Appeal No. UKEAT/0087/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 24 & 25 September 2019
Judgment handed down on 11 October 2019

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

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(1). CO-OPERATIVE GROUP LIMITED
(2). MR RICHARD PENNYCOOK — APPELLANTS

MS SAMANTHA WALKER — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING & CROSS APPEAL

APPEARANCES

For the Appellants	MR ANDREW BURNS QC (One of Her Majesty's Counsel) Instructed by: Addleshaw Goddard LLP
For the Respondent	MR SIMON DEVONSHIRE QC (One of Her Majesty's Counsel) Instructed by: Charles Russell Speechlys LLP 5 Fleet Place London EC4M 7RD

SUMMARY

SEX DISCRIMINATION – Direct

SEX DISCRIMINATION – Inferring discrimination

SEX DISCRIMINATION – Burden of proof

SEX DISCRIMINATION – Continuing act

SEX DISCRIMINATION – Justification

EQUAL PAY ACT – Equal value

EQUAL PAY ACT – Work rated equivalent

EQUAL PAY ACT – Material factor defence and justification

The Employment Appeal Tribunal heard an appeal disputing the basis of an ET's finding of direct sex discrimination. The EAT noted that the pay disparity had its origin in a pay negotiation which the ET accepted gave rise to a material factor defence. However in the period of time that followed these material factors ceased to apply. The Claimant's comparators ceased to occupy the roles they had at the time of the pay negotiation and the role of the Claimant increased in significance. This disparity was evidenced in a Hay survey instructed by the Appellants and supplied to them about a year after the pay agreement in dispute. The ET felt able to assume that there had been direct discrimination in the period prior to the survey. On appeal the EAT held that in the absence of a decision or its equivalent which had the effect of displacing the original pay agreement, the original justifications offered in the material factor defence persisted. The EAT held that the Hay survey had the effect of alerting the Appellants that a pay disparity existed notwithstanding the fact that its conclusions were not reported to the committee of the Appellants responsible for setting executive pay. It was not possible however to extrapolate the findings of the Hay survey backwards standing the authority of **Bainbridge v Redcar & Cleveland Borough Council** and a lack of evidence as to when one or all of the material factors ceased to have effect.

A **THE HONOURABLE LORD SUMMERS**

1. In this case the Co-Operative Group Limited and Mr Richard Pennycook appeal against a judgement of the Employment Tribunal (ET). The Claimant Mrs. Samantha Walker cross appeals. For ease of reference I describe the Co-operative Group Limited and Mr Pennycook as the Appellants and Mrs Samantha Walker as the Respondent throughout the judgement.

2. The first issue between the parties emerges from a dispute about equal pay. The Respondent in or about February/March 2014 was promoted to the role of Chief Human Resources Officer. This promotion occurred at a time of financial crisis for the Appellants. She along with a group of other individuals (the Executive Committee) were considered essential to the survival of the Appellants. With this in mind the Appellants offered enhanced salaries to the members of the Executive Committee and after a process of negotiation their respective salaries were agreed. The Respondent's salary was lower than that of the other members of the group of key appointments.

3. Happily for the Appellants they survived the crisis. They then entered a period of consolidation. One aspect of this phase was the re-consideration of the Respondent's position. It was decided that the Respondent's role should be down sized. Inevitably this was accompanied by a reduction in salary and other diminutions in status. This in turn led to a dispute between the Respondent and the Appellants as a consequence of which she was dismissed in April 2017. She then stated a series of claims that were dealt with by the ET sitting at Manchester in August 2018. Some of her claims were upheld and some were not.

4. One of her claims was that on her appointment in February/March 2014 her work was of equivalent value to two members of the group referred to above (the Comparators). Section 66

of the **Equality Act 2010** implies a sex equality clause into contracts of employment as follows -

> "…..
>
> **(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;**
>
> ...
>
> **(4). In the case of work within section 65(1)(b), a reference in subsection (2) above to a term includes a reference to such terms (if any) as have not been determined by the rating of the work (as well as those that have).**

5. The ET accepted under reference to s 65 of the **Equality Act 2010** that the Respondent's work was of equal value to her comparators having been rated as equivalent in a job valuation study performed by Hays. The Appellants relied however on the "material factor" defence. In this connection the ET was persuaded that the Appellants had established that there were material factors that justified the salary agreed with her and the different salaries paid to her comparators.

6. Section 69 of the **Equality Act 2010** provides as follows -

> **(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.**
>
> ...
>
> **(6). …. For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.**

7. The justifications offered and accepted by the Employment Tribunal were as follows (para 314) -

> **(a). Vital Roles: The Co-operative Group Limited saw the comparators as vital to the immediate survival of the Co-operative as they were part of the core team who refinanced the Bank and reformed governance, unlike the Respondent.**
>
> **(b). Executive Experience: The Co-operative considered that the Respondent was newly promoted to the Executive Committee and unproven at that level, unlike her comparators.**

(c). Flight Risk: it was crucial in the 'eye of the storm' to maintain stability and the top team of people. Had the comparators left it could have brought down the Co-operative.

(d). Market forces: one of the comparators was a top corporate lawyer, paid at the high market rate for top general counsel, which exceeded the market rate for the Respondent's position.

8. It was accepted following the guidance of Lord Nicholls in **Glasgow City Council v Marshall** [2000] 1 WLR 33 at 339 that the Appellants had rebutted the presumption of sex discrimination. The ET accepted the justifications offered for the differences in salary between the Respondent and the Comparators. It was satisfied that the reasons offered were genuine, that the differences were causally connected to the reasons, that the reason for the differences was not the difference of sex and that the differences were material.

9. The Hays study was completed in February/March 2015. The study showed that the roles of her comparators were rated as equivalent to or as lower than that of the Respondent and/or that the work she performed was of at least equal value, but that the comparators were paid at a substantially higher rate. The ET found this study was effective from 12 February 2015 (paragraph 312).

10. The Respondent accepted that the equivalency rating in the Hay report was not retrospective in effect. In other words its findings could not be extrapolated backwards to cover the period of time before the study so as to enable the Respondent to allege that work done prior to the job evaluation report was necessarily work of equal value in the period between 2014 and 2015 **Bainbridge v Redcar & Cleveland Borough Council** [2007] IRLR 494. The case cited was later appealed and the EAT conclusions on retrospectivity were upheld by the Court of Appeal **Bainbridge v Redcar & Cleveland Borough Council** [2007] IRLR 984 at paragraphs 278 et seq.

11. In this circumstance the Appellants argued that since the ET had accepted that the factors relied on in February/March 2014 justified the pay differential, it was not open to the ET to decide that these factors ceased to justify the differential in the intervening period without a basis for doing so. This in effect came to be a submission that the justifications offered for the differential in February/March 2014 could be extrapolated forwards until the justifications could not be said to persist any longer. Mr Burns QC argued that this point could only be reached when the Appellants made a fresh decision in relation to pay and conditions though he also accepted that in suitable circumstances, an omission to fix the Respondent's pay and conditions on equal terms with her comparators could have the same effect. He pointed out that before an unlawful decision could arise the ET must enquire into the facts known to and the beliefs held by the employer in order to be satisfied that they explained the pay differential. The facts and beliefs that underpinned the decisions in February/March 2014 were to be contrasted with the disclosure as a result of the Hays survey in February 2015 that there was no continuing objective justification for the differential see **Kings College London v Clark** EAT/1049/02. Given the need for an appropriate finding that the Appellants entertained certain facts or beliefs or could otherwise be fixed with responsibility for illegitimate facts and beliefs that had the effect of displacing the justification for the pay award in February/March 2014, it was essential to identify a decision or a relevant omission to decide.

12. The reasoning of the ET is as follows -

> **317. ... what was referred to as the rescue phase finished at the end of the third quarter of 2014 and ... the recovery phase started from October 2014. At some stage between February 2014 and February 2015 in our judgment the importance to the respondent of the roles carried out by the claimant's comparators declined relative to the importance to the respondent of the work being done by the claimant, particularly in respect of the recovery phase. In our judgment the value of the claimant's job had on the basis of the job evaluation study, albeit by slim margins, overtaken those of her comparators by the time of the study.**
>
> **318. In these circumstances we find that the historical explanations for the pay differential given at the time the pay was set were no longer material at the time of the Hay job evaluation study ...".**

13. The vagueness of the words "at some stage between February 2014 and February 2015", betray the difficulty with the ET's approach. First there is the conceptual difficulty identified by Mr Burns QC. He pointed out that it must be possible to identify a decision tainted by sex discrimination. Mr Burns accepted that it was not necessary for there to be a fresh decision as such. If there were a circumstance calling for a re-evaluation of the Respondent's pay and conditions, an omission to heed that call could be tantamount to an unlawful "decision". In this case there was no such decision or omission to decide. No pay round had passed by with the discrepancy left unattended. No request from the Respondent had been left unheeded. No minute or memorandum had been written by an officer of the Appellants that identified the issue and called for a response. In this situation it was submitted it was not open to the ET to find that at some unknown point of time the lawfulness of the initial decision tipped into unlawfulness.

14. Second Mr Burns QC sought to persuade me that even if it was not strictly necessary to identify a point of time when the Appellants were fixed with responsibility for the unlawful sex discrimination, there was in any event inadequate evidence to support the transition from a legitimate pay award to an illegitimate one. This complaint was focussed on the ET's conclusion that the initial decision had "evaporated". I was advised that no evidence was led by the Appellants to show that to what extent the initial justifications persisted through the period February 2014 to February 2015. Nor did the Respondent seek to demonstrate that they had expired at any particular point in time. As I understood Mr Burns QC the focus of parties' attention in this connection, was on the initial pay decision and on the subsequent Hay survey that demonstrated that the Respondent's work was of at least equal value with some of the executives in the group. Neither party sought to explore in evidence whether some of the factors might have justified the pay differential for a longer period than others or whether (to use Mr Devonshire QC's phrase) the justifications rested on a "joint and several" basis. In other words

A he argued that it was not necessary to explore whether all the justifications persisted up to the Hay study. If the Respondent could show that one justification ceased to apply, then the whole basis of the award fell.

B

15. I have come to the view that both these arguments are well founded. The law requires a decision that can be characterised as unlawful. Here all the ET could say was that there had been a slide from a position where there were material factors which justified the pay differential C between the Respondent and her comparators, to a position about a year later where the original justifications had gone. But there was no evidence that the Appellants had made a decision to permit this unsatisfactory state to continue nor was there any evidence that the Appellants had D even noticed that a problem might have occurred. It was only when the Hays study came to hand that facts that indicated that the objective justifications originally relied upon no longer persisted. I consider that **Benveniste v University of Southampton** [1989] ICR 617 supports the E proposition that a new decision must be made which is tainted by sex discrimination before a prior legitimate decision can be set aside. The claimant in that case submitted a request for pay parity and was able to demonstrate that the factors that explained her previous pay settlement had disappeared (p. 620C-D). The Court accepted that the University was bound to address the F anomaly either at the point the claimant drew the matter to its attention or from the beginning of the following academic year when salaries were fixed (p. 624H). The University having been seized of the issue, failed to rectify the disparity between the claimant and her male comparators G created by the earlier settlement. The Court of Appeal noted that the burden of proof lay on the University to explain the anomaly and concluded that the failure to give her a full increase was because of sex discrimination. Thus in distinction to the present case, there was a decision made not to grant her a full increase which "washed out" the previous justifiable pay differential. I H should add that I accept that a failure to decide may also crystallise the obligation provided the

failure occurs in the context of facts and circumstances that would otherwise require a decision to equalise pay. I was also directed to **Secretary of State for Justice v Bowling** [2012] IRLR 382. It is authority for the proposition that there may be legitimate reasons why a person may be placed at a lower point on a pay scale and these justifications may be capable of persisting so as to constitute a material factor unconnected to sex in subsequent pay negotiations.

16. The ET's approach was based on the Appellants' knowledge that by 2015 the original pay settlement was out of synch with the work being performed by the Respondent and her comparators. The ET considered that the findings of the Hay study provided a basis for extending its findings back into the period prior to the study. That being so it felt able to conclude that the disparity had emerged before February/March 2015. This approach however is at odds with **Bainbridge v Redcar**. It was not suggested to me that **Bainbridge** could be distinguished or that the considerations upon which the EAT and Court of Appeal had founded their decision were inapplicable to the present case. That being so it was not open to the ET to extrapolate the findings in the study backwards.

17. In any event it seems to me that sub-stratum of evidence upon which the ET based its decision was unsatisfactory. Mr Burns QC advised me that neither side sought to explore in evidence the continuing efficacy of the justifications accepted by the ET. No evidence was led to demonstrate that they had ceased to operate in the intervening period other than the Hay survey which necessitated such a conclusion. No evidence was led to show whether some of the factors endured for longer than others. No evidence was led to explain whether the justification for the pay differential hinged on all or some of the factors. Mr Devonshire QC characterised the justifications as resting on a "joint and several" basis. As I understood it his position was that if one of the justifications ceased to apply then the justification for the pay differential ceased to

apply. But he could not explain to me what evidential basis was laid for that proposition. He did not submit that there had been any examination in the ET of the relative strengths of the justifications for the pay differential or of when they could be said to have "evaporated". While it seems improbable that all the factors were of equal weight and longevity, it was not possible to say what the true position was. Mr Burns QC submitted that some of the reasons given for the February/March 2014 settlement were likely to have endured for longer than others. I accept that in this situation it was not open to the ET to speculate as to the position between February/March 2014 and March 2015. I also hold that if the decision in February/March 2014 cannot be impugned, the material factor defence continues to operate so as to justify the decision until a further decision or omission to decide can be identified at which point the Appellants are required again to defend the pay differential. Once the presumption of sex discrimination has been rebutted a further decision or failure to decide in circumstances that call for a decision must be demonstrated.

18. Although neither counsel addressed me in detail on the issue, it seems to me that once the Hays study was in the hands of the Appellants they became fixed with knowledge that the importance of the Respondent's role in the Co-Op had increased and that therefore one of the material factors previously relied upon was no longer supportable. While as Mr Burns QC pointed out the results of the study were not communicated to the body responsible for setting executive pay, that does not in my opinion alter the fact that the Appellants were then fixed with knowledge that there was a pay disparity. As I understand it Mr Pennycook was aware of its findings. It does not seem significant to me that their internal arrangements were such as to leave the body that determined the Respondent's pay ignorant of the results of the Hay study. For how long this ignorance persisted and at what point they ought to have taken action was not an issue

discussed before me. I do not propose to say more since no doubt the precise date upon which appropriate remedial action should have been taken is susceptible to dispute.

19. A draft of this judgement was circulated to parties prior to publication. The draft contained a suggestion in the closing line of paragraph 18 that the failure of the Co-Op to make a decision could be taken up with the ET and that the ET might be able to identify the date on which a decision should have been taken. Both parties have provided further written submissions in this connection.

20. Having considered the submissions I have come to the view that it would not be appropriate for the ET to consider this issue. I accept that no further evidence can be led to illuminate why the Hays study did not trigger a review of the original decision (**Kingston v-British Railways Board** [1984] ICR 781). In that situation the ET would be left to decide the issue on the evidence led. Both parties acknowledged that the question of why the Co-Op failed to review the Respondent's salary in light of the Hay study's conclusions was not explored in evidence and forms no part of the written case. It emerged as an issue in the EAT. Both parties acknowledge for example that there was no evidence to explain why the Hay study did not trigger a review or when such a review could have taken place or what weight should be attached to the remaining material factors. In the ET the focus was on the position when salaries were agreed in February 2014. Mr Burns QC in his written submission pointed out that the Respondent was aware of the Hays study. He noted that she did not seek a review of her salary. I do not consider the failure of the Respondent to ask for a review means that the Appellants could not have culpably failed to review. If other factors pointed to the need to review the original salary decision the Respondent's inaction may not be decisive. Mr Burn QC's submission however is useful in illustrating a broader point. No evidence was led to illuminate the significance or otherwise of

this failure. There is an evidential void. In this situation it would not be just to ask the ET to determine whether there was a failure to decide and if so when that notional decision should be held to have occurred and with what effect.

21. Mr Devonshire QC submitted that if there was a relevant omission to decide this would give rise to a fresh (rebuttable) presumption of pay discrimination and the burden of proof would shift to the Co-Op to prove a material factor defence. I acknowledge that if the failure to respond to the findings in the Hays study was eloquent of a failure to decide, the burden might then be thrown on to the Co-Op to lead evidence to justify the continuing pay differential. In that situation the burden of proof having shifted, they might have to bear the consequences of the lack of evidence. But neither party sought to lead evidence apt to illuminate the significance of the failure to act on the Hay's study. Inevitably therefore the evidence in that connection will be incomplete and unsatisfactory. In these circumstances I do not consider that the ET should be asked to determine whether the Co-Op's failure to respond to the Hays study gave rise to a rebuttable presumption of pay discrimination.

The Bonus Appeal

22. The ET found that the Appellants directly discriminated against the Respondent in their conduct of the performance review of 2015 (Statement of Reasons paras. 343-366). I am satisfied that the ET was entitled to find (paras 348-350) that she was treated less favourably than her male comparators and that the ET was entitled to draw the inference which it did (para 351). I am not satisfied that the Appellants' have been able to show that the ET erred in its assessment of whether the Appellants' conduct was "in no way whatsoever influenced by sex"? I draw attention to the ET's findings in connection with the Respondent's 2015 performance and to the cursory manner in which the Respondent was treated in contrast to the treatment afforded to her comparators. It would appear to me that the ET was well entitled to conclude -

> **366. ... we cannot be satisfied on the balance of probabilities that Mr Pennycook's failure to give the claimant an adequate year end appraisal and his decision to grade the claimant's performance as only 'partially achieved' for 2015 was in no way whatsoever on the proscribed ground."**

23. In my opinion there is no basis for interfering with these conclusions. I further accept while the Respondent and her comparators were to a degree at variance with one another nevertheless the similarities were such as to entitle the ET to treat Messrs Bulmer and Murrells as true comparators. No error of law or perversity has been demonstrated.

Cross Appeal

24. I am not satisfied that the Respondent have demonstrated any error of law in connection with the ET's decision that the notice of termination and the termination of employment were not acts of direct sex discrimination. In my view the ET was entitled to conclude that the Appellants' reason for dismissal was their wish to make changes in its HR function (paras. 296-298; 369). While there is a competing narrative, it is for the ET to evaluate the reasons for the notice and subsequent termination. I am unable to conclude that the ET's view was perverse and note that there was material to support its conclusions; see e.g. the Note of proposed changes in October 2015 (para 297); the dismissal letter (para 228) and Mr Pennycook's note to non-executive directors of October 2015 (paras 175-6). I am satisfied that the conclusion reached was one that was open to the ET; I am further satisfied that no sufficient basis has been laid with which to challenge the ET conclusion.

25. It follows from the foregoing that I uphold the Appellants' appeal in connection with the Respondent's claim for equal pay; I reject their appeal in connection with the ET's finding of direct discrimination in the 2015 year end appraisal; and I refuse the cross appeal by the Respondent.