



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE F SPENCER
MEMBERS: MR D CARTER
MS P BRESLIN

CLAIMANT Ms A Willis

RESPONDENT National Westminster Bank plc

ON: 24-28 April 2023

Appearances:

For the Claimant: Mr P Gilroy QC, counsel
For the Respondent: Mr C Crow, counsel

JUDGMENT AS TO REMEDY

1. In the absence of the found discrimination the Claimant's secondment to the post of head of OCiR would have been extended until December 2020.
2. The Claimant would not have been appointed substantively to the role of Head of OCiR .
3. The Claimant had a 75% chance of being appointed to a permanent post within the Respondent to take effect once her secondment had come to an end. The Tribunal assesses the likely salary for that permanent post at £97,000 per annum.
4. The Claimant would not have been entitled to any additional bonus for 2019.

5. The remaining issues as to remedy will be considered over 3 days from 16-18 May 2023 as previously advised.

REASONS

1. In a judgment sent to the parties on 14 February 2022, the Tribunal found that the Claimant had been unfairly dismissed and that her claim that the Respondent had discriminated against contrary to section 15 of the Equality Act was successful in part .
2. The Claimant was already under notice of redundancy at the time of her dismissal. Following a hearing on 28th and 29th November 2022 the Tribunal directed that Polkey/Chagger issues (i.e. how long the Claimant would have remained in employment absent the unlawful treatment and at what salary) should be considered in the first instance, before considering future loss. The issues for determination at this hearing were as follows:
 - 2.1 In the absence of any of the found discrimination, what position would the Claimant have secured and, thereby, what would the Claimant have earned with the Respondent? In particular:
 - a. For how long would the Claimant's secondment to the post of Head of OCiR, Centre of Excellence have been extended (at her then current rate of remuneration)?
 - b. In addition, or in the alternative: would the Claimant have been appointed substantively to the role of Head of OCiR, Centre of Excellence, and, if so, at what rate of remuneration?
 - c. Would the Claimant have been (fairly and lawfully) made redundant at some stage in the period after the termination of her employment with the Respondent?
 - d. In the further alternative: would the Claimant have been appointed substantively to a role with the Respondent other than Head of OCiR, Centre of Excellence, and, if so, when and at what rate of remuneration?
 - e. But for the discrimination what, if any, bonus would the Claimant have been awarded in the period determined by the Tribunal to be applicable in respect of her past and future losses?
3. We heard evidence from the Claimant. On behalf of the Respondent, we heard evidence from:

- 3.1 Ms L Lambourne, who managed the Claimant from September 2019 and who at the relevant time headed up the Resolution Planning Programme team.
- 3.2 Ms T Ferguson, Head of Internal Service Management (ISM) at the Respondent: and
- 3.3 Ms L McGeoch, Head of People Relations from 1 October 2020.

We had an extensive bundle of documents.

4. On the third day of the hearing Mr Gilroy applied on behalf of the Claimant for a reconsideration of paragraph 7 of the Tribunal's liability judgment. In that paragraph, after noting that the Claimant was notified of a vacant position in Ms Pagnell's team as Head of OCiR, we continued "*This was a new role that had recently been approved by the Respondent at grade ICM 4/Upper manager (the same grade as the claimant) and based in Edinburgh.*" (This grade subsequently translated to a C11 on the new grading classifications.) Mr Gilroy said that a new document had come to light which proved that the Claimant was a D12 and not a C11. The Respondent denied that the document proved any such thing.
5. For reasons given in the Tribunal we declined to reconsider our judgment. We have proceeded on the basis that the Claimant's substantive grade at the time that she was dismissed was C11.

The law.

6. In considering what loss flows from a discriminatory act or an unfair dismissal, it is for the Tribunal to assess, as best it can, what would have happened had there been no such unlawful treatment. The House of Lords held in Polkey v AE Dayton Services Ltd 1988 AC344 that where a dismissal is unfair for procedural reasons it is not rendered fair merely because the dismissal would probably have occurred in any event. The dismissal remains unfair, but the compensation is calculated by reference to the extent of the chance that the employee would have remained in his job had proper procedures been adopted. If dismissal was a certainty, there is no loss.
7. As was set out by Elias J (as he then was) in Software 2000 Ltd v Andrews 2007 IRLR 568 in assessing the loss that flows from an unfair dismissal a Tribunal must assess how long the employee would have been employed but for the dismissal. This will involve considering the chance/prospect that the Claimant could have been lawfully dismissed at some stage in any event.
8. The same principle applies to discriminatory acts and dismissals. Chagger v Abbey National plc 2010 ICR 397. As was said in that case: "*in many cases the starting point in the case of the discriminatory dismissal will be the period for which the employee would have been employed by his dismissing employer. For example, if the employer can show that the dismissal would have occurred in any event after a specific period of time, for example because of redundancies... Then this will normally set the limit to the compensation payable.*"

9. If the employer cannot show (on the balance of probabilities) that the dismissal would have occurred in any event after a specific period of time, the Tribunal may consider the percentage chance that the Claimant would have been lawfully dismissed within a particular period. The tribunal may instead decide that there was a chance of a lawful dismissal but less than 50% and then assess the percentage chance that this would have happened and reduce compensation accordingly.

Evidence and conclusions

10. In our liability judgment we found that the Claimant was not redundant and that the work which she was doing continued to exist. We found that, absent the discrimination which had occurred, the Respondent would have made a case for the Claimant to be made permanent or for a continuation of her secondment. We found that it was this omission which was the operative cause of the termination of the Claimant's employment. In particular we concluded that, absent the discrimination, the Respondent was likely to have sought, and obtained, approval for the continuation of the Claimant's secondment or for her to be confirmed in post on a permanent basis, although we accepted that the Respondent was unlikely to get approval for the role to continue both in London and at the Claimant's existing rate of remuneration indefinitely.
11. At the time of the Claimant's dismissal she was in a seconded role as "Head of OCiR". That secondment was due to come to an end on March 4, 2020. Her original contractual position had ceased to exist.
12. In our liability judgment the Tribunal found that, absent the discrimination, Claimant would have continued in her role either in a seconded or on a permanent basis. We accept that the Respondent's policy is for secondments not to last more than 12 months, and we accept the evidence of Ms Ferguson that in her experience she was unaware of any exceptions to this policy that had taken the total period of secondment beyond 18 months.
13. The post to which Claimant was seconded to was a permanent post. The Claimant obtained it by way of a secondment because the permanent role was based in Edinburgh and commanded a lower salary than the Claimant. It had not been possible to get the role transferred to London in the short window of time available before the Claimant's notice period came to an end. However, her line manager Ms Pragnell thought that there was a realistic chance that the role could be switched to London.
14. OCiR was part of the Resolution Planning programme. When the Claimant had initially been seconded to the role of Head of OCiR, the work was a project-based activity. OCiR was a new regulatory requirement that came into effect on 1 January 2019. In her previous role the Claimant had been involved with embedding OCiR. Day one compliance had been achieved by the time the Claimant joined the team. Her role as Head of OCiR was to implement OCiR and to set up the business as usual (BAU) operating model and processes. It was funded from the Resolution programme, rather than from a BAU budget.

15. After the Claimant left the Respondent, Mr Jetuah was recruited. His work was initially funded from the Resolution programme but at some point in 2020 he went on to a BAU budget. We accept that, over time, the work was moving from project based to BAU, and this was a gradual process. When the Claimant left the Respondent, this gradual shift was taking place but had not yet been completed.
16. As we have said OCiR was part of the Resolution Planning programme. This was due to complete in December 2020. In the latter half of 2020, when we have found that the Business should have been seeking an extension to the Claimant's secondment (or applying for her role to become permanent), it was anticipated that the Resolution Planning programme would have completed by December 2020, and that from then on there would only be BAU work remaining. We accept that the BAU work did not require an individual of the Claimant's seniority.
17. Given those facts and doing the best we can on a hypothetical basis we conclude that, absent the discrimination, the Respondent would have sought and obtained an extension to the Claimant secondment at her existing rate of pay and in her London location until December 2020. It is unlikely that they would have sought to make the role permanent given that it was anticipated that the project work would have finished by December 2020. We therefore considered that the Claimant should be awarded the whole of her loss at her then existing rate of pay until December 2020
18. As at December 2020 the Claimant's role as it was would have ceased to exist. In her extended secondment the Claimant would have remained at risk of redundancy until the role came to an end in December.
19. Beyond December 2020 the position was more uncertain. The Claimant says that she would have obtained another role. She says that her success rate for the 12 internal interviews she had at the bank was 83%. Equally, over her time working for the Respondent, the Claimant had applied for a significant number of jobs for which she had not been shortlisted for interview.
20. We therefore looked at the available jobs that the Claimant might have applied for in the period from September to December 2020 to assess the percentage chance that she would have been successful in obtaining one of those jobs.
21. The Claimant's grade within the bank was C11. As such she would have been entitled to apply for jobs at one grade higher, namely D12 roles. We accept that her role as Head of OCiR was at the higher end of the type of jobs that were undertaken by those at C11.
22. The Respondent has produced a list of available roles in the period. The Claimant says there were 14 permanent D12 roles that she would have applied for between September and December. She also says that, as a backup measure, she would have applied for 12 C11 roles. These roles are identified all at paragraph 43 – 45 of her first remedy witness statement.

23. Of the roles identified by the Claimant some were in London, and some were based in Edinburgh. We considered that the Claimant would have concentrated her efforts on London roles (commanding as they did significantly higher salaries) but that she would have, if necessary, considered and taken an Edinburgh role. Although the Claimant's family was settled in London, by December 2020 the coronavirus pandemic had significantly affected the Respondent's requirements for jobs to be done in the office. Mr Jetuah, for example, who left the Respondent in March 2021 conducted his role entirely from home.
24. Ms Lambourne on the other hand says it is unlikely that the Claimant would have been appointed to a D12 role. She says that the Claimant was not demonstrating senior management skills by the time she left the Respondent. As one went up the chain of seniority there were fewer jobs available and more competition for them. Two C11's in her team, who had previously worked in D12 roles elsewhere, had applied for D12 roles without being able to secure them despite the fact that both were high performers (one being ranked a 5 and the other being ranked a 4 for the 2021 performance year). Performance was a key factor in determining promotion prospects. Promotion to D12 tended to be given to those with the higher performance ratings.
25. In the period from 1 September 2021 to 31 August 2022 only 2% of C11's were promoted to D12
26. During her employment (2013 to 2019) the Claimant had received a performance rating of 4 in 2 of those years, and a performance rating of 3 in five of those years .
27. In her first witness statement Ms Lambourne's accepted that the Claimant would have been considered for some seven roles that were being recruited to between March and December 2020. Whether she obtained the role would have depended on who else had applied and what their experience and qualifications were. In her second supplemental witness statement Ms Lambourne comments on a number of additional roles. Of those which are advertised as being available prior to December 2020 Ms Lambourne accepted that the Claimant might have been interviewed for 4C11 roles and one D12 role.
28. All C11 roles had a salary range attached to them. An individual being appointed to a C 11 role on a permanent basis would attract a salary within that range. There was a policy within the Respondent to transfer jobs to Edinburgh unless the necessary skills could not be found in that location. It's In 2020 the salary scale for C11 jobs nationally (i.e., outside London) was between £60,840 and £91,260. For inner London roles within Treasury the range was between £61,520 and £122,820 (p221).
29. D12 roles did not have a fixed salary range. They were individually negotiated. The lower quartile, upper quartile and median salaries for D12 roles in three different business areas (Control, Business Management, and Risk Oversight and Challenge) are set out at pages 1076/1077. For non-London roles salaries

range between £84,650 and £115,000 . In London the salaries range between £107,500 and £150,625.

30. It is not for this this tribunal to identify any specific role that the Claimant would or would not have got. Instead, in assessing what would have happened we have taken a broad view of the evidence we have heard, both from the Claimant and from the Respondent's witnesses, as to the Claimant's abilities and prospects for promotion and the roles that were available, had she been able to apply for new roles after she had returned from her sick leave.
31. Inevitably in a case as polarised as this one, the parties' assessment of the chances of the Claimant getting alternative employment is widely divergent. The Claimant considers that she would have had a very good chance of getting some 170 roles (over a period until early 2022) - a position which we find to be unrealistic. On the other hand, it was clear from the evidence that there were a significant number of roles available during 2020; and we accept that the Claimant's record at interview has been good. We consider that the Claimant's chances of obtaining a C11 role were significantly greater than her chances of obtaining a D12 role. Equally her chances of obtaining a national or non-London role were greater than her chances of obtaining a London role.
32. Taking a broad view of the Claimant's chances of finding another job during her extended secondment, we considered that the Claimant had a 75% chance of obtaining another job within the Bank before her secondment came to an end in December 2020. We also found that given the Claimants protected salary any permanent post was likely to entail a reduction in the Claimant's current salary.
33. Assessing her likely future salary as best we can conclude that her likely salary had she remained at the Respondent in a new permanent position was likely to be in the region of £97,000. This equates to a salary just above the mid point for London based C11 treasury roles, or in the low to mid range for a D12 outside London reflecting our assessment of the relative chances of the Claimant getting (i) a job at D12 and/role or (ii) a London role.
34. In the Tribunal's liability judgment we concluded that the Respondent did not discriminate against the Claimant when setting her 2019 bonus; although we commented that the question of whether the Claimant would have got a higher bonus were it not for the discriminatory treatment might be an issue at the remedy stage. If the Tribunal had concluded that the Respondent would, absent the discriminatory conduct, have made her job permanent at the time the bonuses were determined, then it may be that the Claimant would have got a higher bonus as she would no longer be under notice. In the event, we concluded, on the balance of probabilities, that the Respondent would have extended the Claimant's secondment, rather than making the job permanent , so she would remain under notice. On that basis there is no reason to conclude that, absent the discrimination, the Claimant would have received a higher bonus.

35. In relation to bonuses for 2020, bonus awards are decided in February. By February 2021 the Claimant would no longer have been head of OCiR. We do not know what the Respondent's policy is in relation to bonuses if an employee has moved jobs during the bonus year and we will defer any assessment of what the bonus for 2020 would have been to the next hearing. We consider it appropriate to assume that, if the Claimant did get another job, she would continue to be performance assessed as a 3.
36. The remaining issues will be determined at the hearing beginning on 16th May 2023.

Employment Judge Spencer
12/5/23

JUDGMENT SENT TO THE PARTIES ON
12/05/2023

FOR THE TRIBUNAL OFFICE