

Equal Pay: material factor defence

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(1) Co-Operative Group Limited (2) Pennycook ('R') v Walker (UKEAT/0087/19/RN)

(Judgment handed down on 11th October 2019)

The facts

1. In or about February / March 2014 C was promoted to the role of Chief Human Resources Officer. This promotion occurred at a time of financial crisis for R. C along with a group of other individuals ('the Executive Committee') were considered essential to the survival of R. With this in mind R offered enhanced salaries to the members of the Executive Committee. After a process of negotiation, their respective salaries were agreed. C's salary was lower than that of the other members of the group of key appointments.
2. R survived the crisis and entered a period of consolidation. One aspect of this phase was the re-consideration of C's position. It was decided that C's role should be downsized. Inevitably this was accompanied by a reduction in salary and other diminutions in status. This in turn led to a dispute between C and R as a consequence of which C was dismissed in April 2017. She then stated a series of claims that were dealt with by the Manchester ET in August 2018. Some of her claims were upheld and some were not.
3. One of her claims was that on her appointment in February / March 2014 her work was of equivalent value to 2 members of the group.
4. In February / March 2015, a job evaluation study ('JES') had been completed by Hays. It showed that the roles of C's comparators were rated as equivalent to or as lower than that of C and / or that the work she performed was of at least equal value, but that the comparators were paid at a substantially higher rate.

The ET decision

5. The ET accepted under reference to s.65 EqA that C's work was of equal value to her comparators, having been rated as equivalent in the JES. The ET found that the JES was effective from 12 February 2015.
6. R relied on the 'material factor' defence under s.69 EqA. The ET was persuaded that Rs had established that there were material factors that justified the salary agreed with C and the different salaries paid to her comparators.
7. The justifications offered and accepted by the ET were as follows:
 - (a) Vital Roles: R1 saw the comparators as vital to the immediate survival of the Co-operative as they were part of the core team who refinanced the Bank and reformed governance, unlike C.
 - (b) Executive Experience: R1 considered that C was newly promoted to the Executive Committee and unproven at that level, unlike her comparators.
 - (c) Flight Risk: it was crucial in the 'eye of the storm' to maintain stability and the top team of people. Had the comparators left it could have brought down R1.
 - (d) Market forces: one of the comparators was a top corporate lawyer, paid at the high market rate for top general counsel, which exceeded the market rate for C's position.
8. The ET was satisfied that the reasons offered were genuine, that the differences were causally connected to the reasons, that the reason for the difference was not the difference of sex and that the differences were material.
9. However, the ET went on to find that 'at some stage between February 2014 and February 2015', when the JES became effective, the importance to R of the comparators' roles had declined relative to C's work. It concluded that the value of C's work had overtaken that of her comparators' work by the time of the JES, and that the 'historical explanations' for the pay differential given in February 2014 were no longer material.
10. The ET directed that the question of the point at which C became entitled to equal pay with her comparators should be determined at a later remedy hearing.

11. R appealed to the EAT on the question of liability, arguing that it was not open to the ET to decide that the material factors that operated in February 2014 ceased to justify the differential in the intervening period without a basis for doing so.

The EAT decision (Lord Summers sitting alone)

12. The EAT allowed the appeal.
13. It noted that the ET's vagueness in its use of the words '*at some stage between February 2014 and February 2015*' betrayed the difficulty with its approach¹. All that the ET could say was that there had been a slide from a position where there were material factors which justified the pay differential between C and her comparators, to a position about a year later where the original justifications had gone. However, there was no evidence that R had made a decision to permit this unsatisfactory state of affairs to continue, nor was there any evidence that R had even noticed that a problem might have occurred. It was only when the Hays study came to hand that facts that indicated that the objective justification originally relied upon no longer persisted².
14. The EAT stated that Benveniste v University of Southampton [1989] ICR 617 supports the proposition that a new decision must be made which is tainted by sex discrimination before a prior legitimate decision can be set aside³.
15. The ET had in effect extrapolated the findings of the JES retrospectively into the period prior to the study, but that approach was contrary to the CoA's decision in Bainbridge v Redcar and Cleveland Borough Council [2007] IRLR 494 that a JES does not have retrospective effect. In the absence of evidence as to whether each of the justifications persisted, and for how long, it was not open to the ET to speculate on the position between February 2014 and February 2015⁴.
16. The EAT held that if the decision in February / March 2014 cannot be impugned, the material factor defence continues to operate so as to justify the decision until a further decision or omission to decide can be identified at which point R is required again to defend the pay differential. Once the presumption of sex discrimination has

¹ Paragraph 13 of the Judgment.

² Paragraph 15 of the Judgment.

³ Paragraph 15 of the Judgment.

⁴ Paragraph 16 of the Judgment.

been rebutted a further decision or failure to decide in circumstances that call for a decision must be demonstrated⁵.



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⁵ Paragraph 17 of the Judgment.