Neutral Citation Number: [2019] EWCA Civ 267

Case No: A2/2017/2734

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HH Judge Hand QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE FLOYD
and
SIR STEPHEN RICHARDS

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Between :

BMC SOFTWARE LIMITED	**Appellant**
- and -	
ANJUMARA SHAIKH	**Respondent**

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Ms Ming-Yee Shiu (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Appellant**
Mr Andrew MacPhail (instructed by **LB Law**) for the **Respondent**

Hearing date: 5th February 2019

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Approved Judgment

Lord Justice Underhill:

1. The Respondent before us, who was the Claimant in the underlying proceedings and to whom I will refer as such, was employed by the Appellant, to which I will refer as BMC, from June 2004 until 3 September 2014 as part of its sales team. In November 2014 she brought proceedings in the Employment Tribunal raising a large number of complaints of sex discrimination, victimisation, (constructive) unfair dismissal, breach of contract and failure to accord her equal pay. Her claim was heard over three days in October 2015 by a Tribunal in Reading chaired by Employment Judge Lewis. Some of her claims were withdrawn in the course of the hearing or previously.

2. The Judge's reserved judgment was sent to the parties on 30 October 2015. The Claimant succeeded in various respects but we are only concerned with the decision as regards her equal pay claim. She had identified two male comparators, described as Mr A and Mr B, who she said had for many years had higher basic salaries than her. It was accepted that she was doing equal work with them within the meaning of section 65 of the Equality Act 2010, so that the only issue was whether BMC could prove a "material factor" defence within the meaning of section 69. Three factors were relied on by BMC. The Tribunal held that none of them had been established and accordingly that the Claimant was entitled to equal pay with both comparators. I will have to come back to its reasoning in due course, but I should note at this stage that it is set out at paragraphs 70-80 of the Reasons. The Tribunal had not been asked to consider the amount of any arrears due on that basis and a remedy hearing was directed.

3. BMC appealed to the Employment Appeal Tribunal. Two of the grounds related to the equal pay claim. Ground 1 was headed "misapplication of the burden of proof and the test for a GMF", but it also included a contention that the Tribunal had failed to provide adequate reasons for its decision on the material factor defence. Ground 2 was essentially that the Tribunal's rejection of the material factor defence was perverse.

4. The hearing of the appeal, which covered other claims besides the equal pay claim, took place in the EAT before HHJ Hand QC over no less than three days in January 2017. Regrettably, the judgment was not handed down until 9 August 2017. Judge Hand dismissed ground 2, but as regards ground 1 he upheld BMC's contention that the Tribunal did not clearly state its reasons for rejecting the material factor defence. Para. 2 of the formal order of the EAT reads:

> "… [T]he appeal be allowed on ground 1 only and be remitted to the same Employment Tribunal, unless in the view of the learned Regional Employment Judge factors emerge which render such an arrangement impracticable, for it to state, after hearing submissions from the parties, its reasons for reaching the conclusions at paragraphs 73, 77 and 80 of the present Reasons. Any directions in relation to a further hearing will also be a matter for the Regional Employment Judge."

5. BMC sought permission to appeal to this Court against two aspects of that order.

- By ground 1 it contended that, once Judge Hand had found that the Tribunal's reasons were inadequate and allowed the appeal on that basis, it was wrong in principle to order that the issues be remitted to the same tribunal to give further reasons.

- By ground 2 it contended that aspects of other claims on which the Claimant had succeeded were dependent on whether her equal pay claim was well-founded and thus that those aspects also should have been remitted.

6. Lewison LJ gave permission to appeal on those grounds on 23 March 2018.

7. By a Respondent's Notice dated 5 April 2018 the Claimant sought permission to cross-appeal against the EAT's finding that the ET's reasons for rejecting the material factor defence were inadequate. Permission was given in that regard by Sales LJ on 5 July 2018.

8. The appeal and the cross-appeal came before us on 1 February. BMC was represented by Ms Ming-Yee Shiu and the Claimant by Mr Andrew MacPhail, both of counsel, (both of whom also appeared in both tribunals below). We decided to start with the Claimant's cross-appeal, and we asked to hear first from Ms Shiu. At the conclusion of her submissions we were satisfied that the cross-appeal should be allowed, in which case the appeal did not arise. We made an order accordingly and said that our reasons would be handed down later. These are my reasons for that decision.

9. BMC in the Grounds of Resistance attached to its ET3 pleaded two factors as follows:

> "The difference in pay between her and [Mr A] and [Mr B] was not because of sex discrimination. The difference in pay was due to the fact that (i) [Mr A] had been promoted to Account Executive (the level above the Claimant); and (ii) [Mr B] commanded a higher salary as a salary at this level had been necessary in order to recruit him."

Those averments are decidedly unparticular. A list of issues was agreed several months prior to the hearing in the ET, but we have not seen it, and in any event it seems unlikely from the terms of the Reasons that it gave any more detail.

10. At the start of the hearing in the ET Ms Shiu was given permission, without opposition from Mr MacPhail, to add a third factor, described at para. 13 of the Tribunal's Reasons as "merit adjustments". Again, that is extremely unparticular, although it must be assumed that Ms Shiu gave the Tribunal at least a slightly fuller explanation of the factor. The amendment was allowed only on the basis that it would not entail any additional disclosure or evidence from BMC.

11. BMC adduced evidence from three witnesses – Mr Bullimore, the Vice-President of Sales; Mr Corcoran, the Area Vice-President; and Ms Phillips, the HR Country Leader. There was no evidence from either of the comparators, although they remained in BMC's employment. There were also a number of contemporary documents, but the Tribunal found that there had been substantial failures by BMC in its duty of disclosure, of which three examples were given at para. 14 of the Reasons.

In particular, the Tribunal found that there were likely to have been e-mail trails "relating to decisions affecting the individual pay or employment of the claimant or her comparators", for which no search had been made, and that it was not convinced that contractual documentation for the comparators could not have been provided for the earlier periods of their employment (pre-2007) when their pay was first set.

12. At para. 43 of the Reasons, which has thirteen sub-paragraphs, the Tribunal appraised in some detail what it described as BMC's "employment systems". It found that they were not what it would have expected to find in an employer of its size and administrative resources. It had been shown what was described as a "job map", but it found that it was not the basis of any coherent grading system and did not represent one of the conventional purposes of a grading system, namely that of achieving some kind of equity between individuals carrying out what might appear to be different types or work functionally, but which merited equal status and therefore equal terms and conditions, including pay. Job titles were not used systematically, and indeed not all the titles enjoyed by the Claimant and her comparators at particular times appeared on it. There was no formal appraisal system or system for pay review. Pay rises were awarded ad hoc and their frequency and amount were liable to be influenced by the willingness of an employee to seek an increase or of individual managers to propose them. As regards merit awards, the Tribunal said, at para. 43.13:

> "… [T]he respondents' salary records for the claimant and her comparators show increases which, on nine occasions, appear to refer to 'Merit' as the basis of an increase. There was no evidence of what that word meant in any of the nine contexts, there was no evidence of any application, assessment, decision or reasoning process, or of the conventional steps which often accompany pay considerations. In the absence of such evidence, it is possible that the word has been used as a record keeping device, merely to say that a pay increase was given to someone who was thought to deserve it."

At para. 43.12 it said:

> "Ms Phillips agreed that a system such as this was vulnerable to improper use, and that the respondent would have difficulty in showing that it had not been improperly used."

13. It is fair to say that there are one or two passages, to which I will return presently, which show that the Tribunal accepted that the system was not wholly arbitrary. But the overall findings are clear.

14. The Tribunal's reasons for rejecting the material factor defence appear, as I have said, at paras. 70-80 of the Reasons, which I should set out in full. They read:

> "70. We therefore turn to each of the three pleaded material defences. The first applies to Mr A only. It is that he was promoted to Account Executive. In its questionnaire responses, the respondent stated that that was Mr A's title from 1 September 2008, and he received an increase of £5,000 with effect from the following April 'due to performance'. We note

that the answers to the questionnaire are not fully consistent with the remainder of the respondent's case on the point. Mr A's salary record records a general promotion with effect from 1 April 2007 but no promotion-related salary increase thereafter.

71. We accept that Mr A was re-designated Account Executive with effect from 1 September 2008. We accept that he received a pay increase on 31 March 2009 of about £5,000.00 per annum for which no reason is recorded on his salary record. The job map, a document in which, according to Mr Corcoran, we could find no guidance on either grading or pay, indeed shows the existence of the title of Account Executive, and it appears on grade 10. The post from which Mr A had been promoted was that of Senior Account Manager, which on the job map appears between grades 7 and 11.

72. There was no record of the process by which Mr A had been promoted, and no record or evidence of the process by which he had seven months later received a pay increase; indeed, there was no evidence other than chronology that the promotion was the effective cause of the increase. There was no evidence to show why Mr A, at a post which appears only in grade 10 in the notional job map, was paid more than the claimant in a post which reached grade 11 on the same document.

73. We are unable to find that the respondent has discharged the burden of proving that the discrepancy in pay with Mr A from 1 April 2009 onwards was due to his promotion; or that his promotion was material, or that the difference in pay was not attributable to sex and accordingly the defence fails in relation to that matter.

74. The second pleaded material factor related to Mr B's recruitment. Extraordinarily, the respondent was not in a position to prove when a long-serving current employee began his employment. Mr Milonas thought that Mr B had joined as a result of a TUPE transfer in 1999; the responses to the questionnaire said that he joined on 1 October 2001. Mr B's job history stated that he started on 4 January 2000 in a job with an unknown title. His salary records showed that he was on the pay system at 1 April 2000.

75. The precise words of the pleading were that Mr B '*commanded a higher salary as a salary at this level had been necessary in order to recruit him*'. That phrase implies the operation of market forces in attracting a new starter, not the operation of TUPE in preserving terms and conditions on a transfer.

> 76. The material factor relied upon was unclear as to whether it was open market recruitment or TUPE transfer; as to whether it happened in 1999, 2000 or 2001; and why it was material nine years before the period of like work with which we were concerned, and four years at least before the claimant joined the respondent. We were shown no evidence or record of the process by which Mr B joined the respondent, and no evidence of the actual consideration of the terms upon which he joined.
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> 77. We are unable to find that the respondent has discharged the burden of proving that the discrepancy in pay with Mr B at any time was due to his recruitment (whether that word refers to a starter salary or a transfer salary); or that his recruitment was material, or that the reason in pay was not attributable to sex and accordingly the defence fails in relation to that matter.
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> 78. The third pleaded matter relied upon was Merit adjustments. The terms upon which the amendment was allowed perhaps indicate that the amendment carried the seeds of its own failure. It was allowed on the agreed basis that it imported no fresh disclosure and no new evidence. It therefore followed that the respondent had no evidence to give of what the merit was in any of the increases, why the increase was initiated, by whom, when, how it was considered; and how, why or by whom the decision was reached. The high point to which Ms Shiu could refer was the quota history at 282, which showed that by and large, Mr A and Mr B, along with the claimant, had been successful performers against quota.
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> 79. Given that background, and in the light also of Mr Corcoran's evidence that he never considered putting forward any of these three individuals for a basic pay increase, during three years of successful performance, we do not accept that it follows that attainment of high quota percentages necessarily forms the merit basis of an increase in basic pay. We repeat our general findings about merit adjustment and the use of the word at paragraph 43.13 above.
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> 80. We are unable to find that the respondent has discharged the burden of proving that any discrepancy in pay with either comparator at any time was due to any merit increase; or that any merit increase was material, or that the difference in pay was not attributable to sex and accordingly the defence fails in relation to that matter."

(Mr Milonas, referred to in para. 74, is a senior employer of BMC from whom Ms Phillips had sought some information about the circumstances of B's recruitment for the purpose of this case and whose e-mail in response was in the bundle.)

15. It will be seen that the structure of these paragraphs is that the Tribunal takes in turn each of the three factors relied on – the first at paras. 70-73; the second at paras. 74-77; and the third at paras. 78-80 – and concludes in relation to each that BMC has not discharged the burden under section 69 (1) of proving that defence

16. Judge Hand found that those reasons were inadequate to enable BMC to understand why it had lost. Specifically, he criticised what he described at para. 96 of his judgment as "the repeated mantra" in paragraphs 73, 77 and 80 that the Tribunal was "unable to find that [BMC] has discharged the burden of proving [the particular factor relied on]". At para. 97 he recorded a submission by Mr MacPhail that it was plain that the Tribunal's reason was BMC "had not produced the necessary exculpatory evidence about its pay rise system and its application in the case of the Respondent and the comparators". He accepted that there was considerable force in that submission, but he said that it did not go far enough. He said, at para. 98, that it was not "a substitute for a reasoned explanation as to the factors identified by analysis in the judgment of Lord Nicholls in *Marshall v Glasgow City Council* [[2000] 1 WLR 233]". He continued:

> "98. … In respect of all three conclusions … I am left wondering whether, in each case, the ET has concluded that the explanation put forward by the Appellant was not genuine. The ET has said that the difference in pay was not due to 'Mr A's' promotion but it has not said why that is the case (see para 73). It has said that the pay differential was not due to 'Mr B's' recruitment but not why that was so (see para 77). It has said that pay increases were not due to 'merit' but not why that was so (see para 80). In each case, it is said also that these factors were not material and in respect of all three factors the ET has been unable to say that the difference in pay was not attributable to sex.
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> 99. If the factor was genuine, it is difficult … to understand, without further explanation, why the difference in pay is not due to the factor. I think it is particularly difficult to understand, if the pay rise system is genuine, why the difference in pay is not due to the fact that the comparators received 'merit' increases when the Respondent's did not."

Ms Shiu adopted that reasoning.

17. I cannot agree. In my view the conclusions expressed in each of the three conclusory paragraphs (which it is rather unfair to describe as a "mantra") are more than sufficiently explained by the reasoning in the immediately preceding paragraphs; and those paragraphs in turn are based on the full findings of fact made earlier in the Reasons, and in particular in para. 43 which I have sought to summarise at para. 12 above. The common theme is that as regards each of the three factors BMC had not advanced any particularised explanation of the factor relied, let alone any evidence specifically supporting such an explanation, and had relied on a general assertion; the Tribunal did not believe that that was good enough. In each case it identifies with specificity the lacunae in the evidence. I see no point in repeating what it carefully says in each of the paragraphs, because they speak for themselves; but to take the example of "merit awards", which particularly troubled Judge Hand, the Tribunal says

in terms that it could not regard such a case as proved without any evidence of how merit was assessed and on what basis some difference in "merit" was regarded as justifying paying different amounts to the claimant and her comparators, who were agreed to be doing equal work. I do not believe that that reasoning requires any elaboration.

18. Judge Hand's concerns seem to have focused in particular on whether the Tribunal was making a finding that BMC's explanations for the differentials complained of were not "genuine". That is a slippery term, but it was certainly not necessary, if this is what he meant, for the Tribunal to make a finding that the explanation was a deliberate sham, or otherwise disingenuous: see my judgment in *Bury Metropolitan Borough Council v Hamilton* [2011] UKEAT 0413-5, [2011] ICR 655, at para. 18 (pp. 664-5). It was sufficient for it to decide, as it did, that BMC had not proved that the differentials complained of were due to any of the three pleaded factors; and of course to explain, as it did, the defects in the explanations and evidence advanced that led to that decision. In the case of Mr A's "promotion", for example, it needed to be satisfied that that reflected a real difference in responsibilities as opposed to a mere change in title (particularly given that it was common ground that he and the Claimant were doing equal work); and it believed that in the light of the incoherent and haphazard use of job-titles in BMC it could not be so satisfied. It is important not to overlook, as Judge Hand arguably comes close to doing, that the burden is on the employer to prove (by sufficiently cogent and particularised evidence) that the factor relied on explains the difference in pay complained of.

19. Because we are only concerned with a reasons challenge it is strictly unnecessary for me to express a view about whether the Tribunal's reasoning, which I have held to be perfectly understandable, was also correct. But I think I should say that in my view it was. If an employer is going to seek to justify a pay disparity based on a factor such as the comparator's promotion or superior "merit" or "market forces" it needs to be able to explain with particularity what those factors mean and how they were assessed and how they apply in the circumstances of the case. It is evident from the Tribunal's findings that BMC was simply unable to do that, because of its chaotic and wholly non-transparent "employment systems". The equal pay risks in having non-transparent pay systems is a commonplace of equal pay law.

20. In addition to seeking to support Judge Hand's reasoning Ms Shiu in her submissions before us drew attention to a passage in para. 43.12 of the Tribunal's Reasons addressing an observation made by the manager responsible for dealing with the Claimant's grievance appeal, that in the context of pay, promotions and the like "the company … will always blow hot and cold depending who your manager is". It rejected a submission by Mr MacPhail that that should be taken as an admission that "the system worked on whim, or arbitrarily", saying that it understood him to be saying only that some managers were more proactive than others. To broadly similar effect, the Tribunal accepted at para. 43.10 that "an increase in basic pay could not be the gift of an individual line manager, but would have to be justified by the manager to peers, and ultimately in budgetary terms". Ms Shiu said that that was inconsistent with the Tribunal's rejection of the material factor defence. I rather doubt whether that submission falls within the scope of this appeal, which is concerned only with the adequacy of the Tribunal's reasons and not with whether they contained errors. But I do not regard it as well-founded in any event. The findings in question make clear

that BMC's pay systems were not a total free-for-all; but they cannot fill the evidential gaps which led the Tribunal to reach its conclusion.

21. It follows from our decision on the cross-appeal that the appeal falls away, and we did not hear full argument about it. However, I would wish to record my view that an order in the terms which I have quoted at para. 4 above was clearly wrong in principle. An order that a case be remitted to the ET "to state … its reasons for reaching the conclusions [in the impugned judgment]" is of course perfectly appropriate as a stage in the determination of an appeal to the EAT, under the so-called *Burns/Barke* procedure – see *Barke v Seetec Business Technology Centre Ltd* [2005] EWCA Civ 578, [2005] ICR 1373. Such orders are commonly made at the sift stage or at a preliminary hearing; and it would be possible, though unusual, for the EAT hearing a full appeal to adjourn the appeal in order to obtain further reasons. But Judge Hand's order is formulated as the final disposal of the appeal. That is an inadmissible hybrid. The appeal having been allowed, the only possible order was that the claim be remitted to the employment tribunal to make a fresh decision. The anomalous nature of the order is pointed up by two particular features. In the first place, the provision for further submissions is inappropriate if the only task for the tribunal is to state its reasons. Secondly, and more strikingly, although the primary order is for remittal to be to the same tribunal, it contemplates that this may be impracticable, in which case the intention appears to be that it would be to a different tribunal: yet one tribunal could not supply the reasons for a decision taken by another.

Lord Justice Floyd:

22. I agree.

Sir Stephen Richards:

23. I also agree.