



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs Katia Segor

v

Secretary of State for Justice

Heard at:

Watford

On: 9 and 10 October 2023

Before:

Employment Judge Alliott

Members:

Mrs J Hancock

Mrs A Brosnan

Appearances

For the Claimant:

Mr Matt Jackson (counsel)

For the Respondent:

Ms Kate Balmer (counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent on 22 May 2017, initially as an Entry Level Grade 2 Operational Support Grade. By a claim form presented on 11 May 2022, following a period of early conciliation from 23 March to 27 April 2022, the claimant brings a complaint of victimisation (sections 27 and 39 Equality Act 2010).

The issues

2. Both parties have drafted lists of issues. These differ slightly but, in our judgment, are not materially different.
3. Taken from the claimant's list of issues, the issues are as follows:-

“THE CLAIM

The claimant's sole claim is one of victimisation contrary to sections 29 and 39 of the Equality Act (the “EQA 2010”).

ISSUES ON LIABILITY

Prohibited circumstances.

Did one or more of the prohibited circumstances under which it is unlawful to victimise an employee within the meaning of section 39(4) EQA 2010 occur? Namely did the respondent victimise the claimant:

As to the terms of the claimant’s employment;

In the way the respondent afforded the claimant access, or by not affording the claimant access, to opportunities for promotion, transfer or training, or for any other benefit, facility of service; and/or

By subjecting the claimant to any other detriment.

Protected act.

The protected act alleged concerns the disclosures made by the claimant to Governor Nicola Marfleet at a meeting on 2 February 2022. [As the facts of the disclosures made and that they amount to a protected act are admitted by the respondent, so we do not set out the nature of the allegations in this decision.]

Alleged detriment.

Did the respondent subject the claimant to the detriment of changing her job role and pay grade? [Expressed in the respondent’s list of issues as: Did the respondent subject the claimant to a detriment by the respondent when, at the end of April 2022, in the Governor’s office, she was told by Governor Marfleet that her temporary promotion would end in May 2022?]

Because of protected act

If so, was any such treatment by the respondent because the claimant had done a protected act (whether consciously or subconsciously and whether as a sole or significant influence)?

Remedy

[Not set out here as not relevant]”

The law

4. Section 39(4) provides that:-

“(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

...

(d) by subjecting B to any other detriment.”

5. As per the IDS Employment Law Handbook “Discrimination at Work” at 19.13:

“In the light of the current wording, we would submit that the above three stage test can be adapted as follows:-

- Did the alleged victimisation arise in any of the prohibited circumstances covered by the Equality Act?
- If so, did the employer subject the claimant to a detriment?, and
- If so, was the claimant subjected to that detriment because of having done a protected act, or because the employer believed the claimant had done, or might do, a protected act?”

6. Further, as per the IDS Handbook at 19.59 “Detriment “because of” protected act:

“The essential question in determining the reason for the claimant’s treatment is always the same: What, consciously or subconsciously, motivated the employer to subject the claimant to the detriment?”

7. In addition, Ms Balmer, on behalf of the respondent, provided us with closing submissions wherein she has made submissions on the law and we record that we have taken those into consideration.
8. In addition, Mr Jackson, on behalf of the claimant, drew our attention to the case of Alcedo Orange Ltd v Mrs G Ferridge-Gunn [2023] EAT 78 wherein His Honour Judge Tayler cited with approval an extract from the case of Reynolds v CLFIS 9UK) Ltd [2015] ICR 1010 at paragraphs 33-36 dealing with decision makers and the correct approach to be adopted.

The evidence

9. We were provided with a hearing bundle running to 700 pages. The claimant also put in a bundle of 45 unpaginated documents which has not been referred to at all.
10. We had witness statements and heard oral evidence form:
- 10.1 The claimant
 - 10.2 Ms Nicola Marfleet, Governor of HMP Woodhill

The facts

11. The claimant was employed by the respondent on 22 May 2017 as a Band 2 Entry Level Operational Support Grade.
12. The claimant was clearly a good and hard working employee. She began training as a prison officer on 26 March 2018 and qualified as a Band 3 Prison Officer eight weeks later.
13. The respondent operates a system of temporary promotion whereby vacancies are filled on a temporary basis by staff already at HMP Woodhill.

14. Ms Marfleet told us, and we accept, that recruitment for full time roles can be a problem and can take time. The position has to be advertised internally and externally, candidates interviewed and certain qualifications such as 'Full counter terrorism clearance' have to have been applied for and approved. Sometimes the recruitment process could take time as there were no suitable applicants.
15. Normally the temporary position would be pending recruitment for a substantive appointment. The temporary role would normally be advertised internally and an employee could apply and have a short interview.
16. There could be other reasons for a temporary position such as covering block leave or maternity leave. The selection process for those vacancies would not be so formal.
17. There was something of a difference in emphasis between the claimant and the respondent as to the true nature of a temporary position. The claimant has contended that "acting up" or "temping" was used as a stepping stone towards promotion to a higher band. Being asked to "act up" or "temp" a post enabled Woodhill's senior management to fill a vacant post faster than waiting for the same person to pass the required "exam" and "board". The suggestion was that there was an informal procedure and/or legitimate expectation as far as employees were concerned that if a vacancy became available the employee would be able to fill it on a temporary basis and that recruitment would effectively be suspended pending the employee becoming eligible for the role on a full-time basis and being able to apply for it having passed the necessary accreditation courses and received the backing of line managers.
18. The respondent's position is that there is no such informal procedure, strategy or expectation. However, Ms Marfleet gave evidence that the length of any temporary promotion can be difficult to predict and therefore is ordinarily set at three months and then reviewed monthly at the WFP ("Workforce Planning") meetings and extended in increments of between one to three months at a time. In line with policy, no single person should remain temporarily promoted longer than two years but on rare occasions, due to exceptional reasons, (such as a delay in pending CTC (Counter Terrorism Clearance) for a successful candidate arriving), that could be extended slightly longer. On this issue, we found some oral evidence of Ms Marfleet to be illuminating. She told us that on occasions when interviewing external qualified candidates for a substantive role they were found to be less good than the existing temporary staff acting up. Against a difficult recruiting environment, we readily understand why a perception amongst the workforce that a temporary position was a holding position before they could apply for a substantive role, became an expectation. However, we find the fact remains that for a substantive role the position had to be advertised internally and externally and promotion could not be guaranteed to those who had hitherto fulfilled the temporary role.
19. To an extent, the claimant's understanding was borne out by her own career. On 6 April 2020 she was appointed as a temporary Band 4 Supervising Officer. Initially that was to be until 30 May 2020. However, in reality she fulfilled that temporary role until successfully being appointed in

September 2021, some 18 months later. It is notable that during that time her first application for the role had not been successful. We were not told whether or not an external recruitment campaign was taking place during that period.

20. The claimant has suggested that people only step down back to their old band if they did something wrong or if they refused to sign a contract for the higher band. We do not accept that evidence. During the course of this hearing we have been referred to the monthly workforce planning meeting minutes which demonstrate that on a regular basis temporary appointments came to an end for a multitude of other reasons.
21. We note that during the course of these proceedings the claimant has endeavoured to amend her claim to include other protected acts. Although the claimant was not ultimately allowed to amend to include these matters, it is noticeable that she was contending that she had made protected acts in December 2018 and May 2019 concerning ill treatment on the grounds of her race and sex. The latter of these alleged protected acts concerned Governor Marfleet. Both of those alleged protected acts pre-date the claimant's placement as a temporary Band 4 Supervising Officer. That suggests to us that at that stage there was no attempt to penalise or apply any detriment to the claimant as regards her promotion within the service.
22. By September 2021 the claimant was working in the Separation Unit at the prison. Her line manager was Mr Ken Tangie (Band 5). We were told and accept that the Separation Unit was a specialist unit where extremist prisoners were held on the grounds that it was deemed necessary because of their ideology, to keep them entirely separate from other prisoners. Staff working there are given additional training as part of working on that wing.
23. In 2021 HM Prison Woodhall was provided with additional funding that enabled a new Band 7 post to be created in the Separation Unit. Until that time it had been run by Mr Tangie.
24. Due to a staff member leaving there was also a vacancy for a Band 7 Deputy Head of Residence.
25. Accordingly, in September 2021, the prison advertised two Band 7 vacancies internally and externally. Some candidates were interviewed in or around September 2021 and none were successful.
26. The WFP meeting notes from 9 September 2021 state that the two Band 7 interviews were due.
27. The WFP meeting notes from 14 October 2021 confirm that the two Band 7 recruitment campaigns had been unsuccessful.
28. Consequently, the respondent had two vacant Band 7 substantive roles. It is the claimant's evidence that on 13 October 2021 she was approached by Mr Julian Barnes who was the Senior Leader for all of HU6 Section. She was told that management wanted her to act up into a Band 5 post. She was informed that Mr Ken Tangie was going to Band 7 and that consequently she could move to Band 5.

29. The claimant accepts that she needed time to think about it as it would involve a lot of extra work and time to do it properly and she wanted to talk to her husband to ensure she had his support.
30. On 15 October 2021 she informed Mr Barnes that she would like to take the opportunity to act up as a Band 5 Custodial manager.
31. Having accepted the temporary position, on 15 October 2021 Ms Marfleet sent the claimant an email as follows:-

“Hi Katia –

Congratulations and thank you for being willing to help us out on the SEP Centre as a temporary promoted Band 5 from 1 November.

I’m sure it will be a challenge as much as it will be an opportunity, and I want to say from day one that both Sarah and I want this to be a success for you and are here to support you.”

32. At the same time a Mr Marvin Lane was appointed to act up to the Band 7 role in the Deputy Head of Residence position. As he was a substantive Band 5, so another employee also stepped up from Band 4 to fill his position.
33. On 15 October 2021 Governor Marfleet sent a generic email to senior managers which states as follows:-

“Hi Teammates,

As you will be aware, our recent board to appoint Band 7s was not successful and I’m pleased that Ken Tangie has agreed to act up as Band 7 – Head of Separation Centre starting from 1 November on his return from leave.

...

To backfill the gap left by Ken on Sep Centre, Katia Segor will also be temporarily promoted from SEP Centre SO to SEP Centre CM from 1 November. On this occasion, we have only considered SOs trained to work on the SEP Centre for this vacancy due to the specialism of the wing. Other gaps created more widely will be decided from recent expressions of interest submitted for both B5s and 4s, filling the Dep Head of Res first, then working down in grades, filling as we go.”

34. It is noticeable that in the claimant’s witness statement she states that earlier in September 2021 a number of vacancies for “temp” CMs were advertised in Woodhill’s newsletter. She says that she discussed it with Mr Barnes and they agreed that, given that she had only just secured her role as a Substantive Band 4 SO, so she should continue to gain experience in that role before applying to move up.
35. Unusually, the temporary role that the claimant decided to fill in October had not been advertised more widely as the specialist nature of the Separation Centre meant that they needed staff who were trained to work in the Separation Centre. The claimant was actually the respondent’s second

choice for the role. The claimant's initial appointment was until 31 December 2021.

36. The WFP meeting notes from 11 November 2021 include the following:-

“Band 7 – 1.00 will be looking to advertise February/March time in line with completed assessments.”

37. Ms Marfleet told us and we accept, that often there was a pause in recruitment to allow another cohort of potentially qualified individuals to emerge. If the recruitment process was repeated too quickly they would just get the same candidates applying again. Ms Marfleet was unable to tell us why only one Band 7 position was referred to in those notes.

38. In the WFP meeting notes from 9 December 2021 there is a similar reference to a Band 7 x 1 position.

39. In the WFP meeting notes from 13 January 2022 the position is clearly changed as there is a reference to:-

“Band 7 – 2.00 ongoing recruitment.”

40. Hence it is clear to us that a decision had been made to readvertise the permanent Band 7 roles before the claimant's protected act on 2 February 2022. As such those actions cannot have been taken in light of the protected act.

41. On 31 January 2022 the claimant contacted the respondent's organisation “Tackling Unacceptable Behaviour Unit” (“TUBU”) outlining her complaints. Governor Marfleet was informed of this on 1 February 2022 and set up a meeting via teams for 2 February 2022. During the meeting the claimant made the disclosures that are agreed to be protected acts.

42. We have the minutes of the meeting with the claimant on 2 February 2022. Those notes record Governor Marfleet being sympathetic to the claimant, stating that she appreciated her bravery, expressing sorrow that she had had to live with the matters raised and assuring her that she would be protected/safeguarded from negative consequences. We find that those sentiments were genuine and not synthetic.

43. The WFP meeting notes from 10 February 2022 indicate that the recruitment process for the two Band 7 positions was “Interviews in progress.”

44. The claimant's temporary appointment was extended in November 2021 until 31 January 2022. Although we have not seen the documentation it is clear that the claimant's temporary position was extended for a further two months because there is a further extension from 29 March until 31 May 2022.

45. The WFP meeting notes for 10 March 2022 indicate that the Band 7 interviews had been completed and two successful candidates, Hawa Rogers and Karen Blake, had been identified. The apologies indicate that Governor Marfleet was absent from that meeting.

46. It is the claimant's evidence that on 18 March 2022 she was informed by Mr Barnes that Governor Marfleet had decided to end her time acting up as CM. We find that that probably happened. We find that the decision was made ultimately by Governor Marfleet that the claimant's time as a temp Band 5 would end. We find that there is nothing sinister in the fact that this is not specifically minuted in the WFP meeting notes. Having successfully identified and appointed two new Band 7 Managers, it seems to us obvious and a matter of purely administration that those parties fulfilling the Band 7 roles on a temporary basis would revert back to their substantive roles. Further, it seems to us obvious and a matter of administration that upon Mr Ken Tangie reverting back to his Band 5 role so, for a similar reason, the claimant would cease acting as a Band 5 temporary and revert back to her Band 4 role. We were told that the acting Band 7 Deputy Head of Residents, Mr Marvin Lane, also reverted back to his substantive Band 5 role. Governor Marfleet could not remember if the acting Band 5 had reverted back to his/her Band 4 position but we find that that probably happened.
47. The alleged detriment as identified in the respondent's list of issues relates to the claimant being told at the end of April 2022, in the Governor's office, by Governor Marfleet, that her temporary promotion would end in May 2022. There is no real issue as to whether or not that event took place and we find that it did. Further, we find that that it related to a term of her employment and was a detriment.
48. There was some delay in the new Band 7 appointees taking up their positions. This is because there was an HM Prison Inspectorate inspection into the Separation Unit scheduled for the week commencing 11 April 2022. Governor Marfleet explained to us that the reason for the delay in the new appointees taking up their positions was so that the claimant and Mr Tangie would be in a position to deal with the inspection. In our judgment that is an entirely valid reason to delay the start of the Band 7 appointees.
49. In actual fact, the Band 7 position in the Separation Unit was filled by an existing Band 7 employee. Mr Joe Lawson, from the Offender Management Unit (OMU), and the two new Band 7 appointees filled the Band 7 Positions at the Deputy Head of Residence and the OMU units.
50. We disagree with Mr Jackson who has submitted that at the end of the Band 7 recruitment process the respondent had not identified someone who was able to fulfil the Separation Unit Band 7 role. We find that they had recruited someone who was able to fulfil the role but that, for good management reasons, they had a better candidate internally to be transferred to do that role due to his greater experience of high security prisoners.
51. We note that in subsequent dealings with the claimant Governor Marfleet encouraged her to apply for other temporary Band 5 positions.

Conclusions

52. We find that the only motivation for the respondent's decision to terminate the claimant's temporary position as a band 5 was that Mr Ken Tangie was returning to that role. We find that the only reason for Mr Ken Tangie

returning to his Band 5 position was that a permanent Band 7 employee was to be transferred to fill that position.

53. We find that the claimant was not subjected to a detriment because of the protected act.
54. Consequently the claimant's claim is dismissed.

The case of Plaistow v Secretary of State for Justice – case number 3400502/2016

55. At the start of this hearing we were handed a decision of the Employment Tribunal in a case involving Mr B Plaistow v Secretary of State for Justice. This was a decision of the Employment Tribunal issued by Employment Judge Ord on 5 February 2019. The hearing of the case had taken 25 days and the decision contained in 419 paragraphs over 93 pages. Ms Balmer, on behalf of the respondent, complained that she had only been given that decision shortly before the hearing began. We determined to deal with any issues arising as and when they arose. This would give an opportunity to Ms Balmer to consider the case.
56. At the beginning of day 2 of this hearing Ms Balmer, on behalf of the respondent, complained that Mr Jackson, on behalf of the claimant, had informed her that he intended to cross examine Governor Marfleet about some of the conclusions said to be contained within that decision. Her objections were that it was inadmissible as evidence of fact and could only be relied upon as matters of opinion, that it would involve a mini trial within a trial given the length of the judgment and that any conclusions were not relevant to our decision making. Mr Jackson sought to rely on the contents of the decision as relevant to the issue of Governor Marfleet's credibility.
57. I record that we obviously did not have an opportunity to read the entirety of the decision. We were not taken to the parts that are said to be relevant.
58. Neither party made any lengthy submissions to us on the law that we should apply. We were not in a position to research any law. Consequently my advice to the panel was to approach the issue on the basis of relevance and fairness.
59. We concluded as follows:-
60. That cross examination or reference in submissions to findings of another tribunal based on different facts would not assist us as to the credibility of Governor Marfleet.
61. We consider that it would not be fair to Governor Marfleet to cross examine her on findings of another tribunal in circumstances where she may want to refer to other material in justification of her position. Further, we find that it would not have been fair to refer to the decision in closing submissions if they impugned her integrity and she had not had an opportunity to answer them.

62. We find that to allow questioning would not have been proportionate as it would inevitably have lengthened the trial process and resulted in an adjournment of this hearing which has only been listed for two days. For the tribunal to read the 93 page judgment itself would have taken a considerable amount of time.
63. Consequently, we ruled that matters arising from the decision in Plaistow should not be the basis of cross examination or submissions on the basis that it would not be relevant, would not be fair and would not be proportionate.
64. As it happens, when Mr Jackson tried to reopen the issue in submissions, we were informed by Ms Balmer that Governor Marfleet had given evidence in about 25 other cases. It is entirely conceivable that in her own defence this issue could spiral out of control with Governor Marfleet wanting to bring other decisions to our attention where she had been found to be a credible and reliable witness. We further concluded that this issue had been raised far too late.

Employment Judge Alliott

Date: 8 November 2023

Sent to the parties on: 3.12.2023

.....
For the Tribunal Office