Notes

Beyond Equal Pay?

Redcar & Cleveland Borough Council v Bainbridge
[2007] IRLR 984 (CA); [2007] EWCA Cw929

1. INTRODUCTION

Equal pay claims call for a comparison between the work done by two or more individuals. The Equal Pay Act 1970 (EqPA 1970) provides three routes by which the claimant can show that she and her male 'comparator' do work that should be equally well remunerated: the 'like work' route (s 1(2)(a)); the 'work rated as equivalent' route (s 1(2)(b)) and the 'work of equal value' route (s 1(2)(c)). Where one of these routes is available, the 'equality clause' in the claimant's contract takes effect to ensure that she enjoys equally favourable contractual terms to those of her comparator, unless the employer can establish that the difference in pay is genuinely due to a material factor which is not the difference of sex (s 1(3)).

Problems arise where the selected route reveals that claimant and comparator do *un*like work or work of *un*equal value, but the claimant remains of the view that she is being underpaid on grounds of sex. This can occur both where the claimant's work is less valuable or more valuable than her comparator's. Can she claim proportionate pay? For instance, if her work is worth 90% of a man's, can she argue that she should receive 90% of his pay rather than 80%? If her work is worth 120% of his, can she claim 120% of his pay instead of 110%? The answer under the EqPA 1970 is an unequivocal 'No'. Since claimant and comparator do not do like work, work rated as equivalent or work of equal value, the remedial mechanism of the equality clause is not activated.

On a strict reading of the EqPA 1970, the same analysis should apply where the claimant's work is worth more than the man's, but she is paid *less* than him. However, in an important trio of decisions, culminating in the recent Court of Appeal decision in *Bainbridge*, the European and domestic courts have modified the EqPA 1970 and thereby enabled such a claimant to claim pay equal to (although not greater than) that of her comparator. The consequent legal position reveals the tension between a desire to do justice and the limitations inherent in our equal pay legislation.

2. SAME PAY FOR MORE VALUABLE WORK: THE THREE CASES

A. Murphy v An Bord Telecom Eireann (Case 157/86) [1988] ECR 673

The claimants were women employed in dismantling, cleaning and reassembling telephones and other equipment. They brought claims under the Irish Anti-Discrimination (Pay) Act 1974 for pay equal to that of a man working in the same factory as a stores labourer. The Irish Labour Court held that their work was of higher value than that of the comparator and therefore did not constitute like work under the Act.

On a reference to the European Court of Justice (ECJ), it was held that a woman doing work of greater value than a man but being paid less than him may claim equal pay (eg she does work worth 120% of his work and is allowed to claim 100% of his pay). The ECJ said that to adopt a contrary interpretation would be 'tantamount to rendering the principle of equal pay ineffective and nugatory' (at para 10) since an employer could circumvent the principle by assigning additional duties to women and then paying them a lower wage than men not required to do the extra duties.

B. SITA UK Ltd v Hope (UKEAT/0787/04, 8 March 2005)

The claimant was promoted from the position of Assistant Group Purchasing Manager to that of Group Purchasing Manager following the redeployment of the previous (male) incumbent. However, whereas her predecessor had been given a salary raise upon achieving that same promotion, the claimant was not. The employer argued that the claimant was in fact doing more work than had her predecessor as Group Purchasing Manager, since she had no deputy, and therefore could not bring a like work claim under EqPA 1970, s 1(2)(a).

The Employment Appeal Tribunal (EAT) rejected this argument. Although the EAT did not refer to *Murphy*, it applied a similar analysis to that of the ECJ, concluding that '[o]n any purposive construction of the Act, the fact that a promoted woman undertakes more duties than her male predecessor cannot result in a conclusion that the two are not undertaking like work in order to justify her being paid less' (at para 13).

C. Redcar & Cleveland Borough Council v Bainbridge

These ongoing claims are part of the high-profile litigation brought against local councils in the North East of England by female employees. Women employed in manual jobs such as caterers and care workers seek pay parity with male comparators such as road sweepers, gardeners and refuse collectors. Their terms and conditions of employment result from a nationally agreed job evaluation scheme (JES). Accordingly, the claimants must bring work rated as equivalent

claims rather than work of equal value claims (see EqPA 1970, s 1(2)(c)). In most cases, they have identified comparators in the same grade, but some claimants seek to rely on comparators graded lower in the JES. The Council resisted the claims on the basis that a claimant was not employed on work rated as equivalent with a comparator in a lower grade.

Maurice Kay LJ (with whom Mummery and Wilson LJJ agreed) began by emphasizing that the EqPA 1970 'has to be seen in the context of Article 141 of the EU Treaty' (at para 4). Having referred to *Murphy* and *SITA*, he rejected the Council's attempt to distinguish *SITA* on the basis that s 1(2)(a) is a 'less precise' provision than s 1(2)(b). On the contrary, '*SITA* is a useful example of the approach for which *Murphy* is authority' (at para 15). It would be odd for that approach to be applied to ss 1(2)(a) and 1(2)(c) but not s 1(2)(b).

Maurice Kay LJ also rejected the argument that the 'rated as equivalent' concept is a purely domestic one, which does not need to be broadly construed because a claimant can still advance an 'equal value' claim under s 1(2)(c) when she is outside s 1(2)(b). Instead, 'section 1(2)(b) and (c) are intended to implement the same Community principle of equal pay for equal work or work of equal value' and '[c]laims under section 1(2)(b) and section 1(2)(c) are two different and mutually exclusive ways of securing equal pay for work of equal value. The fact that the concept of a JES is not expressly referred to in the European instruments is nothing to the point' (at para 19). Moreover, equal value claims which cannot be based on an existing JES can be very expensive and time consuming, and therefore a narrow construction of s 1(2)(b) cannot be justified by the availability of a claim under s 1(2)(c).

Having decided upon the correct result as a matter of EU law, it remained for the Court to achieve that result under the existing domestic legislation. As Lord Nicholls observed in *Autologic Holdings plc v Inland Revenue Commissioners* [2005] UKHL 54, [2006] 1 AC 118 at para 17, 'if an inconsistency with directly enforceable Community law exists, formal statutory requirements must where necessary be disapplied or moulded to the extent needed to enable those requirements to be applied in a manner consistent with Community law'. Maurice Kay LJ indicated that he had originally thought that words would have to be inserted into s 1(2)(b) itself, but had been persuaded that the following additions to s 1(5) would suffice:

> A woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value *or her job has been given a higher value*, in terms of the demand made on a worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value, *or*

> *her job would have been given a higher value*, but for the evaluation being made on a system setting different values for men and women on the same demand under any heading.

Maurice Kay LJ was of the view that this solution 'is within the ambit of permissible moulding and, consequently, does not necessitate disapplication' (at para 26).

3. COMMENTARY

Bainbridge can be viewed as the final piece in the jigsaw started by the ECJ in *Murphy* and continued by the EAT in *SITA*. A claimant may now rely upon any of the three routes in the EqPA 1970 to show that she does work which is more valuable or demanding than that of her male comparator and should therefore receive the same pay as him. This position is undoubtedly justified by reference to the purpose of equal pay legislation, removing as it does incentives for employers to give women more work in order to pay them less. However, while the present position satisfies this 'anti-avoidance' rationale, the prospect of a claimant showing that she does work of *higher* value but being limited to receiving the *same* pay remains unattractive.

There will be cases, particularly where job segregation occurs, in which the only comparators available to a woman are a better-paid man whose work is less valuable than hers and a much better-paid man whose work is more valuable. Under the EqPA 1970, she is limited to claiming parity with the former. If the Sex Discrimination Act 1975 (SDA 1975) applied, she could rely on their salaries to argue that a hypothetical man doing her job would be paid somewhere between the two. However, it has long been established that hypothetical comparators are not permitted under the EqPA 1970 or under EU equal pay law: *Macarthys Ltd v Smith (Case 129/79)* [1980] ECR 1275. Accordingly, a claim for higher pay than that of the first man must inevitably fail, *even if* the claimant can prove that the reason why their employer did not pay her more to reflect the higher value of her work was that she is a woman. An alternative claim under the SDA 1975 is expressly excluded by s 6(6) of that Act.

The advantages of the SDA 1975 approach are illustrated by pregnancy cases which preceded the insertion into the EqPA 1970 of s 1(2)(d), (e) and (f) (which provide that a woman who argues that she receives lower pay or less favourable contractual terms on grounds of her pregnancy or maternity leave need not rely on a comparator). In *Alabaster v Woolwich Plc* [2005] EWCA Civ 508, [2005] ICR 1246, the Court of Appeal held that a woman was entitled to bring a claim under the EqPA 1970 in respect of the earnings-related element of her statutory

maternity pay which, contrary to Article 141, had not taken account of a pay rise awarded before the end of her maternity leave. To ensure that such a right was effective, the Court disapplied those parts of s 1 of the EqPA 1970 which impose the requirement for a male comparator. As the Court commented, this allowed the claimant to 'succeed in her claim for sex discrimination without the need for such a comparator, just as she would have done automatically if her claim had not related to the payment of an amount of money that was regulated by her contract of employment and had fallen within the SDA regime instead' (at para 37).

Macarthys may be ripe for review for three main reasons. First, the ECJ's reasoning was not entirely satisfactory. It assumed that reliance upon a hypothetical comparator necessarily entailed that the claim was for 'indirect and disguised discrimination' and stated 'it follows that, in cases of actual discrimination falling within the scope of the direct application of Article [141], comparisons are confined to parallels which may be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishment or service' (at para 15). In fact, it is perfectly common for claimants to rely on hypothetical comparators in *direct* discrimination claims—for example, by arguing that a man in a materially identical position would have been promoted. Secondly, following *Enderby v Frenchay Health Authority (Case C-127-92)* [1993] ECR I-5535, it is possible for an employer to justify *part* of a pay difference under s 1(3), even though it cannot justify *all* of it. A claim may accordingly succeed in respect of the part which is not justified. This demonstrates that the purpose of equal pay legislation is to eradicate discriminatory differences in pay in whatever form they occur and that the end result of a successful equal pay claim need not always be that the claimant and her comparator are henceforth paid the same amount. Thirdly, and perhaps most importantly, legislative developments at EU level may already have overtaken *Macarthys*. The Equal Treatment Directive 2006/54/EC prohibits direct and indirect sex discrimination in relation to work and working conditions, *including* pay. Direct discrimination is defined as occurring where a person is treated less favourably on grounds of sex than another is, has been or *would be* treated in a comparable situation. This is the very wording which allows use of hypothetical comparators outside the equal pay regime.

Nevertheless, the government has indicated that it does not favour permitting hypothetical comparators in equal pay claims. It argues that this would create undue uncertainty as to whether pay arrangements were lawful or not, while at the same time claimants would in practice find it difficult to prove that a hypothetical comparator would have been employed under more favourable contractual terms. See 'Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain—A Consultation Paper' (Department for Communities and Local Government, June 2007), paragraphs 3.25–3.29. A future

challenge to the compatibility of the comparator requirements in the EqPA 1970 with EU law therefore seems likely.

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