



# EMPLOYMENT TRIBUNALS

**Claimant: Mr MJ Parr**

**Respondent: The Home Secretary**

**Heard at: London Central**

**On: 12 & 13 June 2019**

**Before Judge: Mrs A Isaacson**

## **Representation**

Claimant: In person

Respondent: Ms C Darwin, Counsel

# RESERVED JUDGMENT

**The Judgment of the Tribunal is as follows:**

- 1. The Claimant's equal pay claim is in time as he is still working in a stable working relationship.**
- 2. Whether the Claimant's complaints of race and sex discrimination have been brought in time will be decided by a full tribunal at the full hearing.**
- 3. The Respondent's application for the claimant's equal pay claim to be struck out is unsuccessful.**
- 4. The Claimant is ordered to pay a deposit of £1000 as a condition of pursuing his equal pay claim.**

# RESERVED REASONS

## The Issues

1. The issues before the Tribunal are:
  - (i) Whether part of this preliminary hearing and part of the final hearing should be heard in private?
  - (ii) Whether the Claimant's race and sex discrimination claims include a claim that the Respondent's failure to deal with the Claimant's internal complaints amount to separate acts of discrimination?
  - (iii) Whether the Claimant's equal pay complaint insofar as it relates to the Claimant's "first appointment" (1 August 2016 until 16 July 2017) is out of time?
  - (iv) Whether the Claimant's complaints of race and sex discrimination have been brought in time?
  - (v) Whether the Claimant's equal pay complaint should be struck out because it discloses no reasonable prospect of succeeding?
  - (vi) Alternatively, whether the Claimant should be ordered to pay a deposit of up to £1000 as a condition of pursuing his equal pay complaint?
2. The first two issues were decided at the preliminary hearing and the reasons for those decisions are set out in a preliminary hearing case management order. A separate Private Hearing order has been made. The other four issues were reserved and the Tribunal's reasons are set out below and a separate Deposit order with attached notes has been made.

## The claims

3. The Claimant's claims are equal pay and direct sex and race discrimination.

## The law on time limits

4. Section 123 of the Equality Act 2010 ("EqA") provides that a claim of discrimination may not be brought after the end of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable.
5. Section 123(3) states:

*"For the purposes of this section-*

- (a) *conduct extending over a period is to be treated as done at the end of the period:*
- (b) *failure to do something is to be treated as occurring when the person in question decided on it.*
- (4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-*
- (a) *when P does an act inconsistent with doing it, or*
- (b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”*
6. The Tribunal has wide discretion in determining whether or not it is just and equitable to extend time and it is a wider discretion than for unfair dismissal. It should consider everything that it thinks is relevant. However, time limits should be strictly applied and the exercise of the discretion is the exception rather than the rule. There is no presumption that the Tribunal should exercise its discretion.
7. The Tribunal is not legally required to but may consider the check list set out in section 33 of the Limitation Act 1980 in considering whether to exercise its discretion:
- a) the length and reason for the delay;
- b) the extent to which the cogency of the evidence is likely to be affected by the delay;
- c) the extent to which the party sued had cooperated with any requests for information;
- d) the promptness which the claimant acted once he knew the facts giving rise to the cause of action; and
- e) the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.
8. The Tribunal will consider whether a fair trial is still possible and the prejudice to the Respondent.
9. Section 129 EqA sets out the time limits for equal pay claims depending on the type of case. For a standard case the period is 6 months with the last day of the employment or appointment. For a stable work case (but not if it is also a concealment or incapacity case (or both)) is 6 months beginning with the day on which the stable working relationship ended. For a concealment case it is 6 months beginning on the day on which the worker discovered (or could with reasonable diligence have discovered) the qualifying fact.
10. There is no discretion to extend the time limits for equal pay claims.
11. A stable work case is defined as “*a case where the proceedings relate to a period during which there was a stable working relationship between the worker and the responsible person (including any time after the terms of work had expired)*”.
12. A concealment case is where-
- “(a) *the responsible person deliberately concealed a qualifying fact from the worker, and*

*(b)the worker did not discover (or could not with reasonable diligence have discovered) the qualifying act until after the relevant day.”*

13. A qualifying fact is defined as a fact:  
*“(a) which is relevant to the complaint, and  
(b)without knowledge of which the worker or member could not reasonably have been expected to bring proceedings.”*
14. Stable work cases usually cover a situation where there has been breaks in what would otherwise have been continuous employment with a single employer. However, where there has been a termination of a contract and continuation of employment (or appointment) under another contract for substantially the same work with the same employer, this comprises a stable employment. The question to ask is whether the contracts are substantially the same?

### **Evidence before the Tribunal**

15. The Tribunal was presented with an agreed bundle of documents and the Claimant brought a few further documents to the hearing. The Claimant produced two witness statements; the first one including his submissions. The Claimant also produced written closing submissions. The Claimant called one witness Sir TP Winsor (“STW”) who is the Chief Inspector of Constabulary. The Respondent called Ms Z Wilkinson (“ZW”) who is Deputy Director in the Home Office Sponsorship Unit (“the unit”). Both parties presented written submissions and made oral submissions and referred to a list of authorities.
16. The Tribunal has taken account of the principles set out in all the cases referred to but has tried to set out just the basic principles which have been applied.

### **Findings of fact**

17. The Tribunal is wary not to make findings of fact which would tie the hands of a full Tribunal at the full hearing as the evidence before this Tribunal is very limited. The witnesses were only cross examined on the issues of time. Although some evidence was given regarding the claims to enable this Tribunal to consider whether to strike out or make a deposit order in relation to the equal pay claim, the Tribunal avoids making any findings of in relation to the equal pay claim other than is relevant to time.
18. The Claimant’s appointment as an HM Inspector of Constabulary to HM the Queen (“HMIC”) was formally confirmed on 7 June 2016 (p54). The Claimant was informed that his remuneration for the role was £133,983 per annum. The Claimant responded on 8 June 2016 (p55-57) referring to the pay of his predecessor and the pay of other HMICs. He sets out his presumption about the arrangements under which other current HMICs salaries were determined and makes two proposals regarding his pay.
19. The Claimant receives a response dated 21 June 2016 which states that:

*“This exercise, which was agreed earlier this year, introduced a new pay arrangement including a salary scale of £133,983 to £185,791 and a presumption that all new appointments would be made at the bottom of this scale or the candidate’s current base salary: whichever were higher. The terms of your offer are consistent with this decision and Ministers are therefore not able to vary your base salary as requested.”*

20. The Claimant raised further queries regarding his pay and received a reply dated 7 July 2016 (p62) in which the Claimant was told that the Respondent would not engage in further detailed correspondence on the issue of the basis for setting remuneration for appointment.
21. The Claimant was offered an additional London allowance of £7904. The Claimant’s terms of appointment are at page 63-67 and his key responsibilities are at p67(a). The duration of his appointment was a period of five years starting on the 1 August 2016 and expiring on 31 July 2021. As the appointment is to Her Majesty The Queen each appointment of an HMIC requires a separate warrant to be issued for the duration of the appointment.
22. In December 2016 the Home Office wanted the HMICs to take on a newly-created role of HM Inspectors of Fire and Rescue Authorities (“HMIF”) for no additional pay. STW made representations on behalf of the HMICs. It was decided that the HMICs would be appointed as HMIFs and that their existing HMIC contracts would be extended to fall in line with the new appointments (p85).
23. In addition, it was decided that the indemnity in HMICs terms of appointment would be amended to include a necessary extension to the legal indemnity to cover the costs of resisting and defending legal proceedings which may be threatened or made against HMICs (p88).
24. In addition, it was agreed that the Home Office would undertake an independent review of HMI salary scales one year after becoming HMIFs.
25. The Home Office was advised to deal with the extension/amendment by way of a letter but in fact issued all HMICs with a document headed “Terms of Re-Appointment”. The preamble refers to the terms of appointment for the HMIF and says they should be read in conjunction with the terms of appointment for HMIC. Under duration the terms refer to the appointment being extended on account of the HMIF appointment until 31 December 2021, an extension of 5 months. The clause goes on to state that if the Claimant resigns or is removed from his HMIF office prior to 31 July 2021, his appointment as HMIC will end on that earlier date.
26. The pay review is set out under remuneration and the extended indemnity clause is under personal liability. The re-appointment terms are signed by the Claimant in August 2017 and a new warrant is issued and the old one revoked to cover the extended period of the appointment.
27. Separate Terms of Appointment for the HMIF role are issued and signed by the Claimant. In the preamble it says the terms should be read in

conjunction with the HMIC terms. Under remuneration it is stated that the HMIF role is not remunerated and refers to the remuneration set out in the HMIC appointment. Annexed to the HMIF terms are new key responsibilities. The new appointment to HMIF did increase the Claimant's responsibilities. STW suggested by approximately a third.

28. The Respondent argued that the Claimant had three appointments: the first HMIC appointment between 1 August 2016 and ending on 16 July 2017; the second HMIC appointment in July 17 and a third appointment to HMIF. There had been significant changes of role or responsibility between the first and second and third appointments such that there was not a stable working case. The Respondent argued the Tribunal should look at the entirety of the working relationship. The significant changes relied on are the fact that the HMIC role was made in light of the proposal to take on the HMIF role; the terms of the second appointment is read in conjunction with the HMIF role; the Claimant's job title allegedly changed; if the Claimant decided not to continue with the HMIF role his end date would be 31 July 2021; the additional indemnity clause; the new warrant being issued and the old one revoked; and the terms recognise the agreement to undertake an independent review.
29. The Claimant argues that his first appointment was merely extended by the re-appointment and in the alternative if the re-appointment was a change it was not a significant change and therefore he is in a stable working relationship.

## **Conclusion**

30. The Tribunal finds that, based on the wording of the terms of appointment and re-appointment documents, that there was a new appointment in 2017 when the Claimant was re-appointed to HMIC but that the Claimant is in a stable working relationship. Case law confirms that where there has been a termination of a contract and continuation of employment under another contract for substantially the same work with the same employer, this comprises a stable employment. This applies equally to appointments.
31. The Tribunal does not accept the Respondent's arguments that there were significant changes with the re-appointment. The re-appointment was done to facilitate the HMICs taking on the new role of HMIF without extra pay. It was also an opportunity to bring in line and extend termination dates and add a needed indemnity clause. The fact a new warrant was issued was just a necessity. The pay review term is not a substantial change and was a carrot to get the HMICs on board.
32. The appointments are interlinked but are separate appointments. This is demonstrated by the separate terms of appointment with different responsibilities listed in the annexes and the HMIC terms being referred to as a re-appointment whereas the HMIF terms are just terms of appointment as it is a new and separate appointment. As a separate and additional appointment, it is expected that the Claimant would have taken on more responsibilities when he accepted the HMIF role. The Tribunal looks at the Claimant's work in his role as HMIC to decide whether his role has substantially changed, as the HMIC and HMIF roles are different

appointments. The Tribunal does not accept the Respondent's argument that the appointment to HMIF should be considered as well when deciding on whether there has been a substantial change to the work. If the Tribunal is wrong on this point then in any event the Tribunal does not find the addition of the HMIF role as a significant change. The roles are both inspector roles and therefore, although there are additional duties the new roles are not substantially different.

33. The Tribunal therefore finds that the claimant's equal pay claim is in time as the qualifying period is the period of 6 months beginning with the day on which the stable working relationship ended. The Claimant remains employed in a stable working relationship.

34. In relation to the Claimant's sex and race discrimination claims the Tribunal feels it would be inappropriate to be making findings of fact about whether or not there has been a single act or omission or a continuing act or continuing omission, or whether it would be just and equitable to extend time based on the limited information before it. Had the Claimant's claim been limited to the original decision to appoint the Claimant on a pay of £133, 983 in 2016 then the claims would have clearly been out of time as the one act took place over 2 years ago. However, as set out in the case management preliminary hearing order dated 14 June 2019, the Tribunal finds that the Claimant's claim form does include the fact that he raised his pay concerns a number of times with the Respondent. Whether or not these complaints by the Claimant to the Respondent and their responses amount to separate acts of discrimination is for a full Tribunal to decide based on all the evidence before them.

### Should the Claimant's equal pay claim be struck out?

35. Rule 37 in schedule 1 of the ETs (Constitution & Rules of Procedure) Regs 2013 (The ET Rules") provides that a Tribunal can at any stage of the proceedings strike out all or part of a claim on the grounds that it is scandalous or vexatious or has no reasonable prospects of success.

36. A Tribunal should not strike out any claim where there is a core of disputed facts and that discrimination issues "*should as a general rule, be decided only after hearing the evidence*" – **Anyanwu v South Bank Students Union and Anor (2001) ICR 391**. It is a high test and the Tribunal must carefully consider all material before it concludes that there is no reasonable prospect of success.

37. The Respondent argues that the Claimant's equal pay claim should be struck out as it discloses no reasonable prospects of success. The respondent summarises the Claimant's equal pay claim as "*It is fundamentally unfair to pay people wildly different amounts for doing what is, by any measure, identical work*".

38. The Respondent argues that the EqA does not require an employer/equivalent to pay all men and women doing equal work the same amounts. A sex equality clause has no effect in relation to a difference between A's terms and B's terms if the Respondent shows that

the difference is because of a material factor relied upon which does not involve treating A less favourably because of A's sex than the responsible person treats B. In summary, the Respondent argues that the Claimant does not establish a prima facie case that he was treated less favourably by being paid under the new salary scale because of his sex.

39. Second, the Respondent argues that the Claimant does not suggest, nor could he, that the reason for the difference in pay, i.e. the Respondent's decision to impose new salary scales in 2016, was tainted by sex.
40. Third, that the policy complained about was not even applied to him.
41. Fourth, there is no relevant claim to "piggyback".
42. Fifth, the Claimant's argument that the new salary scales would not be applied to women at all is not an equal pay complaint.
43. Sixth, the Claimant is prevented from arguing his equal pay claim in the alternative as a sex discrimination claim by section 70 EqA. The Claimant accepts this and isn't arguing in the alternative.
44. The Tribunal refuses the Respondent's application to strike out the Claimant's equal pay claim. The Claimant's equal pay claim isn't as clear as the Respondent asserts. The Claimant appears to be arguing that the new salary scale would not have been applied to a black woman. He also does not accept that his difference in pay is because the Respondent applied a new pay scale to him. He is suggesting that the only consistent policy applied by the Respondent was to drive down HMICs pay and that the various alleged pay policies were not applied on each new HMIC's appointment. What policies were applied and to whom and whether they were tainted by sex will be a matter of fact for the full Tribunal panel, following a full hearing.
45. It is also not so clear to the Tribunal that there are no reasonable prospects in arguing that there is an equal pay claim to piggyback. What discussions and decisions that took place regarding the Claimant's named comparator will be a matter for the full Tribunal. However, the Tribunal does think it is unlikely that such an argument will succeed as no formal complaint was raised by the comparator, no Tribunal claim made or terms of settlement agreed. Any submissions made by the Claimant appear to be on the grounds of discrimination rather than equal pay.

### **Deposit Order**

48 However, the Tribunal does order the Claimant to pay a deposit of £1000 as a condition of pursuing his equal pay complaint. A separate order with notes attached has been made but for completeness and efficiency the reasons for the deposit order are set out below and referred to in the deposit order itself.

49 Rule 39 provides:



- (1) *Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party 9 “the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
- (2) *The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*
- (3) *The Tribunal’s reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*
- (4) *If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response has been presented, as set out in rule 21.*
- (5) *If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order-*
  - (a) *the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*
  - (b) *the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the tribunal orders), otherwise the deposit shall be refunded.*
- (6) *If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.”*

50 Rule 39 of the ET Rules provides for the making of a deposit order if the Tribunal considers that the allegations have little reasonable prospects of success.

51 The legal principles which the Tribunal should have regard to when considering making a deposit order are clearly set out in paragraphs 9 to 17 of the EAT case of Hemdan V Ishmail & another [2017] ICR 486. In summary, the purpose of a deposit order is to identify at an early stage claims with little reasonable prospects of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. This is a legitimate purpose as it saves wasted time, resources and unnecessary anxiety. It is not to make it difficult to access justice or to effect a strike out through the back door.

- 52 A deposit order can be made in relation to each allegation but the Tribunal must consider proportionality as multiple deposit orders may result in a prohibitively high level of collective deposits.
- 53 The Tribunal must make enquiries of the Claimant's ability to pay a deposit order and explain the consequences of the deposit order to the Claimant as set out in rule 39 (5).
- 54 The Tribunal concludes that the Claimant's equal pay claim has little reasonable prospects of success because, based on the limited information before this Tribunal at the preliminary hearing, the Respondent is likely to succeed in defending the claim on the basis that the difference in pay between the Claimant and his comparators is due to the so called new salary scale policy being applied to his pay and not because he is a man. The same policy would have been applied to newly appointed male and female HMICs.
- 55 The Claimant confirmed to the Tribunal he was able to afford to pay a deposit of £1000 and understood the possible cost consequences of the deposit order.

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Employment Judge A Isaacson

Date 14 June 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

17 June 2019

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FOR THE TRIBUNAL OFFICE