



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

MS N PERSAUD

FLIXMEDIA LTD

Heard at: London Central

On: 19-22 February, 2024

Before: Employment Judge: Mr O Segal KC
Members: Ms M Pilford, Ms L Moreton

Representations

For the Claimant: Mr M Todd, counsel

For the Respondent: Mr R Katz, Litigation Consultant

JUDGMENT

1. The Claimant succeeds in her claim of constructive unfair dismissal and in one of her claims of victimisation (in respect of not being invited to a meeting on 3 August 2022).
2. The Claimant's claim for equal pay, a further claim of victimisation, and her claims of direct and indirect sex discrimination, discrimination because of her race, and discrimination because of her religious beliefs, are dismissed (the claims of direct and indirect sex discrimination, discrimination because of her race, and discrimination because of her religious beliefs were withdrawn by the Claimant).
3. The Respondent is to pay the Claimant the following sums:-

Basic award: £2,855; Compensatory award: £44,645; Injury to feelings: £1,000.

REASONS

The issues

1. The Claimant (C), at the outset of the hearing and by reference to an agreed List of Issues, clarified her claim as being:

1.1. A failure to pay her the same salary as a comparator, Liam Garvin;

1.2. A claim of constructive unfair dismissal; and

1.3. Two claims of victimisation, relying on a protected act of bringing an internal grievance complaining of an unlawful failure to pay her equally to Mr Garvin, being:

1.3.1. Not inviting C to a roadmap meeting on 3 August 2022 (the claim in relation to a meeting in July was not pursued);

1.3.2. Unilaterally changing her contract to the role of Junior Product Manager on 21 September 2022.

2. The tribunal gave permission, by consent, for the Claimant to re-label the claims at para 1.3 above as victimisation, rather than discrimination claims.

Evidence

3. There was an agreed bundle of 419 pages.

4. We had witness statements and heard live oral evidence from:

4.1. The Claimant; and (on her behalf) Mr Liam Garvin (LG);

4.2. For the Respondent (R), Ms Susana Zabarskaya (SZ).

5. We also read statements from Ms Nelli Rowsell (NR) and Mr John Hubner (JH), both of whom attended to give oral evidence, but whom C (sensibly) decided did not need to be cross-examined on their statements.

6. A statement had been filed and served on behalf R by Mr Richard Kirk (**RK**), but RK was not prepared to attend the tribunal (there was no medical or other impediment, apparently) and we therefore did not take his written evidence into account.
7. The three witnesses from whom the tribunal heard oral evidence were, we find, all doing their best to assist the tribunal by giving honest and, so far as their recall went, accurate evidence. The same is true of the written statements of NR and JH.

Facts

8. There were, in truth, very few if any disputed primary facts. We are therefore able to set out the relevant facts fairly shortly.
9. C was employed by the Respondent as Project Manager in 2016 (aged 27) and then as a Product Manager (**'PM'**) from April 2021.
10. The latter is perhaps the primary disputed fact, it being the Respondent's case that in fact, C's title was mistakenly stated to be PM in April 2021 (and thereafter until her resignation), but was in fact Junior Product Manager (**JPM**).
11. That case is not tenable. Not only did R provide a written contractual addendum dated 20 April 2021, signed by her manager, RK, confirming her title as PM (and increasing her salary to £45,000), RK also wrote to her on the same day saying "*you have met the challenges head on. I am pleased to see you are settling in well to your role as a Product Manager*".
12. There are several documents in which C's title is said to be PM, the most notable of which is an undated organogram, produced by R between April and September 2022 (probably towards the beginning of that period) showing SZ as Lead Product Manager and C and LG (in that order) reporting to her as PMs.
13. C's job as PM meant she had responsibility for various products and managing a team who worked on those products. Two of those products could be 'sold' as such to customers (though these were not being sold towards the end of her employment) and the main product was one which was used in conjunction with other products of R.

14. R recruited LG as a PM to manage 'data' products in October 2021. R was looking for someone with significant experience in that or related fields, with understanding of data products, market research experience and experience in dealing with clients. R either advertised (or at least stated on inquiry) that the salary for the role was £70,000.

15. SZ was initially recruited as a PM dealing with 'content' products, but was promoted to Lead PM in April 2022. Her initial salary was similar to that of LG; on promotion it rose to a level in excess of his.

16. For a time, the PM team comprised: RK as Product Director, C, LG and SZ and PMs; then RK as Product Director, SZ as Lead PM and C and LG as PMs.

17. The PMs all had the same functional responsibilities, but the products for which they were responsible differed, with consequentially different requirements in managing and marketing those products.

18. The team had quarterly 'roadmap' meetings from about mid-2021, at which they reviewed what the plans were for each of the products in that quarter and the following quarter or two.

19. In February 2022 C discovered LG was earning £25,000 more than her. She was surprised and felt it to be unfair. LG also felt that gap to be unfair to C. They both felt that, while some gap was justifiable, only a much smaller gap (perhaps up to £10,000) was justifiable.

20. C researched the market and in about March 2022 approached her then manager RK to put her case for a pay rise. She did not at that time suggest R was acting unlawfully.

21. From before April 2022 (perhaps as early as August 2021), SZ, who had a good working relationship with C and was broadly supportive of her getting a salary increase to reflect what the market more widely was paying, began an exercise of benchmarking C's role against a matrix (**the Matrix**) which R had drawn up when setting up the Product team and which included headings 'Junior PM', 'PM' and 'Senior PM'.

22. In June 2022 C raised, first informally then formally on 28 June, a grievance about her pay, citing equal pay legislation and referring to LG as her comparator.

23. NR was appointed to look into that grievance. NR interviewed C, LG, SZ and RK, to establish what, if any, differences there were between C's role and LG's role. It was at that time that RK told NR that it had been a mistake to state C's job title as being PM, that it should always have been Junior PM. NR concluded that there were significant differences in the levels of responsibility between C and LG; she accepted RK's account of the 'mistake'. On 29 July 2022, NR sent C a written grievance outcome, stating that on the basis of information provided by RK her job title should have been stated in April 2021 as Junior PM; she noted that it had been about 18 months since C joined the Product team; she set out her understanding of the additional responsibilities and experience of LG; she concluded that C's role "needs to be reassessed" by reference to the Matrix by the end of August 2022, "with a view of confirming the title and subsequently adjusting the salary level once that process is completed" (in that context she made reference to a company salary freeze due to difficult trading circumstances, but stated her view that if/when the assessment of C's role against the Matrix demonstrated that she was working as a PM, then R would have to award a salary increase).

24. For a period of well over a year, RK convened the 'quarterly roadmap meetings' with all the PMs from time to time including C. Apparently, there was concern in about the Spring of 2022 that the structure/content of those meetings was not as useful as had been anticipated and there was one occasion on which that meeting did not take place, but instead a meeting of only more senior people was convened. However, invitations were sent out for a 'quarterly roadmap meeting' on 3 August 2022 including all those who had been invited to the previous such meetings except for C. SZ's evidence is that she understood from RK that the reason for not including C was partly that the agenda was such that C would not be needed/able to contribute significantly. However, SZ also told the tribunal that RK's decision not to invite C was, she understood, influenced by C's attempt to 'level' herself with LG and that she believed that RK would have invited C to the meeting but for that fact, if only as a training or learning experience.

25. C appealed the grievance outcome in early August 2022 and JH dealt with that appeal. As part of that appeal, C acknowledged that the process of assessing her role against the Matrix was in principle appropriate and that some (much smaller) gap

between LG's and her salary was justified; she complained that NR had under-represented C's role and responsibilities and that she had not been invited to the quarterly roadmap meeting on 3 August 2022.

26. JH sent a written outcome on 22 August 2022. He repeated R's position that it had been a 'human error' to give C the job title of PM in April 2021; and confirmed that if as a result of the Matrix assessment, "you are operating at PM level your title will be confirmed and your salary adjusted." He said that process would be concluded by the end of the month. He said that his information was that C had not been invited to the 3 August meeting because the agenda was not relevant to her.

27. After several meetings between C and SZ, the assessment of C's job against the Matrix was concluded around the end of August and the result (delayed because of holidays in part) communicated to C in writing on 21 September 2022. The 'Outcome' stated: "Nargis is meeting all of the expectations of a Junior PM, but she is not yet performing at PM level". The reasons were, in SZ's opinion, partly that C's role did not require the strategic identification of KPIs for her products or the creation of plans to achieve those – by contrast with GL's role; and partly that C's performance of aspects of her role was not as good as SZ expected of a PM. SZ set out a summary plan for C to demonstrate that she was performing at PM level to be reviewed in early 2023 together with practical support for helping C achieve that, saying that the review would "include a review of title and salary".

28. C was bitterly disappointed to receive that outcome and sent a short letter of resignation the next day, saying that "*Due to the unreasonable breach (sic) of my upheld grievance, my position at [R] is untenable and my working conditions intolerable. This has left me no option but to resign [with immediate effect]*".

29. Since it is, strictly, a matter of fact, we also make the following finding. In responding to C's request for a pay rise by reference to LG and her rights under the Equality Act, R chose to analyse the position and make a decision by reference to whether C and LG were doing the same job or not. We explain below why we consider that was not the correct approach. However, having determined on that approach, partly as the result of information provided by RK including that C's job title had been 'mistakenly' stated to be PM, R considered it necessary to characterise the differences

between C's and LG's roles as the result of their having different jobs/job titles. It was for that reason that the outcomes to the grievance, the appeal and the Matrix assessment process were framed in the way they were. It seems also to have been part of the reasoning for that approach that, in light of the pay freeze operating in R at the time, C would only be able to have her salary significantly increased if she was promoted – that is, in order to increase her salary as a PM, it was necessary first to 'demote' her to Junior PM. Although one could interpret that part of R's motive as benign, it was not explained to C in that way in any of the documents we saw and there was no evidence it was explained to her orally in that way.

The Law

30. The relevant statutory provisions and case law were common ground and largely taken as read, save as identified below.

31. Section 65 of the Equality Act 2010 (**EqA**) provides that:

(1) For the purposes of this Chapter, A's work is equal to that of B if it is—

(a) like B's work, ...

(2) A's work is like B's work if—

(a) A's work and B's work are the same or broadly similar, and

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—

(a) the frequency with which differences between their work occur in practice, and

(b) the nature and extent of the differences.

32. At the first stage, it is agreed, one looks at the nature of the work, rather than the tasks performed – by reference to the requirements of the contract/job description and any other requirements of the role, whether or not the postholders are actually performing to the level of those requirements: see e.g. **Beal v Avery Homes** [2012] EWHC 1415 (QB) at [30].

33. At the second stage, one looks at the tasks performed, but without regard for whether different like/similar tasks require different skills: see e.g. *Samira Ahmed v BBC* Case No 2206858/2018. Lord Denning MR in *E Coomes (Holdings) Ltd v Shields* [1978] IRLR 263 CA, 266, commented, “*This involves a comparison of the two jobs—the woman's job and the man's job—and making an evaluation of each job as a job irrespective of the sex of the worker and of any special personal skill or merit that he or she may have...*”.

34. Section 69 EqA provides

(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which— (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and ...

35. It is for the employer to show a reason, untainted by sex, for the disparity in pay. In *Glasgow City Council v Marshall* [2000] IRLR 272, HL, Lord Nicholls said “[A] rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be the difference of sex.” He continued, “*The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a “material factor”, that is, a significant and relevant factor. ...*”

36. The employer must also show that the identified factor is “*a significant and relevant factor*” in order for it to be material: *Rainey v Greater Glasgow Health Board* [1987] AC 224.

37. Since C accepts that there is no ‘taint of sex’ in this case, we do not set out the law relevant to that matter.

38. In relation to the victimisation claims pursuant to s. 27 EqA, the only issues were factual. Were the alleged detriments because of the admitted protected act?
39. In relation to the constructive unfair dismissal claim, C relied on alleged breach(es) of the trust and confidence term, requiring R not to conduct itself in a way likely to cause serious damage to C's trust and confidence in R.

Discussion

40. Given that there was only one material disputed fact and no dispute about the applicable legal principles, we do not consider it necessary to set out each party's submissions. Suffice to say that we are grateful to both representatives for their written and oral submissions, which we refer to as appropriate below.

Equal pay

41. The tribunal had no hesitation in finding that C's work and LG's work were broadly similar. They were employed to do the same job, with very similar functional responsibilities, elements of overlap in actual tasks when one was assisting with or responsible for a product for which the other was primarily responsible.
42. As to whether the differences in their work/tasks were of 'practical importance', we find they were not, although we acknowledge that the comparison is not entirely straightforward.
43. R relied on LG's greater experience and seniority (in terms of length of working life) as entailing that he was able to deal with more complex products and was required to adopt a more strategic approach to the development and marketing of those products. We accept SZ's evidence that LG was expected to take that more strategic approach to a greater extent than C was (although SZ's evidence was that LG did not in fact do so to the expected level). However, that is not enough to persuade us that the nature and extent of the differences between their work were of practical importance (we note that most of the cases in which claimants failed at this stage involved consideration of comparisons where the claimant or her comparator was undertaking a clearly identifiable number of tasks which the other was not expected to perform at

all). We see the differences in this case to fall rather within the “*personal skill or merit*” category referred to in *Shields*.

44. As to ‘material factor’, C relied solely on the submission that R’s position that it needed to recruit someone to be the PM of its data products who had a level of experience in that or related fields, who had knowledge of data products and experience in market research, was – though genuine – objectively unwarranted and therefore not a ‘material’ factor.
45. First, we are not convinced that is the correct legal approach. Once it has been established (and here it was conceded) that “*the proffered explanation, or reason, is genuine, and not a sham or pretence*”, R needs only show that the pay difference “*is due to this reason. The factor relied upon must be the cause of the disparity*” (see above). The factors R relied on were, as a matter of fact, the cause of the pay difference. Moreover, we are in no position to judge whether R was objectively entitled to value the experience, etc, it sought when recruiting to the position obtained by LG.
46. We note in passing, to take an extreme case, that in *King's College London v Clark*, EAT/1049/02 (5 September 2003, unreported), the EAT held that an employer who had mistakenly concluded that a claimant was correctly graded at a lower level than her comparator could seek to rely on a material factor defence to an equal pay claim.
47. The equal pay claim must therefore fail.

Victimisation

48. On the basis of the evidence recorded at paragraph 24 above, it is clear that R has the burden of proving that the reason for not inviting C to the quarterly roadmap meeting on 3 August 2022 was not in any material way because of the protected act and that it cannot discharge that burden. This claim must succeed.
49. The allegation that “Unilaterally changing her contract to the role of Junior Product Manager on 21 September 2022” was because of the protected act, is difficult to adjudicate. As a matter of chronology, R seemed set on that course (via the Matrix assessment) from at least April 2022 when it was exploring whether C merited a pay

rise, some months before the protected act at the end of June 2022. On balance, the tribunal considered that the protected act in June 2022 (supporting the claim for a pay rise by reference to R's duty under the EqA) did not make a materially causative difference in this context. That claim therefore fails.

Unfair dismissal

50. We deal with the various allegations of breach of contract as they appear in the List of Issues, supplemented by C and her counsel during the hearing.
51. C alleges that the grievance and appeal processes were not conducted fairly. We disagree. We find that both NR and JH conducted those processes fairly and diligently.
52. C alleges that R did not implement the critical outcome of those processes, either fairly or at all. Again, we disagree. Leaving aside the fact that it took a few weeks longer than promised (which we do not consider sufficiently serious to amount to a breach of the implied duty of trust and confidence), we find that SZ approached the process comprehensively and fairly, albeit reaching a conclusion with which C disagreed and one based partly on performance issues rather than job content.
53. We have upheld the allegation in relation to the 3 August meeting. That did constitute an unlawful detriment, but of itself did not constitute a breach of the trust and confidence term – it was not sufficiently serious to do so.
54. C was paid less than LG for performing the same role and was 'underpaid' in the sense that she was paid lower than the market rate. However, paying an employee according to her contractual entitlement cannot constitute a breach of contract.
55. The remaining allegations amount to the single complaint that, culminating in the 21 September 2022 outcome letter from SZ (but, subject to that later assessment process, also stated within the outcomes of the grievance and appeal), R unilaterally changed C's job title from PM to Junior PM and confirmed that it would remain as Junior PM at least until the start of 2023.
56. The tribunal considers that this did constitute a breach of the trust and confidence term, entitling C to resign (which, for completeness, she did promptly and for that

reason). First, an employee’s job title is a term of the employment contract and cannot be changed unilaterally by the employer. We recognise that not every such unilateral change would amount to a breach of contract sufficiently serious to constitute conduct likely seriously to damage the relationship of trust and confidence; but we find that it did so in this case.

56.1. The role of PM was one to which C had been formally promoted 18 months previously.

56.2. It is obvious from the job advertisements in the bundle and the Matrix that some real significance attaches in the industry sector to the difference between PM and Junior PM.

56.3. Characterising C’s promotion to PM in April 2021 as a ‘mistake’ exacerbated (objectively) the effect of the change – as did the change being confirmed as part of a process designed to increase if possible C’s salary.

57. C told the tribunal she experienced it as an ‘effective demotion’. We accept that. More importantly, we accept that to have been the likely effect of R’s conduct in this context.

Remedy

58. The parties, having been given an oral judgment with brief reasons, were able to agree all remedy issues, as recorded in the Judgment.

Employment Judge Segal KC

23 February 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

7 March 2024
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FOR THE TRIBUNAL OFFICE