Appeal No. UKEATS/0014/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 22 October 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

CALMAC FERRIES LTD APPELLANT

(1) MRS ELIZABETH WALLACE
(2) MISS SUSAN DAWN McKILLOP

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR STUART NEILSON (Solicitor) Pinsent Masons LLP 141 Bothwell Street Glasgow G2 7EQ
For the Respondents	MR DAVID HAY (Advocate) Instructed by: Drummond Miller LLP 65 Bath Street Glasgow G2 2DD

SUMMARY

EQUAL PAY ACT – Material factor defence and justification

PRACTICE AND PROCEDURE

Possibly the first appellate consideration of the equal terms provisions of the **Equality Act 2010**.

The Claimants, two female port assistants claimed to be paid the same as outport clerks, one of whom was male and the other female, for performing like work. They expressly disavowed a claim that the pay arrangements were directly discriminatory. The Respondent applied to strike out the claim, arguing that it was for the Claimants to establish a prima facie case of indirect discrimination and that on the pleaded cases they could not do so: no PCP had been identified. The Employment Judge refused the application.

Held: she was entitled to do so, since although there had been confusion, the Claimants did not accept the reason the Respondent gave for the pay disparity. The material factor defence is fact specific.

Observations made about procedure, and a reminder that it may be unhelpful when considering the equal terms provisions of the **Equality Act 2010** to talk in terms of direct or indirect discrimination without linking that closely to the statute. The distinction should not operate as a fetter on examining differences in terms and conditions which appear to affect one gender disproportionately.

The question whether **Nelson v Carillion** is good authority was resolved by the terms of the 2010 Act.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. The Applicants before me are agreed this is the first case of which they are aware relating to equal terms and conditions, in particular pay, which has reached this appellate level, which calls for a consideration of the terms of the **Equality Act 2010**, chapter 3, sections 64-80. The decision itself, however, does not, as I see it, turn upon any important question of principle but rather upon whether the Employment Judge was entitled to exercise her discretion to refuse the Respondent employer's application to strike out the claim. That decision was reached by Employment Judge Kearns, in reasons which she gave in Glasgow, delivered on 22 January 2013.

The underlying facts

2. There were two Claimants, who brought identical claims. They are both women. They were employed by the Respondent, whom I shall call CalMac, at Largs Ferry Terminal as port assistants. They were the only two port assistants at Largs. There were two outport clerks, one of whom was a woman, the other of whom was a man. It was conceded by CalMac that the work of the port assistants was like work to that of the outport clerks. The Claimants' initial claims were expressed in terms suggesting that they were seeking to remedy what they saw as unfairness in the pay arrangements, rather than an inequality as between male and female employees resting on the fact of their gender. It is common ground that the **Equality Act 2010**, as also its predecessor, the **Equal Pay Act 1970**, does not lead to the court making a pay award between two negotiating parties. The issue is not fairness in pay, but equality as between the sexes in pay and terms and conditions. However, the claim was viewed as a claim brought under the Equal Terms Provisions of the 2010 Act.

3. Section 66 provides:

"(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.

(2) A sex equality clause is a provision that has the following effect—

(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;

(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term…"

4. Thus, on the face of it, a woman who is employed on like work, which is set out in section 65(2), is entitled to be paid the same as a man. On the face of it, therefore, the Claimants could claim to be entitled to be paid the same as their male comparator, who was an outport clerk. This, however, is subject to section 69, headed "Defence of material factor". This section shows drafting changes from section 1(3) of the **Equality Act 1970**. Some of those changes make clear legislatively what had been the subject of judicial decision before. It must be remembered that the Equality Act is not a consolidating act as such. The purpose is described as "to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination..." Accordingly the extent to which previous law, as revealed by the cases, has to be taken into account, must be treated with some care, though neither advocate before me has argued that any prior case is to be disregarded because of this.

5. Section 69 provides as follows:

"Defence of material factor

(1) The sex equality clause in A's terms has 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, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's…"

The other provisions are not material to the present issues.

6. "Responsible person" is defined in section 80(4) as, here, being the employer of B. The scheme of the Act thus set out is not materially in dispute before me. It provides, as did the **Equality Act 1970** before it, that, in the words of Lord Nicholls of Birkenhead in **Glasgow City Council v Marshall** [2000] ICR 196 at 202F-203B:

> **"The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work...to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a 'material' factor, that is, a significant and relevant factor. Third, that the reason is not 'the difference of sex'."**

Those words, I interpose to say, do not appear in section 69. Neither advocate suggested that the effect of section 69 is any different. Returning to the quote from Lord Nicholls:

> **"This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied is or in a case within section 1(2)(c) may be, a material difference, that is a significant and relevant difference between the woman's case and the man's case."**

7. As under the **Equality Act 1970**, to which the **Marshall** case related, so too under the **Equality Act 2010** do the provisions of sections 65 and 66, taken together, set up a *prima facie* presumption that the difference between the woman's terms and conditions, where the woman is the claimant, and that of the man's, where the man is the comparator, is due to sex discrimination against the woman. The defence is for the employer to prove under section 69(1). However, if he shows that there is a material factor which, in the words of Lord Nicholls, is genuine and is the cause of the disparity, is material, and does not "involve treating A less favourably because of A's sex", then, by virtue of section 69(2), it is for A (the

claimant) to show that, as a result of the factor identified by the employer, women as a group doing work equal to hers are disadvantaged compared to men doing equal work.

8. I would observe that the word "discrimination" despite its careful definition in the **Equality Act 2010** does not appear in section 69. This may be a reflection of the approach taken in **Ratcliffe v North Yorkshire CC** [1995] ICR 833 HL, in which Lord Slynn, with whom their other Lordships agreed, held that the distinction between direct and indirect discrimination in the **Sex Discrimination Act 1975** was not to be imported into section 1 of the **Equal Pay Act 1970**. That itself is perhaps an echo of words of Advocate General Lenz in the seminal case of **Enderby v Frenchay Health Authority** [1994] ICR 112 ECJ at paragraph 15 of his opinion, in which he pointed out that a formalistic approach should not be adopted when categorising actual instances where women are placed at a disadvantage at work. He was advising that the categories of direct and indirect discrimination (see 150G-H) made it easier for discrimination to be identified, but such a conceptual scheme should not operate as a straitjacket so as to prevent the elimination of discrimination between large groups of women and large groups of men where that was statistically apparent upon reliable statistics, that being the issue in that particular case. However, that said, there is an obvious equivalence between section 69(1)(a) and that which would normally have fallen within "direct discrimination" under the earlier provisions of the Equal Pay and Sex Discrimination Acts to that effect, just as there is a broad equivalence between section 69(1)(b) and 69(2) and the way in which indirect discrimination is dealt. Certainly 69(1)(a) looks at A, the claimant, as an individual and asks whether she has been treated less favourably because of her sex, whereas section 69(1)(b) and (2) look at women in her position as a group compared to men as a group in the same position as the comparator. Thus a reference to direct discrimination, though not a term used in the statute, is apt to be seen as a reference to the defence under 69(1)(a).

The issues

9. The Claimants, having brought ET1s without legal advice, secured it. Further Particulars of Claim were supplied in July 2012. They said on behalf of the Claimants that they were not paid as were the outport clerks, identifying various aspects in which the outport clerks were more favourably treated. At paragraph 4 they said this:

> **"The Respondent's pay arrangements in respect of the Claimant and her comparator are indirectly discriminatory due to sex. More female employees than male employees in the combined pool of port assistants and outport clerks are disadvantaged in relation to access to enhanced overtime payments."**

10. The paragraph, however, goes on to call upon the employer to identify whether it asserts a genuine material factor other than sex to explain its pay arrangements at the Largs terminal, it being asserted by the Claimants that no such genuine material factor was present. The Respondent had asserted in its ET3 that the variation in terms and conditions of employment between the Claimants and their comparator was due to a genuine material factor, namely that the roles, port assistant and outport clerk, historically had different duties and responsibilities and different pay arrangements. It asserted that the Respondent could point to genuine reasons for the salaries paid to the Claimants and their comparator, which did not relate to the difference in sex and which did not require objective justification. In that initial paper, the Respondent said that port managers at the Largs ferry terminal had been left to their own devices in terms of fixing pay arrangements. In an adjusted paper provided subsequently it resiled from that contention. It set out that the outport clerks were covered as to terms and conditions by a collective agreement made with the TSSA. Port assistants were supported by the RMT union. It is not asserted that port assistants as a group had any collective agreement applying to their pay. The factual averment is made that the extent of the duties the port assistants may be required to undertake varies from port to port (see paragraph 10).

11. In October 2012, after the Additional Particulars of the Claim had been supplied, the Respondent requested Further and Better Particulars of Claim. It asked the Claimants to specify the provision, criterion or practice on which the Claimants sought to rely and, secondly, to identify which way they considered that the alleged treatment was discriminatory due to sex.

12. That produced a response, which said, in the second sentence, that the Claimants were not advancing an equal pay claim on the basis that the pay arrangements in operation at the Largs terminal were directly discriminatory. It was this statement, or it may be concession, which has caused the difficulties in this case. When the matter came before Judge Kearns, it came on an application under rule 18(7) of the Tribunal Rules for a strike-out or alternatively a deposit order under rule 20. The argument, in short, which Mr Neilson for CalMac advanced was that the Claimants to succeed had to establish a prima facie case of indirect discrimination. The burden of proof was on them to do so. For that proposition, he relied on **Nelson v Carillion Services Ltd** [2003] ICR 1256, a decision of the Court of Appeal, which, though subject to doubts expressed by later divisions of the Court of Appeal, has nonetheless been regarded as authoritative. He need not have done so, for it is clear from the terms of section 69(2), as the advocates before me both accept, that the burden of proof which was the subject matter of the **Nelson** decision is now clearly set out in that subsection. It is for the Claimant to show that there is particular disadvantage as a result of the factor identified by the employer. Accordingly Mr Neilson argued that the Claimants could not in this case hope to establish indirect discrimination because the available pool was simply far too small to amount to providing significant statistics which would compel a tribunal to conclude that there was systematic disadvantage to women as a group. The Claimants had not identified any PCP, which if this were a sex discrimination claim as such would be the other way in which they would establish indirect discrimination. Accordingly the Claimant had no hope of success before the Tribunal.

13. This submission relied heavily upon the acceptance by the Claimants that they did not seek to say that they had been directly discriminated against. Having heard from Mr Hay for the Claimants, the Judge rejected that submission, though plainly sympathetic to aspects of it. The reason she did so was centrally set out at paragraph 26. Having dealt with the concession, she said:

> **"I was less than clear from the first full paragraph of D10** [that is, the response to the request for further particulars, in which the acceptance that there is no claim for direct discrimination was set out] **precisely how far this concession by the Claimants extended. I found it rather confusing because it does not seem to relate to the Respondent's material factor. However, I think it is fair to say that the Claimants have not conceded that the reason for the less favourable terms is as stated by the Respondent. Nor have they conceded that the reason given by the Respondent is material** [that it is the cause of the difference in pay]**. It is also fair to say that the Respondent has changed its position on the issue and the Claimants have founded on this change. Originally the Respondent stated that the port managers at Largs had been left to their own devices in terms of fixing pay arrangements. They now state:**
>
> > **'This was incorrect. In fact the arrangements of pay for outport clerks are determined by the appropriate collective agreement wherever the outport clerk is situated.'**
>
> **27. A material factor defence is fact-sensitive. Concessions aside, the burden is on the employer to prove the material factor relied upon is the real reason for the difference in pay, that it is significant, and that it is not related to sex. Normally, if the employer proves those three matters, the burden shifts back again to the employee to prove the factor is tainted by indirect discrimination. Usually, that involves showing that it has a disparate adverse impact on women.**
>
> **28. As the concession appears to refer to the pay practice itself, rather than a material factor identified by the Respondent and as strike-out is, as has been pointed out in the case-law, somewhat draconian, I think I have to accept Mr Hay's submission that the facts averred by the Respondent as amounting to a material factor are in dispute...**
>
> **29. ... Standing the fact that the material factor defence is not admitted, this case is not at** [the stage that the claim was in *Nelson* when that was determined] **and I have concluded that in light of that, I should not strike it out, nor am I in a position to say that it is little reasonable prospect of success."**

14. Mr Neilson argues, in impressive submissions, that that approach is in error of law. He argues that it does not take account, as it is required to do, of the admission that there here was no plain or direct discrimination. Mr Hay for the Claimants responds by arguing that there was no error of law, that the arguments which Mr Neilson advances assume that CalMac had already proved the reason for the pay disparity, the factor referred to in section 69. That was in dispute. Since that was in dispute, the stage had not been reached within the

Equality Act 2010 at which any question would arise of indirect discrimination or section 69(2). The starting point is for the employer to show that the difference between the man's pay and the woman's pay is because of a material factor. That involves the matters to which Lord Nicholls drew attention in **Glasgow v Marshall**. Those matters were in issue. The Judge, correctly, therefore, on his analysis, identified that the Claimants had not conceded the reason advanced by the Respondent. That being the case, there remained a prima facie case of discrimination. It had to be answered on the facts. A material factor defence is, as the Judge recognised, fact-sensitive.

15. Of all claims, discrimination claims in particular should not be struck out where they involve a core of disputed fact (see **Balls v Downham Market School** [2011] IRLR 217 and **Tayside Public Transport Co (trading as Travel Dundee) v Reilly** [2012] IRLR 755, a decision of the Inner House of the Court of Session). Accordingly the decision which the Judge reached was one which was one which was within her discretion and it was not an error of law to decide as she did.

Conclusions

16. It is difficult to understand precisely what the Claimants intended by accepting that they had no claim of direct discrimination unless they were accepting the reason advanced on paper by the Respondent, but the Claimants had expressly said that they did not accept that and put CalMac to proof. That is not an inherently unreasonable stance where the factual situation was that although one pair of employees was covered by the terms of a collective agreement applying to all outport workers, wherever they might work for CalMac (and assuming that to be established with evidence) the two port assistants might not be in the same position as other port assistants because of the different tasks they performed at each port, and where there had been some doubt in the way in which the Respondent's pleadings had changed as to why they

were paid what they were. Where a pay disparity arises for examination, it is not sufficient for an employer to show why one party is paid as one party is. The statute requires an explanation for the difference, which inevitably involves considering why the Claimants are paid as they are, on the one hand, and separately, why the comparator is paid as he is. Here, it is arguably unclear why the port assistants were paid as they were, and no facts had been established to show it. Accordingly it was not inherently unreasonable for the Claimant to rely upon the terms of section 65 and section 66 establishing, under the Equality Act, as it did under the Equal Pay Act, prima facie discrimination in pay based upon a gender difference. The Act requires the employer to prove the reason. The Judge, in paragraph 26, stated that the Claimants have not conceded that the reason was as stated by CalMac, nor that the reason given was the cause of the difference in pay. I do not understand Mr Neilson's submissions as being that that was in error. I fully understand the confusion because it seems to me difficult to identify a reason for a difference as not being directly discriminatory without knowing in the first place what the reason is. However, the implicit acceptance of the Respondent's factor is explicitly put in issue, and it seems to me a correct analysis of the position that the Claimants had not actually conceded that the Respondent's proferred reason was the real reason. That being the case, I accept Mr Hay's submission that Mr Neilson's argument begins on the assumption that the reason as stated by the Respondents was that accepted by the Claimant. If that were the case, then I would have been very much inclined to think that the rest of his argument would follow, but it is not. As the Judge pointed out, a material factor defence is fact-sensitive. Accordingly, I have concluded that the error of law which Mr Neilson identifies would only be an error if, and on the assumption that, the Judge had concluded or must have concluded that the Claimants were accepting the factor propounded by CalMac. Since they were not, there is no error of law as propounded.

Observations

17. If a Respondent puts forward a factor which is truly not going to be in dispute before a Tribunal, then the parties should make that clear at the earliest possible stage. This allows a proper focus on the real issues in the claim. Secondly, it is not helpful where the equal terms provisions of the 2010 Act are concerned to talk in terms of direct and indirect discrimination without linking them very closely and clearly to the statutory provisions which apply. If the statutory provisions are followed through, adopting the scheme of Chapter 3, using the road map identified by Lord Nicholls in **Glasgow v Marshall**, there is no real room for misunderstanding. It is a matter of fact to establish in the first place what is the reason for the difference in treatment. That cannot be done unless it is conceded as such in an equal terms claim on the pleadings. It may give rise to a deposit being ordered where, on the available information, the grounds for that are made out. As to that, here, I simply say that I cannot see any reason in law why the Judge's exercise of her discretion to order the deposit was wrong, whatever this court might have done had it been determining the claim as did she.

18. It follows, in conclusion, that the appeal, despite as I have indicated some sympathy for many of the underlying points made to me, must be, and is, dismissed.

19. I wish to express finally my gratitude to the advocates for both parties for the quality of their preparation and presentation.