Appeal No. UKEAT/0066/14/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 29 July 2014
Judgment handed down on 3 September 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

COLLIN & HOBSON PLC — APPELLANT

MRS G YATES — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOHN SAMSOM (of Counsel) Instructed by: Peninsula Business Services Ltd The Peninsula 2 Cheetham Hill Road Manchester M4 4FD
For the Respondent	MRS GAIL YATES (The Respondent in Person)

SUMMARY

EQUAL PAY ACT

Equal value

Material factor defence and justification

The Employment tribunal was entitled to conclude (a) that the Claimant's work was of equal value to that done by a male comparator, Mr Hadley and (b) that the Appellant had failed to make out the genuine material factor defence. Appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding in the Birmingham Employment Tribunal. The parties are Mrs Yates, Claimant, and Collin & Hobson, Respondent. The Claimant brought a number of claims against the Respondent, her former employer, the bulk of which were determined by a full Employment Tribunal chaired by Employment Judge Goodier at a hearing in March 2014. A copy of the Employment Tribunal Judgment and Reasons following that hearing dated 17 March 2014 is in the bundle before me. I agree with Mrs Yates, representing herself as she did below, that that Judgment is not relevant to the issues before me in this appeal, which is brought by the Respondent against the earlier Judgment of the same Employment Tribunal dated 7 May 2013 insofar as her equal pay claim succeeded on the basis that her work was of equal value to a male comparator, Mr Hadley, and the Respondent's defence of genuine material factor (GMF) difference failed. Complaints based on a comparison with other male employees, Messrs Young, Braggington and Hobson, failed. There is no cross-appeal against those findings.

2. The present appeal was initially rejected on the paper sift by Wilkie J for the reasons given in the EAT letter dated 18 July 2013. However, at an Appellant-only Rule 3(10) Hearing Slade J permitted the appeal to proceed to this Full Hearing on the basis of Amended Grounds of Appeal, the first two of which challenge the Hadley equal value finding; the third challenges the GMF finding.

Preliminary

3. I considered and rejected the Claimant's applications to adduce fresh evidence before me on appeal. As a result the Respondent's application to adduce a witness statement from

Mr Collin fell away. However, I have taken account of a witness statement by Mr Mark Owen, the Respondent's solicitor, who represented the company below, dated 11 December 2013 and his note exhibited thereto. That statement was admitted by Slade J and is relevant to the third ground of appeal (the GMF point).

Procedural History

4. Prior to the Employment Tribunal rule changes in 2004 the Employment Tribunal had power to appoint an independent expert in every equal value claim (under what is now the **Equality Act 2010**, s.65(1)(c)) unless there were no reasonable grounds for bringing an equal value claim. That proviso was dropped in the 2004 Rules, applicable in the present case, so that an Employment Tribunal has a discretion in every such case whether or not to appoint an independent expert.

5. In this case a case management discussion was first held before Employment Judge Goodier on 1 October 2012. He directed a Pre-Hearing Review, which came before Employment Judge Hughes on 19 November 2012. On that occasion Mr Owen represented the Respondent, the Claimant appearing in person.

6. Paragraph 5 of Employment Judge Hughes' order dated 27 November 2012 recorded:

> **"...In the event that the equal value question cannot be determined without a job evaluation, it will be necessary to appoint an independent expert. However, both parties agree that there should be a Hearing to determine the equal value question (if possible) and the material factor defence. Therefore, the Hearing may well determine the equal pay question in its entirety and consequently should be before a full tribunal..."**

7. On that basis the hearing before the Goodier Employment Tribunal in relation to equal pay only was arranged for 18-19 February 2013.

8. I mention that procedural background because, in the course of his submissions before me Mr John Sansom, now instructed on behalf of the Respondent, suggested that the Employment Tribunal's procedural approach in this case contributed to the Goodier Employment Tribunal falling into error. He drew attention specifically to the procedural rules relating to equal value claims to be found in Regulation 16(4) and Schedule 6 to the **Employment Tribunal Rules 2004**. Schedule 6 sets out certain standard orders in relation to a stage 1 equal value hearing: independent experts and a stage 2 hearing. Insofar as it is suggested that, at the preliminary stages, the Employment Tribunal was wrong not to appoint an independent expert or to follow the standard directions contained in Schedule 6, I reject that submission for three reasons. First, the Employment Tribunal was entitled to make such orders as it considered appropriate (see Schedule 6; paragraph 5(2)). Secondly, there is no appeal against those Preliminary Hearing orders, particularly that of Employment Judge Hughes. Thirdly, the parties expressly agreed to the procedure adopted. It follows, in my judgment, that the Goodier Employment Tribunal was perfectly entitled to follow the approach which it did at the February 2013 hearing.

The Employment Tribunal Decision

9. In my judgment the Employment Tribunal made careful findings of fact, particularly, for present purposes, in relation to the respective demands of the jobs done by the Claimant and Mr Hadley, using the list of factors put forward by the Respondent (see paragraph 23.2.2). Overall they assessed those jobs as being of equal value (paragraph 23.2.3).

10. The Claimant was paid less than Mr Hadley throughout their common period of employment (see paragraph 6). Mr Hadley commenced his employment as Transport Manager

in April 2005; the Claimant as Quality Manager in May 2005. Mr Hadley left in April 2012 whilst the Claimant was still employed.

11. As to the GMF defence in the case of Mr Hadley, the Employment Tribunal said this at paragraph 23.2.4:

> **"The tribunal has gone on to consider whether the respondent has shown the existence of a material factor other than the difference of sex to explain the difference in pay. Mr Owen made no specific submissions on this question. The case is one to which EqA s.69(1)(a) applies. The respondent treated Mrs Yates less favourably than it did Mr Hadley. The question is whether that treatment was (consciously or otherwise) because of her sex. It has considered both the possession by Mr Hadley of the CMC and the more general points made by Mr Owen and listed above. It reminds itself that one of the functions of equal pay law is to prevent the perpetuation in pay differentials that reflect historical stereotypes as to the value of traditionally male and female roles. The burden of proof is on the respondent to show that a material factor is the explanation for the difference in pay. The respondent has not discharged that burden, and the material factor defence must fail."**

The Equal Value Appeal

12. A persistent theme running through Mr Sansom's submissions on this aspect of the appeal is the proposition that the Employment Tribunal failed to make findings as to how the Claimant's tasks and responsibilities changed and developed over the seven-year comparative period between 2005-2012. The Employment Tribunal was wrong to find that the work was of equal value throughout the period. He referred me to the approach of Underhill J in **Potter v North Cumbria Acute Hospitals NHS Trust** [2008] ICR 910, particularly at paragraphs 10 and 14. At paragraph 14 Underhill J observed:

> **"In some cases, however, either party or both may claim that the facts are materially different in different parts of the claim period. In such cases the facts will have to be stated (and, where necessary, found by the tribunal) on a distinct basis in respect of the different parts of the period."**

13. That is plainly true of some cases. However, reading Mr Owen's written opening submissions below (EAT 159-161) it is apparent that no attempt is made to split the relevant period into sections. The case advanced was that at no point was the Claimant's work of equal

value to that of any of the four male comparators; in three instances the Respondent's case was accepted; in one, that of Mr Hadley, it was not.

14. The point is taken that at paragraph 5, where the Employment Tribunal assess the credibility and reliability of the witnesses from whom they heard (Mr Hadley did not give oral evidence; his two witness statements put before the Employment Tribunal were of limited assistance; see paragraph 23.2.1(a)), they found that the Claimant, although honest, "was inclined rather to inflate the significance of some of the tasks she performed as part of her duties". I have no doubt that the Employment Tribunal bore that in mind during their two days of deliberations when assessing the respective demands of the work done by the Claimant and Mr Hadley.

15. More generally, and in various particulars, the Respondent contends that the Employment Tribunal failed to make adequate findings of fact as to the demands of various aspects of the respective roles performed by the Claimant and Mr Hadley. I disagree. On the contrary the Employment Tribunal painstakingly considered and evaluated the various factors identified by the Respondent, through Mr Owen, at paragraph 23.2.1. They then applied the "GEL" method in arriving at their overall assessment that the work done by the Claimant and Mr Hadley was of equal value. In so doing they decided the case on the evidence and arguments then put before them.

16. The second ground of appeal is an attempt, in my judgment, to retry the factual question as to the relative importance of the work carried out by the Claimant and Mr Hadley. I accept Mrs Yates' submission to that effect and echo the observations of Wilkie J in his reasons for

rejecting this appeal under Rule 3(7). I am also not persuaded that the Employment Tribunal's findings are shown to be either unsupported by evidence nor contrary to agreed evidence.

17. It follows that I reject the first two grounds of appeal.

The GMF Appeal

18. The principal challenge is that the Employment Tribunal simply failed to consider the GMF defence advanced in the case of Hadley. Reliance is placed on a single sentence at paragraph 23.2.4 (set out in full above):

> **"Mr Hadley made no specific submissions on this question" [the Hadley GMF defence]**

19. I refer to Mr Owen's witness statement in these appeal proceedings, paragraph 11, and his note exhibited thereto (EAT 164). That is a note which he made in order to address the GMF defence in relation to each comparator. In relation to Mr Young the note mentions "mkt [market] forces". That submission was adopted by the Employment Tribunal (paragraph 20.3), in the alternative to their finding that the Claimant's work was not of equal value to that of Mr Young.

20. There is no reference to market forces in the note so far as Mr Hadley is concerned. Rather, it refers to points made by Mr Owen in relation to the equal value issue; that Mr Hadley was a CPC Holder and held a Class 1 HGV licence, points to which the Employment Tribunal refer at paragraph 23.2.4.

21. The prospect of the Goodier Employment Tribunal considering and determining the GMF issue at their hearing was flagged up by Employment Judge Hughes at paragraph 5 of her order

and indeed by Mr Owen in his opening submissions. If Mr Owen wished to advance the market forces defence in relation to Mr Hadley, as explained by the Court of Appeal and later Underhill P in **Armstrong & Ors v Newcastle upon Tyne NHS Trust** [2006] IRLR 124 and [2010] ICR 674, respectively, it was incumbent on him to do so. In my judgment the Employment Tribunal was entitled to conclude, having considered the points made on behalf of the Respondent, that the GMF defence was not made out. Accordingly this ground of appeal also fails.

Disposal

22. The appeal is dismissed. I am told that quantum has been agreed, subject to the outcome of this liability appeal. Otherwise the case must return to the Goodier Employment Tribunal for a remedy hearing.