



# Equal pay: ruling from the court of appeal

This briefing provides information on a Court of Appeal ruling on equal pay claims filed in the employment tribunals against public sector employers. It is provided to local authority chief executives, council leaders and all APSE contacts.

## Key issues

1. Evershed solicitors have produced a briefing paper for APSE on the recent Court of Appeal rulings on equal pay.
2. The most significant issue is on the legality of pay protection.
3. This paper also covers:
  - Retrospective effect of job evaluation
  - A claimant pursuing more than one claim
  - Failure to follow the grievance procedure

## 1. Introduction

The following briefing paper has been compiled by Eversheds solicitors for APSE on the Court of Appeal ruling in relation to equal pay on 29 July 2008.

Recent years have seen thousands of equal pay claims filed in the employment tribunals against public sector employers. The latest decision to come out of the mass litigation arises out of a number of equal pay claims that have been ongoing for some time against Redcar & Cleveland and Middlesbrough Borough Councils. The Court of Appeal's ruling covers a range of issues, the most significant being that of pay protection.

## 2. Pay protection

### a) Background

The cases that reached the Court of Appeal are set against a backdrop of new pay and grading systems being implemented in local government pursuant to the 'Single Status' agreement reached by local government employers and trade unions in 1997.

Following job evaluation exercises carried out by both Redcar & Cleveland and Middlesbrough Borough Councils, certain roles performed by a predominantly female workforce (such as jobs in catering and care) were graded as equivalent to various positions carried out mostly by men (eg street-sweeping, gardening and refuse collection).

In many cases, those doing 'male' jobs were better paid than female workers doing different, but equivalent, jobs. The higher pay was not, however, supported under the new grades in which the predominantly male workers found themselves. Rather than attempt to reduce the pay of these workers, the councils agreed to maintain, or 'red circle', their existing pay arrangements for a certain period to give the workers time to adjust to a lower rate of pay.

A number of female workers brought equal pay claims, arguing (amongst other things) that if these male workers in equivalent jobs were to continue having their higher rate of pay protected by red-circling then they too should be entitled to higher pay for the same period.

### **b) Employment appeal tribunal decisions**

In November 2006 the EAT gave a ruling in the case of *Bainbridge and others v Redcar & Cleveland Borough Council*. The EAT upheld the decision of the employment tribunal that, where the pay disparity that existed before the new pay and grading system was introduced was itself discriminatory, the red-circling arrangements that preserved the unequal (discriminatory) pay would also be discriminatory unless the employer could show that excluding the women claimants from pay protection was justified as a proportionate means of achieving a legitimate aim.

The facts of the *Bainbridge* case showed that the employees doing the 'men's jobs' had a contractual right to their old, enhanced rates of pay. If the employer had tried to reduce their pay without agreement, there would have been industrial unrest and hardship to the men. The only way agreement could be reached was by offering the men pay protection.

Yet the council also knew that one of the principal purposes of the Single Status agreement was the elimination of past discriminatory pay practices. It followed that the council should have realised that women who had been discriminated against in the past were going to be discriminated against under the new scheme if they were excluded from pay protection. The tribunal had found no evidence that the council had applied their minds to this problem or had made any attempt to avoid or even reduce the discrimination. The council had not even attempted to cost the inclusion of the women. Based on those facts, the EAT upheld the tribunal's decision that the council had not justified its failure to pay the female claimants at the same rate as the male staff whose pay had been 'protected' at a higher rate.

Eight months later, however, the EAT delivered its judgment in the case of *Surtees and others v Middlesbrough Borough Council*. In that case the EAT held that pay protection by red-circling was justified, even though the facts of the case were very similar to those in *Bainbridge*. The only difference of any significance between the facts in the two cases was that, by the date the new pay arrangements took effect, Middlesbrough Council had not conceded liability for equal pay claims whereas Redcar & Cleveland Council had.

### **c) Court of Appeal decision**

The Court of Appeal has now upheld the decision of the EAT in Bainbridge and rejected the EAT's decision in Surtees, in each case approving the judgment of the original employment tribunal.

The Court of Appeal did not rule that all transitional pay protection will necessarily amount to discrimination when employees are replacing a discriminatory pay system with a non-discriminatory one, even if the effect of the pay protection is to continue the historic discrimination to some extent.

The Court of Appeal accepted that there may be circumstances in which an employer could justify denying a woman pay protection that she would have had if the employer had paid her equal pay when it ought to have done. The question is whether the employer can show that its decision is a proportionate means of achieving a legitimate aim.

The Court of Appeal did not doubt that it is legitimate to have as an objective the introduction of a job evaluation scheme which would eliminate discriminatory pay for the future, and the desire to cushion those who had suffered a pay reduction against a sudden drop in pay. The trickier question, however, is whether it will be proportionate to deny protected pay to those whose wage levels are lower due to historic discrimination.

Although the Court of Appeal stopped well short of spelling out the circumstances in which pay protection will be acceptable, it did note that the employer's state of knowledge about the discriminatory effect of its provisions and the extent to which it tries to minimise that effect, will be relevant considerations.

To illustrate its point, the Court of Appeal gave the example of an employer that is reorganising pay structures but has no reason to think that the old arrangements were directly or indirectly discriminatory. In those circumstances, pay protection arrangements which effectively continue unequal pay could be justified if they constitute a 'carefully crafted and costed scheme negotiated .... without any reason to suppose that, when implemented, it would have discriminatory effects.'

If, on the other hand, an employer knows, or suspects, that its existing arrangements are discriminatory, any pay protection arrangements that continue the discrimination will be harder to justify. Indeed the Court of Appeal went so far as to say 'where the old indirect discrimination has been recognised and attempts are being made to correct it for the future, the employer will have great difficulty in justifying the continuation of any discriminatory element.'

### **d) Comment**

For those employers that are keen to tackle potentially discriminatory pay practices within their organisation, this latest decision does not, at first sight, offer much comfort. Without some form of temporary pay protection for the 'losers' in a new pay structure, change may be difficult to achieve in practice. Although the Court of Appeal has left open the possibility that pay protection can be justified, the circumstances when such arrangements will be considered acceptable by the courts remain in doubt.

At one point in its judgment the Court of Appeal does accept that if a pay-protection scheme would be undermined by extending it to those who have historically not been given the equal pay to which they were entitled, that could potentially constitute justification. It is clear, however, that employers will not find it easy to demonstrate justification even in these circumstances and will need compelling evidence before a tribunal is persuaded that pay protection is appropriate.

### **3. Other issues addressed by the Court of Appeal**

Apart from pay protection, the Court of Appeal considered a number of other issues.

#### **a) Do job evaluation studies have retrospective effect?**

An employee who wishes to claim that they have a right under the Equal Pay Act 1970 (EPA) to be paid the same as a co-worker of the opposite sex has to show, amongst other things, that they and their co-worker are engaged in either like work, or work that has been rated as equivalent in a job evaluation study (JES), or work of equal value.

A claimant who shows that she and her comparator are engaged in like work or work of equal value is entitled to claim back pay for up to six years from the date the claim is brought (provided the jobs remained the same throughout the earlier six-year period). A question raised in this appeal was whether the same principle would enable employees who are basing their claim on the 'work rated as equivalent' ground to claim back pay for a period pre-dating the implementation of the JES. In other words, does a JES have retrospective effect for the purposes of equal pay liability?

In the Bainbridge case both the tribunal and the EAT said that a JES does not have retrospective effect. The Court of Appeal agreed.

It is important to bear in mind, however, that a JES might, in some cases, be evidence that jobs were of equal value even prior to the JES exercise. It follows that in appropriate cases, a JES could be relied on to support an 'equal value' claim covering a period pre-dating its implementation.

#### **b) Can an employee who has already pursued an equal pay claim to judgment then pursue another claim covering the same period of employment but naming a different comparator?**

Some of the claimants in Bainbridge had already argued successfully before a tribunal that they were employed in work of equal value to certain male employees and were, therefore, entitled to equal pay. The claimants then tried to pursue claims naming different male employees as comparators. Although the claims covered the same pay period, the claimants were arguing that that they and the new male comparators were engaged in work that had been rated as equivalent in the job evaluation scheme.

The council argued that the claimants were trying to re-open a claim that had already been concluded. The Court of Appeal rejected this argument, however and held that a second round of claims would only be barred if they covered the same pay period and were based on same strand of the EPA. In other words, had a claimant tried to follow up her original 'equal value' claim with another 'equal value' claim covering the same period, that would not have been allowed. But because the second claim was based on an equivalent rating under a job evaluation scheme, the claim could proceed.

**c) What should the sanction be for the employer's failure to follow the statutory grievance procedure?**

The claimants in the Bainbridge case raised grievances via their solicitor. The council did invite three employees to attend meetings to discuss their grievances but then made a conscious decision not to hold meetings while the litigation remained ongoing.

The EAT found that the council had been in breach of the grievance procedure. Ordinarily this would have led to an increase in compensation of between 10 per cent and 50 per cent. However, in exceptional cases a tribunal may decline to uplift compensation if an uplift would not be just and equitable. The EAT held that, on the facts of this case, individual meetings would have been pointless because the claims could only realistically be settled with the claimants' solicitors' involvement due to their complexity. Also, the terms of the lawyer's 'no win-no fee' retainer with his clients meant that a claimant was at risk of incurring higher legal fees if a settlement was brokered without his involvement.

The Court of Appeal upheld the EAT's decision that an uplift was inappropriate in the circumstances.

**d) Another appeal?**

We understand that both sides in this long running dispute have asked the Court of Appeal for permission to appeal to the House of Lords. If that is granted, it is quite possible that the case will, in due course, be referred to the European Court of Justice given the potential impact of the case. If so, it will probably be at least a couple of years before the last word is said on these points.

**4. APSE commentary**

The ruling on pay protection has now set a precedent on pay protection claims against public services and it is likely that this ruling could trigger a new set of equal pay claims on pay protection grounds. APSE would urge its membership to review their arrangements in light of this new ruling.

APSE agree with the need to ensure that local authorities implement fair and transparent pay and grading systems based on the NJC Job Evaluation Scheme. However, the lack of clarity that now surrounds where a pay protection scheme could be justified is problematic, particularly as it could be a couple of years before the last word is said on this issue.

APSE will continue to lobby on behalf of its membership that cost implications of equal pay should be fully reflected in funding settlements to local authorities and will continue to work with Eversheds on providing advice on lawful remedies.

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