26 June 2013

PRESS SUMMARY

North and others (Appellants) v Dumfries and Galloway Council (Respondent) (Scotland) [2013] UKSC 45
On appeal from [2011] CSIH 2

JUSTICES: Lord Hope (Deputy President), Lady Hale, Lord Wilson, Lord Reed, Lord Hughes

BACKGROUND TO THE APPEAL

The issue arising in the appeal is whether the appellants have satisfied the threshold conditions set out in section 1(6) of the Equal Pay Act 1970 ('the Act') in order to bring claims alleging that they are employed under less favourable terms and conditions than certain male employees of the respondent council who do work of equal value. The appellants have to establish that the male employees are 'in the same employment' as they are, notwithstanding the fact that they are employed on different terms and conditions at different establishments from the appellants.

The appellants are 251 classroom assistants, support for learning assistants and nursery nurses employed during school term-time in the respondent's schools under terms contained in a national collective agreement known as the 'Blue Book'. The appellants wish to compare their terms and conditions with those enjoyed by a variety of full time manual workers employed by the respondent, as groundsmen, refuse collectors, refuse drivers and a leisure attendant ('the comparators'), under a different collective agreement known as the Green Book. The comparators are entitled to a substantial supplement on top of their basic pay, whereas the appellants are not.

The issue of whether the appellants are in the same employment as the comparators was determined in a pre-hearing review. The Employment Tribunal ruled that they are, because the appellants could show that if the comparators were employed at their establishments they would be employed under broadly similar terms to those under which they are employed at present. The Employment Appeal Tribunal allowed an appeal by the respondent on the ground that the appellants could not show that there was a 'real possibility' that the comparators could be employed in schools to do their existing jobs. The Court of Session held that this was the wrong test, but that the appellants still failed on the evidence to show that if the comparators were to be based at schools they would be employed on Green Book terms and conditions. The appellants appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the appeal and restores the decision of the Employment Tribunal permitting the claims to be brought. The tribunal will now proceed to decide whether the appellants' work is in fact of equal value to that of the comparators and, if so, whether there is an explanation other than the difference in sex for the difference between their terms and conditions. Lady Hale gives the only judgment.

REASONS FOR THE JUDGMENT

The requirement that claimants and their chosen comparators are in the same employment before a claim can be brought under the Act does not simply mean that they must be employed by the same employer. If they do not work at the same establishment as their comparators, claimants must show that they are both 'employed at establishments in Great Britain … at which common terms and conditions of employment are observed either generally or for employees of the relevant classes' (s 1 (6) of the Act). The common terms and conditions are between the comparators' terms at different establishments and those on which they are or would be employed at the claimant's establishment [**12**]. It is no answer to say that no such comparators ever would be employed at the same establishment as the claimant, otherwise it would be far too easy for an employer to arrange things so that only men worked in one place and only women in another [**13**].

The correct hypothesis to consider is the transfer of the comparators to do their present job in a different location [**30**]. The evidence from the respondent's Group Manager of Human Resources confirmed that, although he could not envisage it happening, in the event that the comparators were based in schools then they would retain their Green Book conditions [**31**]. The Employment Tribunal adopted the correct test and was entitled to find it satisfied on this evidence. It was not necessary to show that it was feasible to co-locate the relevant workers. This was an unwarranted gloss on s 1(6) [**33**] and would defeat the object of the legislation. The fact that of necessity work has to be carried on in different places is no barrier to equalising the terms on which it is done [**34**]. It is not the function of the 'same employment' test to establish comparability between the jobs done, but simply to weed out those cases in which geography plays a significant part in determining the relevant terms and conditions [**35**].

This construction of s 1(6) is more consistent with the requirements of European Union law, to which the Act gives effect [**36**]. Case law of the European Court of Justice has established that for the principle of equal pay to have direct effect, the difference in treatment must be attributable to a single source which is capable of putting it right [**40**]. That is clearly the case here. If s 1(6) were to operate as a barrier to a comparison which was required by EU law to give effect to the fundamental principle of equal treatment it would be the court's duty to disapply it. However, s 1(6) sets a low threshold which does not operate as a barrier to the comparison proposed in this case [**42**].

References in square brackets are to paragraphs in the judgment