



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBER: MS S LANSLEY

BETWEEN:

Ms E Pollard

Claimant

AND

Crown Prosecution Service

Respondent

ON: 2 March 2017

Appearances:

For the Claimant: Mr R O'Dair, counsel

For the Respondent: Ms L Prince, counsel

REMEDIES JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The respondent shall pay to the claimant the sum of **£1,892.17**.
2. The respondent shall pay to the claimant costs of **£1,200** in respect of her tribunal fees.

REASONS

1. This judgment was delivered orally on 2 March 2017. The claimant requested written reasons.
2. By a reserved judgment sent to the parties on 13 January 2017, the claimant Ms Emma Pollard succeeded in her claim for equal pay.
3. The claim succeeded on the sole issue of the appointment of her comparator Mr Dale Sheehan in 2007. We found that the equality clause

operated in the claimant's favour in relation to the appointment of Mr Sheehan.

The issues

4. The issues for this remedies hearing were identified with the parties at the outset of the hearing as follows:
5. It was an issue as to the effect of the equality clause with Mr Sheehan on the claimant's contractual pay.
6. The amount of the arrears of pay due to the claimant. It is agreed that the backdating period is to 1 April 2014.
7. Whether the claimant can benefit in the calculation of her arrears from Mr Sheehan's entitlement to the Old Scale Maximum ("OSM")?
8. Whether the claimant can discount Mr Sheehan's longer service in calculating her arrears?

A two-person tribunal

9. As one of the tribunal members Mr Henderson was unfortunately unavailable and we were not aware of it until the day, we asked the parties whether they consented to the remedy hearing being heard by a two-person tribunal. We said that we would be content with their decision whatever this was and that they could have as much time as they needed to make the decision.
10. On their return after a break both parties consented to this remedy hearing being heard by a two-person tribunal.

The claimant's application for a telephone preliminary hearing

11. On 30 January 2017 the had claimant applied for a telephone preliminary hearing because she wished to argue that "not just the level of pay but also the very appointment of Dale Sheehan was tainted by gender in view of the circumstances of his appointment" so that the respondent could not rely on his longer service or access to the OSM as an explanation for the pay gap. The claimant wished these issues to be "resolved" as a preliminary issue. The respondent resisted the application for a telephone preliminary hearing.
12. The employment judge refused the application. At a telephone hearing, which is effectively a closed preliminary hearing in private, matters such as this could be no more than identified as issues for the remedy hearing. The issues the claimant wanted to raise were set out. The judge saw no useful purpose in holding a telephone hearing when case management orders for the remedy hearing had already been made.
13. No application for a Reconsideration of our Judgment was made under Rule 71.

Witnesses and documents

14. We heard from the claimant.
15. For the respondent the tribunal heard from Mr Keith Myers, a Senior Pay Consultant.

16. We had our liability bundles plus a remedies bundle of 249 pages. We had separate documents which set out salary figures.
17. Once again we had detailed and helpful written submissions from both parties to which they spoke. They are not replicated here and were fully considered together with any authorities relied upon, even if not expressly referred to below.
18. The parties agree that the backdating period is to 1 April 2014.

Synopsis of our findings on liability

19. We found that there was a lack of transparency in the respondent's appointment of the claimant's comparator Mr Sheehan. We found that the respondent did not rebut the presumption of sex discrimination in appointing Mr Sheehan on 2 January 2007 at point 6 of the twelve-point pay scale. We drew an inference of gender discrimination in the appointment of Mr Sheehan at the sixth point of the pay scale and subsequently not reducing this when he became a permanent employee on 1 July 2007.
20. The comparator in relation to whom the claimant is a Senior Crown Prosecutor in the respondent's Southampton team. Our finding (liability judgment paragraph 27) was that he transferred to his position in 2014 having previously undertaken other roles with the respondent. The parties agree that the backdating period goes back to 1 April 2014.
21. In relation to the Old Scale Maximum (OSM) our finding (at paragraph 66 of the liability judgment) was that when the respondent introduced the 2014 pay scale it had to find a solution for those who were entitled to a maximum level of pay under the 2007 scale. Our finding of fact was that this affected those who became Senior Crown Prosecutors on or before 18 May 2007. It therefore affected Mr Sheehan because his appointment date was 2 January 2007.
22. We found that as the claimant became a Senior Crown Prosecutor on 1 April 2010 she did not and does not qualify for the OSM. We found no gender taint in relation to those who had the right to progress to the OSM (paragraph 95, liability judgment).

The claimant's acceptance of parts of Mr Myers' witness statement

23. The claimant accepts that if the respondent is correct on the principle that one has to strip out the OSM element, then paragraph 42 of Mr Myers statement is correct in what it asserts about the salary that Mr Sheehan would have been earning, minus the OSM.
24. In addition paragraphs 33-35 of Mr Myers' statement correctly set out what Mr Sheehan's salary would have been had he been on the National pay scale when he was in fact on the London range.
25. It is accepted that paragraphs 11 to 16 accurately state the claimant's salary and accurately record her part time working in the periods referred to, including the references to maternity leave.

26. The claimant accepted in evidence that the percentages as to her part time working in paragraphs 53-55 of Mr Myers' statement were correct. She also accepts that there should be a proportionate reduction in her pay award to reflect part time working and her maternity leave.

The law

27. Remedy in an equal pay claim is dealt with under section 132 Equality Act 2010 which provides

(1) This section applies to proceedings before a court or employment tribunal on a complaint relating to a breach of an equality clause, other than a breach with respect to membership of or rights under an occupational pension scheme.

(2) If the court or tribunal finds that there has been a breach of the equality clause, it may—

(a) make a declaration as to the rights of the parties in relation to the matters to which the proceedings relate;

(b) order an award by way of arrears of pay or damages in relation to the complainant.

(3) The court or tribunal may not order a payment under subsection (2)(b) in respect of a time before the arrears day.

28. Section 66 of the Equality Act provides that if the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one. Section 66(2) provides:

(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.

(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;

(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.

29. The remedy applies on a term by term basis and it is no defence to argue that the pay package is not less favourable overall.

30. There is no entitlement to an award for injury to feelings in an equal pay claim – **Newcastle upon Tyne City Council v Allan 2005 ICR 1170 EAT.**

31. In **Enderby v Frenchay Health Authority 1993 IRLR 591 (CJEU)** the Court said that a pay differential can be partially justified: *“The only appropriate solution to the problem is, in my opinion, to recognise that the difference in pay is justified in part. An unlimited obligation on the employer to equalise pay despite partial justification of the difference in pay ... would disregard the objective justification which has been alleged and ought to be accepted”* (judgment paragraph 53).

32. The claimant relied upon the decision of Burton J in **R v SS for Trade and Industry 2007 ICRR 1234** and paragraphs G and H on pages 1239, *“The implementation of the [Equal Treatment] Directive shall under no circumstances constitute grounds for a reduction in the level of protection*

against discrimination already afforded by member states in the fields covered by this Directive”.

Submissions

33. We set out below a summary of the submissions and it is not intended as a full replication of the submissions that were made to us in writing or orally, all of which were considered.
34. It was submitted for the claimant that the pay should be equalised unless the material factor defence in section 69 Equality Act is made out and having failed to show that the whole pay differential was non-discriminatory the defence fails. It was submitted that awarding the whole differential achieves simplicity in an otherwise “horrendously difficult” exercise.
35. It was submitted for the claimant that **Enderby** can be distinguished because the ECJ does not have to deal with ordinary practical day to day disputes and that the Equal Pay Act 1970 predated this country joining the EU and that **Enderby** should not be used to read down the protection to equal pay claimants.
36. The claimant submitted that if they were wrong on this, then the burden of proof is on the respondent to show which parts of the pay differential are justified and which are not. It was submitted for the claimant that the OSM was not justified. The claimant relied on paragraph 99 of our liability judgment.
37. On Mr Sheehan’s length of service it was submitted that the effect of this would inevitably disappear once the claimant and comparator got to the top of the scale as the claimant would catch up. It was also submitted that organisations with an old fashioned approach to women’s pay should not be in a position to rely on those appointed under an earlier historical difference.
38. The respondent submitted that the claimant’s approach to the law was incorrect and that **Enderby** permits a partial justification of a pay differential and that this is right under domestic as well as EU law. The respondent submitted that we did not find that Mr Sheehan’s entire appointment was discriminatory. It was said that the fact that the claimant agrees that Mr Sheehan’s London Weighting should be stripped out, illustrates this.
39. The respondent submitted that it is right to strip out entitlement to OSM. Mr Sheehan became a Senior Crown Prosecutor before the claimant and she did not challenge this as discrimination (liability judgment paragraph 39) and she accepted that this inevitably gave rise to some differential in pay.

Conclusions

40. The claimant contended that the appointment of Mr Sheehan itself was tainted by sex.

41. We found at paragraph 94 of the liability judgment that Mr Sheehan was entitled to the OSM, but the claimant was not and that she accepted that those who were appointed prior to May 2007 were entitled to the OSM. Although the claimant today sought to step back from that which we found she had accepted at the liability hearing, we did not accept this. Our finding at paragraph 94 of the liability judgment stands and has not been challenged by an application for reconsideration.
42. We found (paragraph 66) that neither the claimant nor her other comparator Mr Sumpter were entitled to the OSM. Mr Sheehan was entitled to it solely because of his appointment date of 2 January 2007.
43. Our finding in effect was that the material factor defence on the OSM succeeded and therefore the pay differential in that respect is not the subject of the equality clause.
44. We accepted the respondent's submission that **Enderby** permits a partial justification of a pay differential and that this is right under domestic as well as EU law. We could find no favour with the claimant's argument that because the Equal Pay Act was enacted prior to this country joining the EU that we need not now take EU law into account.
45. We find that the OSM should be stripped out of the calculations in making the award to the claimant.
46. In relation to length of service, our finding was that the claimant accepted (liability judgment paragraph 39) that Mr Sheehan became an SCP just over three years before her and this inevitably gave rise to some differential in pay. This finding of fact stands. It has not been challenged.
47. We find that the award to the claimant should be calculated so as to reflect the fact that she is not entitled to the OSM and that Mr Sheehan's length of service results in him being higher than her historically on the pay scale.
48. This hearing is not an opportunity to re-open our findings of fact at liability stage.

The figures

49. After delivering our decision as set out above, we gave the parties an opportunity to have a discussion as to the calculations.

Further submissions

50. The parties were not able to reach agreement because the claimant said that we had not taken account in our decision of their submission that the comparator Mr Sheehan was appointed on point 6 of the payscale. We heard from them further on this. The claimant said that any benefit to Mr Sheehan from that position has to be taken into account as it was a discriminatory appointment.

51. The respondent said that this was addressed in Mr Myers' evidence at paragraphs 36 to 42 of his witness evidence. This was a stripping out of the OSM salary element for Mr Sheehan.
52. Mr Sheehan reached the OSM on 2 January 2013 which predates the agreed backdating period.
53. We find that Mr Myers has stripped out the OSM in his calculations as if it made no difference to Mr Sheehan's salary. Mr Myers was not cross examined on the figures. The OSM was not discriminatory.
54. The claimant accepted at the start of this hearing that if the respondent was correct on the principle that one has to strip out the OSM element, then paragraph 42 of Mr Myers statement was correct in what it asserted about the salary that Mr Sheehan would have been earning, minus the OSM.
55. We asked if this put the parties in a position to agree the figures.

The award

56. The parties agreed that, on that basis, the gross figure is £1,689.44. It is agreed that the calculation dated should be to 31 March 2017 rather than to the date of this hearing.
57. Interest is at 8% from the mid-point date (Regulation 4(2) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996). The mid-point date is 1 October 2015 so it is 1.5 years of interest. The parties agree that interest is £202.73. The figure inclusive of interest is £1,892.17.
58. We award the claimant her fees of £1,200.

Employment Judge Elliott
Date: 2 March 2017