Neutral Citation Number: [2023] EAT 88

Case No: EA-2020-000203-NLD

7 Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 14 & 15 June 2023

Before:
HIS HONOUR JUDGE TAYLER

- -

Between:

CSC COMPUTER SCIENCE LIMITED

Claimant

- and -

MISS C L HAMPSON

Respondent

- -

BEN COOPER of His Majesty's Counsel
(Instructed by **Eversheds Sutherland (international) LLP**) for the **Appellant**

LEE BRONZE of Counsel
(Instructed by **Slater and Gordon (UK) Ltd**) for the **respondent**

Hearing date: 14 and 15 June 2023

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JUDGMENT

SUMMARY

EQUAL PAY

The employment tribunal failed to find the facts necessary to determine whether the claimant and her comparators were engaged in like work. The appeal was allowed.

HIS HONOUR JUDGE TAYLER:

1. This is an appeal from a judgment of the employment tribunal sitting in Manchester. The main part of the hearing was from 2 to 5 September 2019. The employment tribunal appears to have met in chambers on 6 September 2019. There then appears to have been a further day of hearing on 15 October 2019 and a second period in chambers on 23 and 24 December 2019. The judgment is of Employment Judge Sherratt, sitting with lay members. The judgment was sent to the parties on 24 January 2020.

2. The employment tribunal found by a majority, the employment judge in the minority, that the claimant performed like work with two comparators from 2011 and four comparators from 19 October 2015 until the end of her employment.

3. The judgment is unusual because there are virtually no clear findings of fact, as opposed to recitations of the evidence. My overall conclusion, on the primary ground of appeal, is that the employment tribunal failed to find the facts necessary to determine whether the claimant and her comparators were engaged in like work.

4. Against that backdrop, my consideration of the other grounds of appeal requires some caution. On remission, once the necessary findings of fact have been made, the analysis of the claim of like work will have to be conducted entirely afresh. That will be a matter for the employment tribunal. Accordingly, I shall consider the legal framework and the essential findings of fact required to determine a claim of like work in relatively broad terms. I will avoid the implicit invitation in Mr Cooper's submissions to attempt a masterclass in the assessment of like work claims. Much turns on the specific findings of fact the employment tribunal makes before it analyses the legal issues.

5. In broad terms, a like work claim is relatively straightforward. Section 65 of the **Equality Act 2010** ("**EQA**") refers to "equal work" to that of a comparator. Like work is one of three types of equal work, the others being work "rated as equivalent" and work "of

equal value". It is helpful to consider the whole of section 65 **EQA** to note the differences between the three types of equal work:

> "65 **Equal work**
>
> (1) For the purposes of this Chapter, A's work is equal to that of B if it is—
>
> (a) like B's work,
>
> (b) rated as equivalent to B's work, or
>
> (c) of equal value to B's work.
>
> (2) A's work is like B's work if—
>
> (a) A's work and B's work are the same or broadly similar, and
>
> (b) such differences as there are between their work are not of practical importance in relation to the terms of their work.
>
> (3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—
>
> (a) the frequency with which differences between their work occur in practice, and
>
> (b) the nature and extent of the differences.
>
> (4) A's work is rated as equivalent to B's work if a job evaluation study —
>
> (a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or
>
> (b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.
>
> (5) A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women.
>
> (6) A's work is of equal value to B's work if it is—
>
> (a) neither like B's work nor rated as equivalent to B's work, but
>
> (b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making."

6. Section 65(2) and (3) **EQA** provides for the assessment of whether the work of an employee and her comparator is like work. The provision is relatively straightforward, save that it is important to note that subsection (3) applies to the entirety of subsection (2); to answering the questions in both subsection (2)(a) and (b). Thus, it is necessary to consider the "frequency with which differences between their work occur in practice" and the "nature and extent of the differences" both when deciding whether the work of the employee and her comparator "are the same or broadly similar" and whether "such differences as there are between their work are not of practical importance in relation to the terms of their work".

7. The assessment of whether a woman and her comparator are engaged in like work must be founded on clear findings of fact. This was emphasised in an early decision of Phillips J, **Eaton Limited v. Nuttall** [1977] ICR 272 at page 273H:

> "First it is desirable that, in such cases as this, the industrial tribunal should summarise their reasons in a convenient form as much of the information put before them as possible. It is of great assistance if particulars of all the employees concerned, including those with whom the comparison has been made, are set out, showing length of service, age, nature of work, remuneration, etc. If this and other relevant information is not conveniently summarised it is extremely difficult to collect the relevant matters by extracting them from the narrative in which they are embedded. "

8. Analysis of section 65 **EQA** demonstrates that the following are the key factual determinations:

i) what work did the claimant do during the relevant period or periods?

ii) what work did her comparators do during periods relevant to the comparison?

iii) were there any differences between the work that they did?

iv) what was the frequency of the differences in practice?

v) what was the nature and extent of the differences?

9. Having regard to those factors, there are two key questions in deciding whether an employee and a comparator are engaged in like work:

i) is the work of the employee and her comparator the same or broadly similar?

ii) are any differences between their work of practical importance in relation to the terms of their work

10. Mr Cooper asserted some broad propositions that I accept are of general assistance to this exercise. It is, as has frequently been said, a two-stage process. Both stages concern the nature of the work done and the extent of similarity or difference. It is not a question of determining the value of the work, or how well it is performed.

11. At Stage 1 there is a broad assessment of the kind and nature of the work that is done, which can potentially include consideration of levels of responsibility and seniority. It is a broad assessment of the work actually done.

12. Stage 2 involves a consideration of any differences in the work between the employee and her comparator. It requires a more detailed and granular analysis of whether such differences as exist are of practical importance, as would generally be reflected in terms of employment.

13. The focus is on what the employees do in practice, rather than what they might be required to do under their contracts or job descriptions, although such documents may provide evidence of the work that is actually done.

14. The general approach to like work is helpfully set out at paragraphs 35 to 37 of the Equality Act 2010 Equal Pay Code of Practice issued by the EHRC:

> Like work
>
> 35. There are two stages involved in determining 'like work'. s.65(2)
>
> The first question is whether the woman and her male comparator are employed in work that is the same or of a broadly similar nature. This involves a general consideration of the work and the knowledge and skills needed to do it.
>
> If the woman shows that the work is broadly similar, the second question is whether any differences between her work and that done by her comparator are of practical importance having regard to:

> • the frequency with which any differences occur in practice, and
>
> • the nature and extent of those differences.
>
> 36. It is for the employer to show that there are differences of practical importance in the work actually performed. Differences such as additional duties, level of responsibility, skills, the time at which work is done, qualifications, training and physical effort could be of practical importance.
>
> A difference in workload does not itself preclude a like work comparison, unless the increased workload represents a difference in responsibility or other difference of practical importance. …
>
> 37. A detailed examination of the nature and extent of the differences and how often they arise in practice is required. A contractual obligation on a man to do additional duties is not sufficient, it is what happens in practice that counts

15. There is longstanding authority concerning these general points of principle. See **Capper Pass Limited v Lawton** [1977] ICR 852, at pages 856H – 857H and **Shields v E Coomes (Holdings) Limited** [1978] ICR 1159, a decision of the Court of Appeal that included an overview of the previous authorities, judgment of Bridge LJ, 1179D to 1180H.

16. The importance of considering the work that is actually done, rather than provisions of contracts or job descriptions was emphasised in **Brunnhofer v Bank Der Österreichischen Postsparkasse AG** [2001] 3 CMLR at paragraph 42 and in **Beal & Others v. Avery Homes** [2019] EWHC 1415, Lavender J at paragraph 30.

17. There is a potential defence where like work has been established if the employer shows that the difference in terms as to payment are because of a material factor: section 69 **EQA**:

> "69. **Defence of material factor**
>
> (1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—
>
> (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

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

18. The material factor defence should be approached with care. Paragraph 75 of the EHRC Equal Pay Code of Practice suggests that in all cases the factor must be "significant and relevant" whereas absent direct or unjustified indirect sex discrimination there appears to be no more of a requirement than that the factor is the reason for the difference in pay.

19. The latter approach was adopted in the judgment of the House of Lords in **Glasgow City Council v Marshall** [2000] ICR 196 (see page 202 at B to page 203 at F):

20. Potentially, there is an interesting issue about the burden of proof when considering the material factor defence. It is clear that it is for the employer to establish that the factor relied on is the real reason for the difference in pay. In this case there was no assertion of indirect discrimination. If direct sex discrimination is asserted, Mr Cooper suggested that, once it has been established by the employer that the reason for the difference in the terms is the material factor, section 136 **EQA** should be applied, first considering whether there is a *prima facie* case of direct sex discrimination; only if a *prima facie* case is established is the respondent required to disprove direct sex discrimination.

21. I accept that there must be some evidential basis for an assertion of direct sex discrimination, but, in the absence of full argument on that point, I do not consider it appropriate to give a final view as to the interrelation between sections 69 and 136 **EQA**. In many cases there will be no issue about the burden of proof, but I can see that there would have to be some evidential basis for any assertion of direct discrimination.

22. Rule 62(5) of the employment tribunal Rules 2013 provides:

> "In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation

> to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues."

23. This provision was considered in **Simpson v Cantor Fitzgerald** [2021] ICR 695 at paragraphs 29 to 31. Bean LJ held that it is unhelpful to consider whether any breach of rule 62(5) ET Rules amounts to a freestanding ground of appeal; consideration must be given to the substance of any default.

24. The judgment in this case is very unusual. I can only refer to some of the key points but the judgment has to be read as a whole to understand the view I have reached that the key findings of fact necessary to determine a like work claim are missing.

25. The judgment starts at paragraphs 1 – 5 with a brief and uncontroversial introduction. At paragraph 6 the tribunal sets out the key statutory provisions under a heading "The Law", but there is a further direction as to the relevant law from paragraphs 191 to 205. There is nothing controversial in the tribunal's direction as to the law.

26. From paragraph 9, apparently running to paragraph 90, from page 5 to page 35, the text is under a heading "The Evidence". At paragraph 9 we are told who gave evidence and what documents were before the employment tribunal. At paragraphs 10 – 14 there is a description of the business of the respondent and the number of staff it employs. These appear to be factual determinations.

27. Then there is a section from paragraphs 15 - 19 headed "The Claimant". This sets out some evidence from the claimant's witness statement and material from her CV. It includes discussion of the evidence, but without anything approaching clear findings of fact. Paragraph 16 refers to material "taken from the claimant's CV". Paragraph 18 states that “According to the respondent there was a block on promotions”. We are not told if that evidence was accepted. At paragraph 19 we are told that Mr Slingsby, the claimant’s manager, gave oral evidence about how the claimant's salary was fixed, but not whether his evidence was accepted.

28. At paragraphs 20 – 27 we are told about evidence given about the claimant's comparators, but without being told whether the evidence was accepted in whole or in part. Paragraph 20 starts "According to Mr Slingsby" but does not include any conclusion as to whether what he said was accepted. For example, at paragraph 22 it is stated that Mr Bowen, one of the comparators, was "said to be an expert in technical and business consultancy". At paragraph 23 it is stated that he "was said to lead consultancy". Paragraph 24 tells us the view that Mr Slingsby expressed about the comparison between the claimant and Mr Bowen. Paragraph 25 referred to Mr Higgins, another comparator, being "said to have led on complex data migration" and to it being "said" that the claimant could not have undertaken the lead on such projects. And so, on it goes, without any clear determination of whether evidence is accepted or not.

29. Paragraphs 28 to 73 are again headed "The Claimant". The material seems to do no more than set out what the claimant said, mainly in her statement. Material from the claimant's statement and some documents, including appraisals are referred to (sometimes in great detail), but without any clear finding that any of it was accepted to be correct.

30. At paragraph 74 there is a heading "From the claimant's cross-examination". Paragraph 74 starts "It was stated". There are then a series of bullet points from page 18 to page 25 of, I assume, the employment judge's note of the claimant's cross-examination, in vernacular terms, with no conclusion as to whether her evidence was accepted or rejected.

31. At paragraph 75 the tribunal moves on to deal with Mr Slingsby, but it does not have a section summarising what he said in his witness statement, although there is a section dealing with supplementary questions and cross-examination. Paragraph 75 starts "It was stated", and then there are a similar series of bullet points reflecting his answers to questions, running from pages 25 to 32.

32. A similar approach is taken to the evidence of Mr Hawkins, another of the comparators. There is no description of his witness statement, but there is a bullet point note of his cross-examination at paragraph 90, running from pages 34 to 35.

33. There is then a heading "Respondent's Submissions". A summary of the submissions is set out without any view being expressed as to whether they were accepted or not, at paragraphs 91 to 162. There is a similar section headed "Claimant's submissions" at paragraphs 163 to 190. There is a passage on the relevant law at paragraphs 191 to 205. Finally, there is a section headed "Discussion and Conclusions" from paragraph 206 to 255, from pages 53 to 59.

34. I appreciate that employment tribunals often have to deal with a morass of evidence. One of their core roles is to extract the relevant material from that evidence and then make the necessary findings of fact. Appellate decisions have for many years set out the approach that the Employment Appeal Tribunal should adopt to the reasons of the employment tribunal. The classic statement of principle is that of Mummery LJ in **Brent London Borough Council v Fuller** [2011] ICR 806, at page 813, paragraph 30. More recently, this approach was emphasised by the decision of the Court of Appeal in **DPP Law v Greenberg** [2021] EWCA Civ 672, [2021] IRLR 1016 in the judgment of Popplewell LJ, particularly at paragraphs 57 and 58.

35. The judgments that consider the role of the EAT have generally focused on the question of whether the employment tribunal properly set out and assessed evidence and/or has given sufficient reasoning for its conclusions, rather than the question of whether it has made the necessary fundamental findings of fact.

36. When dealing with substantial quantities of evidence, tribunals from time to time refer to evidence given in statements, what was said in cross-examination and re-examination, and/or quote significant parts of documents without expressly stating whether evidence was

accepted or not. In many cases, if one adopts a fair and reasonably generous approach to reading the judgment, it will be apparent, from the context of the judgment as a whole, that the evidence was accepted and so the necessary findings of fact were made.

37. In a judgment of the employment tribunal there often is a heading "The Facts". Just because an employment tribunal, like this one, used a heading "The Evidence" one would not necessarily conclude that the employment tribunal did not thereafter set out findings of fact. But reading this judgment as a whole, it is clear that when the employment tribunal used the heading "The Evidence", it meant precisely what it said. The judgment sets out a summary of the evidence rather than making clear findings of fact.

38. That is apparent from reading the judgment as a whole and, in particular, the sections in which the entirety of the bullet point notes of cross-examination are included. The judgment sets out evidence pointing in different directions without there being any resolution. Despite this being a majority decision, it is not apparent whether there was a different approach to the facts between the employment judge in the minority and the members in the majority.

39. The very unusual approach adopted may result from it being a majority judgment. It may be that the members of the tribunal could not resolve their differences to reach unanimous findings of fact on those matters that were agreed and to reach differing findings of fact where they were not.

40. Regrettably, I conclude that, in so far as there are any findings of fact, they, at best, appear within the section headed "Discussion and Conclusions". That would not itself necessarily be fatal to the judgment. The fact that the vast majority of the judgment was spent setting out the evidence would not matter if the key facts were found in the discussion and conclusions section. Unfortunately, I do not consider that they were.

41. What was required was a clear factual determinations for the five periods that the tribunal identified in respect of the different duties undertaken by the claimant. In particular, findings of fact were required about: the work that the claimant did; the work done in any relevant period by her comparators; what differences there were in their work, if any; their frequency of the occurrence of the difference in practice and the nature and extent of the differences. Then the tribunal could properly assess whether the work was the same or broadly similar at Stage 1, and whether such differences as are established are of practical importance in relation to the terms of their work, at Stage 2. I do not consider that the judgment of the majority does this.

42. What is more, I also accept that there is force in Mr Cooper's criticisms of such reasoning as there is. I shall deal with these grounds briefly because the fundamental failure to find the necessary facts has the consequence that the matter must be remitted for determination by another employment tribunal, and the proper analysis will depend on the facts that the employment tribunal finds on remission. The appeal must necessarily be allowed as a result of my upholding Ground 1, which asserts the overarching failure to make necessary findings of fact.

43. Ground 2 asserts a failure to take account of differences in seniority and responsibility at Stage 1. It is at least arguable that those were factors that could be taken into account at Stage 1. The majority appears to have disregarded them. Accordingly, I consider there is force in Ground 2.

44. Ground 3 asserts improper reliance on individual performance. In the majority decision there is consideration of how well the claimant performed, what was made of her performance in appraisals, which went to the quality of the work that she was undertaking, rather than to an assessment of the nature of the work and whether it was like work to that of her comparators. Accordingly, I accept there is force in Ground 3.

45. Ground 4 asserts improper reliance on the claimant's job description. It is correct that the majority based its assessment to a significant extent on similarity of job descriptions rather than focusing on the nature of the work actually undertaken. I also accept there is force in Ground 4.

46. Ground 5 asserts a failure to give sufficient reasoning for not taking account of differences in level of responsibility. Again, to the limited extent that it is relevant and bearing in mind the underlying failure to find the necessary facts, I accept there is merit in that criticism.

47. Ground 6 asserts a failure to properly assess the material factor defence. I accept that the majority focused on whether they considered that the explanation for the difference was a valid one rather than whether it was material in the sense of being causative. The material factor defence will be for reconsideration on remission to the tribunal.

48. Mr Cooper sought to persuade me that, on the basis of the evidence that was given by the respondent (particularly in respect of the salary range for senior consultants designed to reflect a range of skills and level of seniority, and matters such as benchmarking), there is only one conclusion that could be reached on the material factor defence. He asserts that the evidence was unchallenged and, accordingly, in the absence of any assertion of indirect discrimination, there could only be one possible outcome.

49. I reject that submission. I consider that the failings in factual finding are so fundamental that merely because evidence has been quoted without being contradicted does not lead to a necessary conclusion that that evidence has been accepted. It is for the respondent to establish, at the very least, the materiality of the factors in the sense of them being causative. That requires a careful and detailed consideration of the explanation put forward by the respondent and the making of proper findings of fact.

50. It will be a matter for consideration on remission whether there is material that is said potentially to establish direct discrimination. There is no record that the claimant expressly stated that she was not asserting direct sex discrimination, unlike the express disavowal of indirect discrimination.

51. The appeal is allowed. The matter is remitted to a differently constituted employment tribunal for rehearing.