**Case No: 1401065/2018**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Larry Rawlinson

**Respondent:** University of the West of England

**Heard at:** **Bristol** **On: 24 October 2018**

**Before:** **Employment Judge Fowell**

**Representation:**
Claimant: In person

Respondent: Mr R Dennis of counsel, instructed by Eversheds Sutherland Solicitors

# JUDGMENT

All complaints are struck out as having no reasonable prospects of success save for:

a. the complaint of breach of contract which is dismissed on withdrawal by the claimant and

b. the complaint in respect of Equal Pay.

# REASONS

**Background**

1. This hearing was listed to consider the merits of a number of claims brought by Mr Rawlinson against the University of the West of England, with whom he is still employed. There was a preliminary hearing on 14 June 2018 to identify the relevant issues and which subsequently directed this hearing to assess the merits of the various complaints.

2. Rule 37 of the Employment Tribunal Rules of Procedure allows the Tribunal to strike out any part of a claim which has no reasonable prospect of success, and Rule 39 similarly allows a Tribunal to make a deposit order where any specific allegation or argument is considered to have little reasonable prospect of success. This hearing was therefore to assess whether these tests are met in relation to any of the

complaints raised. It proceeded on the basis of submissions only.

3. By way of background, Mr Rawlinson joined the university in August 2015 as the Head of Contracts. He is a qualified solicitor. Although this was not listed as a requirement of the role the original personal specification did state that the successful candidate would have experience in a number of areas of law including contracts and commercial, property, statutory compliance together with drafting and reviewing contracts and legal documents. Experience of higher education contracting and of charity law was also desirable.

4. On his account, the university soon recognised the advantages that his professional standing and experience gave them and he began to take on a wider range of tasks including advising on such matters as intellectual property and data protection. The University was also happy to pay for his legal practising certificate, a sum of about £1000 a year, and on one occasion he made use of this to represent the University in defending a claim relating to a student debt.

5. As his responsibilities grew he took steps to have this reflected in his job title and salary. An application was made in January 2017 for his position to be regraded, and despite the support of his line manager that application was unsuccessful. He pursued an appeal against that decision in November 2017 and when that too was unsuccessful he initiated the present proceedings.

6. Towards the end of this process he discovered that a female colleague of his, JF, apparently in a more junior position, was being paid more than him, which added to his sense of injustice. She retired in 2016. Her job title was Contracts Solicitor. It appears from the evidence I was shown in the course of this hearing that she began her employment in 1988 and in 2005 was awarded a pay supplement to reflect the difficulty in recruiting someone of the necessary experience to her role. Mr Rawlinson's case is that although she did not report directly to him, he was at a more senior level and was in practice carrying out the work of a solicitor and so should not have been paid less. The University says in response that the relevant pay supplement policy did not apply in his case: it is triggered where there is a succession of attempts to recruit someone, or where there is evidence of staff been approached for similar jobs on a higher salary.

**The complaints**

7. Various complaints were set out in the previous case management summary relating to Mr Robinson's terms of employment under section 11 ERA. Summarising them very broadly, he claims:

    a. that his contract of employment should be amended to reflect the role he actually fulfils, which he says is Head of Contracts and University Solicitor, and so he seeks a declaration to that effect under sections 4 and 11 Employment Rights Act 1996;

    b. that his various complaints about salary and role were protected disclosures and so he has suffered a detriment for raising them under section 47B Employment Rights Act 1996;

c. that he has suffered age discrimination in connection with the appointment of a colleague to the role of "Assistant Vice Chancellor Data Protection Privacy and Complaints"; and finally

d. direct sex discrimination and/or claims equal pay in relation to the difference in treatment between him and JF;

8. This age discrimination claim relates to the appointment to this post of an internal candidate, the Head of the Department of Law, SD. The claimant states essentially that this role was ideal for him. He was already providing advice on such matters as data protection so the role should have been drawn to his attention and he should have been consulted about it. As it was, the role was advertised internally but it did not come to his attention. This is presented as direct, alternatively indirect age discrimination on the basis that it should have been advertised externally, in accordance with university's normal practice.

9. The claims of sex discrimination overlapped with those of equal pay and Mr Rawlinson accepts the complaint of direct sex discrimination is now limited to the alleged less favourable treatment of not providing him with an accurate job description. He confirmed too that his earlier complaint of breach of contract has been withdrawn and so it is dismissed on withdrawal.

**The hearing**

10. I was assisted by a detailed skeleton argument prepared by Mr Dennis on behalf of the respondent and Mr Rawlinson ably represented himself. Both sides produced a bundle of relevant authorities and a further bundle of about 250 pages including pleadings. Given the extent of the complaints in dispute and the limited time available the hearing proceeded on the basis of submissions. I will deal with each complaint in turn.

Declaration under sections 4 and 11 Employment Rights Act 1996

11. Mr Dennis submitted that this was outside the scope of the Tribunal's jurisdiction given the guidance in *Southern Cross Healthcare Co Limited v Perkins 2011 ICR 285*. That case considered the scope of the Tribunal's jurisdiction and held that there was no jurisdiction to construe terms and conditions of employment.

12. Section 1 of the Employment Rights Act places an obligation on an employer to give to the employee a written statement of particulars of employment. That includes, at section 1(4)(f), the title of the job which the employee is employed to do or a brief description of the work for which he is employed". Section 4 states that "If, after the material date, there is a change in any of the matters particulars which are required by sections 1 to 3 to be included or referred to in the statement under section 1, the employer shall give to the employee a written statement containing particulars of the change."

13. The central difficulty on this point for Mr Rawlinson is that the University does not agree that his job title or role includes that of University Solicitor, whether or not in practice he has extended the remit of his duties in that way. He is therefore asking the Tribunal to make changes to his contract of employment against the wishes of his

employer. I have read with care the reasoning of the court in *Southern Healthcare*. At paragraph 28, Maurice Kay L.J. quotes the relevant section of Harvey on Industrial Relations and Employment Law to the effect that the Tribunal has no jurisdiction to interpret the agreement, still less to amend it. The main reason for that is explained at at paragraph 30 – that it would open the door to a multitude of cases advanced on a contractual basis, at odds to what the parties agreed. He described this view as regrettable but well settled. Regardless of the merits of the approach it is binding on this Tribunal. What is suggested here in fact goes well beyond interpretation and is no different in principle to asking the Tribunal to amend the contract on other matters, such as pay. Given this authority, that complaint has in my view no real prospect of success and must be struck out.

Whistleblowing Claim

14. The second complaint relates to the alleged whistleblowing. At the original preliminary hearing the claimant was required to provide further particulars of this aspect, which he has now done. The relevant complaints have been extracted and summarised in paragraph 30 of Mr Denis's skeleton, and no issue is taken with the compilation made. Each instance of a complaint, beginning on 9 September 2016, relates to the fact that his job title did not reflect his actual role and his claim to be re-graded.

15. The main issue raised by the respondent is that none of these complaints meet the public benefit test – they are exclusively about Mr Rawlinson's own circumstances. On this point I was referred to the cases of *Parsons v Airbus International Ltd (unreported) UKEAT/01111/17/JOJ 13 October 2017* and *Chesterton Global Ltd v Nuromohamed [2017] IRLR 837 CA.*

16. The Rawlinson says in response that there is a general public interest in policies being adhered to and this is particularly so in the case of a public body like the University. It is subject to the Public Equality Duty at section 149 Employment Rights Act 1996. In this case that duty requires them to give him the appropriate job title.

17. I cannot accept that submission. If it were valid then in every case where an employer failed to comply with one of its own policies, or in which an employee alleged on reasonable grounds that that was the case, it could be said that issue was in the public benefit. Essentially the public interest requirement would become a dead letter. It does not seem to me that the Public Equality Duty adds anything of substance to the point. There is no suggestion here of some inate flaw in the university's approach which might lead to other members of staff being disadvantaged. The circumstances appear quite specific to him, indeed almost unique in the context of a Head of Contracts who also happens to be a solicitor.

18. I have considered carefully whether this claim has little reasonable prospect of success or no reasonable prospect, but I can see no answer to it. It does not appear to me that any further evidence could assist Mr Rawlinson on the point. I therefore conclude that any claim based upon public interest disclosure has no reasonable prospect of success either and I make a strike out order in that respect too.

19. Although not essential to my decision, I note too that no particular detriment has been identified as flowing from these disclosures. Essentially Mr Rawlinson has complained about his job title and salary without success. Nothing has been done to rectify the

situation. He has not identified any respect in which his working environment has become worse as a result of raising this issue – he is simply left no further forward.

Direct Age Discrimination

20. This relates to the appointment of SD. The main difficulty here for Mr Rawlinson is that SD is in fact only five months' younger than him. Both are in their mid-fifties. Section 5 of the Equality Act defines someone with the protected characteristic of age as a person of "a particular age group". It is not at all clear what age group Mr Rawlinson says that he belongs to. He explained that SD was at university with him, two years below, and so he thought that the difference was greater. There is little guidance about the meaning of this term "particular age group" but it is hard to see how it could be said that the two men were in different age groups, let alone that age played a part in the decision-making process.

21. Again, I have considered whether it can be said that this allegation has little, alternatively no, reasonable prospect of success and have been referred to the guidance of the recent Court of Appeal decision in *Ahir v British Airways Plc [2017] EWCA Civ 1392.* At paragraph 24 it states that it may well be appropriate to conclude that an allegation has no reasonable prospect of success where there is on the face of it a straightforward and well documented, innocent explanation for what occurred.

22. Here it is common ground that the vacancy was advertised internally and that Mr Rawlinson was unfortunately not aware of it. Although he alleges that he ought to have had the vacancy drawn to his attention, the University may say with some justice that this is the purpose of advertising it internally. In any event there appears to be a straightforward explanation for how it was that SD was appointed and Mr Rawlinson was not. They were both existing members of staff and only SD applied for the post. Taken together with the relatively trifling differences in their age, I conclude this allegation too has no reasonable prospect of success.

23. The fact that I conclude that both men were in the same age group also means that any argument based on indirect age discrimination cannot succeed either. But even if they were in a different age group I can see no basis for the view that advertising a post internally would put people of the claimant's age group at a substantial disadvantage, particularly when compared with an external advert. Mr Rawlinson says that he had alerts set up for external appointments but that can only be regarded as an unfortunate turn of events. It is hard to see how in general an internal candidate can complain that a post was only advertised internally.

Equal Pay

24. The next allegation concerns equal pay. Here, it did seem to me that Mr Rawlinson had an arguable claim. The outline facts have already been summarised, and although Mr Dennis drew my attention to a review of JF's salary in 2015, which showed that the market pay policy was considered at that point, JF's own position, as expressed in an email to Mr Rawlinson, was that this was effectively part of her salary from 2005 onwards and was not referred to subsequently in any performance review or subject to any separate salary review. There was another increase towards the end of her employment when she was offered another post. It may be that this approach, from another employer, meant that the University was entitled, in

accordance with its policy, to make a further increase in the pay supplement, but that still leaves open the curious failure of the University to apply any such supplement to Mr Rawlinson. According to that market pay policy, at paragraph 11, the supplement will normally be appropriate where there are others occupying exactly the same role with the same terms and conditions. Although not particularly clear in its wording, that indicates that where, to take this example, it is necessary to apply an uplift to the salary of one member of the team to reflect market forces for legal services, the same approach should be taken to those in similar role. I note the use of the word "exactly" here, but the thrust of the policy is about market forces and the principle is that where market forces dictate an uplift this should be applied, and applied too to others in the same boat. I have been taken to numerous documents to the effect that Mr Rawlinson was in fact carrying out the duties of university solicitor and so it seems to me that least arguable that he too should have come within the scope of this policy. Nor can it be said that any such argument has little reasonable prospect of success, and so I declined to make any order in respect of that complaint.

Sex discrimination

25. This allegation relates to the failure to provide Mr Rawlinson with an accurate job description. Mr Dennis submitted that there was nothing to show this was on grounds of sex. It was not a point to which Mr Rawlinson responded, nor is it easy to see what response he could make. My conclusion in respect of the whistleblowing allegation is also relevant here: the failure – if there was a failure – to provide him with an accurate job title or job description arose out of the unusual circumstances of his role and the fact that he had additional abilities to offer as a solicitor which the university was happy to draw on.

26. I approach this question mindful of the burden of proof provisions under section 136 Employment Rights Act 1996 and the well-known cases on that question to which I was referred. Fundamentally there is an obligation on the employee first to establish circumstances from which the tribunal *could* conclude, in the absence of a satisfactory explanation from the employer, that the failure was tainted by discrimination. Something more is required than the fact that the claimant has a protected characteristic and has suffered less favourable treatment. In the absence of any indication of what that might be I have to conclude that this aspect too has no reasonable prospect of success.

27. It follows that the only remaining complaint relates to Equal Pay under section 64 to 66 of the Equality Act 2010.

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Employment Judge Fowell
Date 2 November 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON
.....8 November 2018.....
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FOR THE TRIBUNAL OFFICE