

Equal pay – Constructive dismissal

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BMC Software Limited v Ms A Shaikh [2019] EWCA Civ 267

Underhill VP, Floyd LJ and Sir Stephen Richards – 5 February 2019

The Facts

Ms Shaikh brought a number of claims in the ET, including an equal pay claim and claims based on constructive dismissal arising from the alleged breach of the equality clause amongst other things.

ET decision

The ET upheld those claims, including of particular significance the equal pay claim. Like work had been conceded. The issue for determination was therefore whether the employer had proven its material factor defences. In that regard, the ET concluded that BMC had failed to do so.

The ET rejected the claims for sex discrimination, other than the claim for discriminatory constructive dismissal which it upheld in reliance on the breach of the equality clause.

EAT decision

BMC appealed to the EAT on various grounds.

In respect of the discriminatory constructive dismissal claim, the EAT upheld BMC's appeal. The EAT took the view that no such claim could arise given the effect of s70 EqA 2010 which in essence provides for a split between sex discrimination and equal pay claims. The EAT's decision can be found at [2017] IRLR 1074.

In respect of the equal pay claim, the EAT took the view that the ET had failed to give adequate reasons for its conclusions. The EAT remitted the matter back to the same ET for further reasons.

Appeal to the Court of Appeal

BMC appealed to the Court of Appeal, arguing that the EAT's approach to disposal was incorrect and that in any event that the EAT should have remitted the matter to a fresh ET.

Ms Shaikh cross-appealed, arguing that the ET had given adequate reasons for upholding the equal pay claim, and that the EAT had been wrong to take the opposite view.

Court of Appeal's judgment

The Court of Appeal upheld the cross-appeal by Ms Shaikh, agreeing that the ET had given adequate reasons for upholding the equal pay claim, and that the EAT had erred in that regard.

Of note in respect of GMF defences:

“19..... If an employer is going to seek to justify a pay disparity based on a factor such as the comparator's promotion or superior “merit” or “market forces” it needs to be able to explain with particularity what those factors mean and how they were assessed and how they apply in the circumstances of the case. It is evident from the Tribunal's findings that BMC was simply unable to do that, because of its chaotic and wholly non-transparent “employment systems”. The equal pay risks in having non-transparent pay systems is a commonplace of equal pay law.”

The Court of Appeal's view on adequacy of reasons rendered academic BMC's appeal as regards the manner of disposal adopted by the EAT. The Court of Appeal nevertheless took the opportunity to point out that an invitation to an ET to give further reasons is not an option available to the EAT at point of disposal; rather it is a tool which can be deployed only whilst the relevant appeal is ongoing.

Comment

Equal pay claims are arguably more pro-claimant than sex discrimination claims. The burden of proof is switched simply by a claimant being able to point to a valid higher paid comparator in equal work (like work, work of equal value or work rated as equivalent). Once such a comparator has been identified a presumption arises that the reason for the differential is sex, and it falls to the employer to prove its material factor defence. The claimant need not show the “something more” usually required in sex discrimination claims.

Employers should take note that, when faced with having to show a material factor defence, it is risky to seek to rely on anything other than compelling evidence in support of the relevant assertions, such as a clear paper trail or first-hand witness knowledge. Those employers who adopt a more flexible system, such as those who permit discretionary pay rises for staff in equal work to others, should be especially careful and would be well advised to keep a clear and careful paper trail in support of all such decisions.

Andrew MacPhail of 3PB represented Ms Shaikh at all stages, including at the Court of Appeal (instructed by LB Law).



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