EMPLOYMENT TRIBUNALS

Claimant: **Mr T Clements**

Respondent: **Suez Recycling and Recovery UK Limited**

ORDER MADE AT A PRELIMINARY HEARING by CVP

Heard at: **Birmingham** **On: 27 June 2023**

Before: **Employment Judge Gilroy KC**

Appearances

For the Claimant: In person
For the Respondent: Ms G Churchhouse, Counsel

JUDGMENT

(1) The Respondent's application for a costs deposit order pursuant to rule 39 of Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is dismissed.

(2) Directions for the further conduct of this case are set out at paragraphs 34 to 47 below.

REASONS

Case Summary

1. The Claimant was employed by the Respondent, the UK subsidiary of an international group of companies specialising in water services, waste management and recycling, as a Customer Relations Officer, ("CRO"), from 18 January 2021 until 5 September 2022.

2. By a claim form presented on 1 December 2022, the Claimant brought proceedings for unfair dismissal and direct sex discrimination. The unfair dismissal claim was struck out by order dated 19 January 2023 as the Claimant had not been employed by the Respondent for 2 years. The matter therefore proceeds as a claim of direct sex discrimination. The Respondent denies the claim.

3. The Claimant commenced employment with the Respondent as a CRO working in the Key Accounts team. During the COVID-19 pandemic, he worked from home. In September 2021, the Respondent amalgamated its Key Accounts Relations Management team for its Industrial and Commercial ("I&C") division by integrating it into the existing Customer Service Hub.

4. It is the Claimant's case that the amalgamation exercise was announced to him with no prior warning, that he was not consulted about the matter, and that he was shocked and dismayed that the job he enjoyed and was performing well in had been taken away. He maintains that the amalgamation exercise resulted in detrimental changes to his working pattern (essentially concerning his childcare responsibilities for his then 9 year old son). He maintains that he did not raise any issue in relation to the alleged changes at the time because he was advised that it would not "look good" if he protested, and that this could have a negative impact in terms of any future prospects. It is the Claimant's case that if he had been female, based on the way he had witnessed female members of staff being treated with regard to their childcare responsibilities, he was discriminated against as a male working parent who was also his son's primary carer.

5. It is the Respondent's case that all CRO's were required to work as part of the Customer Hub to manage the I&C key accounts and all other standard customers, and that whereas there were changes to the Claimant's line management, his substantive role and terms and conditions remained the same.

6. It is the Claimant's case that changes were soon being made to his working pattern which caused difficulties for him in terms of childcare.

7. The amalgamation process took place during COVID and in due course the Respondent devised a policy providing for two categories of home worker subject to line management approval, namely (i) Informal hybrid worker who was normally office based but may work from home for up to two days per week (pro-rated for part-time employees), and (ii) Formal hybrid worker who had a contractual arrangement where the home was either the main place of work or where a regular pattern of home working was contractual. CRO's were invited to make an application by 4 March 2022 should they wish to apply for a hybrid working arrangement in line with the above policy. Once applications were received by all interested CRO's, the Respondent decided to extend the offering of home working to three days per week for full time CROs and a consistent 60% home working arrangement applied to all part-time workers.

8. The Claimant made a flexible working request to work from home for 80% of the week on the basis that he was required to collect his child from school at 3.10 pm four days a week and given that (a) it was not an option for his son to attend any after school clubs for personal reasons, and (b) he did not have any other childcare options.

9. The Claimant attended a meeting in relation to his flexible working request with Daniel Gillert (Business Development Manager) on 7 April 2022. It is

the Claimant's case that he was treated in an insensitive manner at that meeting, and that thereafter he was discriminated against by the Respondent on the grounds of his gender.

10. Mr Gillett considered that the implementation of 40% of the working week in the office was already over and above the Respondent's stance on hybrid working arrangements and could not be further adjusted.

11. Shortly after the meeting on 7 April 2022, the Claimant commenced a period of sickness absence and, on 13 April 2022, submitted a grievance relating to (a) the conduct of the meeting on 7 April 2022, (b) the decision on his hybrid working request, and (c) lack of consultation about the change to his role in the autumn of 2021.

12. The Claimant attended a grievance outcome meeting on 17 May 2022. In terms of the complaint about the conduct of the meeting on 7 April 2022, it was determined that the meeting had not gone well for either party, but that this should not prevent the parties from moving forward. It was determined that the Claimant would work in the office two days a week until his son attended senior school in September 2023. The complaint of lack of consultation was not upheld. The Claimant asked for the outcome to be put in writing. There was considerable delay in the outcome being produced (the Respondent's case is that this must have been due to postal issues) and when it arrived, on 18 July 2022, according to the Claimant it was not satisfactory, in that it was "generic" and did not address his concerns. By this stage he was out of time to present an appeal.

13. Whilst the Claimant awaited the outcome of his grievance he remained absent from work. He continued to submit notes from his doctor certifying his absence and he was reviewed by the Respondent's occupational health provider.

14. It is the Respondent's case that during a welfare meeting with the Claimant on 18 August 2022, he agreed to return to work on 12 September 2022 with a call being scheduled with his line manager on 8 September 2022 to discuss his phased return to work.

15. However, the Claimant resigned on 5 September 2022, alleging that he had been discriminated against on the grounds of gender and as a result of being a male working parent, and as such he felt he could not return to work.

Procedural Background

16. From the outset, the Respondent maintained that further Information was required in relation to the Claimant's claims in order to enable the Respondent to understand the case it had to meet. Further particulars were provided at the preliminary hearing on 24 January 2023. The Claimant clarified that he was making 8 discrete complaints of direct sex discrimination as set out at paragraphs 31.1 to 31.8 of the order issued at that hearing. Reference is made to that order (which need not be set out here, given that, with some modification, it forms the basis of the list issues

in this case - see paragraph 17 below).

17. Following the preliminary hearing on 24 January 2023, the Respondent served Amended Grounds of Resistance and produced various iterations of a draft list of issues. No formal agreement had been reached on the Respondent's draft list by the time of the preliminary hearing on 27 June 2023, but at that hearing the Claimant did not object to the Respondent's draft list and raised no complaint in relation to the formulation of the issues as set out therein. The list is attached hereto marked "Appendix 1".

18. Also following the preliminary hearing on 24 January 2023, the Respondent again sought further information as to the basis of the Claimant's claim. Following an exchange of correspondence with the Claimant, the Respondent intimated that it intended to seek costs deposit orders in respect of a number of issues in the Claim, on the basis that certain of the claims articulated stood *"little reasonable prospect of success"* within the meaning of rule 39 of Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Tribunal rules"). The relevant detail of the exchanges between the parties is set out in the discussion which follows.

19. The Respondent having intimated an intention to seek deposit orders, the Tribunal directed that the Respondent formalise that application in writing and serve it on the Claimant in advance of the preliminary hearing of 27 June 2023. The Respondent duly complied with that direction.

Respondent's application for a costs deposit

20. Rule 39 of the Tribunal rules provides as follows:

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.

21. In its written application, the Respondent sought deposit orders in respect of 5 headings amounting to 14 issues as set out in Appendix 1, as follows:

Heading 1 (3 issues)

21.1. *"In respect of paragraph 5(a), (b), (c) the factual premise that the Claimant 's role changed from key accounts to customer hub, in light of the fact his contract of employment stated "Land or Street Customer Hub" as his role. The Respondent does not understand this to be in factual dispute".*

Heading 2 (1 issue)

21.2. *"In respect of paragraph 5(c), the factual premise that prior to November 2021 the Claimant was working flexibly, no request for flexible working having been made. The Respondent does not understand this to be in factual dispute".*

Heading 3 (1 issue)

21.3. *"In respect of paragraph 5(e), the factual premise that the Claimant was not permitted to have a union representative with him and HR not being present in light of the notes at p.199 of the preliminary hearing bundle. The Respondent does not understand these notes to be in factual dispute".*

Heading 4 (1 issue)

21.4. *"In respect of paragraph 5(g), the allegation that he was treated less favourably on the ground of sex in not being permitted to be the primary carer for his son in light of the policy wording at p.154 of the preliminary hearing bundle which was applied to all individuals".*

Heading 5 (8 issues)

21.5. *"In respect of paragraph 5(a) to (h), deposit orders in respect of each of the claims as to the issue of less favourable treatment, on the ground that the Claimant has not set out any primary facts in his claim to establish less favourable treatment on the ground of sex so as to establish the "something more" capable of proving on the balance of probabilities unlawful direct sex discrimination:* ***Madarassy v Nomura International plc [2007] All ER (D) (Jan)*** *at p.56). As to this, the Claimant's response at p.141 of the preliminary hearing bundle fails to adduce any primary facts from which to establish less favourable treatment on the ground of sex".*

22. At the preliminary hearing on 27 June 2023, the Respondent narrowed its application to 4 headings amounting to 11 issues, by withdrawing its application by reference to the matters set out at paragraph 21.1 above.

23. Ahead of the preliminary hearing on 27 June 2023, the Respondent informed the Claimant that at that hearing it would be inviting the Tribunal to make awards of up to £1,000 per issue and indicated that the Claimant should come prepared to provide evidence as to his means.

24. The Claimant provided certain information as to his means at the preliminary hearing on 27 June 2023. In view of the determination of the Respondent's deposit application (see below), it is not necessary to say anything further on the issue of the Claimant's means.

Discussion and conclusions in relation to the Respondent's application

Heading 2 (1 issue) (see paragraph 21.2 above)

Respondent's contention: *"In respect of paragraph 5(c), the factual premise that prior to November 2021 the Claimant was working flexibly, no request for flexible working having been made. The Respondent does not understand this to be in factual dispute".*

25. The Respondent pointed to the fact that the Claimant's contract of employment provided (at clause 6.1) that his normal place of work was Landur Street (the Respondent's offices), and (at clause 7.1) that his normal working hours were 37.5 per week Monday to Friday. The Respondent pointed to the fact that it had a flexible working policy, a copy of which was contained in the preliminary hearing bundle, and submitted that the Claimant had made no application for flexible working before November 2021. The Respondent contended that it was therefore not open to the Claimant to argue that prior to November 2021 he had enjoyed the benefits of flexible working.

26. It was the Claimant's position that prior to November 2021 he was working flexibly. In an e-mail sent to the Respondent's solicitors on 19 June 2023, the Claimant said: *"….under the management of Gemma Goater, my having a child and being his primary carer was not an issue, as she herself was the primary carer for her own daughter Betsy, so much so that her daughter was even with her during zoom virtual meetings with myself and the rest of the key accounts team"*. It is not in dispute either that Gemma

Goater was the Claimant's line manager before the amalgamation exercise in the autumn of 2021, or that he had a change of line manager as a result of that process. It is entirely possible that prior to November 2021 the Claimant did not make a formal application for flexible working, but that is not to say that prior to November 2021 he was not working flexible hours. I am not satisfied that the Claimant stands *"little reasonable prospect of success"* in relation to this issue, and the Respondent's application is dismissed in relation to this issue.

Heading 3 (1 issue) (see paragraph 21.3 above)

Respondent's contention: *"In respect of paragraph 5(e), the factual premise that the Claimant was not permitted to have a union representative with him and HR not being present in light of the notes at p.199 of the preliminary hearing bundle. The Respondent does not understand these notes to be in factual dispute".*

27. Issue 5(e) is in respect of two meetings, on 7 April and 17 May 2022 respectively. In referring to the notes at p.199 of the preliminary hearing bundle, the Respondent was pointing exclusively to the notes of the meeting of 17 May 2022. That was certainly a meeting in connection with the Claimant's grievance. However, the meeting on 7 April 2022 was in relation to his flexible working request. Be that as it may, this does not matter for the purposes of the Respondent's costs deposit application. The Tribunal was provided with notes of the meeting of 7 April 2022. There is no reference in those notes to the need for (or the lack of attendance of) a union representative or a representative from HR. The notes of the meeting of 17 May 2022 contain this exchange *"SM:* (Sean Matty, chairing) *Thanks for attending. I will chair the hearing. SB* (Steph Browning) *here from HR for notes and advice. Is anyone companying you? TC: No I am OK"*. This provides the sole evidential basis upon which the Respondent bases its costs deposit arguments in relation to this issue. I am not satisfied, based on the above extract of the notes of the meeting of 17 May 2022, that the Claimant stands *"little reasonable prospect of success"* in relation to the issue in hand, and there is no evidence that the Respondent can point to in respect of the meeting of 7 April 2022 to support its costs deposit application on this issue. The Respondent's application is dismissed in relation to this issue.

Heading 4 (1 issue) (see paragraph 21.4 above)

Respondent's contention: *"In respect of paragraph 5(g), the allegation that he was treated less favourably on the ground of sex in not being permitted to be the primary carer for his son in light of the policy wording at p.154 of the preliminary hearing bundle which was applied to all individuals".*

28. The Respondent's Hybrid and Homeworking Policy provides as follows:

*"**Caring Responsibilities***

Any employee working from home, on either a formal or informal basis, must not have caring or supervisory responsibilities for children under the

age of 11 at the time when they are working. Any exceptions to this required due to an unplanned or domestic emergency must be brought to the attention of your line manager. For clarity, employees with caring responsibilities must have dedicated care arrangements in place during their contracted working hours".

29. The fact that the Respondent's policy so provides does not exclude the possibility that the Claimant was informed that he could not be the primary carer for his son whilst working from home, and it does not preclude the possibility that this represented less favourable treatment when compared to the treatment of the Claimant's alleged comparators on this issue. I am not satisfied that the Claimant stands *"little reasonable prospect of success"* in relation to this issue, and the Respondent's application is dismissed in relation to this issue.

    Heading 5 (8 issues) (see paragraph 21.5 above)

    Respondent's contention: *"In respect of paragraph 5(a) to (h), deposit orders in respect of each of the claims as to the issue of less favourable treatment, on the ground that the Claimant has not set out any primary facts in his claim to establish less favourable treatment on the ground of sex so as to establish the "something more" capable of proving on the balance of probabilities unlawful direct sex discrimination:* ***Madarasssy v Nomura International plc [2007] All ER (D) (Jan)*** *at p.56). As to this, the Claimant's response at p.141 of the preliminary hearing bundle fails to adduce any primary facts from which to establish less favourable treatment on the ground of sex".*

30. On 13 June 2023, the Respondent's solicitors sent the Claimant an e-mail inviting him to identify the primary facts that he intended to rely on to establish a prima facie case of discrimination in relation to the each of the acts listed at paragraph 5 of the list of issues. Enclosed with the Respondent's e-mail was a copy of the judgment of the Court of Appeal in ***Madarasssy***. The Respondent drew particular attention to paragraph 56 of that judgment, a frequently cited passage which is authority for the proposition that it is not sufficient for a claimant simply to prove facts from which the Tribunal could conclude that the Respondent "could have" committed an unlawful act of discrimination, on the basis that the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, and they are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an act of unlawful discrimination.

31. Responding by e-mail on 19 June 2023, the Claimant addressed a number of points raised in the Respondent's solicitors' e-mail of 13 June and said this:

    "It is my belief that had I have been female, due to the way I witnessed members of the opposite sex treated with regard (sic) their roles of caregivers that I was discriminated against for being a male working parent who was also my son's primary carer".

32. In this case, witness statements are yet to be exchanged. In terms of the substance of the parties' respective cases, each side has provided a formal statement of case: Grounds of Complaint in the case of the Claimant and (now Amended) Grounds of Resistance in the case of the Respondent. Each side has expanded upon its case in the form of e-mail correspondence and representations made now at two preliminary hearings. I am not satisfied that at a substantive hearing of this matter, when disclosure has taken place and witness statements have been exchanged, that the Claimant will fail to establish a prima facie case of discrimination in relation to the each of the acts listed at paragraph 5 of the list of issues. I am not satisfied that the Claimant stands *"little reasonable prospect of success"* in relation to the issues covered by this part of the Respondent's application, and the Respondent's application is dismissed in relation to this issue.

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Employment Judge Gilroy KC

Date_19th December 2023_

APPENDIX 1: DRAFT LIST OF ISSUES

(This list supersedes paragraph 32 - when read in conjunction with paragraph 31 - of the order made following the preliminary hearing on 24 January 2023).

1. The Claimant claims direct sex discrimination within the meaning of s.13 of the Equality Act 2010, "EqA".

Jurisdiction

2. Is each individual complaint under the Equality Act 2010, "EqA", brought within 3 months from the date of the act to which the complaint relates as required by s123(1)(a) EqA 2010, and as qualified by s140B EqA 2010?

3. If not, can the Claimant show that there was conduct extending over a period of time which is to be treated as done at the end of that period as provided under s123(3) EqA 2010?

    3.1. If so, what is the final act relied on by the Claimant? Alleged Constructive Dismissal on 5 September 2022

4. If not, is it otherwise just and equitable to extend time under s123(2)(b) EA 2010?

Direct Sex Discrimination

5. Did the Respondent engage in the following conduct? The Claimant relies on the following acts and comparators:

    (a) In November 2021 Daniel Gillert changing the Claimant's role from key accounts to the customer hub without consultation about the impact of the new role upon his caring responsibilities. The alleged comparator is Jade Hackett [Claimant to specify (i) the date in November 2021 (ii) how the change was communicated and (iii) how his treatment differed from that of Jade Hackett and how she is an appropriate comparator].

    (b) In November 2021 Daniel Gillert changing the Claimant's role to a lesser role without consultation. This was delivered verbally with no witness by Gemma Goater on 10/11/2021 at Malpass Farm, Rugby, CV21 1AT. This meant that his ability to manage his own accounts and time was taken away from him. The alleged comparator is hypothetical. [Claimant to confirm (i) how the change in role was communicated and (ii) when in November 2021. The Claimant relies on the following as particulars of the lesser role (i) lesser account value (ii) removal of book of business when working in the customer hub – Claimant to confirm].

    (c) In November 2021 Daniel Gillert changing the Claimant's role which meant that he could no longer work flexible hours as he had done so previously under his manager at the time Gemma Goater. nor have

his son in his sole care whilst working from home. The alleged comparator is hypothetical. [Claimant to confirm (i) how the change in role was communicated and (ii) when in November 2021 and (iii) when it was agreed he would work flexible prior to November 2021].

(d) On 7 April 2022 Daniel Gillert raising his voice and pointing his finger at the Claimant and saying <*I am getting really angry now*= and using a curt tone towards the Claimant in a meeting. The alleged comparator is hypothetical.

(e) On 7 April 2022 and 17 May 2022, Daniel Gillert not allowing the Claimant to bring a union representative and not arranging for someone from human resources to be present at a Grievance investigation and outcome meeting. The alleged comparator is hypothetical.

(f) On 17 May 2022 Daniel Gillert in collaboration with Katie Wakefield-Pierce making the decision to require the Claimant to work in the office two days each week. The alleged comparators are Jade Hackett, Louise Harris and Hayley Booth [Claimant to specify how Jade Hackett, Louise Harris and Hayley Booth are appropriate comparators].

(g) On 17 May 2022 Daniel Gillert in collaboration with Katie Wakefield-Pierce making the decision that the Claimant could not be the primary carer for his son whilst working from home. The alleged comparators are Jade Hackett, Louise Harris, Hayley Booth and Gemma Goater [Claimant to specify how Jade Hackett, Louise Harris, Hayley Booth and Gemma Goater are appropriate comparators].

(h) On 5 September 2022 the Claimant's resignation allegedly because of the acts described above.

6. If so, did the Respondent treat the Claimant less favourably than others or than it would have treated others?

7. If so, did the Respondent treat the Claimant less favourably on the grounds of sex?

Remedies

8. If the Tribunal finds that the Claimant has been discriminated against:

8.1. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

8.2. Is the Claimant entitled to a compensatory award?

(a) If so, what if any reduction should the Tribunal make to the compensatory award on account of ***Abbey National ple and anor v Chaggar [2010] ICR 397***.

(b) Can the Respondent show that the Claimant did not take reasonable steps to mitigate his loss?

i. If so, what reduction to the compensatory award is appropriate?

8.3. Is the Claimant entitled to an award for injury to feelings for any discrimination found by the Tribunal?

(c) If so, at what level?

8.4. Has the discrimination caused the Claimant personal injury over and above injury to feelings? If so, what compensation should be awarded for that?

8.5. Should any uplift or reduction be applied due to either party's failure to comply with the ACAS Code of Practice?

8.6. Should interest be awarded on the award?

(a) If so, at what rate?