Appeal No. UKEAT/0459/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 April 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

PROFESSOR C BRADLEY — APPELLANT

ROYAL HOLLOWAY AND BEDFORD NEW COLLEGE,
UNIVERSITY OF LONDON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS KARON MONAGHAN QC and MISS LAURA PRINCE (of Counsel) University and College Union Legal Services Carlow Street London NW1 7LH
For the Respondent	MR OLIVER SEGAL QC and MR STUART BRITTENDEN (of Counsel) Mills & Reeve LLP Solicitors Botanic House 100 Hills Road Cambridge CB2 1PH

SUMMARY

EQUAL PAY ACT – Material factor defence and justification

A female professor claimed equal pay under the Equal pay Act 1970 with two male professors at the college where she taught and researched. They were assumed to be engaged on like work/work of equal value. In each of their cases, significant sums in addition to their original basic pay had been given to them when it was learned by the College that approaches had been made to "poach" them away from its service. This was a wholly genuine reason, which the ET held was made for sound business reasons. It decided that the genuine material factor defence provided for by s.1(3) of the Act had been made out, and that the differences in pay were unrelated to sex. It was argued that in doing so the ET did not adequately deal with evidence produced by both College and Claimant which showed on available statistics that male academic staff were paid more than female staff, and evidence that retention payments were more likely to be made to men than to women because (inter alia) men were likely to be more mobile. This was rejected: the ET sufficiently reasoned why it thought that this evidence did not establish any "taint" of sex, the burden being on the claimant to produce some evidence to show this once a genuine reason causative of the difference in pay had been identified. No issue of justification thus arose.

The ET also however held that a comparison could be made globally between the "retention-related" terms in the men's contract with those in hers, which it identified in fact though it had not been invited to do so by either party, and which the College had never claimed to rely on as a reason for the difference in pay. Indeed, it held that it eliminated any difference. This was an error: both the Act and European law called for a term by term comparison, and not an overall view of the value of remuneration and employment arrangements. It was however unnecessary for the ET to consider the question, since it had no obvious relevance to the question whether there was a genuine material factor, unrelated to sex, which explained the differences in retention payment (as such) which the ET had found to exist. The error was immaterial to the decision, which appeared clear, and which was reached without error after a correct statement of the applicable law.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. By a reserved Judgment of 15 July 2013 an Employment Tribunal at Watford (Regional Employment Judge Gay, Mr Lodge, Mr Surrey) rejected claims made by the Claimant that in three respects her terms and conditions had been less favourable than those of two male professors employed by Royal Holloway and Bedford New College, the Respondent, such as to give her a claim under the **Equal Pay Act 1970**. The matter was tried as a discrete issue in ongoing litigation which involved claims also brought under the **Equality Act 2010**, but it was accepted for the purposes of this discrete issue that the **Equal Pay Act** applied.

The Equal Pay Act

2. By section 1(1) of the **Equal Pay Act 1970** it is provided:

> **"If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include... an equality clause they shall be deemed to include one.**
>
> **(2) An equality clause is a provision which relates to terms, whether concerned with pay or not, of a contract under which a woman is employed..."**

It was agreed between the parties for the purpose of the discrete issue that the Claimant was employed on like work or work of equal value to those of the professors.

> **(3). An equality clause...shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor... must be a material difference between the woman's case and the man's or in other cases may be a material difference."**

3. The scheme thus set up by section 1 of the **Equality Act** is that if a woman shows that, in respect of a particular term of her contract, she is treated less favourably than a man doing like or equal work to hers, it is to be assumed that the difference is because of her sex. That assumption may, however, be displaced if the employer (and it is for it to prove) shows in accordance with section 1(1) that there is a "genuine material factor": that is, a reason causing

the difference in term which is both significant and relevant. That difference must not be "the difference of sex". The Act says nothing about the distinction found elsewhere between direct and indirect discrimination. The purpose is to identify and eliminate discrimination in pay as between men and women and I agree entirely with the views expressed by Cox J in the Employment Appeal Tribunal in the **Ministry of Defence v Armstrong and Others** [2004] IRLR 672 EAT that indirect pay discrimination, that is discrimination which does not wear its name on the sleeve but is disguised or group discrimination, may arise in a number of different circumstances, the list of which cannot be regarded as closed (see paragraph 44). There the Employment Appeal Tribunal said through her that the categories of indirect pay discrimination were not closed, and that a Tribunal would not necessarily have erred if it found that there was disparate impact and sex-related pay discrimination on the evidence before it, albeit outwith the three obvious categories familiar to those dealing with indirect discrimination - that is where there is a PCP, where there is what might be called "**Enderby**" discrimination (**Enderby v Frenchay Health Authority and another** [1993] EUECJ C-127/92), where the rate of pay is determined by factors which, though not gender-based, have the consequence that in practice the disadvantaged group is exclusively or almost exclusively female, or where the rate of pay is determined in accordance with the application of a category which applies equally to men and women but is such that a substantially larger number of women than men suffer a detriment.

4. However, the requirement that the material factor must not be the difference of sex does not, on the present state of the authorities binding on me, require the employer to prove the negative. It is for the Claimant to show that there is sufficient evidence that there is a sex taint. If there is no such evidence, then the employer may establish it is a genuine material factor, and it will be a defence to the claim. In a case in which the discrimination is not direct, if there is

accepted to be disparate impact on women to a degree which satisfies the Tribunal that there is some relationship between the factor and gender, it is open to the employer then to justify the application of the factor. He must show that it corresponds to a real need of the undertaking and is appropriate and necessary to that end (see **Bilka-Kaufhaus GmbH v Weber von Hartz** [1986] IRLR 317 ECJ). This process, objective justification, only comes into play if there is some evidence sufficient to satisfy the Tribunal that there may be or is a sex taint.

The Facts

5. The Claimant was a professor recruited from within the College to the post of Professor in 1996. In her claim she initially maintained that six male professors were advantaged in terms of pay over her. By the time of the Tribunal there were two: Professor Gammerman and Professor Smith. She argued that her pay was significantly less in total than was theirs; the Tribunal found that in many respects to be so (see paragraph 5.3) and attributed this to three particular causes: the first being a difference in starting or basic salary, to which might be added possibly as a fourth reason, market supplement, in order to retain services or to adjust the salary upwards to accord with that paid elsewhere by other colleges; the second, differences in the annual increments which were awarded; and the third, a difference in payments in that the two professors were explicitly paid more in order to retain their services when the college had information that they might be poached away from its service. It was common ground before me that the Claimant herself was never known to be approached by another institution so that such a retention payment was not made nor offered to her.

6. Before me the only issue arose in respect of the retention payments. So far as Professor Gammerman was concerned, four approaches were made to him in the early millennium. Two resulted in what were described as retention payments. The first was one of

£10,000 made on 25 March 2002. It was made on the basis that (a) he would not request a salary rise within two years and (b) his Head of Department supplement which he had been receiving for some seven years, a matter of £4,000 per year, would not be rolled into his salary when he ceased to occupy that position: but it was plainly a substantial sum. The second was one of £12,000, made on 1 August 2003. He was Professor of Computer Science. The Tribunal found that the Principal, then Professor Hill, was entitled to treat the third-party approach to him which resulted in the payment as a serious threat to the Respondent's Computer Science department. Its summary, at paragraph 5.5, was that Professor Gammerman, interested in the approaches made to him, had become involved in high-level confidential discussions with other universities. He had spoken at least on one occasion to members of this team about it. At paragraph 5.56 the Tribunal observed:

> **"It was not disputed, and we find, that it was enormously in the Respondent's interest to retain Professor Gammerman. Using our nous as an industrial jury, we also find that it was certainly in the Respondent's interests to act relatively speedily to prevent uncertainty, limit the time for the other university to enhance their position and restrict any extended period of discussion by, as Professor Hill put it, pre-empting matters."**

7. The Tribunal reached a similar conclusion in respect of Professor Smith. The college's assessment that it could not afford to lose him was not challenged, and the Tribunal accepted it (paragraph 5.59). In his case, however, the financial sum paid to retain him was rather more modest, as set out between paragraphs 5.60 and 5.63. It came in the end (it is unnecessary to describe the details) to something over £3,000. He had the additional benefit of moving to a research professorship, which was a position he preferred to occupy.

8. The Claimant received no such payment in cash terms directly to retain her.

The Employment Tribunal Judgment

9. The Tribunal set out the applicable law at its paragraph 2 in terms which have raised no criticism before me. In its paragraph 6 it concluded, expressly applying the law which it had set

out, that the Respondent had established material factors which genuinely explained the differences in pay for the period 2006 to 30 July 2010. That was the period in question. It added that the making of the payments was not tainted by gender. The expression of that view echoed the summary of its view at paragraph 1 at the start of its reserved Judgment, stating that the Respondent had established material factor defences.

10. The reasoning by which the Tribunal reached those conclusions, so far as retention is concerned, is not only contained in the "Conclusion" section. In opening that section the Tribunal made it clear that it would apply the law and the facts as it had found them at paragraph 5, which itself was subdivided into 106 separate paragraphs. Accordingly, to understand the conclusions, it is necessary for the reader to do some work to see precisely what is being said. So far as the retention payments were concerned, the Tribunal said at paragraph 6.4:

> **"We ask: does the Respondent explain part of the difference in salary between the Claimant and her comparators as based on its desire to retain them in employment. We recognised above that the rewards for remaining a loyal servant, that is for being retained in employment, may be paid in sundry ways. Our findings are that Professors Gammerman and Smith each received specific benefits when it was known that other academic institutions were seeking to poach them. For Professor Gammerman there were two lump sum increases totalling £22,000 and that included a £4,000 setoff to bite when he ceased to be Head of Department. For Professor Smith it was a research chair and a relatively modest salary increase, later boosted somewhat to maximise his full economic cost. We accepted this latter point is one which reflects the availability and the amount of external funding, which the Respondent was legitimately entitled to take into account. We also accept that it was at material times reasonably necessary for the Respondent to maximise its income."**

11. The findings of fact which cross-relate to that conclusion are principally set out at paragraph 5.55 and following. These are passages which I have already mentioned.

12. At paragraph 5.63 it said in respect of Professor Smith:

> **"We accept that this retention issue, mixed with commercial savvy in respect of available external funding, entirely explains the creation of the research chair and the salary increase."**

That is a finding of fact. It leaves, on its face, no obvious room for there being any sex taint. But in any event the Tribunal went on, at paragraph 5.64. Conceptually, having established that the employer had satisfied the Tribunal that it had a genuine reason, a material factor both significant and relevant, for paying retention sums to Professor Gammerman and Smith, it was then concerned with whether or not the Claimant could show that the factor might be related to sex. At 5.64 the Tribunal said this;

> **"The Claimant has argued, and called Professor Frank, to establish retention payments are inherently gender discriminatory or discriminatory in operation. Based on a relatively small survey (of economics professors, approximately 1995 to 2000 including only 17 female Respondents) Professor Frank concluded that men were more likely to be more able to move, more likely to attract external interest or offers, and more likely to be the subject of increased pay offers by universities desiring to retain them. The Respondent, through Miss Bailey's evidence about statistics at its college over the years and by urging that Professor Frank's statistics were so small as to be unreliable sought to refute the gender taint. We find that whatever the position generally or for lower-level academics, in respect of the London area which includes the Respondent and professors, it is not established that there is a gender taint in retention payments. This is because it is often not necessary for professors to spend much time at their home university and/or because there are so many universities including those with prestigious research ratings within accessible travel distance and/or for other reasons as for example that the husband might move if the higher earning wife as perhaps if the Claimant wanted to since her husband's income is apparently dependent on her work."**

13. The reference to Miss Bailey's evidence takes one in turn back to paragraphs 5.24 and 5.25. There the Tribunal said this:

> **"Evidence from Gemma Bailey was relied on by the Respondent as demonstrating that woman academics at the Respondent have received market forces supplements and/or retention payments in proportions approximately equal to or better than the percentage of women in employment when compared to men. We accept Miss Prince's challenge that the information upon which Miss Bailey based her evidence was incomplete because it did not include Professor Gammerman. However, we find from the face of the document that is because it deals with awards after 2003 when the present system of recording was implemented.**
>
> **5.25 We therefore do not accept criticisms in respect of the period from 2003 onwards. We recognise that although information is provided up to and including January 2013 that latter date is outside our period."**

14. It is thus apparent that Miss Bailey said nothing about the period prior to 2003. The statement made by Miss Bailey, which was not, according to the Tribunal, disputed, said at paragraph 33 that there were payments which had been made in the calendar years 2003 to 2006 which could be broken down by gender. At paragraph 34 she observed:

> **"Given the small numbers involved it is difficult to draw conclusions from these figures (in all the years if you added or took away one female professor the percentages would look very**

different) but it is clear that women did receive retention payments from the College as well as men in about the same proportions as the proportion of male to female professors in the College at the time."

15. Thus the conclusion to which the Tribunal came (paragraph 5.64) was based on evidence by Miss Bailey, which she thought established that men and women were treated broadly equally when it came to retention payments, and Professor Frank, whose evidence was insufficient (for reasons which the Tribunal expressed in 5.64) to show that there was any gender taint in the retention payments generally made. It appears from what the Tribunal say in the Judgment that there was no further evidence which might show that there was a difference of sex in the material factor, that is the payment of the retention payments in these circumstances to these two male professors.

16. The Tribunal, returning to its conclusions, went on at paragraph 6.5 and 6.6 to express views which I need to set out in full:

"6.5 As to the Claimant, we have found (at paragraphs 5.64 and 5.84) that in order to retain her in employment the Respondent gave preferential intellectual property rights, at least in part to lure her in the first place, so far as we can establish, but thereafter to retain her, hugely preferential spin-out company terms, precisely the terms she desired in respect of 50% work for the Respondent, leading to 100% pension rights, in part due to the availability of external funding.

6.6 We understand and adopt the obligation to engage in a term by term comparison as set out in *Heywood v Brownville*, but we consider that to look simply at annual gross pay or particular retention pay increase, would misrepresent the matter. The Respondent has first to identify each element (term) of any differential in pay. The Claimant then has to prove that a particular term is less favourable to her. We are not persuaded that the retention-related terms of the Claimant's remuneration, summarized at paragraph 6.5 above, are less favourable than the comparable retention related terms of her comparators. Quite the reverse. Our primary conclusion in respect of the different terms attributable to retention is that the Claimant has achieved a bargain at least equal to and actually very much better than that of her comparators. Even without actuarial evidence in respect of pensions, we are satisfied that she has achieved greater financial rewards than her comparators in response to the Respondent's desire to keep them all in their employment. Only by ignoring the equivalent or comparable terms in the Claimant's contract and looking solely at the retention-pay increases awarded to the comparators but not to her could we come to a different conclusion. But that would be artificial, one-sided and not in accordance with the law. It would permit the Claimant to acquire the wonderful bargain she has secured and then wholly to ignore them because they were expressed in a different format or style. We are not required to do that."

17. This amounts to a finding that there was in fact no difference in salary which needed to be explained by any genuine material factor, let alone that relied upon by the Respondent. It is a finding that, in effect, the Claimant by comparing the comparable term in her contract with the cognate term in each of the professors' contracts was better off than they were.

The Grounds of Appeal

18. In a fine argument, Miss Monaghan QC, who did not appear below and Miss Laura Prince, who did, argued that the Employment Tribunal's Judgment, at paragraph 5.64, was incredibly brief and unclear to the extent that it was not **Meek-**compliant. Secondly, they submitted that the Tribunal erred in law because it made no findings, or at least no adequate findings, in respect of the Claimant's submissions that the retention payments were indeed tainted by sex in accordance with the case of **Danfoss**. Nor, ground 3, had the Tribunal made any findings as it should in respect of the Claimant's submission that the statistical evidence showed that the payments were sex-tainted. The fourth ground was the ground with which Miss Monaghan began her argument and substantial assault on the Judgment, attacking the conclusions at paragraphs 6.5 and 6.6 because the Tribunal there had not looked at each term of the contract separately, a term being a distinct provision or part of another contract and had fallen into the trap identified in **Brownbill v St Helens and Knowsley Hospital Trust** [2011] IRLR 128 of taking an overall view rather than a term by term approach, thus preventing effective implementation of the **Equal Pay Policy** because it prevented transparency in pay structures.

19. The fifth ground advanced in the Notice of Appeal was that it was perverse of the Tribunal to conclude that the Claimant had had particular terms in her contract in order to retain her when the Respondent had never asserted it had agreed such terms with her. There had been

no evidence to that effect before the Tribunal and the terms had not been agreed in response to any specified retention issue such as the approaches made to her male comparator professors.

20. I shall deal with the arguments as they appear in the Notice of Appeal and as they were originally set out in the Skeleton Argument.

21. The attack upon the adequacy of paragraph 5.64, in which the Tribunal rejected there being a sex taint to the genuine material factor relied on by the College, began by reference to the closing submissions of Miss Prince. She had argued that there were at least three ways in which, in a case in which it was accepted direct discrimination was not involved, a Claimant could establish sex taint. The first was **Bilka** taint. In **Bilka** the Court of Justice of the European Community said, at paragraph 31, that Article 119 of the EEC Treaty (the Article which then enshrined the right to equal pay) was infringed by a department store which excluded part-time employees from its occupational pension scheme where that exclusion affected a far greater number of women than men:

> **".....unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex".**

22. It is argued that the Tribunal should have identified the PCP relied upon which gave rise to the disparate impact, identified the relevant pool, identified whether the PCP disadvantaged women in the pool compared to men in the pool, and considered whether the Claimant was herself disadvantaged. A specific PCP was advanced.

23. Paragraph 5.64 does not make reference to **Bilka** in terms, nor does it set out or discuss any of the statistics which were proffered in detail.

24. So far as the reasoning for rejection of Professor Frank's views, the Tribunal had referred to whatever the "position generally" was, and it is complained that that gives no clear information about whether the Tribunal accepted that there was statistical disadvantage or that generally female academics were less mobile than male academics. Professor Frank had given his view as to the reason for likely disadvantage to women in the operation of retention payments. The reasons given for rejecting his view were not clearly and fully developed.

25. The question here for the Tribunal, as submitted by Mr Segal QC, who appeared with Mr Brittenden, Mr Segal not having appeared below as Mr Brittenden did, was to make a finding of fact open it. It had to make an assessment of that which Professor Frank was saying. His study was not one which compelled the sort of answer for which Miss Monaghan contended. It did not deal, except in small numbers, with professors. It did not deal specifically with the London area. Hence, looking at the expression "whatever the position generally", that was used to show that Professor Frank was not engaging with the particular situation in which the Claimant and her comparators were placed. He submitted that the Tribunal gave clear and cogent reasons, though they might well have given more, for concluding that the evidence provided by the Claimant did not satisfy the Tribunal, and was not bound to satisfy the Tribunal, that there was any question of gender taint such as to engage the need to consider whether the payment was objectively justified.

26. Before turning to my conclusions on this, I shall deal with the **Danfoss** and **Enderby** arguments, also addressed by Miss Prince, and that which Miss Monaghan submits is in effect the fourth way, that is the proof of sex discrimination which does not come formally within the requirements which **Bilka**, **Danfoss** and **Enderby** might each themselves be thought to

establish, a gate to which was left open by the comments in **Armstrong**, subsequently endorsed by the Court of Appeal.

27. The **Danfoss** argument again relied upon statistics. **Danfoss** itself, going by the full name of **Handels-og Kontorfunktionaernes Forbund i Danmark v Dansk Arbejdsgiverforening** [1991] ICR 74, was one in which a trade union brought an action against an employers' organisation in respect of employees a random survey of whom revealed that the men were paid on average over six percent more than the women doing the same work or work of equal value. The employees knew only the total amount of their supplemented pay without being told which if any criteria had been applied to them. Each, the men and the women, had supplements above their basic rate of pay by reference to criteria but none knew how those criteria had been applied in their individual cases. At paragraph 10 and 11 of its Judgment the European Court of Justice set out the facts and answered the question posed to the effect that the **Equal Pay Directive** must be interpreted as meaning that:

> **"...where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men."**

28. The expression of principle by the European Court thus looks for statistical evidence which encompasses a relatively large number of employees. In the present case the Claimant argues that statistics showed an average gender pay gap of 7.8% in 2010 based on a sample of 161 professors. This, she submits, provided statistics which were every bit as powerful as those considered in **Danfoss**. There had been a lack of transparency because there was no transparency in the process for making retention payments. There were no laid-down procedures. There were no set criteria. There was no provision as to when such payment

would be made. The pay advantage which the men in **Danfoss** secured, if they did, was unexplained by any factor which objectively could be established.

29. The **Enderby** argument is not separately pursued on appeal in the Skeleton but it is argued that, by reference to **Armstrong**, there was statistical evidence which showed that the retention payments were potentially affected by sex.

30. At paragraph 27 of their Skeleton Argument, Miss Monaghan and Miss Prince refer to two particular points which are relevant to retention payments, two others being relevant to salary more generally. They are that it is asserted that in the relevant period women made up between 16% and 22% of professors yet received just 30% of the retention payments paid. Secondly, that a report had been commissioned by the employer in 2009 from the Hay Group, which identified a gap between the salaries of male and female professors at the college, noting in particular that the better paid schools were those of Management, Economics and Computer Science and observing that substantial difference in average basic salary observed in the professorial grade might be a cause for concern given the substantially higher number of males than females occupying that grade.

31. In response Mr Segal showed that there were no sufficient statistics such that the Tribunal was entitled so to conclude. The figures put forward by Miss Bailey merited the comment which I have cited above from paragraph 34 of her statement. She did not regard the figures she herself put forward as sufficient to draw any conclusions other than broad comparability between men and women in terms of retention payments made to professors.

32. The percentages quoted are a reflection of her own figures, as set out at paragraph 33. I accept that the figures there are small. The percentages are highly vulnerable to tiny shifts in numbers. It would be difficult to regard them as reliable statistics. The Tribunal was fully entitled to regard them as having no force at all other than that which Miss Bailey claimed for them.

33. As to the Hay Group Mr Segal argued that full reference to the text of the paragraphs relied upon included the comment that there was a problem throughout working with small numbers and therefore a risk that the picture would be distorted by a few outliers (see paragraph 5.3) and a comment in the succeeding paragraph that there was a substantial change when three departments were excluded from a consideration of the gender gap in pay which "still leaves a significant gap which has to be investigated further", therefore drawing no obvious conclusions. He pointed out that the Tribunal had itself considered the Hay Group report (see in particular paragraph 5.18) and had spent some paragraphs discussing what it found before turning to deal with the evidence from Gemma Bailey to which it reverted in coming to its final conclusions on fact at paragraph 5.64.

34. I have to ask whether paragraph 5.64 says sufficient to enable the Claimant to know why she lost. If the Judgment does not meet this standard, then the Tribunal will be in error of law. Though the paragraph is terse, it must be read in context. So read, the reasoning of the Tribunal is in my view clear. It accepted that the employer had established a genuine material factor which it had identified. In asking whether that might be tainted by sex, on the authorities as they stand it had to look to the Claimant for her to show that was or might be so. It regarded that as "not established". That is an application, on the face of it, of the burden of proof. In my view, it sufficiently shows to the Claimant why it was she did not succeed. There was here a

genuine material factor, accepted by the Tribunal and not seriously in dispute as such, which on the available evidence (that is the evidence of Professor Frank, there being no evidence called for her and no evidence from the Respondent from which the Claimant could rely, in the light of what was said in paragraph 34 of Gemma Bailey's statement) did not establish that which needed to be established.

35. I accept, therefore, the central argument of Mr Segal and Mr Brittenden that at paragraph 5.64 the Tribunal said enough to establish that there was no gender taint or rather that it had not regarded it having been established that there was any gender taint, and therefore it would follow that, if the Employer showed there was a genuine material factor, the employer had established a defence to the claim. That view fits entirely with what the Tribunal said at its concluding and opening sentences.

36. I turn to the second ground, that relating to **Brownbill**. The leading authority on the comparison which is required to be made by section 1(2) of the **Equal Pay Act** is the House of Lords decision of **Hayward v Cammell Laird Shipbuilders** [1998] 1 AC 894. In the two leading Judgments, those of Lord Mackay and Lord Goff, with which their other Lordships agreed, the House concluded that, where a woman received less favourable basic pay than the men with whom she compared her pay and less favourable overtime rates, it was impermissible for the court to look at her contract and the men's contracts as a whole, including other provisions such those for sickness benefits and meal breaks, so as to conclude that, taken holistically overall, the Claimant was as favourably treated as a man. As Lord Mackay said at 903G-H:

> **"When elimination of all discrimination on grounds of sex is to be applied to all aspects and conditions of remuneration I consider this requires each of these aspects to be considered and discrimination existing in any aspect to be eliminated irrespective of the other aspects. It does not appear to me to be a natural reading of Article 1 to say that if the remuneration as a whole provides the same result for a man and a woman it does not matter that some aspects of the**

> **remuneration discriminate in favour of the woman so long as there are corresponding discriminations in other aspects in favour of the man."**

37. He thought (paragraph 901B-C) that it would be natural to compare the Appellant's basic salary as set out in her contract with the basic salary determined under the men's contract. It would be natural to treat the provision relating to basic pay as a term in each of the contracts. The word "term" in respect of the contract the House was there considering was one which naturally applied to basic pay: the appropriate comparison was between the hourly rates, a term being a distinct provision or part of the contract which has sufficient content to make it possible to compare it from the point of view of the benefits it confers to a similar provision or part in another context.

38. This is entirely consonant with subsequent domestic and European authority. In **Brownbill** a term-for-term comparison was called for for the purposes of transparency: see **Brownbill v St Helens and Knowsley Teaching Hospitals NHS Trust** [2011] EWCA Civ 903, paragraph 20. That is in line with the decision of the European Court of Justice in **Barber v Guardian Royal Exchange Assurance Group** [1990] IRLR 240 at page 258, paragraphs 31 to 35 and in the Advocate General's opinion in the Swedish midwives case of **Jämställdhetsombudsmannen v Örebro läns landsting** [2000] IRLR 421, paragraph 43:

> **"...the court has already held that if the national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of article 119 would be diminished as a result. It follows that genuine transparency, permitting effective review, is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women."**

Brunhoffer v Bank der Österreichischen Postsparkasse AG [2001] IRLR 571 reinforces that (see paragraph 35).

39. Miss Monaghan argues that, having correctly set out the law, the Tribunal (at paragraphs 6.5 and 6.6) impermissibly adopted the approach proscribed by that chain of domestic and European authority. I agree. There is no attempt to identify a term other than by the use of the expression "retention-related terms" and even this may indicate that there may well be different terms covered by the definition: the Tribunal adopted the wording "our primary conclusion in respect of the different terms attributable to retention", though that might be reading perhaps too much in to the word "terms" in that context.

40. This approach appears to look for "retention-related terms". This creates, first, the problem that no such term had been relied upon by the Respondent and that its argument, as I understand it, had accepted that there was a salary differential between the Claimant and the Respondent. Although the Respondent did argue, as reflected at paragraph 3.2 in the Decision, that there were separately identifiable aspects of remuneration in respect of which the Claimant was paid as well as or better than comparators, and that these eradicated any difference in the respects singled out for consideration by the Tribunal, that plainly would not be looking at a term-by-term comparison as required by the relevant law which I have cited, but instead at an overall comparison.

41. The problems to which the Tribunal referred, had it not adopted the approach it set out in paragraph 6.6, echo the problems noted by the House of Lords in **Hayward** but regarded by them as a necessary feature and consequence of the legislation as it stood. The Tribunal did not explain properly why it regarded the Claimant as being paid sums in order to retain her, when there was no evidence that, although it might have been the inspiration for some terms and conditions of her contract so far as the Respondent was concerned, she was never told that this was so. If the terms which were (on the Tribunal's findings, but unknown to her) indeed truly

comparable to terms relating to retention in the contracts of her comparators this was never spelt out.

42. It is a pity that the Tribunal did not adopt at this stage in its Judgment the structured approach which I see as necessary under the **Equal Pay Act**. First, it should ask if there is a difference in pay or relevant term or condition, taking a term-by-term comparison. If no, there is no claim. If yes, then there is discrimination unless (secondly) there is a genuine material factor which is proved by the employer which explains it. If there is such a factor, then there will be no discrimination unless (thirdly) there is evidence to show that the factor may itself be tainted with sex discrimination.

43. The Tribunal here did not set out at paragraphs 6.5 and 6.6 what the purpose was of its explanation of the **Hayward** and **Brownbill** point. I accept that, on the face of it, there was also a further unexplained point, which may well be a material misapprehension of the evidence or perversity, to this limited extent, that the Tribunal regarded the acceptance by the college that she would retain 100% of the intellectual property rights which she had in valuable questionnaires as part of the rewards paid to retain the Claimant in service. That was an unusual arrangement. It applied in her case. But the Tribunal said at paragraph 5.69 that it had always been the agreement, though formalised in writing only in November 2003. If so, it was an arrangement which applied from the outset of her employment, and therefore it does not seem to have been paid nor could it have been paid in order to retain her against an external threat to poach her as in the case of the male professors. Such threats arose during the course of their employments. The Tribunal later confessed that the history of the arrangement was "unclear": but that is no reason for concluding it was paid in order to retain her services.

44. There are, as it seems to me, therefore problems with the approach which the Tribunal took. However, Mr Segal argues that neither 6.5 nor 6.6 is a necessary finding for the integrity of the decision as it stands. The extent to which the Claimant was given terms or conditions in order to secure her retention does not help to explain why it was that the two male professors received more money than she did, specifically by way of payments to secure their retention when there was an external threat to poach them. That matter, the payment of retention payments to them but not to her would, adopting **Hayward** and **Brownbill**, justify a conclusion that different terms applied to the claimant and her comparators, which favoured the latter. That then requires a Tribunal to answer the second question posed at paragraph 42 above. Here the Tribunal answered it, by finding that the factors were genuine and material, and then going on to exclude any question of taint. It was entitled to do so, on the evidence, as I have found above. It was not obliged to find the contrary. Its conclusion to that effect was not perverse.

45. Despite what I see as an error of law in the reasoning of the Tribunal in respect of the "term by term" comparison, and the curiosity that it should have thought it necessary to deal at all with what is said at paragraph 6.5 and 6.6 when this does not seem relevant (though this may be a reflection of the way in which the college put its case below) I have concluded that this error is not material to the decision. The decision is, as I have accepted, adequately explained. The Claimant was paid less in specific respects than her two comparators. The College satisfied the Tribunal that there was a genuine, significant and relevant reason which explained the difference in those respects. The fact that the Claimant may have been rewarded in other ways for the value of her service was not part of the facts on which the employer relied. It was beside the point. The other grounds of appeal fail.

46. Accordingly, whilst recognising the very considerable attractiveness with which Miss Monaghan QC has advanced the argument, the appeal must be and is rejected.