Appeal No. UKEAT/0222/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 April 2018
Judgment handed down on 7 June 2018

Before

MRS JUSTICE SIMLER DBE

(PRESIDENT)

SITTING ALONE

APPELLANT

READING BOROUGH COUNCIL

MS T JAMES & OTHERS

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr Richard Leiper (One of Her Majesty's Counsel) Instructed by: Boyes Turner LLP Abbots House Abbey Street Reading Berkshire RG1 3BD
For the Respondents	Miss Daphne Romney (One of Her Majesty's Counsel) Instructed by: Paul Doran Law Unit 14B Building 10 Central Park Mallusk Co. Antrim BT36 4FS
	Mr Stuart Brittenden (Of Counsel) Instructed by: Thompsons Solicitors LLP Congress House Great Russell Street London WC1B 3LW

SUMMARY

EQUAL PAY

This appeal raises a short point of law concerning the temporal scope of a pay comparison in proceedings based on equal pay for work of equal value brought under the Equal Pay Act 1970.

The Claimants sought arrears of pay dating back to 2002, comparing themselves with two comparators in post from that time and found to be doing work of equal value to the women. With effect from 6 April 2006 Mr Coleman was promoted to a different role; and with effect from 1 May 2011 Mr Peever's role was assimilated onto a Single Status Scheme at a lower rate of pay. There were other male highways operatives who remained employed and were available as comparators for equal pay purposes. The Respondent argued that the Claimants could not compare themselves with Mr Coleman for the purposes of calculating their arrears claims from 6 April 2006 onwards, or Mr Peever from 1 May 2011. The ET rejected those contentions; and the Claimants' losses were assessed by reference to Mr Coleman's pay from 6 April 2006, frozen as at 5 April 2006; and Mr Peever's pay at a level frozen prior to assimilation.

The Respondent appealed. It accepted that where a comparator is in post during the whole period of comparison then the sex equality clause operates with respect to that individual, but argued the position is different if he leaves during the comparison period, and other potential comparators remain because he is no longer an individual who "is employed" on work of equal value (see s.1(2)(c) Equal Pay Act 1970). The reasoning in Sorbie v Trust House Forte Hotels Ltd [1977] ICR 55 and Sodexo Ltd v Gutridge [2009] ICR 70 (EAT) could be distinguished. A statutory modification occurred by reason of the continued employment of actual but different male highways operatives who were available as comparators.

The appeal failed and was dismissed:

(i) There is no temporal limitation or other provision in the Equal Pay Act that restricts the continued implication of the equalised term in any way.

(ii) Once the necessary conditions are satisfied a presumption that there is an equality clause to be read into the contract arises and the less favourable term of the woman's contract is treated as modified so as not to be less favourable. In other words, the implied contractual right to pay at the higher rate referable to Mr Coleman and/or Mr Peever crystallised in 2002 and has and will continue until the women's contracts are validly varied or terminated.

(iii) No operative variation occurred (bringing an end to the equality clause modification based on these comparators' earnings) because a different (albeit potentially valid) comparator continued in post while the chosen comparator did not. On Mr Coleman's promotion, the necessary conditions for the automatic operation of an implied equality clause in the Claimants' contracts based on the other male highway operatives cannot have been satisfied because no term in the Claimants' contracts was less favourable than the terms of the other male highways operatives' contracts. It was the other way around: the Claimants already had statutorily implied contractual rights to higher pay by 2006 when Mr Coleman was promoted.

(iv) The argument is unsupported by authority. It is inconsistent with Sorbie and Sodexo: once contractual rights to equal pay crystallise, those rights continue until lawfully varied or terminated. The focus is on lawful changes to the women's contracts and not on the fortuitous continued presence or otherwise of the chosen comparator in the same role.

THE HONOURABLE MRS JUSTICE SIMLER DBE

Introduction

1. This appeal raises a short point of law concerning the temporal scope of a pay comparison in proceedings based on equal pay for work of equal value brought under the Equal Pay Act 1970.

2. Following a stage 3 equal value hearing earlier in these proceedings, the Employment Tribunal held that a number of female employees of Reading Borough Council ("the Claimants") were employed, with effect from a date in 2002, on work of equal value to the job performed by Andrew Coleman, a highways operative. Although material factor defences were raised by the Council (referred to as the Respondent for ease of reference) none was established despite the fact that Mr Coleman was uniquely paid at an average rate that was higher than other male highways operatives who were also performing work of equal value and paid at a higher rate than the Claimants during the same period, though not as high as Mr Coleman.

3. Two particular Claimants, Ms Chan and Mrs Janes, brought claims based on Mr Brian Peever, a tractor driver, as their comparator. It has been established in their cases too, that between a date in 2002 and 22 July 2011 when their employments came to an end by reason of redundancy, they performed work of equal value to that performed by him.

4. The Claimants all sought arrears of pay dating back to 2002. Both Mr Coleman and Mr Peever were in post from that time doing work that was of equal value to the women. However, with effect from 6 April 2006 Mr Coleman was promoted to the position of senior highways operative, a different role. There is no suggestion that this promotion was in any way related to the claims or done to avoid the operation of the Equal Pay Act 1970. The other male highways operatives remained employed thereafter and were available as comparators for equal pay purposes. The Respondent argued that the Claimants could not compare themselves with Mr Coleman for the purposes of calculating their arrears claims from 6 April 2006 onwards. The Claimants disagreed and calculated their losses by reference to Mr Coleman's pay from 6 April 2006, frozen as at 5 April 2006. In the case of comparisons with Mr Peever, his job was assimilated onto a Single Status Scheme introduced by the Respondent, at a lower rate of pay with effect from 1 May 2011, and the Respondent contended that the arrears of equal pay claims should be assessed by reference to his reduced pay from that date. Employment Judge Gumbiti-Zimuto (sitting with members Mr Cameron and Ms Edwards agreed with the Claimants in both respects by a judgment promulgated on 15 July 2017.

5. The Respondent challenges that judgment as wrong in principle in relation to each comparator relied on. It accepts that where an individual in the comparator role is in post during the whole period of comparison then the sex equality clause operates with respect to that individual; but contends the position is different if he leaves that post during the comparison period, and other potential comparators remain. Thus, although the Claimants were entitled to rely on the comparison with Mr Coleman whilst he remained in post, once he was promoted, he was no longer an available comparator for them because he was no longer an individual who "is employed" on work of equal value (see s.1(2)(c) Equal Pay Act 1970). In reaching the contrary conclusion, the Respondent contends that the Employment Judge was wrong to rely on the reasoning in Sorbie v Trust House Forte Hotels Ltd [1977] ICR 55 and Sodexo Ltd v Gutridge [2009] ICR 70 (EAT). Moreover, the Employment Judge erred in law in failing to

acknowledge the statutory modification that occurred by reason of the continued employment of actual but different male highways operatives who were available as comparators.

6. Mr Richard Leiper QC appears for the Respondent, as he did below. Ms Daphne Romney QC appears for the Paul Doran Claimants and Mr Stuart Brittenden of counsel for the Thompsons Claimants, neither of whom appeared below. I am grateful to all counsel for their assistance in writing and orally.

The Legal framework

7. So far as relevant for present purposes, section 1 of the Equal Pay Act 1970 (now wholly repealed) provides:

> "(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.
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> (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 (the "woman's contract"), and has the effect that –
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> …….
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> (c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment –
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> (i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and
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> (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term;
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> (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 ……."

Accordingly if the situation in s. 1(2)(c) arises there is a presumption that an equality clause will operate. The presumption can be rebutted if the employer proves that the pay (or other) differential is due to a material factor in s. 1(3) but not otherwise. Section 66 of the Equality Act 2010 is in similar terms and makes provision for a sex equality clause to be implied into A's contract where she is employed on work equal to the work done by her comparator B (a person of the opposite sex) adopting a similar mechanism.

8. It follows that in relation to both Acts the mechanism to achieve equal pay is contractual and operates by means of an equality clause implied into every contract of employment. As the

Employment Appeal Tribunal explained in Hartlepool Borough Council v Llewellyn [2009] ICR 1426 at [30] and [33]:

> "30. We agree with Mr Allen that the conceptual approach adopted by the draftsman of section 1 appears to be that the modification of the term in "the woman's contract" occurs automatically if the required conditions apply and that it is not dependent on any decision to that effect by the tribunal; and such an approach would indeed seem to be necessary to justify the award of arrears. …
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> 33. In short, we agree with Mr Allen that F1's entitlement to equal pay with M2 arises – or, as Elias J put it in *Sodexo Ltd v Gutridge* [2009] ICR 70 "bites" – as soon as the conditions specified in section 1(2) are satisfied…"

In other words, as Mr Leiper QC accepts, if the necessary conditions in s. 1(2) of the Equal Pay Act are satisfied (that is, a term of the woman's contract is less favourable than a term of the man's, they are employed on work of equal value and there is no material factor to explain the difference) the equality clause operates automatically to equalise the less favourable term in the woman's contract with the corresponding more favourable term in the comparator man's contract without the need for a tribunal order declaring that to be the case. Once a tribunal comes to make an award, it is doing no more than declaring the existence of a statutory modification of the contract that has already taken effect, and assessing the amount of arrears to be paid.

9. Both domestic and European law require a comparison to be made between the pay of a claimant and that of an actual comparator. It is for the claimant to select the man or men with whom she wishes to be compared, no matter how anomalous her chosen comparator might be: see Ainsworth v Glass Tubes and Components Ltd [1977] ICR 347, referred to with approval by the House of Lords in Pickstone v Freemans Plc [1988] ICR 697 (HL) (Lord Templeman at 716E-F).

10. The comparator must be an actual rather than a hypothetical one under the Equal Pay Act. Further, although as Mr Leiper submits, the wording of the Equal Pay Act envisages comparison with someone employed at the same time as the claimant, in Macarthys Ltd v Smith [1980] ICR 672 the ECJ held that the principle enshrined by Article 119 (now 157 TFEU) is not confined to situations in which men and women "are contemporaneously doing equal work for the same employer" (see paragraph 13) and extends to comparison with an actual predecessor which would provide a basis for a concrete appraisal of the work actually performed. This aspect of the ECJ's judgment in Macarthys has been given statutory force in s. 64(2) Equality Act 2010.

The Employment Tribunal's judgment

11. Before the Tribunal the Claimants relied on Sorbie and Sodexo as authority for the principle that higher pay rights by reference to Mr Coleman and Mr Peever had crystallised and continued despite Mr Coleman's departure on promotion and Mr Peever's reduction in salary on assimilation to the Single Status Scheme. The Respondent contended that neither case was authority for the arguments advanced by the Claimants; and the facts of both were distinguishable since no available comparators remained in employment in those cases. The Tribunal summarised the facts of those cases briefly and set out the reasoning of the Employment Appeal Tribunal (Elias J) in Sodexo (subsequently upheld in the Court of Appeal).

12. At paragraphs 14 to 16 the Tribunal held as follows:

> "14 We however consider that the equality clause operates to amend an employee's contract. The contract once amended remains until "something else happens". The something else in our view must relate to the claimants' employment contract. The examples given by Phillips J in Sorbie of a further contractual agreement between the parties, a further collective agreement or a further statutory modification because of a subsequent operation of the sex equality clause are all examples of ways the employment contract terms can be lawfully changed.
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> 15 In this case the fact that Mr Coleman was promoted cannot operate to change the claimants' employment contract terms. The fact that there are other employees working in the role is irrelevant as the equality clause has caused the right to pay at the same level as Mr Coleman to crystallise and the claimants remain entitled to enforce it as a term of the contract until something else happens to change the contractual term.
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> 16 We consider that the same principle applies in relation to the comparisons made with Mr Peever."

The Appeal

13. Mr Leiper emphasises that the purpose of equal pay legislation is to achieve equality of pay, not higher pay for one particular sex. The effect of the Employment Tribunal's judgment is that the Claimants will receive higher pay than the male highways operatives who continue in employment (other than Mr Peever). He submits that cannot be right, and contends that the facts of Sorbie and Sodexo are distinguishable because no properly comparable man remained available for comparison in those cases. In any event, he reserves the right to challenge the correctness of Sorbie in the Court of Appeal.

14. In Sorbie the comparator was promoted to avoid the provisions of the Equal Pay Act and following his promotion there was no comparator in post with whom the claimant could compare her pay. Mr Leiper relies on the Employment Appeal Tribunal's acceptance that the modified pay term would cease to be so modified where "something else happens" which could include "a further statutory modification by reason of a further operation of the equality clause": see page 59G-H (Phillips J). He submits that in the present case the Employment Tribunal's error was a failure to acknowledge that where there continues to be a comparator in post, this serves as a further statutory modification: that there is an actual comparator in post means the claim for equal pay must be a claim in relation to his pay. In the absence of any continuing comparator, as in Sorbie, there is no further statutory modification, but the same is not true here. The Employment Tribunal did not explain why a further statutory modification because of a subsequent operation of the sex equality clause did not change the position in relation to the Claimants' terms when Mr Coleman was promoted. The Employment Tribunal asserted that this was so without explaining why. Likewise in Mr Leiper's submission, in Sodexo there was also no comparator remaining in post in the same employment with whom the claimants could compare their pay. The Court of Appeal acknowledged that the crystallised

right represented by the modified pay term remained in place "until validly terminated or varied": see paragraph 27. TUPE then operated to preserve rights so that the claimants' contracts were neither terminated nor varied.

15. In relation to Mr Peever, Mr Leiper submits that it was common ground that his pay was reduced as part of a process to equalise pay between male and female dominated roles when he was assimilated onto Single Status terms and conditions on 1 May 2011. The Tribunal took the approach that once the woman's pay was elevated by application of the sex equality clause it remained at that level irrespective of what happened to the comparator's pay. On that approach only increases in pay are recognised in the operation of the sex equality clause and any decrease in pay of the comparator is ignored. That he submits, defies logic and principle and does not achieve equality in pay.

16. I do not accept these arguments. I agree with Ms Romney QC and Mr Brittenden that the essence of the decision in Sorbie is that the less favourable term in a woman's contract is modified from the first date of comparison if the necessary conditions are met. Once the contract is modified as a consequence of the application of s.1 of the Equal Pay Act, the modified contract provides for pay at the modified rate. That modified contract remains in place as modified:

> "until something else happens, such as a further agreement between the parties, a further collective agreement, or a further statutory modification by reason of a further operation of the equality clause."

17. In Sorbie the claimants were employed as waitresses seeking equal pay with a male waiter, Mr Savvas. There was never any dispute that the work the claimants performed and that performed by Mr Savvas was "like work" and that they were paid 12p less per hour than he was. They claimed equal pay for the period from 23 December 1975 onwards but on 5 January 1976 Mr Savvas was promoted to avoid the provisions of the EPA 1970. The tribunal limited their award to the difference in pay for the one paid day's work between 29 December 1975 and 5 January 1976. The claimants appealed and their appeal was allowed, the Employment Appeal Tribunal holding that conclusion would mean that:

> "the EPA would have a fluctuating effect, requiring an increase to ensure equality at one point, but bringing that to an end when the man with whom comparison was being made ceased to be employed." (page 58H)

Since the women were employed on like work as that performed by Mr Savvas between 29 December and 5 January, their less favourable term as to remuneration (85p) was modified and 97½p was substituted. That modified contract continued in the absence of any proper basis for concluding that it did not.

18. In Sodexo the claimants were female hospital domestics employed by the NHS Trust when, in July 2001 their employment transferred under TUPE as part of a domestic services contract awarded to a new contractor. In December 2006 they brought claims for equal pay naming as comparators maintenance assistants who had also been employed by the NHS Trust at the same hospital but who had remained employed by the Trust after transfer. On the question whether they could pursue their claims for what was done before the transfer so far as equal pay is concerned, and do so more than five years after the transfer, the tribunal held that they could but that decision was overturned on appeal. So far as concerns the continuing

liability to honour the contractual terms in place at the point of transfer, that liability transferred under TUPE, including the equality clause.

19. In relation to an alternative argument pursued by the employer, that the equality clause operated only during the period when the claimant and her chosen comparator are in the same employment, the argument was rejected as wrong by Elias J in the following terms:

> "60 It is submitted that the equality clause operates only during the period when the claimant and her chosen comparator are in the same employment. Section 1(2)(c) makes it clear that the right to the equality clause is triggered only where that condition is met. Accordingly, so the argument goes, since the comparator was no longer in the same employment following the transfer then the right to the comparator's pay came to an end.
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> 61 If correct, it would mean that a woman would lose her right to the enhanced pay she had secured under the 1970 Act if the comparator is promoted or leaves the company. In this connection Mr Bowers relies upon the observation of Phillips J in *Sorbie v Trust Houses Forte Hotels Ltd* [1977] ICR 55 in which he said that the contract would remain modified by the equality clause "until something else happens". He submits that the transfer of an undertaking is such an event that brings the operation of the equality clause to an end.
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> 62 I have no doubt at all that this analysis is wholly misconceived. It misunderstands the way in which the equality clause operates. The identification with a comparator is necessary to demonstrate that there is discrimination on grounds of sex. Once the discrimination is established, the woman is entitled to receive what the man is paid. That is the proper non-discriminatory rate for the job. She does not just receive that increase for the period for which the man receives it, only to have her pay reduced again to the "woman's rate" if and when he ceases to be a comparator.
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> 63 Common employment is necessary to establish the enhanced contractual terms, but not to maintain them. Of course, a woman cannot continue to compare herself with the man once he ceases to be a comparator, but she does not lose such enhanced rights as have already been incorporated into her contract. Those rights are by then crystallised and she remains entitled to enforce them as a term of the contract. It would be wholly at odds with the purposes of the equal pay legislation if the woman could receive the male rate only whilst the male was employed on equal work.
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> 64 In my judgment, this analysis is confirmed by a number of indications. First, the *Sorbie* case itself, on which Mr Bowers relies, an argument along precisely these lines was rejected by the Employment Appeal Tribunal. A female waiter had been employed on like work with a man who was subsequently promoted to banqueting supervisor. It was argued that since they were no longer employed on like work the female was not entitled to the higher pay. The Appeal Tribunal rejected that submission. I have no doubt that the reference to "until something else happens" in the part of the judgment extracted above, simply means until there is some event which either terminates or modifies or varies the woman's contract of employment. The transfer of an undertaking is not, in my judgment, such a "relevant event".
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> 65 Second, the argument seems to me to be inconsistent with the decision of the European Court of Justice in *Macarthys Ltd v Smith* (Case 129/79) [1980] ICR 672. The court held that a woman could compare herself with a predecessor in the job. I do not see how this would be possible if Mr Bower's argument were correct. It would mean that if the claimant followed the comparator into the job then she would

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> be entitled to equal pay. However, if they were employed together and he then left, she would cease to be so entitled. However, his successor would be so entitled. There is no conceivable logic in that analysis.
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> 66 Third, it would lead to extraordinarily complex results. Not only would the pay fluctuate as and when the comparator was created or removed, but there would be considerable difficulty in determining quite what the pay should be. Take the case of the woman who was employed on the same terms as the comparator for, say five years. If he then left, would she go back to the pay she was receiving five years ago? Or would there be some allowance for pay increases in the interim, and if so, what?
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> 67 I have no doubt that this submission is wrong and I reject it."

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20. In the Court of Appeal (see [2009] IRLR 721) the argument was rejected in the following terms:

> "27 I would reject that argument. I accept of course that a woman who is employed by Sodexo cannot compare herself with a man who is employed by the trust. But in this case, the women compared themselves with the men while both were employed by the trust. The women are not seeking to compare themselves with the men after they have transferred to Sodexo. They are seeking to rely on a right which has crystallised while they were in the same employment as the men and which they say continued to be their right until validly terminated or varied. That right, which was the counterpart of the transferor's liability to pay the higher rate, was not terminated on transfer; rather it was transferred to Sodexo under regulation 5 of TUPE.
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> 28 Mr Bowers submitted that the purpose of TUPE is to preserve the rights of affected employees on transfer but not to create new or improved rights: see *Computershare Investor Services plc v Jackson* [2008] ICR 341. That is right but I cannot see how it can be said that the claimants are claiming new or improved rights in this case. They are seeking only to preserve the right to enhanced pay which had accrued to them during their employment with the trust.
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> 29 Elias J rejected Sodexo's arguments on this issue as being wholly misconceived. I agree and, for the reasons given above, I would reject this ground of Sodexo's cross-appeal."

21. Applying the principles established by those cases, and as a matter of statutory construction, it seems to me that the following conclusions emerge.

22. The Claimants were required to identify a named individual comparator rather than simply a type of job or pay grade. They named Mr Coleman (and in some cases Mr Peever). In circumstances where Mr Coleman's work was held to be work of equal value and no material factor defence was established in relation to any part of his pay, the fact that other men performing the role at a lower rate of pay were available as comparators did not and could not undermine their chosen comparison with Mr Coleman.

23. Moreover, the Claimants have always been entitled to select their own individual comparator. They were not required to select a comparator who is representative of a particular group of workers and it is not open to the Respondent to contend for a "better" or "more appropriate" comparator. To the extent that a comparator is not a proper comparator that is relevant in determining whether the necessary conditions for a claim based on work of equal

value are satisfied. The more extravagant the comparator, the more risk the comparison will carry of not satisfying the necessary conditions.

24. However, once the necessary conditions are satisfied a presumption that there is an equality clause to be read into the contract arises and the less favourable term of the woman's contract is treated as modified so as not to be less favourable. The presumption can be rebutted if the employer can demonstrate that the difference in pay has nothing whatever to do with sex. Here the presumption was not rebutted, so that the equality clause took effect as soon as the necessary conditions were fulfilled, during 2002. It did so by amending the less favourable remuneration term in the Claimants' contracts and equalising it with the relevant pay term of Mr Coleman's contract (or that of Mr Peever where he was the comparator).

25. Having done so, there is no temporal limitation or other provision in the Equal Pay Act that restricts the continued implication of the equalised term in any way. In other words, the implied contractual right to pay at Mr Coleman's higher rate of pay crystallised in 2002 and has and will continue until the women's contracts are validly varied or terminated.

26. I do not accept the Respondent's argument that an operative variation occurred (bringing an end to the equality clause modification based on Mr Coleman's earnings) because different valid comparators (all male highway operatives earning more than the Claimants but less than Mr Coleman) continued in post while the chosen comparator did not. The argument is unsupported by authority. It is inconsistent with both Sorbie and Sodexo: once contractual rights crystallise, those rights continue until they are lawfully varied or terminated. The focus is on lawful changes to the women's contracts and not on the fortuitous continued presence or otherwise of the chosen comparator in the same role. The argument is also inconsistent with the way the equal pay legislation operates.

27. The position might have been different if Mr Coleman was shown to have received a higher rate of pay than other highways operatives to reflect certain features of his role unique to him personally while the "proper" rate of pay for highways operatives is the rate paid to the other male highways operatives. However, a material factor defence of this kind has never been established and indeed the Claimants have been found to be performing work of equal value with Mr Coleman. His rate of pay is the non-discriminatory rate of equal pay to which they have established a contractual right, and having done so, it continues until lawfully modified. The Claimants do not need to rely on Mr Coleman or anyone else as a comparator once their right to equal pay has crystallised and is implied as a matter of statute into their contracts. That accrued contractual right continues until it is validly varied or terminated.

28. The Respondent's argument can be tested by considering the application of s. 1(2)(c)(ii) of the Equal Pay Act which deals with absent terms but is to be construed consistently with s. 1(2)(c)(i) which deals with less favourable terms. Assume Mr Coleman had a car made available to him under his contract while the Claimants and other male highways operatives did not. The Claimants and Mr Coleman (their chosen comparator) were doing work of equal value, and a term that benefitted him was absent from their contracts. By virtue of s. 1(2)(c)(ii) the Claimants' contracts are treated as including the same provision for a car as Mr Coleman's as soon as the necessary conditions are satisfied in 2002. The contractual right to provision of a car continues in the women's contracts thereafter, just as all other terms of their contracts continue irrespective of what Mr Coleman does. When Mr Coleman leaves his highways operative role in 2006 there is no statutory basis for withdrawing the accrued contractual right

to the car, and I can see no lawful contractual basis for doing so either. The same approach applies in relation to the higher rate of pay to which the Claimants are entitled.

29. Moreover, on Mr Coleman's promotion, the necessary conditions for the automatic operation of an implied equality clause in the Claimants' contracts based on the other male highway operatives cannot have been satisfied because no term in the Claimants' contracts was less favourable than the terms of the other male highways operatives' contracts at that point. Rather it was the other way around: the Claimants already had statutorily implied contractual rights to higher pay by 2006 when Mr Coleman was promoted. The fact that Mr Coleman was no longer available as a comparator after that is irrelevant: the statutory modification had already occurred and continued without temporal limitation. In fact once the Claimants' terms were improved because of the operation of the equality clause in relation to Mr Coleman, the other male highways operatives could have relied on their terms to achieve equivalent enhancement: see Hartlepool Borough Council v Llewellyn and others. Mr Leiper is critical of this "ratchet effect" that involves levelling up only without any levelling down; but it seems to me to be entirely consistent with the legislation which makes no provision for levelling down. Further, in appropriate cases employers can deploy the material factor defence. They can also protect themselves by taking proper, timely steps to ensure that pay structures are free of unlawful sex discrimination.

30. In my judgment nothing has been shown to have happened to terminate, modify or vary the Claimants' contracts. Their crystallised rights continue notwithstanding that Mr Coleman was promoted in 2006. I can see no ground for denying them compensation on this basis, even if the quantification of their arrears claims is made more difficult in practice because Mr Coleman's pay fluctuated.

31. The same principle applies in the case of Mr Peever. Although his contract was varied when he was placed on the Single Status Scheme, the two Claimants, Mrs Janes and Ms Chan, did not agree to a variation of their pay and they were not assimilated onto Single Status terms. Since their contracts were not validly varied, their crystallised rights also continued.

32. For all these reasons which are essentially the reasons given by the Employment Tribunal, the appeal fails and is dismissed.