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EMPLOYMENT TRIBUNALS

Claimant: **Ms S Beg**

Respondent: **HSBC Global Services (UK) Ltd**

Heard at: **East London Hearing Centre**

On: **Thursday 14 March 2019**

Before: **Employment Judge Brook (sitting alone)**

Representation

Claimant: Mr D Matavou (Counsel)

Respondent: Mr S Purnell (Counsel)

JUDGMENT ON PRELIMINARY ISSUES

The judgment of the Tribunal is that:

(1) A contract worker, not being an employee of a principal, has no locus to bring an Equal Pay claim against a principal pursuant to the Equal Pay provisions at Section 64 et seq of the Equality Act 2010. The said provisions constitute a sui generis regime applicable only to direct employees of the same employer, or those deemed to be employees pursuant to the provisions of Section 83(2)(a);

(2) The said Equal Pay provisions, in particular Sections 70 and 71, do not operate so as to prevent a contract worker from bringing a claim in sex discrimination against a principal on an allegation of gender based disparity in the terms of payment on which the contract worker is allowed to work in comparison to a contract worker of different gender providing the same services, or services of equal value, to the same principal;

(3) Employment Judge Hyde's Decision of 18/10/18 refusing the Claimant's application to amend her Claim is confined to the equal pay provisions at Sections 64 et seq of the Equality Act 2010. It did

not decide the issue of whether the Claimant as a contract worker can apply to amend her existing claim, or seek to bring a new claim, in sex discrimination against the Respondent as principal founded on allegations of gender based unfavourable payment terms on which she was allowed to work by the Respondent in comparison with male contract workers providing the same services to the Respondent, or providing services of equal value, where the comparators are equal in all material respects save that of gender. Accordingly, that issue is not res judicata nor is the Claimant estopped by reason of Judge Hyde's Decision. The Claimant can make application to amend to bring such sex discrimination claims as a contract worker against the Respondent as a principal pursuant to the provisions of Section 41 Equality Act 2010. The Respondent is at liberty to resist any such application and, if such an application is granted, to defend any such claim.

DIRECTIONS

1 The Parties have indicated there are further preliminary issues to be decided by the Tribunal before the matter proceeds to final hearing. The Parties are encouraged as soon may be convenient to agree draft Directions and, so far as may be necessary, an amended List of Issues and submit these together with Counsels' availability and time estimates for any further preliminary hearings, to the Tribunal marked for the attention of Employment Judge Brook.

2 If the Claimant intends to apply to amend her Claim to include claims in sex discrimination against the Respondent based on allegations of unfavourable terms of payment upon which she was allowed to work by the Respondent in comparison with appropriate male workers, then the Parties are encouraged to agree any further disclosure as may be relevant in respect of such an application.

3 Whether or not such disclosure can be agreed if the Claimant wishes to apply to amend then she should do so on notice to the Respondent identifying a comparator, or class of comparators, if applicable draft directions as to relevant disclosure, together with a draft proposed amendment and an application to amend out of time with reasons in support of the same. The Claimant should set out the legal and factual basis for the proposed amendment and the nature and scope of the remedy she seeks by reason of the same.

4 The Respondent may resist any such application, or any part of any such application, and each Party is at liberty to make relevant applications and resist the same on proper notice if so advised.

REASONS

1 This matter came before me on 14th March 2019 on a referral from Employment Judge Hyde and I am again indebted to Mr Purnell and Mr Matovu of Counsel for their respective clear arguments and submissions. At the commencement of the hearing

both Counsel characterised the present state of this Case as being *'something of a muddle'*, a characterisation with which I could only agree. In so saying I intend no criticism of either Counsel, still less of Employment Judge Hyde, but rather that a degree of cross purposes appears to have entered into the arguments as to the extent and legal effect of the equal pay provisions to be found at Section 64 et seq of the Equality Act 2010, and the effect and scope of Judge Hyde's Decision from the telephone hearing of 18/10/18 where she refused the Claimant's then application to amend to plead claims in equal pay.

2 The issues before me on this preliminary hearing were whether as a matter of law the Claimant as a contract worker has locus to bring a claim in equal pay against the Respondent as a principal pursuant to the provisions of Section 64 et seq of the Equality Act, or indeed whether the Claimant has any locus in law to bring any claim in sex discrimination against the Respondent founded on allegations of gender based pay differentials operated by the Respondent or, as argued for by Mr Purnell, the aforesaid equal pay provisions operate to preclude any such claims as the employment status of the Claimant in relation to the Respondent was that of a contract worker. Finally, and whatever the true position might be at law, whether the Decision of Employment Judge Hyde at the telephone hearing of 18/10/18 refusing the Claimant's Application to amend her Claims to bring 'equal pay' sex discrimination claims rendered the issue res judicata and/or issue estopped as between the Parties such that the Claimant can bring no claim against the Respondent founded on gender based disparity in terms of pay.

3 Put simply Mr Purnell argued that such was the effect and purpose of Section 64 et seq that Ms Beg was non-suited to bring a claim in gender-based pay disparity against this Respondent and that in any event the Decision of Judge Hyde rendered the issue res judicata and/or issue estopped as between the Parties. Mr Matavou's argument was that there was no such lacuna in the law and that in principle there is no statutory provision or rule of law preventing a sex discrimination claim by a such a claim. As to Ms Hyde's Decision as I understood his submission this was not a judgment, merely a direction and the issues of res judicata and/or issue estoppel did not arise.

4 I heard a full day of argument on these issues and reserved my judgment. It was with some trepidation that I then took to considering my judgment on these inherently complex issues which, in part at least, accounts for the delay in promulgating this judgment. I did not find this an easy case though there were other intervening reasons going to the delay which I have disclosed to the Parties through their respective Counsel and I am grateful for their forbearance and patience. As with His Honour Judge Hand when faced with similar issues and consequentially delayed promulgation in *BMC Software Ltd v Ms A Shaikh* [Employment Appeal Tribunal UKEAT/0092/16/DM], I can only offer my sincere apologies to the Parties for any inconvenience and distress caused by this delay.

5 After giving the matter considerable thought the answers to the issues eventually resolved along relatively straightforward lines and accordingly it has proved possible to keep this Judgment short, though I hope not so short as to be inconsistent with the requirement to give proper reasons for the same. My hope is that this case is now 'back on track' and in that endeavour I was greatly assisted by Judge Hand's

careful analysis in *BMC Software* of the salient issues involved in the equal pay provisions in the Equality Act, which essentially operate in contract, and in the provisions going to the statutory tort of sex discrimination, all now to be found in the Equality Act 2010. I was told by Mr Purnell, who took me to *BMC Software*, that part of that Judgment might be appealed but not that part providing the analysis and distinctions in the law relating to equal pay and sex discrimination drawn by Judge Hands. I therefore considered myself bound by that case, and by the Decision of the ECJ in *Allonby v Accrington Rosendale College and Others* [ECJ Case C – 256/01 2004 ICR 1328], which was particularly useful in its discussion of the 'single source' criterion.

6 Despite Mr Purnell's reliance on these authorities I do not agree with Mr Purnell that either judgment, nor the equal pay provisions in the Equality Act, operate so as to preclude a contract worker from bringing a claim in sex discrimination against a principal founded on allegations of gender based pay differentials used by a principal as a term on which that principal permits a contract worker to undertake work. There might well be evidential difficulties in bringing such a claim in sex discrimination and much will depend on the particular facts in each case, in particular whether the principal can be said to satisfy the 'single source' criterion identified in *Allonby*. However, in my judgment, the equal pay provisions, originally enacted in the Equal Pay 1970 and now to be found, with minor amendments, at Sections 64 et seq of the Equality Act 2010, operate as a sui generis regime for employees of different genders of the same employer engaged in the same work, or work of equal value, to imply into relevant employment contracts an 'equality clause' and do not prevent other claims in pay disparity being brought by non-employees. This equal pay regime is only available to employees and, insofar as the provisions operate to exclude claims in sex discrimination at all, it is to prevent a claim in sex discrimination being brought together with a claim in equal pay based on the same facts (see in particular Sections 70 and 71) by the same employee. Thus, the wide ranging 'precluding provisions' relied upon by Mr Purnell as a consequence of the equal pay provisions are in my view no such thing. In my view they operate reflexively on this separate regime serving to maintain the integrity of the equal pay regime, distinct from the generality of the sex discrimination provisions under the Equality Act.

7 That conclusion is not, however, determinative of the issue of law before me. Be that conclusion as it may the equal pay provisions do not, as argued by Mr Purnell if I have understood him correctly on this point, operate so as to exclude a contract worker from making a claim in sex discrimination against a principal based on alleged gender-based disparity in payment terms operated by a principal. Mr Purnell's Skeleton Argument No 1 at his paragraphs 5 to 9 correctly sets out the equal pay regime available to employees of different genders, including deemed employees satisfying the provisions of Section 83(2)(a), of the same employer at the same establishment. Providing the employee and same work provisions are met then Section 66(1) implies a sex equality clause into relevant employment contracts. So far so good, and as Mr Purnell correctly contends these Sections, and that contractual remedy, are self-evidently not available to non-employees. Ms Beg is an employee of her own 'one-woman' company (as per my Judgment of 15/10/18) but that is not to the point so far as the equal pay provisions and this Respondent is concerned to whom Ms Beg stands as a contract worker to his principal.

8 Paragraphs 10 to 14 of Mr Purnell's Skeleton Argument seek to argue that the combined effect of Sections 70, 71 and 39(2) is to exclude claims in sex discrimination in relation to gender based pay disparity unless they can be brought within Sections 64 et seq and here I believe is where error entered into his argument. To cite directly from Mr Purnell's Skeleton Argument at paragraph 11: '*Section 39(2) provides that an employer (A) must not discriminate against an employee of A's (B) as to, inter alia, B's terms of employment (Section 39(2)(a)).'* This is the general prohibition against discrimination in employment. At paragraph 12 Mr Purnell submits: *'Section 70(2) provides that neither of the following is sex discrimination for the purposes of Section 39(2)*' and goes on to cite '*i. the inclusion in A's terms of a term that is less favourable as referred to in Section 66(2)(a)*; *ii. the failure to include in A's terms a corresponding term as referred to in 66(2)(b)'.* That in my view is precisely because the equal pay regime and the sex discrimination regime are mutually exclusive, that is to say where Section 66 provides a contractual remedy to the relevant employee by implying into their employment contract a 'sex equality clause' then that same employee, on the same grounds of unequal pay by reason of gender, cannot then also avail themselves of a tortious claim in sex discrimination. In that sense these provisions are reflexive on the equal pay regime but have no further impact on the generality of the sex discrimination regime. They serve to point up that, so far claims in equal pay and sex discrimination are concerned, these are mutually exclusive regimes, but not in a way that precludes a contract worker such as the Claimant from bringing a claim pursuant to the provisions of Section 41 in sex discrimination founded on an allegation of gender based disparity in the payment terms operated by HSBC as principal on which the Claimant is permitted to work by that principal. With respect to Mr Purnell he seems to have read these provisions as operating not just to restrict all bar those employees falling under the provisions of Sections 64, 79 and 83 as qualifying for the contractual 'equality clause' remedy provided by Section 66, and in that he is correct, but he has moved from there to assert that unless one can come within these provisions then there can be no claim in sex discrimination founded on an allegation of gender based pay disparity in the terms on which a contract worker, or indeed anyone else of non-employment status, is permitted to work for a principal. If that is what Mr Purnell is arguing then it is a fundamental misreading of the equal pay provisions, the reflexive purpose and scope of Sections 70, 71 and 39 on Section 66, and Judge Hand's carefully drawn distinction between the statutory contractual and tortious regimes.

9 Nor is Section 41 of the Equality Act, by itself or by express reference to it in other sections of the Act, proscribed from being the mechanism by which claims in sex discrimination can be brought founded on gender-based pay differentials as to the terms on which a contract worker is permitted to work for a principal. I am persuaded by Judge Hand's very helpful analysis in *BMC Software* that the equal pay provisions operate in contract and are only available to employees of the same employer, perhaps so restricted by reason of their relative antiquity in first arising in the Equal Pay Act of 1970, but do not impact upon the statutory tort of sex discrimination save that, though this is not strictly necessary for present purposes but does explain what I regard as the mistaken interpretation of Mr Purnell, they do operate to preclude concurrent claims in sex discrimination and equal pay by the same employee based on the same facts.

10 I agree with Mr Purnell that the *'statutory objective is to make claims of sex discrimination and equal pay mutually exclusive'* (his Skeleton at paragraph 18.ii.) but that mutual exclusivity gives rise to an 'either or' distinction with equal pay in the contractual 'equality clause' sense of Section 66 being a remedy that is only available

to employees but, in virtue of this contractual remedy, those same employees cannot then also claim tortious relief in sex discrimination on the same pay disparity facts. It does not mean that sex discrimination claims founded on gender-based disparity in payment terms are thereby excluded to all but employees. I suspect that part of the problem, and fuel to the vigour with which Mr Purnell and Mr Matavou have each pursued their respective arguments, is that each have been using the term 'equal pay' in different senses, Mr Purnell as a term of art entirely dependent on the meaning ascribed to it by Section 64 et seq, and Mr Matavou in the more general colloquial sense of gender based pay disparity. Such can be the bewitching effect of linguistic misunderstandings.

11 As to the requirement of a 'single source' for the discriminatory conduct as identified in *Allonby*. Mr Purnell correctly contends that the requirement of such a single source is necessary to identify the author, or cause, of the discriminatory conduct and to enable a proper comparator to be identified. Plainly the same employer at the same establishment is likely to satisfy that single source requirement so far as an employee is concerned. However, on my reading of *Allonby* that does not rule out that a single source of gender-based pay disparity might be found in work relationships other than that of employee/employer at the same establishment. Identifying a single source is a matter of fact and in certain circumstances a coherent argument could be made that a single source and proper comparator might be satisfied by contract workers providing the same services to the same principal at the same establishment, particularly where the type of tripartite arrangement in play is as prescriptive as that in the instant case. It seems to me that the greater the degree of control exercised by a principal over the choice of contract worker and the terms and conditions on which the worker is permitted to do the work then the closer that principal will come to satisfying the 'single source' criterion and the easier it will be to identify an appropriate comparator.

12 In my earlier judgement I set out in some detail the nature of this particular tripartite arrangement and the comprehensive way in which HSBC exercised considerable, if not near complete, control over the same from start to finish. There is of course nothing intrinsically wrong with that, indeed much to recommend it from a quality assurance point of view, though the greater the degree of control by HSBC as principal then the more likely this is to have an evidential bearing on whether there is a sustainable claim in sex discrimination based on pay disparity open to Ms Beg as a contract worker if she now seeks to amend to bring such a claim pursuant to Section 41. I am not required to decide such issues at this stage, and do not do so, though these considerations are likely to be relevant if such an application is made.

13 Whilst I am persuaded by Mr Purnell's submissions that only an employee can avail him or herself of the equal pay provisions I do not agree with his conclusion that a contract worker, for good measure one employed only by their own 'one woman' company, is thereby prevented from bringing a sex discrimination claim against a principal (HSBC) based on a pay disparity term compared to a male contract worker. I am not with Mr Purnell on his submissions that the only mechanism available to bring a discrimination claim founded on gender-based disparity in payments terms is as an employee pursuant to the equal pay provisions as they now appear in the Equality Act. There is no such express prohibition, nor is there a lacuna in this area of the law. There is, for historical reasons amongst others, express provision for equal pay between male and female employees of the same employer which operates to imply a pay equality term into their respective employment contract, and there are other routes and

remedies for those persons of different employment status. So far as contract workers are concerned if such a claim can be coherently evidentially supported, which might well present difficulties, a sex discrimination claim against a principal founded on gender based disparity in payment terms can be brought pursuant to Section 41 of the Equality Act. The equal pay and sex discrimination regimes are mutually exclusive insofar as they provide different causes of action in relation to terms of pay for different classes of employee/worker.

14 This brings me to Mr Purnell's res judicata/issue estoppel objections to the Claimant seeking to amend her claim to plead sex discrimination by HSBC founded on allegedly gender-based disparity in payment terms on which she was permitted to work for the Respondent. He submitted that if I were to find, as I do, that Ms Beg can in principle bring such a sex discrimination claim against HSBC then the unappealed decision of Employment Judge Hyde now prevents any amendment to this effect as the issue is res judicata and/or issue estopped as between the Parties. For reasons which will hopefully also become apparent, again I do not agree with Mr Purnell, not because his admirably succinct and coherent arguments re the law of res judicata and issue estoppel were unpersuasive, but because on a proper reading of Judge Hyde's decision she did not go so far as to decide against amending the existing claim to enable Ms Beg as a contract worker to bring such a discrimination claim pursuant to Section 41. Rather Judge Hyde decided only, and in my respectful opinion correctly, that no equal pay claim could be brought against HSBC pursuant to the provisions of Section 64 et seq as Ms Beg was not an employee of HSBC but a contract worker providing services to HSBC as principal.

15 Judge Hyde's Decision was to refuse the Claimant's then application to amend, made without the benefit of Mr Matavou to then represent her, so as to bring a claim against HSBC in equal pay. In so doing Judge Hyde made express reference to my Judgment regarding Ms Beg's employment status of not being an employee of HSBC but of Datanut, as well as to the equal pay provisions in the Equality Act which are available only to employees of a putative respondent. Judge Hyde does not go on to give any reasons for refusing the application to amend that were specific to Section 41. It seems to me that Mr Purnell places unwarranted weight on Judge Hyde's remark at paragraph 8 of her Summary that *'… any purported claim equal pay claim or claim about pay more generally related to her gender could not proceed because of her employment status'* [my underlining] in support of his contention that the effect of Judge Hyde's Decision is the Claimant cannot bring any claim, as a contract worker or at all, related to her gender. Whatever the correct position at law might be Mr Purnell submitted that the Claimant is bound by his wide reading of Judge Hyde's decision.

16 In my view Judge Hyde's remark must be read in context, and some regard must be had to the nature of the hearing at which her Decision and (underlined) remark were made. The format of Judge Hyde's written summary does not have the appearance of a conventional judgment, and a closed telephone hearing is not conducive to hearing extensive argument of the type subsequently heard by me on the issue of 'equal pay'. I had set the date of that hearing which at the time was intended for further directions. Judge Hyde's reason in law for refusing the Claimant's application to amend expressly refer to the equal pay provisions, Section 70 is mentioned which (though not expressly mentioned) refers to the equality clause provision of Section 66, and Judge Hyde noted that at the earlier open preliminary hearing before me the Claimant had withdrawn her Section 83 contention that she was

employee of the Respondent. All that is entirely correct. She goes on to state that *'It was necessary in order to bring such a claim* [in pay] *to compare her treatment with that of someone in the same employment as her. As she was a contract worker, she could not do this',* and she went on to acknowledge that *'…. unless a claimant fell within the extended definition of employee for the purposes of the discrimination legislation, i.e. the Equality Act 2010, then she could not bring her claim'.* On my reading of this Decision it goes no further than Judge Hyde applying the conventional wisdom of what is required to bring a claim under the equal pay regime now found in the Equality Act at Section 64 et seq, namely that to bring an equal pay claim under that regime one had to be an employee of the Respondent and as this Claimant lacked that employee status with HSBC she could not amend to bring an equal pay claim against HSBC. Judge Hyde's remark that *'… any purported claim equal pay claim or claim about pay more generally related to her gender could not proceed because of her employment status'* is in my view consistent with Judge Hyde deciding the issue on that basis, namely that the Claimant lacked the employment status to engage Sections 64 et seq. The seemingly 'catch all' remark '*or claim about pay more generally related to her gender'* when reading the Judgment as a whole does not bear the weight now put upon it by Mr Purnell. It could just as easily relate to a claim for a bonus, or sick pay, or some other emolument arising from direct employment for which Section 64 can provide a contractual remedy. I am now of course aware that Mr Purnell takes a different view, I would say unconventional and mistaken, of the effects of Section 70 and 71 but that is no reason to conclude that Judge Hyde thought anything other than she was deciding the application in terms of the equal pay provisions on conventional lines. To read any more into her Judgment is unwarranted.

17 There was a flurry of correspondence following Ms Hyde's decision which, with respect to both Counsel, generated more heat than light, and in my view was in part fuelled by the use of 'equal pay' to cross purposes and in different senses as between Counsel. Whilst I am prepared to regard Judge Hyde's Decision refusing the amendment as a Judgment, and accept Mr Purnell's contention that as between themselves the Parties are now bound by Judge Hyde's Decision, I find that on a natural reading of Judge Hyde's Decision it is confined to the equal pay provisions and goes no further than that.

18 I anticipate that Mr Matavou will now apply to amend the Claim to plead sex discrimination founded on allegations of gender-based disparity in the terms of payment on which the Claimant as a contract worker was permitted to work for this Respondent, and that Mr Purnell will seek to resist this application. I refer both Parties to the Directions that followed this Judgment.

Employment Judge Brook

19 August 2019