

Deploying a material factor defence in equal pay complaints

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[Scottish Water v Edgar \[2024\] EAT 32](#)

1. **[Scottish Water v Edgar \[2024\] EAT 32](#)** considered two points which are important to equal pay cases (references herein to square brackets are to **[Scottish Water's](#)** judgment paragraph numbers):
 - a. The first point is whether the putative decision-maker must be identified, i.e., whether the Employment Tribunal (“ET”) must identify the individual who is said to have applied material factors (such as a comparator’s skill and experience) to justify a pay difference between male and female colleagues.
 - b. The second point relates to whether the ET is able to have regard to a comparator’s performance in their role after a pay difference has arisen through the hiring process, either as an evidential factor in justifying the initial pay difference, or as being relevant proof of why the pay difference was maintained thereafter (see [38] (**[Bury Metropolitan Borough Council v. Hamilton and others \[2011\] ICR 655](#)** at paras 31 and 34)).
2. At its core, **[Scottish Water](#)** concerns whether a material factor defence (“MFD”) should be assessed on an objective or subjective basis, for example whether the defence’s success is dependent on establishing that the material factors operated on the mind of a particular decision-maker. This question is of practical significance as, in **[Scottish Water](#)**, the Claimant argued that the Respondent must “*lead evidence from the relevant decision-maker who must give evidence as to what was operating on their minds at the material time*” [40]. In the absence of such evidence, the Claimant argued that the Respondent’s MFD must fail.

3. The EAT rejected the Claimant's subjective approach and concluded as follows:
 - a. On the first question (para 1a. above), the EAT determined that “[T]he Tribunal’s self-direction that the [Respondent] needed to prove the identity of the decision-maker was a material misdirection” [51].
 - i. The EAT held that the touchstone of a MFD is “whether or not the respondent had proved the cause of the difference in pay between the claimant and the comparator” [52]. In essence, the ET had unduly elevated the importance of the decision-maker’s identity; it would be perfectly proper for the ET to consider “circumstantial” or “second hand” information as to the material factors that the Respondent had applied, without identifying the decision-maker [53]. Such evidence would, of course, be subject to considerations of weight.
 - ii. Further, the EAT held that causation (i.e., whether the material factors caused the pay difference) should not be assessed exclusively by reference to the subjective thought processes of an individual decision-maker [54].
 - b. On the second question (para 1b. above) the EAT found that the ET had fallen into error by declaring that evidence of how Mr Bingham (“Mr B”) (the Claimant’s chosen comparator) performed in the role after his appointment was “completely irrelevant”. The EAT stated that Mr B’s performance shone a light on the extent to which the Claimant’s and Mr B’s skills and abilities differed at the date of Mr B’s appointment [57]. A valid inference could be drawn from this evidence as to Mr B’s skills and abilities as they previously existed when he was offered a salary that outstripped the Claimant’s.
4. In light of the foregoing, the EAT allowed the appeal and remitted the matter to a differently constituted ET.

Summary of Facts

5. The facts are summarised as follows:
 - a. The Claimant commenced employment with the Respondent in 2003. Thereafter, she held a variety of positions, which included operating as a Business Analyst, Developer Services Administrator and Commercial Analyst. In 2017, the Claimant was promoted to the role of Corporate Affairs Officer (a band C role). At all material times, the Claimant remained at band C [11].

- b. In the period 1 July 2021 to 31 March 2022, the range of pay band C was £30,605 to £42,575. In the period from 1 April 2022 the range of band C was £31,380 to £43,350 [12]. Until November 2022, the Claimant received a salary of £30,605.
- c. In May 2021, the Claimant applied to become a Corporate Affairs Specialist (band B). Mr B (an external candidate) applied for the same role; he was interviewed on 23 June 2021. Whilst neither the Claimant nor Mr B were successful, Mr B scored more points than the Claimant during the recruitment process (23 to 13 points respectively). The interview panel was comprised of Ms Reid, Mr Fraser and Mr Steel (all of whom were Corporate Affairs Managers) [15].
- d. Mr B had been pipped to the post for the band B role by one point. Ms Reid considered that Mr B had “*a huge set of skills to enhance [her] team*” [18]. Thereafter, Ms Reid sought the Head of Corporate Relations (Mr Alan Thomson)’s approval to offer Mr B the Corporate Affairs Officer role at band C. Despite his skillset and experience falling within band B, Ms Reid knew that Mr B did not, at that time, have a regular income and so might accept the band C role [19].
- e. Mr B indicated that he would accept the band C position at £35,000 per annum, i.e., the same level of remuneration as his previous role. Ms Reid considered it to be “*a no brainer to get band B talent for a band C salary*”. She took into account his skills, experience and ability as well as his former salary (para 37(110) and para 126 of the ET’s determination) [21].
- f. The Respondent offered Mr B £36,500 per annum and he commenced employment on 23 August 2021. That salary offer was “signed-off” by the Respondent’s Head of Corporate Relations, Mr Thomson [21]. At this point, the Claimant’s salary was £30,605.
- g. In November 2022, both the Claimant and Mr B received a 5.5% pay rise, resulting in Mr B being paid £38,143 per year and the Claimant £32,289 [25].

How was the material factor defence characterised?

- 6. The Claimant pursued an equal pay complaint to the ET. The Respondent defended the claim on the basis that Mr B and the Claimant did not carry out “like work” nor “work of equal value” (s.65 of the Equality Act 2010 (“**EqA**”). Further, the Respondent advanced a MFD under s.69 EqA, i.e., the Respondent claimed that the pay difference between the Claimant and Mr B was caused by a “material factor” that was not tainted by sex discrimination.

7. The Respondent relied on the following elements to construct its defence of material factor [8]:
 - a. Mr B's skills or other relevant supplements;
 - b. Mr B's experience;
 - c. Mr B's responsibility and potential; and
 - d. where applicable, in conjunction with one or more of the above factors, cost.
8. At the ET hearing, Ms Reid and Mr Fraser (the Respondent's Corporate Affairs Managers) led evidence on the above matters. Mr Thomson did not provide evidence [32].

What did the ET decide?

9. By judgment dated 8 February 2023, handed down by a full ET sitting at Glasgow and chaired by EJ McPherson, the ET rejected the Respondent's MFD on two grounds:
 - a. At para 111, the ET stated that *"without identifying the decision maker, it is not appropriate for us as the fact-finding industrial jury to speculate on what might have been in the decision maker's mind at the relevant time"* [27].
 - i. The ET concluded that it was unable to accept that the decision-maker was Ms Reid, nor Mr Thomson.
 - ii. At paras 120 and 129, the ET stated that:

"120. We find that the respondent has failed to discharge its burden of proof, as there is no clear and cogent evidence available to us from whomsoever was the respondent's decision-maker.

*129. At best the tribunal has been presented from the respondent, with an incomplete picture of what happened, and no clear and cogent evidence in answer to **Kipling's six honest men** - who, what, where, when, how, and why."*
 - b. At paras 118 and 119, the ET refused to take into account any evidence upon which the Respondent sought to rely which related to Mr B's actual performance in the role after his appointment. The ET held that such evidence was *"completely irrelevant"* as it could not have been known at the time that the pay decision was made.

How did the EAT analyse the ET's findings?

10. The EAT wasted no time in identifying contradictory passages in the ET's determination. Importantly, the ET held, at para 120 (and paras 128 and 133), that the decision-maker could not be identified. However, at para 37(112), the ET stated:

"This tribunal heard no evidence from Mr Thomson, and so it had no evidence directly from him as to the factors that he took into account when deciding upon the starting salary to be paid by the respondent to [Mr B] at £36,500."

11. The EAT held that the above passage was inconsistent with the ET's conclusions that:
- a. the Respondent had failed to discharge its burden as to the identity of the decision-maker; and
 - b. the absence of any factual finding that Mr Thomson was the relevant decision-maker.
12. The EAT is perhaps being uncharitable. Another way of viewing matters is that the ET did not hear any evidence as to the factors that operated on Mr Thomson's mind and, as he remained a candidate decision-maker, the ET could not find that Mr Thomson applied the alleged material factors (see paras 7a-d. above). On the other hand, for the reasons provided below, the ET required an unreasonable amount of certitude as to the identity of the decision-maker. In reality, the decision-maker was highly likely to be Ms Reid and/or Mr Thomson, and there was at least circumstantial evidence from which it could be inferred that both Ms Reid and Mr Thomson were aware of the material factors when the offer of £36,500 was made to Mr B.
13. The EAT had further cause for concern as the ET held, at para 136, that "*we have no reason to doubt, based on the evidence we heard at this Hearing*" that Mr B's starting salary was "*related to his skills and experience*" [33].

What were the EAT's conclusions?

14. As stated above, the EAT found that the ET fell into error on both aspects of its determination: (1) the ET was wrong to find that it was fatal to the Respondent's MFD that the decision-maker had not been identified; and (2) the ET should not have dismissed the evidence which concerned Mr B's performance in the role after he was appointed.
15. The EAT's reasoning can be distilled in the following way:
- a. The EAT held that the ET needed to ask itself "*whether or not the respondent had proved the cause of the difference in pay between the claimant and the comparator*"

[52]. The EAT noted that it is no doubt helpful to understand the subjective viewpoint of decision-makers when the ET assesses, on an objective basis, the cause of the pay disparity. However, it is not essential for the material factors to operate on the mind(s) of the decision-maker(s), nor is it therefore necessary to identify the decision-maker.

- b. The EAT referred to cases such as **Skills Development Scotland Co Ltd v Buchanan** **UKEATS/0042/10/BI**, where the pay disparity was caused by a TUPE transfer (a factor that did not operate on the mind of the new employer when it made a fresh decision to maintain the pay difference).
- c. The EAT amplified the point by stating that the ET could have deployed circumstantial or second hand evidence. For example, the ET *may* have concluded, on the basis of the evidence that it heard, that the alleged material factors operated on Ms Reid's mind at the material time, and that she was likely to have expressed these to Mr Thomson (if he was in fact the ultimate decision-maker). The ET was wrong to "fixate" on the identity of a decision-maker at a particular moment in time.
- d. Further, the EAT held that Mr B's performance in the role was not irrelevant. In fact, it was circumstantial evidence that could be considered when assessing whether Mr B's skills and experience caused the difference in pay. Excluding such evidence prejudiced the Respondent: it hindered the Respondent's ability to discharge the burden that its decision to offer Mr B a higher salary than the Claimant was not tainted by sex discrimination [57].

Take aways

16. Whilst the EAT's conclusions are sound, its reasoning does not fully address how causation operates. The following observations are made:

- a. One wonders whether **Buchanan** (the TUPE transfer case mentioned above) is entirely analogous to the facts of **Scottish Water**. From **Buchanan**, the EAT extrapolated a universal principle that the subjective views of a particular decision-maker are not indispensable when determining whether the material factors caused the pay difference. However, TUPE cases may be a special class: the rationale appears to be that there is a pre-existing state of affairs and/or a "hidden reason" which justifies an ongoing pay difference. The EAT perhaps underexplored whether the same logic could apply here, i.e., if Mr Thomson was the decision-maker, yet merely rubberstamped Ms Reid's decision to offer Mr B £36,500, could Ms Reid's decision-

making process (which the ET accepted was based on material factors which may not have been tainted by sex discrimination [33]) be transferred to Mr Thomson?

- b. The EAT is not taken as implying that causation is to be assessed exclusively on an objective basis. For example, if a Claimant established that a decision-maker was entirely unaware of a particular material factor (such as a comparator's skill or experience) at the time that they made a pay decision, it is doubtful whether the objective existence of such a factor would *always* grant the employer a MFD.
 - c. The above observations suggest that a contextual approach may be required to establish whether the material factors caused a pay difference (which may involve both subjective and objective considerations).
17. Nevertheless, the main message in **Scottish Water** is that there is no substitute for a full and thorough consideration of all of the evidence when determining "*the cause of the difference in pay*". As a practical word of caution, Respondents should lead evidence from all potential decision-makers, include evidence as to discussions between such decision-makers in relation to the material factors, and provide material which evidences a comparator's performance, even where that postdates the pay decision under consideration.

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