



EMPLOYMENT TRIBUNALS

Claimant: Mr G Clarke

Respondent: Network Rail Infrastructure Limited

RECORD OF A PRELIMINARY HEARING

Heard at: (in private; by CVP) **On:** 15 January 2021

Before: Employment Judge Dean (sitting alone)

Appearances

For the claimant: Mr G. Price-Rowlands, of counsel

For the respondent: Ms I. Ferber, of counsel

PRELIMINARY HEARING

The decision on the Preliminary issue is that:

- (1) The Respondent's application to strike out the claimant's complaints does not succeed.**
- (2) The Claimants complaints before the Tribunal have little reasonable prospect of success in respect of:**
 - (i) The Claimant's Equal Pay claim as it relates to the comparator Helen Teather; and**
 - (ii) The Claimant's Equal Pay claim, as it relates to the comparator Clarie Hulstone.**
- (3) Having had regard to the claimant's ability to pay a deposit the claimant is ordered to pay a deposit of £50.00 as a condition of pursuing each of his complaints at (2) above.**

REASONS

Background

1. The claimant in this case presented a complaint to the employment tribunal on the 20th of May 2017 alleging that he was automatically unfairly dismissed for making a disclosure qualifying for protection, an authorised deduction from wages and breach of contract in respect of notice pay. The claimant's employment with the respondent began on the 1 August 2016 and came to an end on the 8 February 2017 he has insufficient service for a complaint of ordinary unfair dismissal.

2. The Respondent operates as an online casino whose business entails receiving payments from customers who register with the Respondent's website to play various online gambling games through mobile phones and other electronic devices worldwide. The Respondent accepts referrals from third party web site providers and via intermediaries, known as affiliates, and is liable to pay commission as a result. The Respondent defends the claim and says that the claimant was in fact dismissed from employment fairly, without notice for gross misconduct. It is alleged the claimant had perpetrated a theft by changing genuine players bank details to those of his own so that player refunds were in fact paid to him. The respondent denies that the claimant had made protected disclosures of which they were aware and denies that he was dismissed because he made disclosures. The claimant is subject to High Court proceedings in respect of the misappropriation and for that reason the claim in the tribunal was initially stayed. The High Court claim ended in a judgement against the claimant for £30,056 on 2 January 2019.

The Issues

3. The Preliminary Issues which remain to be determined at this open Preliminary Hearing are those applications:
4. Strike out application in respect of two elements of the Claimant's claim made by the respondent in their notice to the claimant and the Tribunal on 2 December 2020 in respect of two aspects of the claimant's complaints:
 - 4.1. The Claimant's Equal Pay claim as it relates to the comparator Helen Teather;
and
 - 4.2. The Claimant's Equal Pay claim, as it relates to the comparator Clarie Hulstone.

5. Deposit application in the alternative if the application to strike out is not successful the Respondent makes an application on 11 January 2021 [710-711] that the claimant be required to pay a deposit as a condition in respect of two aspects of the claimant's complaints:
 - 5.1. The Claimant's Equal Pay claim as it relates to the comparator Helen Teather;
and
 - 5.2. The Claimant's Equal Pay claim, as it relates to the comparator Claire Hulstone.

The Law

6. The statutory provisions to which I have had regard in considering the applications for strike out of a complaint or response and/or deposits is that detailed in the Employment Tribunal (Constitution & Rules of Procedure) Regulation 2013 and in particular:

Rule 37 Striking out

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

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

7. To consider an application for strike out I am required to have regard to the provisions of rule 37 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013. The application made by the respondents is that at the complaints have no reasonable prospect of success. I am guided in large part by the Court of Appeal in Ezsias v North Glamorgan NHS Trust 2007 ICR 1126 and the House of Lords in Anyanwu v South Bank Students Union 2001 ICR 391. Lady Smith expanded upon that guidance in Balls v Downham Market High School and College [2011] IRLR 217 stating that where strikeout is sought or contemplated, on the ground that the claim has no reasonable prospect of success, tribunal must first consider whether, on careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail. The test is a high test.
8. The test is high because of the proposition that it is unfair to strike out a claim where there are crucial facts in dispute and that has been no opportunity for the evidence in relation to this fax to be considered. More recently the Court of Appeal in A v B and anor [2010] EWCA 1378CA concluded that there was a 'more than fanciful' prospect that the employer would not be able to discharge the 'reverse' burden of proof and as a result the EAT had been right to decide that the employer had not succeeded in demonstrating that claims had no reasonable prospect of success.
9. For discrimination claims, the starting point regarding case-law is **Anyanwu and anor v South Bank Student Union and anor [2011] ICR 391 UKHL**. Here, the House of Lords emphasised that discrimination claims are often fact-sensitive and require close examination of the evidence at a full merits hearing.
10. I am also assisted by the case of **Balls v Downham Market High School and College [2011] IRLR 217**, in which Lady Smith held:

When strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim

will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether there written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects.

8. Mitting J in **Mecharov v Citibank NA [2016] ICR 1121 EAT** provided the following guidance at paragraph 14:

...the approach that should be taken in a strike out application in a discrimination case is as follows:

- (1) Only in the clearest case should a discrimination claim be struck out;
- (2) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
- (3) The claimant's case must ordinarily be taken at its highest;
- (4) If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and,
- (5) A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

9. However, there are some caveats to the general approach of caution towards strike out applications. In **Ahir v British Airways plc [2017] EWCA Civ 1392 CA**, it was held that, when a tribunal is satisfied that there are no reasonable prospects of the facts needed to find liability being established, strike out may be appropriate. This is caveated by the need to be aware of the danger of reaching that conclusion without having heard all the evidence.

10. In relation to applications to Deposit order the rule is detailed at

Rule 39: Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

11. In addition, tribunals are entitled to have regard to the likelihood of the party being able to establish the facts essential to his case and, in doing so, which provisional

view as to the credibility of the assertions put forward – Van Rensburg v Royal Borough of Kingston-upon-Thames UK EAT/00954/07.

12. In considering the amount of any deposit to award, should the Claim be one that is considered to have little reasonable prospect of success, a tribunal must make sure that the order “*does not operate to restrict disproportionately of a fair trial rights of a paying party, or to impair access to justice*” Hemdan v Ishmail [2017] IRLR 228.
13. The rationale of a deposit order is to warn a claimant against pursuing claims with little merit, which may leave them open to a risk of costs should they proceed with the claim and lose on the same basis as identified as the reason for the making a deposit order.
14. If I decide to make a deposit order, I must give reasons, not only for the fact of the order, but also for the amount of that order – **Adams v Kingdon Services Group Ltd** EAT/0235/18.

Argument and decision

15. In considering the applications in this hearing to determine Preliminary Issues I have considered the application and written submissions made by the respondent, [537-539] and [710-711] and from the claimant [540-547] as amplified by both in oral argument.
16. The application relates to the complaint for equal pay and in particular, as identified in the list of issues, whether the claimant and a named comparator was employed on equal work. The claimant identifies four named comparators and the respondent limits their application to two named comparators, Claire Hulstone and Helen Teather which they say were not employed in work of like work. The claimant has for the avoidance of doubt confirmed I his email 12 November 2020 to the tribunal confirmed that the is not pursuing an equal value claim.
17. In the case there is no dispute that the respondent uses a banding system to rate job roles according to their level of responsibility that the role attracts and seniority and the pay and benefits that the role attracts.
18. The claimant is Band 3C as too are three of his comparators including Helen Teather. The claimants fourth comparator is Claire Hulstone who is a Band 2B employee a higher band than the claimant and the other comparators.
Helen Teather

19. It is not disputed by the parties that Ms Teather when working as Band 3C was paid less than the claimant and the respondent say that during the period 24 April 2018 – 31 May 2020 Ms Teather was seconded to a Band 2B role and that as the role was evaluated higher than the claimant's Band 3C role, and during the period of secondment she received an additional pay award at Band 2C for the period. The respondent assert that while undertaking the Band 2B role the different level or responsibility and the differences in the type of work done and the skills and knowledge needed means that the work undertaken is not the same or broadly similar to satisfy the like work test by reference to the duties undertaken by the Claimant. The respondent claims that the differences are of practical importance as they are material and substantial.

Claire Hulstone

20. Ms Hulstone is engaged as a Band 2B employee and throughout the relevant time her role has attracted a different level of responsibility. The Band 2B role has been evaluated higher to recognise the different level of responsibility and the type of work done and skills and knowledge needed by reference the work undertaken which the respondent say is not the same nor broadly similar to that of the claimant to satisfy the like work test by reference to the duties undertaken by the claimant.

Argument

21. It is accepted by the claimant that the Band 2B job description [681] that of a Project delivery Engineering Manager which he points out includes:

“Undertake the role of Designated Project Engineer as defined by NR/L2/INI/02009 ‘Engineering Management For Projects’.”

Which the claimant says is the role which he and other Band 3C Designated Project Engineers such as he undertakes. The claimant's claim for Equal Pay is that his job was broadly similar to that undertaken by Ms Teather and Ms Hulstone and that the job descriptions for the Project Delivery Engineering Manager does not in fact have a distinction in the roles and that the respondent has disingenuously paid him less than Ms Teather and Ms Hulstone.

22. It would appear that the claimant, whilst acknowledging the job descriptions for the Band 2B and 3C are different he suggests that the job title and descriptions are a sham and in reality there is no distinction in the roles and rather the work that the Band 2B incumbents undertake is not materially different from the role that the claimant undertakes [123]. The claimant asserts that in Ms Hulstone's case she was

working as a Designated Project Engineer on the same job description as him and the next day she was doing the same work on a new job description as Project Delivery Engineering Manager and on a new pay grade which was an artificial construct to justify paying her a higher salary. The claimant asserts that Ms Tether, unlike Ms Hulstone and the claimant himself, does not have a University Engineering degree which is an essential for the role of Project Delivery Engineering Manager. The claimant points to the fact that Ms Tether does not have a University degree in Engineering nor is she a chartered engineer and although Ms Hulstone attained her chartered engineer qualifications while in post she is not as well qualified and experienced as the claimant becoming a chartered engineer only after her promotion as she had been in the process of attaining that qualification. It is by this argument that the claimant suggests that the comparators were offered the Band 2B posts in preference to the claimant because the respondent were seeking to positively discriminate in favour of advancing women as engineers and that the appointments were not in all other things equal.

23. Ms Tharoo draws my attention to the schedule of Project Engineers and to the fact that of the 59 Engineers listed there are only 5 women.
24. The respondent is plainly frustrated that the claimant seems to conflate the alleged unlawful direct discrimination in treating male engineers less favourably than female as the claimant complains that he ought to have been considered for and appointed to the Band 2B opportunity with the issue in the claim for Equal pay must be to consider if the work undertaken by the comparator was indeed like work with that undertaken by the claimant.
25. On the face of it the roles set out in the job descriptions are evaluated as being for the Band 3C and Band 2B are different and that difference the respondent asserts is material.
26. There are on the face of the documents to which I have been referred matters that a tribunal will need to make findings of fact upon to determine whether the jobs undertaken by Ms Hulstone, and while seconded by Ms Tether, at Band 2B were in fact like work to that undertaken by the claimant. If not like work the claim will not succeed in relation to these two comparators.
27. The test to satisfy the argument that a claim has no reasonable prospect of success in a discrimination claim is high. The claimant has identified issues that will need to be considered by the tribunal to determine if the work was like work for the equal pay

claim comparison and the claim may have some, though I consider little reasonable prospect of success. In all of the circumstances the respondent's application to strike out the complaints as framed does not succeed.

28. I turn to the application that the claims in relation to the two comparators have little reasonable prospect of success and I should require the claimant to pay a deposit as a condition of pursuing the complaints identifying Ms Hulston and Ms Tether as comparators. While there is evidence to be heard to determine whether the job role undertaken by the Project Delivery Engineering Manager and the Band 2 C roles were roles that were like work I am mindful that the Job description of the Manager role [681] whilst including the key accountability to undertake the role of Designated Project Engineer as defined by NR/L2/INI/02009 'Engineering Management For Projects' is different to that of a Designated Project Engineer alone and it will be for the claimant to establish that his team leader and other responsibilities would lead to a finding that his role was like work.

29. I am aware that the claimant alleges that he was treated less favourably than his female comparators by not being promoted as Ms Hulstone and Ms Tether were, albeit on secondment, and that claim of itself suggests that the role was a promotion and different and not like work to that undertaken at the time by the claimant. To the extent that the respondent relies on the Band 2B role being rated as more senior role in level of responsibility to the band 3C role I consider that the claimant's complaint in respect of the named comparators in respect of like work has little reasonable prospect of success.

30. Ms Tharoo has accepted that the claimant has had relatively short notice of the alternative application for a deposit to be paid as a condition of pursuing these two complaints and as a result has confirmed that the respondent does not seek to a deposit in a meaningful sum. The deposit is requested to provide the claimant with a clear indication of the difficulties that the claim has in terms of prospect of success. In light of Ms Tharoo's concession I have not made enquiries of the claimant's means, the claimant remains in the respondent's employment. I order that as a condition of the claimant pursuing the claims in respect of each of the named comparators. I order the claimant to pay a nominal deposit in the sum of £50.

Employment Judge Dean

23 July 2021