



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs D Kotecha

v London Borough of Harrow

Heard at: Watford by CVP

On: 4-6 January 2022

Before: Employment Judge Manley
Members: Ms S Hamil
Mr N Boustred

Appearances

For the Claimant: In person
For the Respondent: Mr Harding, Counsel

JUDGMENT

1. The claimant's application to amend to include a claim for unlawful deduction of wages between 2012 and 2018 is refused.
2. The claimant was not discriminated against because of her age.
3. There were no unlawful deductions of wages.
4. The claims are dismissed.

REASONS

Introduction and issues

1. The claimant brought a claim in December 2019 which alleged that from 2018 she should have been paid at a higher rate than she was paid by the respondent council. She was then and remains in the employment of the council.
2. There was a preliminary hearing to clarify the claim and agree a list of issues in January 2021. They were agreed to be as follows:-

"Time limits / limitation issues"

- 1.1. *Were all of the claimant's complaints presented within the time limits set out in section 123 of the Equality Act 2010 ("EQA") and sections 23 of the Employment Rights Act 1996 ("ERA")?*

EQA, section 13: direct discrimination because of age

The Claimant alleges that her age group is 50 to 59 and her comparator's age group is 20 to 29.

- 1.2. *Has the respondent subjected the claimant to the following treatment:*

- 1.2.1. *Removal of duties in around August / September 2018, and allocation to an agency worker, Dimple Patel. [The duties being minute taking, support to Director, support to Heads of Service, Project work for Heads of Service.]*

- 1.3. *Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators and/or hypothetical comparators.*

- 1.3.1. *Dimple Patel*

- 1.4. *If so, was this because of the claimant's age and/or because of the protected characteristic of age more generally?*
- 1.5. *If so, has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim?*

Unauthorised deductions

- 1.6. *Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13?*

The Claimant's allegation is that she has an email dated 16 August 2018 which states that she will be entitled to be paid Grade 6; her interpretation is that that means that she is entitled to be paid Grade 6 for all of her working hours, Monday to Friday.

Whereas the Respondent alleges that she is only entitled to be paid Grade 6 for one day a week, and – because she does different duties on the other days – the Claimant is entitled to Grade 5 for the other 4 days per week.

- 1.7. *If so how much was deducted?*

Remedy

- 1.8. *If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded”.*
3. In summary, there is a claim for age discrimination, with respect to a younger member of staff, the claimant alleging that her duties had been transferred to her around August or September 2018. She also says that she has been wrongly paid as she should be paid at G6 (earlier called H6) but has been paid at G5 (H5) That was alleged to be an unlawful deduction of wages from 2018 on the basis of an email sent in August 2018.

Application to amend

4. At that preliminary hearing in January 2021, there was also a discussion as is recorded in the summary, when the claimant said that she believed there was a communication in 2011 that she would be paid the higher rate, that was then called H6, from around 2012. The discussion was recorded in the summary as follows:-

“During the hearing, the Claimant also alleged that – as well as the email dated 16 August 2018, which allegedly states that she will be entitled to Grade 6 going forwards – she also has an email dated, she thinks, 2011, stating that she is entitled to Grade 6 from around then (commencing, she thinks, from a date in 2012). The claim form does not include an allegation that the Respondent had agreed to pay her Grade 6 from around 2011 or 2012 (and, in fact, only refers to a decision communicated on 16 August 2018). Therefore, I informed the parties that if the Claimant wishes to rely on an alleged agreement in around 2011 or 2012 to pay her Grade 6, then she will need to make a formal application to amend the claim which will need to give full details of the alleged agreement (including, for example, the name of the person who sent the email, and the exact date), and full details of the earlier period she is seeking to claim for, and what deductions she is alleging occurred during that period, and why it would be appropriate for deductions allegedly occurring from around 2011 or 2012 onwards to be included as part of this claim”.

The judge also recorded information he had provided about amendment applications as follows:-

“Any application to amend the claim must be sent to the tribunal, and copied to the Respondent. The Respondent should comment within 14 days stating whether it consents to the amendment, or else stating reasons for objecting. As I explained to the Claimant in the hearing, she does not have an automatic right to amend or add to her claim, and so, if applying, she should attempt to either explain why the new allegations are already referred to – expressly or by implication in the claim form and/or explain why they were not expressly mentioned. She should also state why she believes it would be fair and reasonable for a judge to allow the amendments”.

5. No such amendment application was made until the commencement of this hearing. The claimant has recently found a letter from the respondent dated 19 March 2012 which stated that she would be paid at the rate of H6. This had followed earlier letters stating she would be paid at H5 which is a slightly lower payment. The claimant's case was that she found this letter around 4 December 2021 and had sent it to the respondent around 7 December 2021. No application was made to the tribunal to amend her claim until the morning of this hearing. Her application was that she should be allowed to amend her claim for unlawful deduction of wages back to 2012 on the basis of this letter having been received by her.
6. The respondent objected to the amendment application, on the grounds that it was only hearing the application now and it was unable to deal with it because it might not be able to find the person who had written that letter who had left the council many years before. It was not known the reason for the letter and it was not within the claimant's HR file. As a matter of fact, the claimant had been paid throughout at H5 rather than H6 until she began to be paid at G6 for part of her working time in 2018. If the amendment was allowed the respondent would have to seek a postponement and would apply for wasted costs for this hearing. The respondent submits that the application is made far too late without any good explanation provided by the claimant. It is now almost 10 years since the letter was apparently written.
7. After giving due consideration to the application to amend the claim, the tribunal declined to allow the amendment for reasons given orally at the time. The tribunal decided that it was not in the interests of justice to allow the amendment. We noted that it was many years since the letter had been sent and the respondent would have considerable difficulties in being able to deal with it. The amendment is plainly out of time with respect to a claim for payment back to 2012 and up to 2018, it now being early 2022. The tribunal noted that clear advice had been given to the claimant at the preliminary hearing in January 2021. Taking into account the timing and manner of the application, clear problems in terms of evidence, the balance of hardship impacts more on the respondent. The claimant agreed at the preliminary hearing in January 2021 that her claim arose from matters in 2018 and, although the proposed amendment fell under the heading of unlawful deduction of wages, it would have to be pursued with different evidence. The tribunal did not consider the amendment to be a minor amendment. The passage of time since the events of 2018 is already considerable and it would be unjust to try to find further evidence from 2012, putting this hearing in jeopardy. A claim for unpaid wages between 2012 and 2018 would have had to be made by mid 2019 and it was reasonably practicable for the claimant to present this alternative argument, either then or when she presented this claim in December 2019. The amendment was refused.
8. We proceeded to deal with the hearing on the basis of the list of issues agreed in January 2021.

The Hearing

9. We heard from the claimant herself, from Ms Keen, (who earlier in her employment used the name Soroay), Business Support Hub Manager and from Ms Heena Patel, team leader in Business Support and the claimant's line manager. All had prepared written witness statements.
10. We also had a bundle of document that the respondent had prepared and the claimant had also sent in a bundle of documents. There was duplication in the bundles but we needed to between two electronic bundles of documents from time to time. On the whole, we managed to do that without too much difficulty.

Facts

11. The relevant facts are, in summary, as follows. I should point out that the tribunal has concentrated on those facts which are relevant to the issues as set out in the January 2021 hearing rather than the considerable number of other matters which were raised by the claimant and which do not touch on those issues.
12. The claimant started working for the respondent in the Directorate of Adult Social Care in March 2005. She is still employed by the respondent. She works in what is essentially the administrative support of that directorate, now called business support.
13. In 2011 and 2012 there was an evaluation of these roles and those officers were named Business Support Officers. The grade at that time for Business Support Officers covered both grade levels H5 and H6 (now G5 and G6). A job description was drawn up with a number of tasks set out there. The first four tasks are said to generic. There are then tasks numbered between 5 and 20, which all the Business Support Officers, including those at G5 might carry out. There are then task numbered between 21 and 32, that is 12 extra tasks, which if carried out sufficiently, would mean that someone is paid at G6. This is all at page 65 of the bundle and we will come back to those in a moment.
14. In early 2012 the claimant received letters which indicated that she was going to be graded at what was then H5. She did then receive the letter dated 19 March 2012 which was from an interim Head of Department, Andy Parsons and which indicated that he had looked again at matters and it had been decided that she would be graded at H6. The claimant did not produce this letter, as we have stated, until December 2021. What the claimant told us is that she believed that she was being paid at H6 from 2012 and did not notice that she had not been paid at that level until the matters about which she complains arose in 2018. It appears that she did not check her pay statements to see whether she was being paid correctly.
15. In any event, there was, as is common with local authorities, a number of reorganisations and there was one in 2014 which led to Ms Patel becoming the claimant's team leader. Ms Patel's evidence was that the claimant asked on more than one occasion but specifically in 2017, that she be moved to G6

and there was a discussion with Jonathan Milbourne, who is Head of Business Support, but he declined to make that move.

16. The claimant's evidence is that there was no such discussion and she points out, quite rightly, that there is no documentary evidence to support any such discussions. However, the tribunal do accept Ms Patel's evidence that there was at least one such discussion that the claimant was asking that she be paid at G6 towards the end of 2017. That is partly because when Ms Keen became the Business Support Manager in 2018, Mr Milbourne mentioned to her that there was an issue about the claimant's grading and rate of pay. Her evidence, which we accept, is that she spoke to Mr Milbourne and asked if the claimant could receive the G6 payment when she was covering for Ms Chohan, who supported the Director of Adult Social Services, and who did not work on Mondays. That is when the claimant carried out at least some of Ms Chohan's tasks on that day. Mr Milbourne agreed that there should be payment for that day.
17. In summary, the claimant was, as far as Ms Keen was concerned, to be paid for G6 level for Monday and G5 for the remaining days which would be between Tuesday and Thursday, the claimant working part-time at 20 hours a week.
18. By an email which appears at page 152 of the bundle, Ms Keen wrote to Ms Patel, the claimant's line manager, and said:

"Hi,

Jonathan said we can increase Darshna (the claimant) to a G6 to match her with Kokila (Ms Chohan). Happy for you to let her know".

19. Ms Patel forwarded that email to the claimant on 16 August 2018. The claimant replied:

"Thank you so much. That is fantastic news. I would like to check if there was any chance I could request extra hours".

20. It appears therefore that the claimant believed at that stage, with some justification, that she was going to be paid G6 for the whole of her working time. However, there were then a number of discussions and the tribunal have email communications, which would appear to indicate that there was some doubt about how much of the claimant's working week would be paid at the G6 level. The tribunal can see that there were attempts to meet, which did not happen for a number of reasons, and discussions continued about whether and how the claimant would be paid the G6 rate.
21. At some point in August or September, there had been an appointment of a person called Dimple Patel, who had been an agency worker, working already for the council. Dimple Patel was appointed to a full-time temporary role because Mr Sathisavam, who was acting up as the Director in 2018, had decided to carry out a fairly significant restructure. There were four new Heads of Service with more responsibilities and there were between five and

eight new panels to be set up. There had been some changes to existing panels as well and there were changes to statutory responsibilities for the local authority.

22. Ms Keen took the view, having discussed it with Mr Sathisavam, that the Business Support Officer for that role should be a temporary full-time person so as not to disrupt the other Business Support Officers carrying out their existing tasks as usual.
23. There was also a concern because it was unclear how long these panels would continue; whether they would continue for any length of time or whether they would be reduced. If a current member of staff had been appointed to that role, it could lead to a possible redundancy future, which could include any of the permanent Business Support Officers, including the claimant. It does not appear that it was considered that it should be offered to any of the existing Business Support Officers who were already carrying out roles and that the temporary full-time officer role was therefore offered to Ms Patel who, it appears, is between 21 and 30. The role was graded at G6 because it included a significant undertaking of the tasks at 21-32 of the job description.
24. There was then a meeting in October between the whole team because there had been some changes, linked to another restructure. There was a discussion with the claimant and the other Business Support Officers about how work would be divided. This was clarified in an email at page 144 of the bundle as to which Business Support Officers would carry out which tasks.
25. The claimant's case is that some of her duties were transferred to Dimple Patel but the respondent says that is not the case. Its case is that many of the tasks had changed as indicated, it involved new panels and a significant change within the Heads of Services's responsibilities.
26. The tribunal is satisfied that the claimant's duties were not transferred to Dimple Patel. The claimant failed to tell the tribunal which duties she is alleging transferred to Dimple Patel. It seems to the tribunal that it is possible that some of the things the claimant was doing before might have then been carried out by Ms Patel but she was clearly doing considerably more than that, not least because she was carrying out some new tasks which the tribunal is satisfied had not been carried out by the claimant before. The claimant has not been able to prove that any of her duties, or at least none that are of any significance, were transferred to Dimple Patel.
27. There is a dispute between the witnesses as to contents of discussions in September 2018. Ms Patel and Ms Keen said that the claimant was told towards the end of September that she was only to receive the G6 payment for the Monday when she covered for Ms Chohan. The claimant denies that that was said to her at that point. The tribunal cannot say for sure whether the claimant was told that and can understand that she may have been a little confused about what the arrangements for pay were.
28. There were some difficulties with the claimant meeting with Ms Keen and/or Ms Patel but there was a meeting eventually on 31 October 2018. The

tribunal have seen the notes at page 154 which the claimant does not necessarily agree were accurate. In any event, it is clear that the claimant was asking for extra hours and there was then some discussion about that. Ms Keen also raised some issues which might be considered conduct related about the claimant not agreeing to meet with them to discuss work issues. It is clear that the claimant was arguing that she should be paid at the G6 level but there was really no clear outcome about that at that meeting and the claimant was still not paid, even for the Monday work, at G6 rate at that point.

29. The claimant continued to express concern about her rate of pay with some justification, as it appears she had still not received pay even for the Monday work. The tribunal understands this might have been because it was felt a meeting needed to be held to clarify the situation.
30. There was then a meeting with Ms Keen, the claimant and her trade union representative on 19 December 2018. The claimant accepts that it was at this meeting that it was made clear to her that the rate of pay at the G6 level would be for Mondays only when she was covering part of Ms Chohan's role.
31. It took some time to action that and, in March 2019, the claimant received a letter from HR (page 174). Unfortunately, that letter from HR does not say that the G6 would be for part of the role and it could be read as if it was for the whole of the claimant's time. However, soon after that (page 178), Ms Keen sent an email to HR, which was copied to the claimant which made it clear that the G6 was to be for 20% of the claimant's hours and that it should be backdated to August 2018.
32. The claimant continued to request consideration for her to be paid at G6. The tribunal find that she did not believe that she was being paid at G6 because she continued to argue that she should be paid at that level.
33. In July 2019, Ms Keen undertook an evaluation of the claimant's role. It is clear from the emails and other documents in the bundle (pages 206 to 210) that the claimant raised the question of whether she carried out tasks under three of the twelve G6 points between 21-32. Those that she made reference to were at point 21 which is "*carrying out duties with minimal supervision*"; point 26 which is "*to be the first point of contact on projects*" and point 29 which is "*responsibility for health and safety matters*".
34. Ms Keen looked at the claimant's tasks and had a meeting with her and discussed the review at some length. On 14 August 2019 Ms Keen sent the claimant an email setting out why, in her view, having taken advice from HR, the claimant could not show that she was carrying out sufficient tasks under the G6 headings. She gave a response to each of the claimant's suggestions under points 21, 26 and 29 providing reasons why she did not agree with the claimant. She said that she could not reevaluate the claimant's role as she was not satisfied that the claimant had "*demonstrated that you undertake a full range of duties within the G6 section of your role profile*".
35. It is clear to the tribunal that there were then some difficulties in the relationship between the claimant, Ms Patel and Ms Keen and other matters

were raised which we do not need to go in to. The claimant did receive her back pay for G6 payment for the Mondays worked. She continued to be paid at G5 for the rest of her working week. She presented her tribunal claim in December 2019.

The law

36. The tribunal heard the claimant's oral application to amend her claim and considered it in line with case law, the presidential guidance and the overriding objective. In summary, the tribunal must consider injustice or hardship to either party and carry out a careful balancing exercise. Factors to consider include what type of amendment is being applied for (whether it is minor or substantial), any applicable time limits and the timing and nature of the application. The tribunal needs to consider whether the amendment sought arises out of the same facts or whether it is unconnected with the existing claim. We also need to consider whether the proposed amendment is being made in time and, if not, whether it was not reasonably practicable for that claim to be made within time
37. The law which is relevant for the age discrimination claim is contained in Equality Act 2010 (EQA). The claimant relies on the direct discrimination provisions of the Equality Act 2010 under section 13 EQA. The provisions under section 136 EQA apply to the claim. This means that the burden of proof lies on the claimant to show facts from which the tribunal could conclude that less favourable treatment because of her age had occurred. For this the claimant needs to show that an actual or hypothetical comparator, in not materially different circumstances, did or would have not received the treatment complained of. If she does shift the burden, the respondent can seek to provide evidence that the reason for the treatment was not because of age. For a complaint of direct age discrimination, it is possible for the respondent to bring evidence to justify any such discrimination but that does not really arise in this case.
38. As far as the unlawful deduction of wages claim is concerned, this arises under section 13 Employment Rights Act 1996 (ERA). The burden of proof rests on the claimant to show that she is entitled to a sum other than that which she has received. That means that we must consider the contractual arrangement between the parties as to pay as well as the surrounding circumstances if it is unclear what the pay rate should have been.
39. Both claims must be presented within the time limits set out in EQA and ERA unless time has been extended by a tribunal. In summary, there is a three month time limit to present a claim from the act complained of or the deduction claimed as being unlawful. For the age discrimination claim under EQA, section 123 provides that the tribunal can consider whether there is conduct extending over a period such as to bring the claim in time and, if not, can extend time on a just and equitable basis. Section 23 ERA provides that claims for unlawful deduction of wages must be presented within three months of the date the deduction was made and, if it has been presented late, a tribunal should consider if it was not reasonably practicable to bring the claim in time and, if so, consider what further period of time would be

reasonable. In this case, it is likely that the claimant would argue that the failure to pay at the rate she claims she should have been paid is conduct extending over a period and the deductions continued up to the date of presentation of her claim.

40. The claimant and Mr Harding for the respondent, made short written submissions and Mr Harding added briefly to his submissions before we deliberated. The legal tests are not in dispute and the tribunal's task, as always is to find facts, especially where they are in dispute, and apply the legal tests to those facts.

Conclusions

41. These then are our conclusions and some of them must be clear from the findings of fact.
42. First, with respect to the age discrimination claim, the question is whether the claimant was subjected to discrimination because of her age, arising from the alleged removal of duties in August or September 2018 which were allocated to Ms Patel. As is clear from our findings of fact, the tribunal did not find that there was such a removal of duties or that they were allocated to Dimple Patel. Even if there were some duties which Ms Patel began to carry out because there was a major reorganisation, the claimant is unable to show that that had anything whatsoever to do with either her age or that of Ms Patel.
43. Indeed, the claimant has sought throughout this hearing and in discussion with the respondent before, to compare her tasks with those of Ms Chohan, who was older than her and not a comparator for the age discrimination claim. The claimant decided to rely on the comparator of Dimple Patel and she has not been able to show either that the duties were transferred or that they were anything to do with age. Even if the burden of proof had shifted, the respondent has shown non-discriminatory reasons for Dimple Patel's appointment. That claim must therefore fail.
44. Secondly, we consider the unlawful deduction of wages claim. This claim is also one where the claimant bears the burden of proof. The tribunal has considerable sympathy for the claimant. It is true that she has received communications from the respondent which have confused her, and led to some of the issues between them. It has certainly led to escalation of problems in that there has been a lack of clarity particularly in the written communication with the claimant.
45. However, the claimant has to show that she was entitled to be paid at G6 for the whole of her time from 2018 rather than the G5 rate which she has received for the majority of her time. She is unable to do that. It is quite clear that the claimant knew, at the latest by December 2018, that she was to be paid the G5 rate for Tuesday to Thursday and G6 while she covered for Ms Chohan, particular on a Monday and, occasions, on some other days. It was clear to her then and it is clear from the actions she took particularly in relation to try to get a re-evaluation of her grade, that she understood that she was being paid at G5 for her other hours that were not cover for Ms Chohan. That

is the arrangement she was working under and although there might have been some confusion contained within various communications, that is what she received in her pay and whilst the claimant might have not looked at her payslips between 2012 and 2018, it is clear that she understood that is what she was being paid from 2018, if not before. It therefore follows that she must have affirmed that contract because she continued to work for that level of pay until she put in this claim in December 2019. The claimant is not able to show that she is entitled to any higher payment than that which she received.

46. She is not able to show, either on the basis of the documents sent to her or on the basis of the job description, that she is carrying out tasks under the G6 headings. That means that this claim for unlawful deduction of wages must also fail.
47. We have not considered the time limit points in any detail, except with respect to the application to amend, as the claimant has failed on the facts before us.
48. The claimant's claims are dismissed.

Employment Judge Manley

Date: 20/1/2022

Sent to the parties on: 8/2/2022

N Gotecha

For the Tribunal Office