Case Number: 1300968/2018

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr Lee Mills **Birmingham City Council**

PRELIMINARY HEARING

Heard at: Birmingham **On: 29 March 2019**

Before: Employment Judge Woffenden

Appearances
For the Claimant: In person
For the Respondent: Ms L Chudleigh of Counsel

RESERVED JUDGMENT

1. The claimant's application for wasted costs and a preparation time order is refused.

REASONS

1 The claimant presented a claim to the tribunal on 26 February 2018 in which he claimed equal pay in that since 26 August 2015 he has been doing work of equal value in the grade 5 role of Facilities and Systems Manager as compared with his previous manager Sue Round (employed in the grade 6 role of Buildings Operations Senior Manager until December 2015).

2 In paragraph 6 of its response the respondent said, '*The claimant's role was evaluated following an objective, lawful and comprehensive evaluation exercise, as was the comparator's*.' In paragraph 10 of its response it said ' *Pursuant to ss 131(5) and 131(6) Equality Act 2010,the tribunal must determine that the claimant's work is not of equal value to the comparator's work ,since the claimant's work and the comparator's work have been given different values by a job evaluation study .For this presumption to be rebutted ,there must be reasonable grounds for suspecting that the evaluation contained in the study was based on a system that discriminates because of sex; or is otherwise unreliable. The respondent contends there are no such grounds*.'

3 On 25 September 2018 there was a preliminary hearing before Employment Judge Findlay at which the claimant disputed that the respective roles had been given different values by such a study and argued in the alternative that it was based on a system that discriminated because of sex; or was otherwise unreliable. The parties agreed (and Employment Judge Findlay decided) there should be a stage 1 Equal Value hearing at which the tribunal would consider whether the claim (as it was solely a claim based on equal value) should be struck out pursuant to section 131(6) Equality Act 2010 ('EqA') and/or because it had no reasonable prospect of success, or should continue ,in which case directions would be given. The hearing was listed for three days (1 ,4 and 5 February 2019) and directions were given to enable the parties to prepare for it. The notice of hearing expressed the issue as follows: To consider whether the work done by the claimant and the work done by the comparator (Ms S Round)

have been rated as equivalent on a job evaluation study complying with section 131(6) EqA and ,if so, to strike out the claimant's equal value claim. In accordance with the order made by Employment Judge Findlay on 23 October 2018 the claimant provided details as to why he said no valid job evaluation study had been undertaken and/or the unreliability of the study. Essentially he contended he should have been graded as 6 not a 5 because following a restructure in 2015 his role subsumed a number of other roles which were deleted in a restructure in 2015 and he challenged Ms Round's evaluation arguing it was not properly evaluated at Grade 6 because it was matched to a benchmark post .

4 On 31 January 2019 the hearing was postponed by the then Acting Regional Employment Judge because it was extremely unlikely it could have been heard. That same day the respondent wrote to the tribunal and the claimant to concede that 'having considered the evidence in the case and the claimant's submissions ' , there were reasonable grounds for suspecting that the job evaluations of the claimant's role and/or that of Ms S Round were unreliable. It was said Ms Round's post was matched to another role, and although matching was 'perfectly permissible in any job evaluation study', the exercise must be 'analytical.' Despite its best endeavours, the respondent was unable to produce the matching form used by the analyst who conducted the task in 2012 and that person had left the respondent's employment. Its opinion was that in the light of the concession made 1 day (I February 2019) would suffice.

5 The hearing was relisted for today with a time estimate of one day.

6 On 27 February 2019 the claimant applied for a wasted costs or alternatively a time preparation order against the respondent in relation to its insistence that it had carried out a valid job evaluation study. On 4 March 2019 the respondent objected to the claimant's application. It explained that Ms Round's position had been matched to a benchmark job, as was common in local authorities ,but although a matching exercise was undertaken the matching form could not be located .The respondent had continued to look for it up to the day before the hearing but because it could not be found it had been decided to make the above concession to save the expense of a three day hearing (Rule 2 (e) Employment Tribunal Rules of Procedure 2013). Although the respondent had reasonable grounds for its contention that the claimant's work and Ms Round's work had been given different values by a job evaluation study it made a 'pragmatic and sensible 'decision in the circumstances in the light of a 'missing, but crucial piece of evidence.'

7 I have read both parties' written submissions (that of the claimant was 157 pages in length) and heard their oral submissions. I have read only those documents in the claimant's bundle of 155 pages and the respondent's bundle of 734 pages to which they have respectively referred me.

8 Under rule 76 (1) of the Rules a tribunal may make a preparation time order and shall consider whether to do so where it considers that-
"(a) *a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
(b) any claim or response had no reasonable prospect of success; or
(c) a hearing has been postponed or adjourned on the application of a party less than 7 days before the date on which the relevant hearing begins."

9 Under rule 75 (2) of the Rules a preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing."

10 Under rule 79 of the Rules a tribunal decides the number of hours in respect of which a preparation time order should be made, on the basis of information provided by the receiving party on time spent falling within rule 75 (2) and the tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required. The amount of a preparation order is the product of the number of hours assessed and the applicable hourly rate.

11 Under rule 80 of the Rules a tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs-
"(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.
Costs so incurred described as "wasted costs". However, a wasted costs order may not be made against the representative where that representative is representing a party in his or her capacity as an employee of that party.

12 Costs in the employment tribunal (though made more frequently than was the case in the past) remain the exception rather than the rule (**Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420)** and are compensatory not punitive. Tribunals must look at the whole picture of what happened in the case and ask whether there has been unreasonable conduct by the claimant in bringing the case and in doing so identify the conduct what was unreasonable about it and what effects it had. 'Reasonableness' is a question of fact for the tribunal. Costs should be limited to those which have been reasonably and properly incurred. Even if the grounds under rule 76 (1) (a) (b) or (c) are established the tribunal still has a discretion as to whether to make an order.

13 In my judgment (and as submitted by Ms Chudleigh) no wasted costs order can be made against Mr. Harris and/or Shugufta Shabeen because both are employees of the respondent.

14 It was held in **Mitchells Solicitors v Funkwerk Information Technologies York Ltd EAT 0541/07** that a legal representative should not be held to have acted improperly, unreasonably or negligently simply because he or she acts on behalf of a party whose defence is doomed to fail. Even if a legal representative can be shown to have acted improperly, unreasonably or negligently in presenting a hopeless case it remains vital to establish the representative thereby assisted proceedings amounting to an abuse of the court's process thus breaching his or her duty to the court ,and that his /her conduct actually caused costs to be wasted. In **Ridehalgh v Horsefield 1994 3 AER 848, CA** (approved by the House of Lords in **Medcalf v Mardell and ors 2002 3 AER 721**)It was indicated that 'improper' covers ,but is not confined to, conduct that would ordinarily be held to justify disbarment ,striking off ,suspension from practice or other serious professional penalty ;'unreasonable' describes conduct that is vexatious ,designed to harass the other side rather than advance the resolution of the case ;and 'negligent' should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. I accept Ms Chudleigh's submission that "These are very high hurdles indeed for a party who claims wasted costs" and, "Furthermore, it is vital to establish that the representative assisted proceedings amounting to an abuse of the court's process (thus breaching a duty to the court) and that his or her conduct actually caused costs to be wasted." Ms. Chudleigh confirmed the respondent did not waive privilege about any aspect regarding the difference.

15 The claimant's oral submissions did not identify any conduct of Ms Chudleigh's which could be said to amount to an abuse of the process of the court. As far as his written submissions were concerned, he complained of having to provide particulars as to why the JES was unreliable as a result of her having advised this was necessary, forcing him to rebut a defence that 'simply didn't exist'. However I remind myself that the burden of proof under section 131 (6) EqA, falls on him (**Armstrong v Glasgow City Council [2017] CSIH 56 Court of Session ,[57], Brennan v City of Sunderland 250 3297/2006 [2006]**) and the respondent is entitled to know what his case was in this regard. He went on to complain that in her submission for hearing on 25 September 2018 she had stated that "both roles were evaluated under the respondent's job evaluation study" and that there was a "high standard required of counsel' to advise their clients on the merits of their case. No competent legal adviser should have concluded on a balanced and objective review of the respondent's evidence that they possess sufficient to adduce to prove their defence. The defence was bound to fail and she should have advised her client accordingly. She had "compounded and thoroughly cemented the abuse of process."
Applying **Mitchell Ridehalhalgh and Medcalf** there is nothing about the conduct ascribed to Ms Chudleigh by the claimant which could amount to an improper, unreasonable or negligent act or omission by her nor was there any abuse of the court's process and there is no information before me that her conduct in any way caused costs to be wasted. I therefore also refuse the claimant's application for wasted costs as far as she is concerned.

16 Turning now to the claimant's application for a preparation time order, he confirmed to me that he was making his application under rule 76 (1) (a) (b) and (c) of the Rules. In his oral submission he relied on the information disclosed to him on 15 December 2017 following a Freedom of Information Act ('FOIA') request dated 22 November 2017 which indicated to him that Ms Round's role had not been job evaluated but matched to the post of Manager Archive and Heritage and he had concluded the respondent knew from the outset there had been no valid job evaluation of either his own or his

comparator's role, contrary to its contention in paragraph 6 of its response. The respondent had insisted at the preliminary hearing on 25 September 2018 that the jobs had been correctly evaluated; he had quoted from **Armstrong** and denied there had been any such job evaluation. He had been required to say why no valid JES had been undertaken or the JES was unreliable but denied early disclosure. He did not consider the respondent had been transparent in the spirit of Code of Practice on Equal Pay (2011). The concession made by the respondent should have been made at a much earlier stage indeed from the outset. Instead he had had to prepare cross examination and all manner of things. The respondent had gambled that something would turn up. The respondent's advisers had been negligent and, in his opinion, should have advised there was had no reasonable prospect of success; to carry on without evidence was unreasonable and the respondent should have desisted.

17 To summarise her oral submission Ms Chudleigh said that the respondent had a complete defence to an equal value equal pay claim if following a JES the claimant was graded 5 and the comparator was graded 6 unless section 131 (6) applied. It was not until the preliminary hearing on 25 September 2018 the claimant had mentioned job matching and the FOIA request. Job matching did not mean jobs were not evaluated properly under the JES. The order made by the tribunal was very 'standard'. It was entirely proper for the claimant to be required to say what his case was. The listed hearing was to address a number of matters. It had been vacated not because of what the respondent did but because of the lack of appropriate judicial resources on the day of the hearing. The burden of proof was not on the respondent (as the claimant submitted) but (following **Armstrong** paragraph 57) on him. The role of the comparator had not been improperly evaluated; it had been benchmarked to that of Manager Archive and Heritage. The claimant's own role had been perfectly properly evaluated. The Manager Archive and Heritage role had been evaluated analytically and it was a benchmark job within the meaning of the Green Book (paragraph 4.2). It did not have to be a real life job and may not have had an incumbent .The Green Book contained a technical note for dealing with non-benchmark jobs in particular referring to **Bromley v Quick [1998 IRLR 249 CA]** in which it was stated there would be no objection to using benchmark jobs provided there was no material difference between the benchmark jobs and other jobs. There were 13 factors for job analysts to complete for job matching. Detailed guidance was provided. The evidence indicates the job analyst undertook the job matching exercise for the comparator post on 30 November 2012 .However the matching form could not be found though enquiries continued .The job analyst had left the respondent's employment so the decision was taken the day before the hearing to concede the section 131 (6) point. She described this a little generous to the claimant, but also time saving because only 1 day would be needed to address the remaining issues. There was no basis for any suggestion as to a lower threshold in the case of a preparation time order. The claimant's role was Grade 5 and had complained about his grade 6 role; there can be different ways to 'unpick' a JES and it was therefore fundamental he set out his case. Matching was permissible and there was evidence the comparator was 'matched'; the only missing piece of the puzzle was the matching form. It looked as though the respondent could have got home in this respect against the claimant because the claimant (erroneously) seems to think 'matching' means the respondent cannot win. Even if the threshold was met the tribunal should exercise its discretion in the respondent's favour, a costs order would be wholly disproportionate.

18 The claimant then in further oral submissions described the job matching as a sham. No evidence had been adduced about the validity of the Facilities Job Family. His own job evaluation had been 'shockingly poor'; the impression had been given under the questionnaire about the use /maintenance of equipment and tools he was managing a garden shed/broom cupboard. He could not appeal against the outcome of his job evaluation, so the appeal was to the employment tribunal. He should be awarded a proportion if not all his preparation time. He had had to prepare witness statements for the hearing. If the respondent had conceded earlier that it did not have the evaluation form for the comparator the proceedings would have reached the same point some time ago.

19 Miss Chudleigh then responded with 4 short points on those facts. The witness statements of the claimant and his compactor would be used at any subsequent hearing because the bulk of them dealt with the parties' factual dispute. The issue with the approach taken to the use/maintenance of equipment had formed no part of the claimant's costs application. The job families document was not the respondent's but that of the National Joint Council for Local Government Services. There was no evidence that the job matching was a sham; the number of points was not miraculous as described by the claimant but a product of matching jobs.

20 In my judgment the respondent was not acting unreasonably in its conduct of the proceedings to make the concession it made when it did. That there was a preliminary issue to be determined under section 131 (6) Equality Act 2010 was identified at the preliminary hearing on 25 September 2018. The

respondent was entitled to know the details of the claimant's case on that issue because of the incidence of the burden of proof. It made the concession it did not because it accepted the accuracy of the criticisms the claimant made on 23 October 2018 of the job evaluation scheme (in particular concerning job matching) but for the limited reasons given by Miss Chudleigh and then only when it became apparent that its searches for the missing bit of the puzzle were to no avail. There was no information before me on which I could conclude those searches were not both diligent and timely. Another party might have adopted a different course of action in the conduct of litigation and at a different stage in the proceedings but that does not make what the respondent did unreasonable. This was a sensible litigation decision which because of a reduction in the length of the hearing from three days to one could lead to a savings in both parties' costs and administrative and judicial resources and from which parties should not be discouraged.

21 It does not follow, and I cannot conclude from the limited concession made by the respondent about section 131 (6) Equality Act 2010 that its response (read as a whole) has no reasonable prospect of success. The claim has not been struck out pursuant to section 131(6) EqA but there still needs to be an equal value inquiry.

22 Further the hearing was not postponed or adjourned on the application of the respondent less than 7 days before the date on which the hearing was due to begin. It sought a reduction in the length of the hearing not a postponement or adjournment of it. The vacation of the hearing was at the instigation of the tribunal.

23 Since I do not consider any of the relevant grounds are established the claimant's application for a preparation time order is refused

Employment Judge Woffenden
Date: 9 May 2019