Case Number: 2206044/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBER: **MS J CAMERON**

BETWEEN:

Ms C Spragg

Claimant

AND

Richemont UK Ltd

Respondent IN CHAMBERS ON:

21 December 2018

JUDGMENT ON RECONSIDERATION OF MAJORITY DECISION

The Judgment of the Tribunal is that the original majority judgment is varied to the findings that on the first vacancy the claimant had a 20% chance of success and on the second and third vacancies a 30% chance of success.

REASONS

1. By a judgment sent to the parties on 29 October 2018 the claimant Ms Cheryl Spragg succeeded on part of her claim, including that there was discrimination in failing to shortlist her for the role of Controller. These were issues (a), (d) and (h) in paragraph 8 of the liability judgement.

2. The majority decision (Employment Judge and Ms Cameron) was that even if the claimant had been shortlisted, she would not have been appointed to the role of Controller. The minority decision (Dr Weerasinghe) is that she would have been appointed to the first vacancy. This was set out at paragraph 364 of the Reasons. The tribunal found by a majority that there

was no direct discrimination in the failure to appoint the claimant to the role, as opposed to shortlisting. The minority view was that there was direct discrimination in the failure to appoint on the first vacancy and had that taken place, there would have been no need for the second or third processes.

3. On 9 November 2018 the claimant sought a Reconsideration of the majority decision as to the percentage chance of the claimant being appointed, particularly as this was relevant to remedy. As the claimant did not seek reconsideration of the minority decision, which was in her favour, the tribunal met as the majority to carry out the reconsideration.

4. The claimant asked the majority to consider the majority view of the percentage chance that the claimant would have been offered the permanent role in March 2013 if she had been interviewed and considered fairly when there were only two candidates, herself and Ms Ait-Mammar; what with the percentage chances that she would have been appointed as maternity cover in July 2014 if she had been given the opportunity to apply and considered fairly and the same for the substantive role in June 2015.

Submissions

5. The Reconsideration application was dealt with on paper with both sides submitting detailed written submissions. The written submissions are not replicated here. They were fully considered together with all authorities referred to, whether or not expressly referred to below.

6. The claimant's position was that in March 2013 she had a 50% chance of success in securing the controller vacancy because there were only two candidates. The claimant accepted that on the second application there would only have been two interviewees, herself and Ms Roman and that because Mr Roman was the more experienced candidate she does not contend for an even 50-50 chance. This was therefore put at 33%.

7. The claimant submits that there was a 60% chance of success in June 2015 because she would have been one of three interviewees and she would have had the benefit of feedback on the previous interviews. The claimant accepts that there was a requirement for five years' experience (submissions paragraph 10c.) which the claimant accepted she did not have (Reasons paragraph 106).

8. The claimant's position is that the tribunal should apply the loss of chance approach and express in percentage terms the loss of the claimant's opportunity to be considered fairly for the Controller roles and not adopt an "all or nothing" approach.

9. The respondent's position is that the claimant is seeking to persuade the majority to re-determine existing findings when, on its submission, the

tribunal's conclusions are clear that the claimant would not have secured the post she applied for.

Findings

10. The majority decision was that there was discrimination in the failure to shortlist (paragraph 364). This is not the same as a finding that the claimant should or would automatically have been guaranteed an interview. Whilst we accept that this was the claimant's view, it was not the finding. We found unanimously that nine candidates were shortlisted for the third Controller role in June 2015 yet only two candidates went through to interview.

11. The claimant relied upon the Ministry of Defence cases from the 1990s on loss of opportunity - ***Ministry of Defence v Wheeler 1998 IRLR 23 Ministry of Defence v Cannock 1994 IRLR 509***. These are cases in which the claimants were dismissed from their roles in the Armed Forces when they became pregnant and those cases are concerned with the lost opportunity to remain in the forces. We agree as a matter of law that loss of chance is the correct approach.

12. In ***Wheeler*** and ***Cannock*** what the tribunal was required to do was to assess the amount the claimants would have received had they remained in the armed forces, deduct the amount of outside earnings and then apply a percentage discount to reflect the chance that she might have left the forces in any event.

13. In this case as a majority we have made clear findings of fact that the act of discrimination was the failure to shortlist and not a failure to appoint.

14. We have made findings that the claimant would not have been appointed and we draw attention to these findings at the following paragraphs of our Reasons: paragraphs 121-123 – it was a business analysis role which the claimant accepted was not a role she had been doing. The other candidate had more relevant recent experience within the respondent's organisation. The claimant would not have been ready to start in the role from day one. It is clear from these findings finding that Ms Ait-Mammar was the best candidate and therefore if she had been interviewed in competition with the claimant are finding is that Ms Ait-Mammar would still have been the successful candidate.

15. Our view is had the claimant been interviewed in a proper process, with a fair-minded manager and based on the respondent's policy set out at paragraph 36 of our Reasons and our findings at paragraph 81, we find that the claimant had a 20% chance of being appointed. We are also persuaded in this view by Mr Pensa's evidence that he thought the claimant as a candidate was "*strong and good*", Reasons paragraph 107.

16. On the second vacancy which was for maternity cover, our finding was that the claimant needed support in the role and the amount of support she needed was particularly relevant for a temporary appointment as there was not enough time to give her a learning opportunity. Absent any discrimination, we find that the claimant would have been made aware of the vacancy and would have been interviewed. We also find that had the claimant been interviewed on the first vacancy she would have, as submitted, received feedback on how she needed to step to up to meet the requirement of the role. We weigh the fact that our finding was that Ms Roman had been doing the same job in a Group company but there were reservations about her communications skills in English. This was a maternity cover role. We find that the percentage chance of the claimant securing the maternity cover role was 30%.

17. On the third application we found that there was a requirement for five years' experience in controlling which the claimant did not have. Even had she been successful at an earlier stage she would still not have had the five years' experience. By this stage the claimant would have received feedback from two previous interviews and we find would have had received the guidance that she needed in order to help her step up. This was the vacancy on which Mr Pensa was the interviewer and considered the claimant's CV "*strong and good"* and conceded that he would possibly have invited her for interview (paragraph 109). This leads us to find that there was some flexibility on the five year requirement.

18. Nevertheless our finding is that Ms Railhac was a stronger candidate. We therefore find that the percentage chance of the claimant securing the role was no more than 30%.

The law

19. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides that a tribunal may, either on its own initiative or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Conclusions

20. As a result of our findings above, our original majority judgment is varied to the findings that on the first vacancy the claimant had a 20% chance of success and on the second and third vacancies a 30% chance of success.

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Case Number: 2206044/2017
Employment Judge Elliott
Date: 21 December 2018

Judgment sent to the parties and entered in the Register on: 10:1:19 .

_____ for Secretary of the Tribunals