants did not have not a valid claim based on location of work. She submitted the but for the fact that she and the other claimants resided in Glasgow, they would have been engaged on a 35-hour FTE contract.

17. In relation to means, Mrs Dunn explained that relation to herself and the other claimants around 60% to 70% of her income goes on bills, the remainder is effectively spent on food and travel.

Consideration

18. Rule 37(1)(a) provides:

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

(a) that it is scandalous or vexatious or has no reasonable prospects of success."

19. In considering whether to strike out a claim on the ground that it has no reasonable prospect of success the Tribunal has to form a view on the merits of the case, and only where it is satisfied that the claim had no reasonable prospect of succeeding, should it exercise its power to strike out the claim under Rule 37.

20. In the case of *Ezsias*, referred to above by Mr Maxwell, it was emphasised by the court that it will only be an exceptional case where an application for strike out on the grounds that a claim has no reasonable prospects of success will succeed, where the central facts are in dispute.

21. The Tribunal take into account Mrs Dunn submissions as to the matters which she disputed about the factual background to the claim as set out by Mr Maxwell. While no criticism of Mrs Dunn is intended, none of these are material points. There was no dispute between the parties that contractually the claimants' pay was based on FTE equivalent working 37.5 hours per week, while others employees engaged in the same or a similar role to the claimants where contractually entitled to pay based on an equivalent FTE working 35 hours per week, and that position persisted until July 2019.

22. The reasons why these differences existed, or why the position was altered July 2019 in relation to pay, and in May 2019 in relation to rest breaks, does not impact on the material points which the Tribunal has to consider.

23. That point in this case is whether, as a matter of law the claim identified by the claimants has reasonable prospect of success before this Employment Tribunal.

24. In the absence of any material dispute on the facts, that question turns on whether there is a legal claim before the tribunal which has a reasonable prospect of success.

25. In the initial ET1, no legal basis for the claim is identified at all, and the claimants rely on the general unfairness of the respondents. The ET1 states:

paragraph 11.1 '… I am not sure what legal basis of our argument would be…'

paragraph 11.2'… I do feel that Barclays have acted unfairly….'

26. The case management Preliminary Hearing Agenda submitted by the claimants included a statement to the effect that a claim was being made for discrimination *'based on the location'*, and contained further detail to the effect *'contracted to work 37.5 hours per week while colleagues in the same role in Jersey/Liverpool and Sutherland are contracted at 35 hours per week within the same salary band'*.

27. In a further document submitted by the claimants in response to the ET3, under the heading *Legal Grounds for the Dispute*, it was stated that the claimants *accused the respondents of discrimination on the basis of the location of their role.* It further stated:

"A long-standing test in direct discrimination is known as the 'But for' as further explained in the case of James v Eastleigh Borough Council (14 June 1990). The claimants asked the question… 'Would the claimants have received a 35 hour per week contract from the Respondents but for his or her role being located in Glasgow, as opposed to Sunderland for example?'"

28. The Employment Tribunal does not have the power to consider a freestanding claim of fairness in relation to pay. The Tribunal's jurisdiction is defined by statute, and in a complaint of direct discrimination's the parameters of its jurisdiction are identified in terms of the Equality Act 2010. That Act provides that the Tribunal can consider complaints of discrimination on the basis of a number of identified 'protected characteristics', which are set out in section 4 of Part 2 of the Act. Those protected characteristics are: age; disability;

gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief sex; and sexual orientation.

29. The protected characteristics do not include 'location of work', which is said to be the basis of this claim.

30. There is no suggestion that the respondents were in breach of the claimants' contracts of employment. The claimant's complaint is about unfairness, based as they say, on the location of their workplace as opposed to the workplace of others. That however is not a complaint which this Tribunal has the power to consider, and on that basis the Tribunal was satisfied that the claims have no reasonable prospects of success and should be struck out under Rule 37 (1) (a) of the Rules.

31. In light of this conclusion, it is unnecessary for the Tribunal to consider the respondent's application for a deposit order.

Employment Judge: L Doherty
Date of Judgment: 09 July 2020
Entered in register: 13 July 2020
and sent to parties