SUMMARY

2010/65: Scottish court reverses ‘same establishment’ doctrine in respect of gender pay equality (UK)

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Facts

The Equal Pay Act 1970 (EPA) gives effect in the UK to the EU principle of equal pay for equal work between men and women.

In bringing a claim under the EPA a claimant can only rely on particular comparators if certain criteria are met. For example, the comparator must be of the opposite sex and must do work of equal value in terms of the skills, demands and responsibilities involved in the jobs. One criterion that must be satisfied is that the comparator must be in the 'same employment' as the claimant.

The definition of 'same employment' can be found in Section 1(6) of the EPA which states that the claimant and comparator must either work in the 'same establishment' or, if they work in different establishments then common terms and conditions must be observed at the different establishments either generally or for the relevant employees. The definition of 'same establishment' is not further defined in the Act.

The question of whether claimants and comparators were in the 'same establishment' and also in the 'same employment' arose in the course of mass equal pay claims brought against various local authorities in Scotland.

In those claims there had been a large number of claimants who had been employed under terms and conditions of employment set by the APT&C collective agreement reached by the trade unions and the local authorities. These claimants were, for example, clerical officers, classroom assistants and nursery nurses. This agreement is often referred to as 'the Blue Book'.

The equal pay claims brought by these claimants were based on a comparison with, for example, roadworkers, gardeners, roadsweepers and refuse collectors who received bonuses that were not paid to the claimants. People employed in these jobs had their terms and conditions of employment set by the Manual Worker collective agreement which is also known as 'the Green Book'.

The question that arose was whether the term 'establishment' in Section 1 (6) could refer to the local authority as a whole or whether it had a more restricted definition, such as a department or workplace. This was particularly significant as very few, if any, of the relevant claimants were employed in the same department or in the same workplace as the comparators. It would then be a question of whether they worked in different establishments where common terms and conditions were observed.

In 2009, in *Dumfries & Galloway Council v North*, the Scottish Employment Appeal Tribunal (EAT) decided that, where claimants and comparators worked in different establishments, in order to go on to satisfy the second limb of the Section 1 (6) test, claimants had to show there was a realistic possibility of the comparators working in the same establishment as the claimants and on the same terms and conditions. For example, a claimant employed as a classroom assistant would need to demonstrate that a refuse collector could realistically be employed to work in a school or by the education department. It was generally felt by commentators that this set the bar very high and would make it all but impossible for the claimants to pursue their claim.

Judgment

The question of what was the 'same establishment' was considered by the Scottish EAT in *City of Edinburgh Council v Wilkinson & ors*. The EAT decided that the authority as a whole was one establishment for the purposes of Section 1 (6) and so the claimants could compare themselves to the relevant comparators who were also employed by the authority. The reasoning of the EAT was that the local authority was one organisation set up to discharge

various, diverse statutory functions such as the provision of education, the collection of waste, street cleaning and so on. Where the local authority employed staff to carry out these functions and discharge their statutory obligations then these staff were all employed in the same establishment even if the local authority separated its operations into various different departments.

The EAT also went on to decide that, in any event, the claimants and comparators were all employed on common terms and conditions as a result of a further collective agreement reached by the Scottish local authorities and trade unions in 1999. This agreement is known as the Single Status agreement or 'Red Book'.

The purpose of the Red Book was to harmonise terms and conditions for all local authority employees previously working under Green Book and Blue Book terms. The agreement stated that, from 1999, all local authority employees were employed under Red Book terms although the previous pay and grading structures under the Green and Blue Books were preserved until individual local authorities had carried out a job evaluation to place its employees on a new single pay scale.

The EAT found that this was sufficient to satisfy the requirement that all the claimants and comparators were on common terms and conditions regardless of whether they were in the same establishment.

Finally, the EAT decided that it had been wrong in the *North* case to state that claimants had to show there was a realistic possibility of the relevant comparators working in the same department or workplace.

Commentary

The EAT's judgment recognised that to take the approach urged by the local authority would make it unduly difficult for claimants to enforce the right to equal pay for equal work. It would certainly prevent claimants from pursuing claims where there was clear gender segregation within a particular workforce, where women were predominantly employed in particular jobs in a different workplace or department from male-dominated jobs.

It is worth noting that the North decision has been appealed to the Inner House of the Court of Session and this appeal is due to be heard later this year. It remains to be seen whether the employer in that case will continue to oppose the appeal in light of the Wilkinson decision or whether City of Edinburgh Council will now appeal leading to the whole matter being considered.

Comments from other jurisdictions

France (Claire Toumieux and Aude Pellegrin): French courts take a broad approach to the 'equal work, equal pay' rule. In this regard, the Scottish case reflects quite well one of the principles recently adopted by French courts, i.e., that differences in remuneration may not be justified solely by the fact that employees belong to different establishments of the same company (French Supreme Court, 28 October 2009).

Subject: Gender discrimination

Parties: City of Edinburgh Council - v - (1) Wilkinson and 21 others (2) MacLeod and 31 others

Counsel: Ian Truscott QC (Edinburgh), Jane NcNeill QC (Wilkinson et al), R. Allen QC (MacLeod et al)

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