



EMPLOYMENT TRIBUNALS

Claimant: Miss Susan Jones

Respondent: The Commissioner of Police of the Metropolis

Heard at: Watford (by CVP)

On: 14, 15 and 16 February 2022

Before: EJ Price, Mr R Clifton, Mr M Kaltz

Representation

Claimant: In person

Respondent: Mr R Moretto, Counsel

JUDGMENT

1. The Claimant's claim for a breach of section 66 of the Equality Act 2010 is dismissed.

REASONS

The Claim

1. This is claim for Equal Pay arising out of the Claimant's contract of employment with the Respondent. The claim concerns the removal of the claimant's entitlement to Premium Pay in May 2014. The Claimant's employment commenced with the Respondent on 4 June 2007 and is ongoing.
2. The Claimant had already clarified at a case management hearing on 5 March 2021 before Employment Judge Wyeth that she was not pursuing a separate stand-alone sex discrimination claim. Nor is she pursuing an argument that the alleged material factor the Respondent relies upon for the purpose of defending the claim is tainted by sex discrimination such that it is indirect discrimination and requires justification under section 69 (2) read alongside section 69 (1) (b). The Tribunal therefore approached the case on this basis.

3. The Claimant had ticked 'other payments' on her ET1 form but clarified at the outset of the hearing that there were no other payments or claims she was making.

Issues

4. It is agreed that the Claimant is a band D Communications Supervisor at MetCC in Hendon. The Claimant relies on Mr Martin Leach as her comparator for the Equal Pay Claim. Mr Leach is also a band D Communications Supervisor in MetCC in Hendon. It is accepted that Mr Leach is in receipt of premium pay ('PP') (and consequential PP overtime element) whereas the claimant is not. The respondent also accepts that the Claimant and Mr Leach undertake "equal work" (s.65(1)(a) & (2) EqA 2010).
5. Therefore, the only issues for the Tribunal to consider are those set out under the Material Factor Defence upon which the Respondent relies:
 1. Can the respondent show that the difference between the claimant's terms and her comparator's is because of a material factor (s.69 EqA 2010)?
 2. In broad terms, the respondent relies upon a material factor defence being the implementation of a new contract in MetCC which the claimant moved on to upon accepting a post in MetCC in 2014.
 3. The claimant has confirmed that she is not seeking to allege that the material factor defence (if made out) is tainted by indirect sex discrimination.

Preliminary matters

6. The Claimant had submitted two pieces of evidence after the bundles were agreed. The Respondent helpfully added these to the joint bundle, but sought to bring an addendum witness statement from Mr Pickett one of their witnesses in response. This was not objected to by the Claimant and the Tribunal considered that it was relevant and proportionate to admit this evidence in all the circumstances.

Introduction and issues

7. By a claim form presented on 25 September 2019 the Claimant brings a complaint for equal pay. ACAS were notified under the early conciliation procedure on 15 August 2019 and a certificate was issued on 15 September 2019. The ET3 was received by the tribunal on 18 November 2019.

Procedure, documents, and evidence heard

8. This was a remote CVP hearing which had not been objected to by the parties. The form of remote hearing was video. A full face-to-face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.
9. We were assisted by a chronology prepared by the Respondent, a cast list, an agreed bundle of documents of 559 pages and a bundle of witness statements.
10. The Claimant provided a witness statement and gave oral evidence. Mr Leach and Mr Anastasiou gave evidence on behalf of the Claimant. Mr Pickett provided two witness statements and gave oral evidence on behalf of the Respondent. Mr Goddard provided a witness statement on behalf of the Respondent. He did not give evidence as his statement was agreed by the Claimant
11. We heard oral submissions from Mr Moretto and the Claimant. Mr Moretto also submitted written submissions which we took account of.

Findings of fact

12. The Respondent operates a pay policy that involves different elements of pay for different roles.
13. One of these elements of pay is called Premium Pay ('PP') and was referred to in evidence before us as the 'old contract'. This is an allowance paid to eligible police staff to recompense them for working shifts on a weekend or a bank holiday. Payment is made whether or not the hours are worked as part of rostered conditioned hours or as overtime.
14. A further element of pay is called the Flexibility Comms Allowance ('FCA') this is paid to MetCC staff in recognition of the approach to flexible rostering within the Command and is paid instead of PP. No employee can receive a PP and FCA element of pay.
15. Finally, for the purposes of this claim, the Respondent also provides pay for overtime which is defined by the Respondent as hours worked at management's request that are in excess of the conditioned hours for the band. For "premium exempt" staff (i.e. those who are not in receipt of PP) on band D (which is the Claimant's band), this is paid at a standard x1.5 normal hourly rate Monday to Sunday. Bank Holiday overtime is paid at x2.0 normal hourly rate. By contrast, staff who get PP are paid for x1.5 rate, 'plus ½ their premium' on a Saturday, and x2.0 on a Sunday.

16. In June 2007, the Claimant was employed as an IT trainer, training police officers and police staff to use MPS and national computer systems. It is agreed that as part of this role the Claimant benefitted from an element of enhanced payments known as PP as part of the terms and conditions of her contract.
17. The Claimant changed roles in May 2014. She changed role having applied for and been transferred internally to the MetCC. This is the Respondent's Command and Control function and it operates from three sites, Hendon where the Claimant is situated, Bow and Lambeth. Although the Claimant sought to move because there was doubt as to the future of the IT trainer role, it is agreed the Claimant was not at risk of redundancy when she made this application for transfer.
18. It was agreed that the Claimant was considered to be a 'band D' level of seniority when she transferred and her new role after transfer was a Communications Supervisor which was also a band D position.
19. It was agreed she was made aware that the PP would be removed from her payment upon transfer. It was agreed this was set out in a paragraph on the transfer application form and also in the advertisement for the job for which she applied. Instead she was told she would get a flexibility allowance which would replace the premium payments, namely the FCA.
20. We accept that the Claimant was upset with the change at the time, but did not believe she could challenge it. The Claimant's evidence was that once she settled into the MetCC she became aware that other staff were entitled to PP and she was never happy about this fact.
21. Martin Leach is also a Band D Communications Supervisor at MetCC and is the comparator upon whom the Claimant relies. It is not disputed that he joined the Respondent's employment in October 1990. He also works at the Hendon location.
22. Mr Leach and other staff from Enfield Borough were compulsorily transferred to MetCC around 27 November 2006, as part of the C3i (Command Communication, Control and Information) reorganisation. The Respondent states that this cohort of employees remain entitled to PP. Mr Leach understood at the time that the reason why he retained his entitlement to the PP contract was because the 'unions fought for it' and that in essence as a result his pay was given pay protection.
23. By way of context to the reorganisation that resulted in Mr Leach's transfer, the C3i programme was an exercise that resulted in the centralisation of local, Borough, 999 call receipt and despatch rooms ("CAD" rooms) to three centralised MetCC centres (Bow, Hendon and Lambeth).

24. It is accepted by the Respondent that as a general rule, with some exceptions, staff outside of MetCC receive the PP element of pay, including staff that currently transfer out of MetCC to other roles with the Respondent (regardless of whether they received PP while working at MetCC).
25. It was clear that there was a proposed change to terms and conditions for the staff working at MetCC around 2006 when the reorganisation took place. A contract note before the tribunal showed that there was a request made to payroll to alter payment of band E communication officers. The tribunal did not see any contract note in relation to staff at band D, including communication supervisors or those at band C.
26. The Respondent was unable to identify for the tribunal any written evidence that the intention in 2006 or 2007 was to move all MetCC staff (i.e. other bands including D) onto new contracts. The Respondent's witness, Mr Pickett, has been employed as an HR Reward Manager for the Respondent since 1990. His evidence was that he was not involved in the negotiations in or around 2006 so he had no direct knowledge but his assumption was that inclusion of all bands must have been the intent and that had that not been the intent when the later Band D and C jobs were put on the new terms the unions would have raised this as an issue had it not been agreed.
27. As there is no evidence other than Mr Pickett's speculation, the Respondent has not proven that there was an intention to move all band D posts in Met CC on to the 'new' contracts and remove the PP element of pay in 2006. However, by the time the advert was published in 2014 for a cohort of 83 new band D roles in the MetCC we find that a decision had been taken that these roles should be placed on the 'new' terms and not receive PP. We accept Mr Pickett's evidence that anyone who was not being compulsorily or involuntarily (which mean their current role had been made redundant) transferred into MetCC (in other words any voluntary internal transfer or external applicants) would all be on the new terms and not receive PP. His evidence was supported by the wording of the advert. And in addition, it was agreed that Mr PS who was an internal transfer applicant with the Claimant in 2014 and was therefore one of the 83 new recruits at band D in the MetCC at this time, was also put on the new non PP terms.
28. In 2018 the MPS had brought in a new HR computer system and payroll system. Prior to the implementation of the new system, the Respondent completed a pay audit and discovered that when the Claimant joined MetCC the finance sub-code that had been allocated to her (and which is used by the Respondent's payroll systems to calculate pay) was incorrect and this resulted in over payments to her for her weekend work, the Claimant's overtime pay on a Sunday had mistakenly included the 'PP' element to it. This meant that from May 2014 when she transferred to MetCC to January 2018 the Claimant had been paid double time

for time worked on a Sunday. This had been part of the old PP contract, whereas following the terms of the new contract she should have been paid for 1.5 times her rate of pay.

29. As a result of this, the Claimant's pay code was altered. The change in the finance sub-code issued to the Claimant resulted in her being paid less when on overtime. We accept that this was because of an administrative error which meant she had been receiving enhanced pay.
30. In January 2019 the Claimant raised the issue with HR about her pay and the fact she considered it unfair. And in March 2019 she raised the matter as a grievance. This was looked at by Mr Pickett and ultimately direction was sought from Superintendent Josephs whose advice was relayed in these terms:

'Tony's direction is :-

If the advert comes back and supports her application i.e. not shown as a MetCC Communications Supervisor or details on change of contract/Terms & Conditions / Flexi Allowance essentially she should be allowed to return to her Old Contract and Terms and Conditions associated.

If we cannot locate a new contract for this position on her file then the above also applies'.

31. Although we did not see any evidence of a new contract being signed or provided to the Claimant. There was a letter dated 7 March 2014 which set out the change to her terms and conditions of pay and included the fact she was being moved from the old PP contract to the new type.
32. In addition to Mr Leach and the Claimant, we heard evidence about a number of employees who worked in the Met CC that the claimant had raised during her discussions with the Respondent as being employees who were said not to follow the pattern of being voluntary transfers on the FCA terms and involuntary or compulsory transfers on the PP terms.
33. Mr Pickett set out in his witness statement the following:

Mr Connor Vincent joined the MPS on 7 April 2014. Mr Vincent was placed on a new contract when he joined Met CC and was paid a flexibility allowance when he joined Met CC. However, he no longer works within Met CC and he is no longer in a premium exempt role and is therefore eligible to claim PP in that new role.

Mr David Bovill joined the MPS on 11 November 2002. When he joined Met CC on 3 February 2014 he was placed on new contractual terms with a FCA. He does not receive PP and his terms are the same as the Claimant.

Mr Adam Fehres joined the MPS on 2 May 2006 on an old PP contract and transferred to Met CC on 24 September 2012 following a reorganisation. This was a compulsory transfer so he was entitled to retain PP.

Mr Jason Woods joined the MPS on 19 March 2018 as a Comms Supervisor in Met CC. As such he was placed on a premium exempt contract, and his terms were the same as the Claimant's. He moved to a non Met CC role on 6 January 2020. Therefore, he is no longer in a premium exempt role and was therefore eligible to claim PP.

Mr Matt Cowley joined the MPS on 6 November 2006 but was compulsorily transferred to Met CC on 2 January 2018. Thus he was compulsorily transferred and so he was entitled to retain PP.

Ms Denise Munday joined the MPS on 24 April 2006 and moved to Met CC on 30 January 2014. *'Ms Munday says that she was told by her union PCS that as she voluntarily transferred in she would not retain the old contract'*.

34. We accept Mr Pickett's evidence about these members of staff and consider that they are evidence that the Respondent did indeed have a policy of moving staff joining MetCC voluntarily to the new contract which does not include the PP element of pay.
35. In 2018 the Claimant was dealing with a pay issue for one of her staff when information came to light that a male colleague, Mr Anastasiou, had been in the same situation after a voluntary move to MetCC and he had been asked at the time to sign a new contract. He challenged the decision and his old contract was reinstated and he received back payment for losses incurred. The reason for the reinstatement was that it was shown that he had not at the time of application or acceptance been made aware of the different (new, premium exempt) terms which the Respondent intended to apply.
36. A further two examples were used by the Claimant to show that there was no universal approach, Ms Kemp and Ms Taylor are female employees who were transferred in to the MetCC and were retained on the old PP contracts. Mr Pickett told us that he could not say why they were on the old contracts, when in his view they should not be. We accepted his evidence that these employees were anomalies and had erroneously been kept on the old PP terms and conditions.
37. There was also an advert sent out for band D posts in the MetCC in 2021. This mentions both the FCA and PP element of pay for the role. The advert says:

'Allowances:

- *Flexibility Allowance (please refer to Police Staff Pay & Allowances Manual).*
- *Premium Payments (as per the Police Staff Pay & Allowances Manual).*

38. The Respondent suggested that this was a mistake and the advert should not have said that. However if the advert was indeed going to be seen by everyone including those currently in the redeployment pool, then the advert would in fact have been accurate as some applicants would have been entitled to PP. Although the advert did not make it clear that the entitlement to the allowances was 'either/or rather than both or which employees would be entitled to which type of payment.

The law

39. This claim solely concerns the material factor defence. This is set out in section 69 (1) of the EQA which provides 'The sex equality clause in A's terms have no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which (a) does not involve treating A less favourably because of A's sex than the responsible person treats B...'

40. Following section 69 of the EQA, as the Respondent has conceded that the Claimant's work is like work to that of Mr Leech, the burden falls on the Respondent to show that, firstly there is a material factor and secondly that reliance on that material factor does not involve subjecting the claimant to direct sex discrimination.

41. Material means the cause of disparity is something that is 'significant and relevant' *Rainey v Greater Glasgow Health Board 1987 ICR 129, HL.*

42. We remind ourselves that a factor can be material, irrespective of whether it is a 'good reason for the pay disparity' (Lord Nicholls in *Glasgow City Council v Marshall and Others 2000 ICR 196, HL*) and in the same case the difference in pay must be due to the factor relied upon. To be material or 'significant and relevant' as Lord Keith described it in *Rainey*, the factor relied upon must explain the difference between the particular women's pay and the particular man's pay. It must be of actual relevance in the particular case, see *Calmac Ferries Ltd. v Wallace and anor 2014 ICR 453.*

43. In *Snoxell and anor v Vauxhall Motors Ltd 1977 ICR 700*, the EAT recognised that despite the fact there may be good reason for pay protection for certain groups of employees there were arguments to say that it should not be artificially inflated indefinitely. However, in *Skills Development Scotland Co Ltd v Buchanan & Anor UKEATS/0042/10/BI*, the EAT made clear that *Snoxell* was not an authority for

the proposition that 'that an "evaporation" principle applied' and that 'it is not, in our view, the law, that the mere effluxion of time causes a gender neutral explanation to lose its "non-sex" character', subject to the limitation that the initial reason for the difference should still apply (*Fearnon v Smurfit Corrugated Cases (Lurgan) Ltd* [2008] NICA 45 ; [2009] IRLR 132).

44. Finally, we considered [King's College London v Clark](#) EAT/1049/02 in which the EAT at [29] held that even if the Respondent mistakenly concluded that the Appellant was correctly graded, at a level lower than her comparator, such mistaken, if genuine belief, is itself capable of amounting to a material factor for the purposes of the section 1(3) defence.

Conclusions

Material factor

45. It was difficult in this case for the Tribunal to see the equity in two colleagues performing identical roles being paid differently merely because one had the foresight to seek a move when business discussions suggested that a role may no longer exist rather than to wait until the role was formally made redundant.
46. We accepted that the Respondent wanted to move employees in the MetCC on to 'new terms' that did not include the PP element of pay. We conclude that the resultant implementation on the new non PP contract was the broad reason why there was a difference in the Claimant and her comparator Mr Leach's pay.
47. We further accepted the Respondent's evidence that new employees in the Met CC are put on the non PP terms. We found that there were some 'exceptions' to this, where employees were not told in advance of the change in their terms, such as Mr Anastasiou. We note that Superintendent Josephs directed that the Claimant be treated in the same way as Mr Anastasiou if the same circumstances applied to her. Therefore we concluded that the exceptions were applied consistently and were part of the Respondent's policy.
48. It was not disputed that Mr Leach had pay protection to the PP element of his pay and that this has gone on for many years (15 to date). We also accept that some 'new' employees in MetCC are also afforded this protection and that this creates two parallel systems of terms for the same role. However, we find that this system is in place to allow for exceptions where employees have not chosen to move on to the new terms, such as those who are compulsorily moved role when their original position is redundant.
49. We find that this rationale is still equally applicable in 2022, as it was in 2006 when the MetCC Unit was set up. We consider that although this creates two systems of pay and a perception of unfairness on behalf of the Claimant and maybe others, we can see that it also ensures that staff are not moved off more favourable terms

as a result of redundancy which may also be perceived as unfair. We understand this rationale which we find to be genuine. In terms of testing if this was the material reason for the difference, we considered whether given the duration of the pay protection it would have been possible to phase out the difference in pay levels prior to now. This may cause great difficulties given the impact it would have on the pay of staff who had been promised retention of the PP terms and the numbers of staff employed who are in this position. We considered that the on-going policy of retaining PP to those who do not enter the MetCC voluntarily was still relevant and causative of the differential between the Claimant and Mr Leach.

50. It was not clear from the evidence that there was an intention in 2006 to move Band D as opposed to Band E staff in the MetCC on to the 'new' non PP contracts. However, we accept that by 2014 when the job advert was created for the 83 Band D posts in the Met CC that it was the intention that these posts would all be on the new contract. We further concluded that even if the person drafting the advert was mistaken about this always being the position in the MetCC, it made no difference, as by this date clearly the decision to include the Band D roles had been made. And further we find that the reason for this was still to allow for exceptions to the 'new terms of employment' where employees have not chosen to move on to the new terms, such as those who are compulsorily moved role when their original position is redundant.
51. We conclude that Mr Leach's pay was effectively pay protected by way of a collective agreement reached with the 'unions' when the Met CC was created in 2006 that continued to have effect in 2014 and does so to the present day. We accepted Mr Leach's recollection about this, albeit we did not see any agreement in writing. We accepted Mr Leach's and Mr Pickett's evidence that a collective bargain was struck with the four unions operating in the Respondents' organisation in 2006. And that consequently the Respondent was obliged to maintain his terms and conditions of Employment, on the premium enhanced rate. And we concluded that the reason that Mr Leach was still on the PP contract was because of this collective agreement.
52. We consider that the reason for the difference in pay was the Respondent's application of the 'new' non premium contract to the Claimant which was applied to her because (a) she was made aware of the difference prior to accepting the role and (b) because she made the application voluntarily in the sense that her role was not at risk of redundancy when she made the application.
53. Although he was not a named comparator, we accept Mr Anatasίου's evidence that he was retained on his old terms (the premium enhanced contract) when he moved to Met CC because he protested and it was found that he was not given advance notice of the proposed change to the terms of his contract. This demonstrated that the reason the Claimant was treated differently was because

she was aware of the change in terms prior to accepting the role in the MetCC. Indeed, the Claimant did not dispute this fact, and the tribunal had sight of the job advert she responded to which made this perfectly plain on its face.

54. The reason given by the Respondent for the difference in pay was that it applied the 'new' non premium terms to new applicants or voluntarily applicants. We find that this factor was causal of the pay difference, and that this was both significant and relevant to the pay disparity between the Claimant and her comparator.

Difference due to sex

55. The Claimant does not put her case on the basis of the reason for the difference in treatment being tainted by indirect sex discrimination. This had been agreed at a preliminary hearing on 5 March 2021 not to be part of the issues for the Tribunal. Therefore we did not consider this, instead we considered if there was less favorable treatment as set out in section 69 (1)(a).

56. We are further satisfied that the lower payment was not because the Claimant was a woman. We accept, and it was agreed by both parties, that Mr PS, a man, was moved onto the same terms and conditions as the Claimant when he applied for a Band D role at the same time as her. We also accepted Mr Leach's evidence that a number of women transferred in the 'involuntary' process in 2006 when the MetCC was created with himself and they were all retained on the old contract (the premium enhanced contract containing the PP element). Miss Jones herself accepts that the difference is not due to sex. In answer to questions she accepted readily that the reason for the difference in pay was due to the change in contracts that the Respondent introduced and repeated this in her submissions. There is no other evidence before us that would suggest that the difference in pay was because of sex and therefore we consider that the Claimant's lower pay was not due to a factor that involves treating her less favorably because she is a woman.

EMPLOYMENT JUDGE PRICE

Dated: 19 April 2022

Sent to the parties on:

19 April 2022

For the Tribunal Office: