



EMPLOYMENT TRIBUNALS

Claimant: L Calder

Respondent: Plymouth Hospitals NHS Trust

Heard at: Plymouth **On:** 07 September 2018

Before: Employment Judge Housego

Representation

Claimant: A Midgley, of Counsel, instructed by Bevan Brittan LLP, solicitors

Respondent: O James, of Counsel, instructed by Slater & Gordon LLP, solicitors

RESERVED JUDGMENT

1. The claim in respect of the First Period (as defined in the previous case management order) is out of time and is dismissed.
2. The claim in respect of the Second Period (as there defined also) has little reasonable prospect of success.
3. I order the claimant to pay a deposit of £1,000 as a condition of continuing with the claim in respect of the Second Period.

REASONS

1. The claim arises from a change of role of the claimant at the respondent. The claimant was at band 8b, as "*Records Strategy and Archives Manager*". There was a role as a "*Service Line Cluster Manager in Haematology Immunology and Oncology Services*". This was vacated by a man who moved to a new role. He was on a higher pay band, 8c.
2. It was a role that would have to be advertised, but which needed to be covered immediately. The claimant was considered as a possibility for the role. She was considered a person of ability and potential, but not someone with the experience to undertake the role immediately. The policy provided that there were two options, to "*act up*" or to be "*seconded*". These have different meanings within the respondent. Being seconded is to undertake the role in full. Acting up, as I understand it, may, but does not necessarily, mean this. Whatever the technical internal differences, it was decided to offer the claimant the opportunity to act up. She remained on her 8b pay band, but was given an extra "*spine point*" and so was paid more than before after commencing the role, but less than if on a band 8b scale.
3. The acting up role was to be for a fixed period, after which she would revert to her previous role and pay. It was doubtless the hope of both the claimant and management that she would grow into the role, and be appointed to it substantively. In the meantime, while acting up, the claimant undertook the cluster manager role in haematology, but not in oncology or immunology. She retained some of her role in archiving and document management.
4. No information was provided by either side as to the proportion of the new role she undertook, and it was not be safe to assume that the amount of work was $\frac{1}{2}$ for haematology and $\frac{1}{2}$ oncology and immunology, and so the proportion of new work and continuing existing work is unknowable in coming to this decision. What is common ground it that there was a substantial amount of old work and a substantial amount of new work.
5. It is also apparent from contemporaneous documents that the claimant found the new role a challenge, and had a steep learning curve. She proved up to the task. There were extensions to her secondment. This started on 01 August 2012, and was extended on 01 February and on 31 March 2013. It was to end on 30 June 2013, but she continued for a few weeks, as her application for the substantive role was then in process. She was successful in that application, and was appointed to it on 18 July 2013. Her new role was at band 8c, as was that same role held by her (male) predecessor.
6. In November 2016 the claimant discovered that her predecessor had been on band 8c. It appears that this was not something she had considered before. She raised a grievance about this, but it was not upheld and her appeal against that decision was dismissed on 28 April 2017.
7. The claimant's claims arising from this are twofold. First, of sex discrimination and for equal pay with her predecessor for the period when she was

seconded (the First Period). Secondly, the claimant claims that if she had been on band 8c from the date her secondment started, she would have progressed up the spine points (if this is the right term) from that date, and not (as happened) from the later date when she was appointed. As this was about a year later, in effect for each year of her employment in the new post (after the first) she was one point below where she would have been if she had been at band 8c from the date she commenced acting up. This is entirely logical, but of course (as Counsel for the claimant realistically accepted) the claim for the Second Period depends entirely on the claim for the First Period succeeding, for if it does not, then the claimant was properly on band 8c for the first time only once appointed.

8. The claimant asserts that this is a stable contract for equal pay purposes. That is, her employment continued under one contract throughout. The calculation of time limit would then commence with the date the claimant left the employment of the respondent. That is the date for calculation of time for the claims for the Second Period. This was explored in some detail in the hearing. That discussion and analysis need not be recorded for at its conclusion both advocates and I agreed that the claim filed on 13 December 2017 was filed on the last day possible, if the applicable date for the start of the calculation is the effective date of termination of employment.
9. The respondent asserts that the appointment was not a stable case, but a standard employment case. This would mean that time would run from, at the latest, 18 June 2013, and so the claim for the First Period would be some years out of time. The claimant accepts that this is so.
10. The law on equal pay claims is dissimilar to that for sex discrimination.
11. The two cases can be put relatively simply, hopefully without injustice to the erudition of both Counsel. First the claimant's case. She worked for the respondent throughout. She had a career with them, and her role changed over time. The move to her last job was one of a series. She had no change of written contract at any time. The appointment to the Cluster Manager job was described in only one document and that (as with other changes during her career) described the new role as a change to her terms and conditions, not as a new contract. More, her change from one role to the other was not abrupt, but through the mechanism of the acting up period. During this period she had retained some of the responsibilities of the previous role and taken only some of the responsibilities of the new role. This was a continuum, and there was no break point such as is required if this is not a stable employment throughout the claimant's period of employment by the respondent. There was no intention to break any form of continuity, and viewed objectively this was a promotion, no more and no less. It was not unusual for promotions to involve different duties, in fact it was implicit in any promotion that duties changed.
12. The respondent stresses the case law guidance on the issue. This is a contractual analysis, to be undertaken in the way set out in case law. Of course it was the same employer, but that was not synonymous with it being the same contract of employment. That there was continuity of service was not relevant to the issue of what the contract was at any given time. Here there could not be a starker divergence between the two roles. There were technical things like different cost centres, but in addition the reality was of a

totally different job. The old role was administrative – management of patient records and their archiving. The new role was patient focused: to admit patients for treatment in three large disciplines. The claimant had needed almost a year to get herself to the position where she was able successfully to apply for the role. The role had been advertised externally: this was a new job for the claimant just as much as it would have been for an external candidate. There was nothing to suggest this was the claimant as incumbent getting the role permanently: it was an open competition. If the claimant had not been successful she would have reverted to her old role: the acting up documentation expressly stated that this would occur on a set date (and that it was twice extended on the same basis did not weaken that point).

13. I enquired whether this did not boil down to a question of whether the claimant, on being told that she had been successful, would have told her family and friends that she had been promoted, or that she had got a new job with the respondent. Counsel for the claimant did not see it quite that way, stressing the route to the new role, with the claimant being identified as a person with potential, who was enabled to gain necessary experience and expertise by acting up for part of the role so as to move seamlessly from one position to the other.
14. Both Counsel addressed me at some length (and helpfully) about the law. The contract can be terminated expressly or impliedly. It may be terminated by dismissal, resignation or mutual consent.
15. Inevitably, where (as here) there has been no thought given to this question (because it is not obvious and there was no need to do so) the issue will be whether there is implied termination by mutual consent.
16. Case law stating that the issue is ultimately of intention is therefore of little real assistance. Nor is case law always about employment contracts – Morris v Baron and Co [1918] AC1, was quoted in Marriott v Oxford and District Co-Operative Society Ltd (No 2) [1969] 1 WLR, itself cited in Cumbria County Council v Dow [2007] UKEAT 0148_06_2505, and is about a contract for delivery of a parcel. While contract law applies to parcels and employment equally, the circumstances are so different that it is hard to see cases about the former shedding much light on the latter. That particular case history is yet more complex as the result was overturned on appeal, on other grounds. The submissions of Counsel can be studied by a higher Court if required.
17. It is clear from the case law that the question has to be decided objectively.
18. Ultimately, and having considered both arguments at length, I decide that for the purposes of the Equal Pay Act this was a new contract, so that this is a standard case, and the claim in respect of the First Period is out of time and must be struck out, because this is not a stable employment case.
19. The strongest point for the claimant is the one page document stating that there was a change to the terms and conditions applicable to the claimant's employment with the respondent. However this is also consistent with a new contract on the same terms save as to job title, job description and pay. As Counsel for the respondent pointed out, there is no individual negotiation of contracts in the NHS. These are the only points that could be changed. There is the word "*amendment*" which implies the altering of an existing contract. If

one is reduced to detailed textual analysis, that is also consistent with a new contract on the same terms and conditions as the previous, save for those alterations.

20. Looked at objectively, this was a job for which the claimant had potential but was so lacking in experience for it that she had to be able to learn on the job, doing part of it only, in order to be able to apply successfully for it. The previous role was purely administrative – about patient records. The new role was entirely patient focused, in organising treatment for patients in these 3 disciplines. There is no similarity at all between previous and new roles, as was borne out by the fact that this was accepted to be a really steep learning curve for the claimant.
21. I have considered carefully whether the level of this role – annual pay in the mid £50,000s – is a management role, so that it is the management skill that is being utilised in a different department, although this was not an argument put before me. The difference in the actual work undertaken (in so far as I can judge as I was not provided with any job descriptions for either role) and the advertising of the role to external candidates against whom the claimant was successful persuade me on balance that this was a new contract. It commenced when the claimant was successful in her application for that role. That was when the old contract ended, as then she was not going to be returning to her old role.
22. There is a conundrum for the claimant in the argument put forward to justify this as a stable employment for the equal pay claim. That this was said to be a gradual change from the old role to the new over a year was argued to show one continuous and gradually changing employment, not a new contract at the point the new role was offered and accepted.
23. The more cogent that argument the greater the chance that it was one stable contract required for the claim to be in time. However the stronger that argument the harder for the claimant to show that it was unfair, while acting up, for her to be paid at her old grade of 8b (enhanced) and not the grade 8c for the full role.
24. The claimant's case is that she was not doing that full job when she started the acting up role. It is not said that there was anything wrong with the 8b grading of the old job. Since she was not doing the 8c job, it is not easy to see any cogent argument that her pay when acting up breached the Equal Pay Act, or was sex discrimination for she was paid an (enhanced) 8b rate while doing part of her old job and part of what eventually became her new job.
25. More, the better the argument is put for the time point the harder it becomes to win the substantive point.
26. Accordingly had I decided that the claim was in time I would have ordered the claimant to pay a deposit as a condition of continuing with it.
27. The claim for the Second Period can only succeed if the claim for the First Period succeeds (as set out above). It is doomed to failure. A deposit order only was sought, and I make one.

28. I consider that the claimant's allegations or arguments that she suffered sex discrimination or that her pay breached the Equal Pay Act have little reasonable prospect of success, for the reasons given above. The claimant is ORDERED to pay a deposit of £1,000 in respect of those claims not later than 28 days from the date this Order is sent as a condition of being permitted to continue to advance those allegations or arguments. I have had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit.
29. The notice of hearing referred to a third issue to be determined, but it was not addressed in the hearing, and neither advocate was prepared for it, both focusing on the time point. Given this decision that third issue is irrelevant.

Employment Judge Housego

Date: 10 September 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
27 September 2018

FOR EMPLOYMENT TRIBUNALS