



## EMPLOYMENT TRIBUNALS

**Claimant**

**Mr G Radley & Mr M Richards**

v

**Respondent**

**London Fire Commissioner**

### PRELIMINARY HEARING

**Heard at: Watford**

**On: 8 October 2019**

**Before: Employment Judge C Palmer**

**Appearances:**

**For the Claimant: Mr Radley & Mr Richards in person**

**For the Respondents: Ms S Keogh, Barrister**

### JUDGMENT

**Mr G Radley**

1. The claimant's claim for breach of contract is struck out as the tribunal has no jurisdiction to hear a breach of contract claim where the claimant is still employed.
2. The claimant's claim for indirect sex discrimination is withdrawn by the claimant and is dismissed.
3. The claimant's claim for harassment is withdrawn by the claimant and is dismissed.
4. The claimant's claim for direct sex discrimination is struck out because it has no reasonable prospect of success.
5. The claimant's claim for victimisation is struck out as it is out of time and it is not just and equitable to extend time.

6. The claimant's claim for equal pay has little reasonable prospect of success and I order that a deposit of £1,000 be paid on or before **5 November 2019**, as a condition of continuing with the equal pay claim.

**Mr M Richards**

1. The claimant's claim for breach of contract is struck out as the tribunal has no jurisdiction to hear a breach of contract claim where the claimant is still employed.
2. The claimant's claim for harassment is withdrawn by the claimant and is dismissed.
3. The claimant's claim for indirect sex discrimination is withdrawn by the claimant and is dismissed.
4. The claimant's claim for direct sex discrimination is struck out because it has no reasonable prospect of success.
5. The claimant's claim for victimisation is struck out as it has no reasonable prospect of success.
6. The claimant's claim for equal pay has little reasonable prospect of success and I order that a deposit of £1,000 be paid on or before **5 November 2019**, as a condition of continuing the equal pay claim.

**Mr A Bathie and Mr Healey**

7. The claims by Mr Bathie and Mr Healey are struck out as they have not been actively pursued. They are dismissed.

**Reasons: Mr Radley and Mr Richards**

**Claims and Issues**

1. Mr Radley lodged a claim with the Tribunal on 2 December 2018, following a period of early conciliation from 19 October 2018 and 19 November 2018. He claimed breach of contract, direct and indirect sex discrimination, harassment on grounds of sex, victimisation and equal pay. The claims changed since they were originally filed with the tribunal and where there were amendments it was agreed by the parties that decisions and orders should be made in relation to the amended claim.
2. Mr Richards lodged a claim with the Tribunal at the same time as Mr Radley and his claims and arguments were much the same. Mr Richards did not have an ACAS Early Conciliation certificate. Mr Richards also said he suffered discrimination because he is Welsh. His application to amend to include race discrimination was refused, there being no credible evidence of less favourable treatment because he was Welsh.

3. On 23 March 2019 Mr Radley wrote to the Tribunal setting out their claims in more detail, arguing as follows:
  - 2.1 As Watch Managers (A) the claimants were affected by the changes being made by the Brigade's change in staff structure, whereby the Brigade failed to recognise them in the structure change and failed to treat them fairly and equally as others thereby discriminating against them, victimising them, causing harassment and distress and demeaning their role;
  - 2.2 There was different treatment in relation to pay and uniform despite having exactly the same role at the same station;
  - 2.3 Requiring the claimants to undergo an additional assessment process to move into their own role within the new structure, despite having the same roles, responsibilities, training and development;
  - 2.4 The indirect sex discrimination claim was on the basis that males should be treated the same as other males and females and all employees should be paid equally for equal work, ie males in the same position as other males (para 12 of Amended grounds of complaint).
4. The purpose of this Preliminary Hearing is to consider whether any of the claims have no reasonable prospect of success and /or are not being actively pursued and should be struck out or a deposit ordered if they have little reasonable prospect of success. Rule 37(1)(a) and 39 of the Employment Tribunal Rules of Procedure 2013 apply.
5. There was a bundle of documents and I read those documents to which I was referred including a summary of claims. I did not hear any evidence but the claimants explained in detail the facts on which they were relying to support their claims and why they considered they has been discriminated against, harassed and/or victimised.
6. It took a full day to identify and understand the claims made by Mr Radley and Mr Richards. In brief, they argued that they should have the same rights as women. In relation to the victimisation claim the claimants argued that the protected act was the allegation of discrimination and the detriment was unequal pay
7. Apparently there are other employees who may ask to be additional claimants as they had similar concerns.

## The facts

8. Mr Radley has worked for the respondent since 9 January 2001 and is still employed. Mr Richards is also still employed.
9. By way of background, there are very few women firefighters and fewer in management positions. The vast majority of employees were white men. 4% of Watch Manager Bs (WMBs) were women and 7.9% of Watch Manager As (WMAs) were women. WMBs are paid more than WMAs by about £4,000. The respondent took some steps to redress the gender balance through positive action (section 158 Equality Act 2010). The claimants did not raise any issues or claims relating to positive action during the Preliminary Hearing.
10. In June 2019 a collective agreement was reached between the London Fire Commissioner and the Fire Brigades Union (London Region) in regard to a revised watch-based structure (known as The Role to Rank Agreement) (p104-115). The planned implementation date was 15 October 2019.
11. The structure was to change so there were three core manager roles on a watch at fire stations:
  - a. Station Officer (Stn.O), formerly Watch Manager B,
  - b. Sub Officer (Sub.O.), formerly Watch Manager A (the claimants' position),
  - c. Leading Firefighter (LFF), formerly Crew Manager.
12. The Station Officer/WMB, would be paid more than the Sub Officer/WMA. This, argued the claimants, was unequal pay for equal work. An increment was also paid for the Station Officer after three years.
13. The claimants argued that the roles of WMA and WMB were currently identical and both could be in command of up to a 6-pump incident.
14. The new system required a Sub Officer/ WMA to apply to be a station officer/WMB. The claimants said this meant the role of WMA was being demeaned and demoted to that of a significantly lesser role to that of WMB (see summary of claims).
15. There was a difference in managerial responsibility between WMAs and WMBs as the former could only take responsibility for 10 employees and for WMB it was unlimited. This was the norm though WMAs sometimes acted as WMBs.
16. In addition, the claimants said that there were other differences:
  - 16.1 WMAs would only be responsible for incidents up to 4 pumps;
  - 16.2 There were different uniforms including different coloured helmets with WMBs retaining their white helmets which signified that they were in charge of an incident;
  - 16.3 Different training was provided;

- 16.4 WMBs monitor WMAs giving them the option to take over from a WMA.
17. The only actual comparator (as opposed to hypothetical comparator), for the discrimination and equal pay claims, was Ms Van Dop who had been a WMB since October 2018. She was a specialist and had some pay protection. When appointed WMA in 2015 her pay was £34,000, which was the same as Mr Richards at the time. She was then promoted to operationally competent in 2018 and to WMB on a graduate development scheme. Her salary was £37,854. The claimants were not on the graduate scheme. The circumstances of the claimants and Ms Van Dop were different.
18. Ms Van Dop was to be assimilated to Station Office in October 2019 when her salary would include London Weighting of £5,888. Mr Radley earned £37,209, which was £600 less than Ms Van Dop. Mr Richards earned £36,479 plus London weighting.

### **The law**

19. Rule 37 Employment Tribunal Rules provides that the Tribunal may strike out all or part of a claim on the ground that it has no reasonable prospect of success.
20. Striking out a claim should not be exercised lightly and only done after careful consideration of all the relevant material. Particular care must be taken with litigants in person, who may find it difficult to identify the correct claims. In practice, this often involves the tribunal scrutinising the alleged claims and facts to identify the correct claims based on the facts set out in the claim.
21. A discrimination claim should not be struck out except in the plainest and most obvious cases as it was a matter of public interest that tribunals should examine the merits and particular facts of discrimination claims. If there is a significant conflict of relevant facts a claim should not be struck out without hearing the evidence.
22. There is a two-stage test. First, the tribunal must consider whether any of the grounds set out in rule 37(1)(a) to (e) have been shown and second whether the tribunal should exercise its discretion to strike out the claim.
23. Rule 39 Employment Tribunal Rules provides that a tribunal may make a deposit order of up to £1,000 where a claim has little reasonable prospect of success. The test for a deposit order has a lower threshold than striking out the claim. The tribunal must make reasonable enquiries into the paying party's ability to pay the deposit.

### **Conclusions**

24. Apart from the equal pay claim, where there were some factual disputes, the facts were not substantially in dispute. The different treatment between WMAs and WMBs was set out in the collective agreement (p104-115). The dispute was whether the difference in treatment was substantially caused by the claimants' sex.

25. The claimants' claims related to a difference in treatment (and pay) between staff who occupy the role of Watch Manager A as compared with staff who are in the role of Watch Manager B.
26. The claimants provided no credible explanation or evidence to show that the difference of treatment was related to the claimants' sex as opposed to the differences set out in the collective agreement. The claimants felt that as a result of the role to rank change they, as WMAs, or below, were treated in a demeaning and different way. The difference between the roles applied to men and women equally. Men and women in WMA were treated the same, as were men and women in WMB.
27. Mr Radley said that the victimisation occurred in mid-late 2017. It was therefore out of time. There was no evidence to suggest that the claimant could not have filed the claim in time. Further, it was argued that the detriment was paying him less. This was the allegation made (the protected act) which cannot be the same as the detriment.
28. The issue as to whether the jobs were of like or similar work is more difficult as there was a conflict of evidence. The respondent said that the only named comparator, who was identified today, Chloe Van Dop, had come up through the graduate scheme and had protected status but the claimants denied this was the case.
29. I find that the discrimination claims have no reasonable prospect of success and they are struck out. The equal pay claim remains, subject to the payment of a deposit order.

Employment Judge C Palmer

30/10/19

Sent to the parties on:

.....30/10/19

**For the Tribunal:**

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3335139/2018 Mr A Bathie

3335140/2018 Mr M Richards

3335141/2018 Mr W Healey