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EMPLOYMENT TRIBUNALS

Claimant: Mrs G Morris

Respondent: London Ambulance Service NHS Trust

Heard at: East London Hearing Centre

On: 9th January 2020
10th January 2020 (in chambers)

Before: Employment Judge Reid

Members: Miss J Henry
Dr L Rylah

Representation

Claimant: In person (accompanied by Mr Howard as notetaker)
Respondent: Mr Dyal, Counsel (instructed by DAC Beachcroft LLP)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The Claimant was not treated less favourably contrary to Regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.
2. Her claim is therefore dismissed.

REASONS

The claim

1 The Claimant presented a claim on 11th June 2019, claiming breach of the Part-time Workers (Less Favourable Treatment) Regulations 2000, in relation to a promotion to Emergency Call Handling Supervisor (Band 5) (ECHS), for which she had been unsuccessful following a restructuring within the Respondent. The Claimant is still employed by the Respondent at band 4, the same level as she was employed at before she applied for that promotion. The Claimant's claim was for a recommendation (page 9).

2 The issue in the claim identified at the Preliminary Hearing on 23rd September 2019 was whether the failure to appoint the Claimant to the ECHS role was a breach of Regulation 5 of the PTW Regulations 2000 (PH para 5). The only issue in the claim was the ground on which the Claimant had not been appointed to the role (ie the reason why). The Claimant's case was that she was not appointed to the role because she was a part-time employee. The Respondent's case was that she had not been appointed to the role because she had not reached the minimum mark in a competency assessment which all candidates for the role had taken. The Respondent's case was that there had been 10 vacancies and 9 candidates for the ECHS role in that exercise and that the Claimant and another employee (who worked full-time) had been unsuccessful because both scored below the minimum mark; when the remaining vacancies after that exercise were subsequently advertised more widely within the Respondent (beyond those affected by the restructuring) they had appointed two part-time employees to the ECHS role. The Respondent's case was therefore that the sole reason was the failure to meet the minimum score in the competency assessment. The Claimant has been employed by the Respondent since 1995.

3 The Claimant also raised the reason for her treatment as being because of a past disciplinary issue (page 8). This was not a basis on which to challenge the decision not to appoint her under the PTW Regulations 2000 because that is about part-time status. The past disciplinary issue was therefore not relevant to her claim.

4 The Claimant raised past failures by the Respondent in her witness statement as regards past opportunities for development and training which she said she had missed out on because she worked part-time and nights. She said this had been the reason she had not passed the competency assessment for the ECHS role. These past failures were not part of her claim identified at the Preliminary Hearing on 23rd September 2019 and she did not set out in her claim form the claimed past failures as she did in her witness statement. Therefore whilst the Claimant could refer to these claimed past failings as possible reasons why she did not pass the competency assessment as background to her claim to shed light on the reason behind the decision not to appoint her, the claimed past failures were not acts complained of in this claim. The Tribunal had to decide the ground (reason) why she was not appointed, not the reason why she did not pass the competency exercise.

5 The Claimant attended the hearing accompanied by Mr Howard as notetaker. The Respondent was represented. There was a one file bundle to page 343 (to which was added as pages 344-353, the sample April 2019 assessment form). The Tribunal was provided with witness statements from the Claimant (her email dated 20th December 2019), from Mr Taylor who took the decision on the minimum score to be reached by the candidates for the ECHS role and from Mr Cox and Mrs Thompson who conducted the competency assessment for the candidates for the ECHS role. The Claimant and the Respondent's witnesses all gave oral evidence and the Tribunal heard oral submissions on both sides (in conjunction with a skeleton argument for the Respondent).

Findings of fact

6 The Claimant has been employed by the Respondent since 1995 in various roles, summarised in her witness statement. At the time of her application for the ECHS role, the Claimant was employed as an Emergency Medical Dispatcher (EMD) (grade 4) working

part-time and doing night shifts. She is now employed, following the restructuring, as an Emergency Call Co-Ordinator (grade 4) (ECC). She has therefore not been demoted as claimed in her ET1.

7 In August 2018 the Respondent announced a restructuring to the Emergency Operations Centre (page 138) which was finalised, after consultation, in October 2018 (page 179). The way in which appointments were to be made within the new structure was explained (page 187-190). Employees were asked to complete an Expression of Interest (EOI) form which the Claimant did (page 197, 201) and referred to the relevant job descriptions (page 198). Her first choice was for consideration for the ECHS role at band 5 (which would amount to a promotion) and her second choice was the ECC role at band 4 (to which she was ultimately appointed and still holds). The situation was therefore that the Claimant was either going to stay in the same grade as she then was (band 4) or was going to be promoted to band 5 if successful in her ECHS application.

8 The ECHS role competency assessment was conducted at the same time as the assessment for another role, Emergency Resource Dispatcher (ERD).

9 There were 10 vacancies for the ECHS role and 9 applicants (being those who had put it first on their EOI form and including the Claimant). This was not therefore a competitive exercise because provided candidates met the competency requirement (see findings below), in theory all could be appointed.

10 The Claimant was encouraged to apply by Ms Worth her manager (page 206O) and indirectly by Mr Cox who is referred to in that text and who the Claimant accepted in her oral evidence had also encouraged her to apply (albeit indirectly in this way). Mr Cox facilitated her attendance at the pre-assessment workshop organised to prepare the candidates for the competency assessment (see findings below) by standing her down during her shift so that she could attend the workshop (page 206A). The Claimant was the only part-time employee who applied for the ECHS role though there were two other candidates who worked on the flexible roster, albeit full time. The remaining 6 candidates worked full-time.

11 The pre-assessment workshop was designed to prepare the candidates for the type of assessment they would be taking for either the ECHS role or the ERD role, depending on which they had applied for. Candidates were taken through how competency would be assessed ie by way of scenarios on flashcards (page 208D-H). There were to be two parts to the assessment, three scenario based questions and questions about the Respondent's values and diversity issues, although ultimately (see findings below) only the scenario questions were used to score candidates. The Claimant therefore had the same opportunity to prepare for the competency assessment in this way as the other candidates, in a way which prepared her and the other candidates in the actual method to be used ie the method explained in the preparation was in line with the actual assessment. The Tribunal finds that this was a fair and transparent way to prepare and assess candidates. The Claimant made no criticism of the actual assessment process, except for the fact she did not pass the exercise (page 208B). The Claimant claimed she had been 'mis-sold' the promotion opportunity (page 208B) and the Tribunal finds from this that because she had been encouraged to apply she had concluded that she was likely to be successful.

12 The Claimant was assessed on 28th January 2019 by Mrs Thompson and Mr Cox (pages 229 and 235). As there were 9 candidates for the ECHS role and 10 vacancies it was enough to meet the minimum criteria set by the Respondent in order to be successful. Because of the way the assessment was structured candidates had every opportunity to demonstrate their abilities because if they struggled on the initial 'ideal' answer, they had a second opportunity to give a narrative answer and the assessor was able to give some prompting help to elicit the answer from the candidate. The Claimant had three common scenarios and was scored on her answers. Mrs Thompson and Mr Cox were surprised she did not do better on the scenario questions, the situations being ones she would regularly have come across during her years of experience and well within her call-handling experience (ST para 6, RC paras 11-15). The Claimant was in effect being asked what the ECHS would do in that scenario and the Tribunal finds that with her length of experience in call handling (whether when full time between 1995 and 2006 or after 2006 when part-time) and her more recent experience as EMD these were common situations she would have come across over the years on which she would have knowledge of what the supervisor would advise. The Claimant was being assessed for a promotion, not being assessed as to how she performed in her then role and if appointed would be given training on the new role. She was not being expected to be 'job ready' for the new role at the time of the assessment because if successful there would be further training for the role.

13 The scores from the ECHS (and EDR) assessment were considered at a meeting (of which there are no notes) by Mr Taylor, Mrs Thompson, Mr Cox and Ms Bowden from HR. Because of the poor way in which candidates across the board had answered the values and diversity questions these were put on one side (MT paras 14-15) and only the scenario based questions were used to mark the candidates because that focused on the practical skills needed (MT para 15). The decision was that a candidate had to score at least 50% on the scenario questions in order to meet the competency level required. This was a reduction from the previously set level that candidates achieve at least 70% and was to maximise chances that the vacancies would be filled (MT para 15). The Tribunal therefore finds that the Respondent was keen for all the candidates including the Claimant to be successful in the assessment taking into account this subsequent adjustment of the marking scheme by Mr Taylor. By taking the answers to the values and diversity questions out of the equation, the Respondent was removing an area all candidates had not done well at, thus demonstrating that it was keen for candidates to meet the minimum requirement on the practical skills side of the assessment only. The Tribunal finds that this meeting did not discuss any of the candidates individually, it was a meeting to set the minimum score required. When assessing the score level to be achieved and deciding on the 50% minimum, Mr Taylor was also not aware then that the Claimant worked part-time (MT para 24.1). The Claimant as an individual was therefore not personally singled out for 'failure' but had the minimum mark applied to her in the same way as all the candidates across the ECHS and EDR roles were (48 in total). The Claimant and another ECHS candidate who worked full-time (candidate 5) failed to meet the minimum score (MT para 17). Whether or not the Claimant had missed out as a part-timer on past opportunities to observe and experience the supervisor role (see findings below), candidate 5 who worked full-time was in the same position as she was in having failed the assessment and candidate 5 worked full-time.

14 The Claimant scored between 7 and 8 out of 15 by Mrs Thompson and between 6 and 7 out of 15 by Mr Cox. This meant an overall score of 14 out of a possible 30. This was below the re-set minimum level of 50% for the scenario based questions. The

Claimant does not claim that there was any bad faith on the part of Mrs Thompson and Mr Cox in the scores they gave her based on the criteria or disagree with the way marks were allocated or explained in her score sheets. This was consistent with her witness statement in which she says that the three scenarios she chose on the day from the flashcards were the same as situations she had been in.

15 On 12th February 2019 the Claimant was notified that she had not been successful in the ECHS application and was asked to consider whether she now wanted to apply for the ERD role (page 207-208), inconsistent with wanting to exclude her from other opportunities because she worked part-time. The 4 remaining ECHS roles were then opened up for applications more widely internally (ie to beyond those affected by the restructuring) (page 212) and two part timers were appointed to the remaining 4 roles in this second exercise (MT para 23). The Tribunal finds that whilst the notification of the vacancy said that the role was full-time, in fact part-time status was not a bar to appointment to any degree (and had not been in the prior exercise undertaken by the Claimant).

16 The Claimant emailed Mr Cox to ask for feedback on 13th February 2019 (RC para 19). The Tribunal finds that the Claimant's request for feedback was not responded to particularly promptly and she had to chase it on 7th March 2019 (page 211, a note she handed in at a grievance meeting on another matter on 8th March 2019, page 213). Mr Cox was waiting to give that feedback face to face which meant they had to be working the same shift, which caused a delay. He tried to arrange it on a day the Claimant was not due to be on shift (C witness statement) on 4th April 2019. Mr Cox was criticised at the hearing for not arranging it on a day she was not on shift (for which time off in lieu could be given) but the Claimant herself says that he did try to arrange it for a day/time she was not on shift. The Claimant was then asked by her manager later in April 2019 if she wanted feedback and said 'not now' (because in the middle of a busy shift) which was miscommunicated back to Mr Cox as the Claimant saying she no longer wanted feedback at all. This was unfortunate because it left the Claimant feeling like she was being deliberately denied the feedback she had asked for, even if she wasn't. The situation was mishandled but this was not because the Respondent was unwilling to provide feedback on the competency assessment or was obfuscating its reason for not appointing the Claimant to the ECHS role.

17 The Tribunal finds that the Claimant's grievances dated 18th March 2019 and 21st March 2019 (pages 217, 221) were not handled in line with the Respondent's policy (page 107-109), although she was responded to by letter (pages 220,226). Irrespective of the mis-communication about her request for feedback, the Claimant had nonetheless raised a formal grievance and a grievance meeting should have been arranged with consequent appeal rights. A grievance meeting and appeal are also required under the ACAS Code of Practice.

18 The Claimant's case was that she had missed out on prior opportunities which the other (full-time) candidates had had, to work with a supervisor to gain experience of that supervisory role. She said that she had missed out on these opportunities because she worked part-time and nights. She said this affected her ability to do well at the competency assessment and put her at an unfair disadvantage. Her case was that she had only had a few shifts giving her that additional experience. The Tribunal finds that the Claimant had raised concerns about development and training in 2017 (pages 132 – 134) and how that

could work better for employees working part-time and unsocial shifts. The Tribunal finds that the Respondent accepted that these were matters which needed to be addressed (page 132). She raised the issue again in March 2019 and had a meeting with Mr Harding (page 216) and the Respondent accepted that there were some possible improvements which could be made (page 216). However the Tribunal finds that whether or not it was the case that the Claimant had missed out on past training or development opportunities it was not the case that such opportunities affected her chances under the competency based assessment, taking into account the above findings as regards her existing experience since 1995 and the kind of assessment it was. In addition a full-timer (candidate 5) who had had more access to that kind of experience (which was what she claimed), had not succeeded either under the competency assessment.

Relevant law

19 Regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides that a part-time worker has the right to be treated not less favourably than a comparable full-time worker as regards the terms of his contract or by being subjected to any detriment by any act, or deliberate failure to act by his employer. The right applies if the treatment is on the ground that the worker is a part-time worker. The burden is on the employer to show the ground for the treatment (Regulation 8(6)).

20 There is conflicting case law as to whether the ground ie reason for the treatment has to be the sole cause for the treatment or whether it can be the effective and predominant cause, but does not have to be the sole cause.

21 The cases of *Gibson v Scottish Ambulance Service UKEAT 52/04* and *McMenemy v Capita Business Services Ltd [2007] IRLR 400* decided that the reason for the treatment has to be the sole reason. The most recent case on this issue *Engel v Ministry of Justice [2017] ICR 277* also says that the reason has to be the sole reason.

22 By contrast *Sharma v Manchester City Council [2008] IRLR 336* and *Carl v University of Sheffield [2009] ICR 1286* decided that it is enough to show that the part-time status is the effective and predominant cause of the treatment.

23 If there is a failure to comply with the ACAS Code of Practice as regards the handling of a grievance by an employer this can result in an increase of up to 25% to any compensation awarded in certain claims (s 207A Trade Union and Labour Relations (Consolidation) Act 1992) but only if the claimant wins that claim. A claim under the Part-time Workers (Less Favourable Treatment) Regulations 2000 is not one of the listed claims which can attract this increase to compensation (Schedule A2).

Reasons

24 Taking into account the above findings of fact, the Tribunal decides that the only reason the Claimant was not appointed to the ECHS role was because she did not pass the competency assessment. That decision was taken on her scoring alone because she fell below the pass mark. It was not a decision taken by reference to her individually but as part of a pool of candidates across two roles to whom the same pass mark was applied. The person taking that decision to set the pass mark (Mr Taylor) was unaware the

Claimant worked part-time when setting that mark and did not consider her individually when he set that pass mark.

25 Candidate 5, a full-timer, also failed the assessment. Two part time candidates were successful in the later internal recruitment exercise for the ECHS role.

26 The Respondent has therefore shown that the ground on which the Claimant was unsuccessful in her application for the ECHS role was therefore neither solely nor predominantly (depending on which legal test is applied) the fact that she was a part-time worker. The only ground for the way she was treated was her mark on the competency assessment.

27 Whilst her grievance was not handled in line with the ACAS Code of Practice the Claimant has not won her claim and it is not in any event a claim to which an increase can be applied so no compensation can be awarded to the Claimant for that failure.

Employment Judge Reid

16 January 2020