



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Ms V Smith

AND

EDF Energy Plc

REASONS OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields

On: 16, 17 & 18 January 2017

Before: Employment Judge Shepherd

Members: Ms D Winship
Mr S Lie

Appearances

For the Claimant: In person (accompanied by Tracy Wainwright)
For the Respondent: Mr E Legard of Counsel

REASONS

- 1 The Tribunal had sight of a bundle of documents which consisted of two lever arch files, together with documents added during the course of the hearing numbered up to page 559. I heard evidence from Ms V Smith, the claimant, Kevin Gatens, Senior Manager, Kerry Lawson, Resource Manager, Gareth Capstick, Operations Manager and Andrew Hall, HR Business Partner.
- 2 The Tribunal also had sight of unsigned statements in the form of e-mails provided by the claimant in respect of Shane Ollivro, Union Branch Secretary and Mel Valder, Unison Branch Secretary. Neither of these witnesses attended to give evidence and the information provided is accorded less weight than that of witnesses who attend the Tribunal and whose evidence can be challenged. The respondent also provided a statement from Claire Todd, HR Business Partner. The claimant indicated that she did not wish to challenge Claire Todd's evidence and accepted the contents of the statement.

- 3 The issues for the Tribunal to determine were identified at the start of the hearing and agreed as follows – agreed issues which are within the respondent’s skeleton argument and were agreed by the claimant. (NOT SURE IF YOU WANTED THE ISSUES INSERTED BUT I’VE PUT THEM IN ANYWAY – EASILY TAKEN OUT IF NOT NEEDED).

Issues

Equal Pay (“Like Work”)

- 3.1 Was the claimant’s work and the work done by either Shaun Thompson and/or Greg Jennings the same or broadly similar.
- 3.2 If so, were such differences (if any) as between their work not of practical importance in relation to the terms of their work?
- 3.3 If so, was there a contractual term that was less favourable to the claimant that it was to either Shaun Thompson and/or Greg Jennings?
- 3.4 If so, was the difference between their respective terms because of a material factor, reliance on which did not involve treating the claimant less favourably because of her sex? (“defence of material factor”).

Disability discrimination – Direct (s.13)

- 3.5 Was the claimant subjected to less favourable treatment and, if so, what was it and when did it happen?
- 3.6 With whom does the claimant seek to compare herself for the purpose of establishing less favourable treatment?
- 3.7 Was the claimant subjected to the alleged treatment because of her disability?
- 3.8 Is the claim in time?

Discrimination arising (s.15)

- 3.9 Did EDF treat the claimant unfavourably and, if so, what was that treatment and when did it occur?
- 3.10 Was that treatment because of something that arose in consequence of her disability?
- 3.11 If so, can EDF justify that treatment (ie was the treatment a proportionate means of achieving a legitimate aim)?
- 3.12 Is the claim in time?

- 4 The claimant was employed by the respondent and its predecessors from September 1998. She is employed at the respondent's Doxford Customer Contact Centre in Sunderland. The primary purpose of the centre is to handle telephone calls to and from the respondent's energy customers.
- 5 The claimant worked as a Customer Service Adviser. This position is primarily to deal with a large number of telephone calls with the respondent's customers. The number of calls is unpredictable and the nature of the calls is variable. The role requires the call handler to deal with customers and can involve difficult conversations and it can be a stressful role.
- 6 The claimant's disability is heart disease, arterial fibrillation, diabetes and high cholesterol. As a result of this disability the claimant has been unable to undertake direct telephone calls with customers from around the year 2000.
- 7 There were a number of employees who were unable to deal with direct telephone communications with customers who still dealt with communications such as correspondence and e-mails and administrative tasks. These employees were still employed as Customer Service Advisers but in a non-call handling position.
- 8 Due to concerns raised by non-call handling Customer Service Advisers (CSAs) in respect of such issues as job security, career path and having a clear set of duties, the respondent, after consultation with the trade unions, introduced a new role of Business Service Adviser (BSA). The BSA role was for those employees who were deemed permanently incapable of performing the call handling role.
- 9 A pay and grading exercise was carried out and, due to the different duties and requirements of the roles the BSA role was graded lower than the CSA role with consequent lower salary.
- 10 The BSA role was introduced in 2012. The claimant was offered and accepted the BSA role in August 2012. The claimant was a shop steward, she was aware of the negotiations and consultations that had taken place with the trade unions at a national level and the Tribunal had sight of the minutes of the Office Negotiating Committee.
- 11 The claimant said that she agreed to accept the role under duress after she was told that if she did not accept the BSA role she would not have a job.
- 12 The claimant agreed that many of the employees in the CSA role would prefer the less stressful BSA role. What she really objects to is the assessment of the role at grade 9 whereas the CSA role is assessed at grade 12. The respondent identified three categories of employees as follows:

Category 1 - where the respondent entered into a contract of employment with an employee who had a known disability that had an impact on them undertaking the full CSA duties. Reasonable adjustments were to be made but the only role at the time would have been the

CSA role. In this case the employee's cost of living increase would be protected.

Category 2 - where the employee had been employed as a CSA and had originally been capable of completing the full role. Over time, the employee has become unable to undertake the CSA role due to a developing or new condition. In this case the employee's cost of living increase would not be protected.

Category 3 - this applies to a small group of employees who have never undertaken the CSA role. Over time the employees developed a disability and were unable to undertake the CSA role. The level of service and duties would be considered and it may then be reasonable that the cost of living increase would be protected.

- 13 The claimant fell within category 2. She received red circle pay protection at that point. That meant that she received the cost of living increase for a further year in 2013 and that her pay in the BSA role would then be frozen until the BSA salary was at the same level as her frozen salary.
- 14 The claimant had a medical assessment indicating that she was permanently incapable of performing the call handling duties of the CSA role.
- 15 On 25 November 2015 the claimant raised a grievance on the basis that she was not receiving pay at the same level as that of a male colleague, Shaun Thompson, despite the fact that they were carrying out the same role.
- 16 A grievance hearing took place on 4 December 2015 before Gareth Capstick who carried out further investigations.
- 17 The outcome of the grievance was that Gareth Capstick found that Shaun Thompson was not in the same position as the claimant as he was only temporarily assigned to the BSA role and his pay had not been red circled as the claimant's had.
- 18 The reason was that an employee would only be red circled if medical evidence stated that they could not do the CSA role on a permanent basis. The claimant was informed of the outcome of her grievance in a letter dated 11 January 2016.
- 19 The claimant appealed and an appeal hearing took place before Kerry Lawson on 26 February 2016. The claimant was accompanied by a trade union representative and also in attendance was an HR representative and Gareth Capstick as he had heard the grievance.
- 20 At the appeal hearing the claimant identified another comparator in relation to her equal pay claim, Greg Jennings.
- 21 Following the appeal hearing, Kerry Lawson carried out further investigations. With regard to the newly identified comparator, Kerry Lawson found that he had not been placed permanently in the BSA role and the red circling did not apply to

him. He was carrying out some outbound customer calls and not carrying out the same duties as the claimant.

22 Kerry Lawson found that the claimant was not carrying out like work to that of the comparators and even if they had been, the reason for the difference in treatment was because the claimant had been permanently redeployed to the BSA role on medical grounds whereas the comparators were in the BSA role with the intention of moving them back to a call handling role if they became medically capable of performing that role at some time in the future.

23 The claimant presented a claim to the Employment Tribunal on 16 March 2016. She brought claims of disability discrimination and equal pay.

24 The issues for the Tribunal to determine were agreed at the start of the hearing.

NOTE – set them out here or earlier? I HAVE SET THEM OUT ABOVE.

25 The relevant law is contained within section 65 of the Equality Act 2010 in respect of equal pay together with an abundance of case law.

NOTE – set this out.

26 The claimant has set out her claim as that of like work.

27 With regard to disability discrimination the claimant identifies her claims as direct discrimination and discrimination arising from disability. The applicable law is section 13 and section 15 of the Equality Act 2010 and the relevant case law.

NOTE – set this out.

Conclusions

29 With regard to the equal pay claim the roles of CSA and BSA are different roles. The claimant was unable to carry out the call handling role required of the CSA position. The medical advice from the Occupational Health Physician was that she would not ever return to the phone work involved. Call handling would cause further health issues making it impossible. With regard to both comparators, it was indicated in the medical evidence that they might return to call handling in the future.

30 The central purpose of the call centre is to deal with customers' calls. The BSA role was created in order to provide a defined role for those unable to handle the calls. The roles were evaluated by four or five assessors who received independent training. It is notable that Claire Todd was one of those assessors and the claimant did not challenge her evidence.

31 The grading found significant differences between the roles and, as a result, the roles have not been rated as equivalent.

- 32 The Tribunal is not satisfied that the claimant has shown that she was engaged in like work to that of her comparators.
- 33 Even if it had been shown that they were engaged in like work, the Tribunal is satisfied that the respondent has shown that the difference in pay is not related to the employees' sex. The claimant was employed as a BSA not a CSA. There are roughly equal numbers of male and female employees in each of these roles.
- 34 An employee will only be offered the BSA role if there is medical evidence that the employee is permanently incapable of call handling. This was the case for the claimant but not for her comparators.
- 35 The respondent wished to maintain as flexible a workforce as possible and to that end they only allocated permanent BSA roles with the consequence pay differences to those permanently incapable of call handling.
- 36 With regard to direct discrimination there was no evidence that the fact of the claimant's disability was the reason for the claimant's appointment as a BSA.
- 37 In respect of the section 15 claim – discrimination arising from disability – the creation of the post of BSA was to provide the non-call handling staff with a defined role, job security and career development. There was an element of pay protection provided.
- 38 The eventual production of pay was unfavourable treatment because of something arising in consequence of the claimant's disability – the permanent inability to deal with call handling with customers.
- 39 The Tribunal is satisfied that the respondent has shown that the treatment is a proportionate means of achieving a legitimate aim. The aim is to provide a quality service to his customers in a competitive market. Also, to provide secure employment for its employees who are permanently incapable of handling calls and who might otherwise lose their jobs. The Tribunal considers that balancing the reduction of pay against the commercial requirements of the respondent and the protection of employment jobs means that it is a proportionate means of achieving a legitimate aim.
- 40 The claims for disability discrimination are a long way out of time. The act of discrimination alleged was a provision of the role of BSA on 12 August 2012. This was not a continuing act, it was an act with continuing consequences. Even if the date on which the pay protection was removed – NOTE THINK IT WAS APRIL 2014 – the claims are a long way out of time. The time limit for bringing discrimination claims is three months from the act of discrimination unless it is considered just and equitable to extend time.
- 41 The claimant was an experienced trade union representative. She knew that she had access to professional advice if needed. The only reason she gave for not issuing a claim sooner was that she chose to trust the company.

- 42 The claim was substantially out of time. It is also notable that the claimant made no explicit complaint of disability discrimination until she presented the claim to the Employment Tribunal. The Tribunal suffered prejudice as it had been unable to recover evidence such as the recovery of certain e-mails. The Tribunal finds that the balance of prejudice is against the respondent in that it suffered the greatest prejudice and the Tribunal does not find it just and equitable to extend time in these circumstances.
- 43 The Tribunal has no jurisdiction to hear the claim of disability discrimination. If it had such jurisdiction it would not have found that the claimant's disability discrimination was well-founded as set out in these reasons above.
- 44 In the circumstances, the claims of equal pay and disability discrimination are not well-founded and are dismissed.

EMPLOYMENT JUDGE SHEPHERD

**REASONS SIGNED BY EMPLOYMENT
JUDGE ON**

17 February 2017

REASONS SENT TO THE PARTIES ON

20 February 2017

FOR THE TRIBUNAL

G Palmer