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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF A DECISION OF AN INDUSTRIAL TRIBUNAL ON APPEAL BY WAY OF CASE STATED

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BETWEEN:

MARY FEARNON, MARGARET PATTERSON and JUDITH TOLAND

Appellants/Claimants

-and-

SMURFIT CORRUGATED CASES LURGAN (LIMITED)

Respondents

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Before Kerr LCJ, Higgins LJ and Coghlin LJ

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KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of an Industrial Tribunal. An equal pay complaint by the three female appellants to the Industrial Tribunal gave rise on a pre-hearing review to the question whether the respondent was entitled to rely on the defence of genuine material factor for the purposes of Section 1(3) of the Equal Pay (Northern Ireland) Act 1970 as between the claimant's contracts of employment and that of their comparator, Mr Wesley Warnock. The tribunal held that the respondent was

entitled to rely on that defence. The appellants assert that this decision is wrong in law.

The facts

[2] The facts were agreed and are set out in the case stated. Mr Warnock had worked for Ulster Paper Mills as a costings clerk from about 1969. The appellants started work with the company in 1983. In or around 1988, Mr Warnock was promoted to sales manager, and his pay was increased for a variety of reasons. These included the fact that he had additional qualifications and responsibilities. The decision to pay him a greater salary was also made in order to ward off an approach from a competitor.

[3] In about 1994, Ulster Paper Mills was purchased by the respondent and a transfer of employment rights under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) took place. Mr Warnock's supervisory duties were removed, but his job and salary were protected under an arrangement known as "red-circling" or "red-ringing". Since that date, uplifts in Mr Warnock's salary have come about solely by means of the annual increment or percentage increase applied to others in the workforce.

[4] In 1997 an internal memorandum was sent from a manager, Mr Ian Simpson, to Mr Warnock. It was entitled "Appraisal October 1997" and it described the work that Mr Warnock then carried out and expressed the high regard in which he was held by his colleagues. It did not contain any reference to the continuing discrepancy in salary levels between him and the appellants. Of course, since he has continued to receive percentage increases at the same level as they, the difference in their earnings has increased over the fourteen years since the red-circling of his salary began.

The pre-hearing review

[5] The rules of procedure for industrial tribunals are contained in Schedule 1 to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005. Rule 18 deals with the conduct of pre-hearing reviews and paragraphs (1) and (2) provide: -

> "18.—(1) Pre-hearing reviews are interim hearings and shall be conducted by a chairman unless the circumstances in paragraph (3) are applicable [This refers to the circumstances in which the hearing should be conducted by a tribunal, as happened here.] Subject to rule 16, they shall take place in public.

> (2) At a pre-hearing review the chairman may carry out a preliminary consideration of the proceedings and he may –
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> > (a) determine any interim or preliminary matter relating to the proceedings;
> >
> > (b) issue any order in accordance with rule 10 or do anything else which may be done at a case management discussion;
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> > (c) order that a deposit be paid in accordance with rule 20 without hearing evidence;
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> > (d) consider any oral or written representations or evidence;
> >
> > (e) deal with an application for interim relief made under Article 163 of the Employment Rights Order."

[6] We were told by Mr O'Hara QC (who appeared for the appellants with Mr Mark McEvoy) that the pre-hearing review system was introduced principally to dispose of unmeritorious cases where a preliminary 'knock-out' blow could be delivered. Be that as it may, the focus of the review in this case was on the employers' claim that the red-circling of Mr Warnock's salary was due to a genuine material consideration, untainted by sex. Although the employers did not concede that the appellants performed the same work as Mr Warnock, by agreement, the review hearing proceeded on that assumption.

[7] In its decision the tribunal recorded counsel for the appellants as having accepted that in 1994 there had been 'good reasons for the red-circling of Mr Warnock's pay'. Mr McEvoy (who was then appearing for the appellants) took issue, however, with the absence of any review of this situation since 1994. For the employers, it was submitted that the legitimate reasons justifying the difference in pay in 1994 continued to apply with equal force. The reason for red-circling Mr Warnock's pay was 'to maintain the protection afforded under the TUPE Regulations and time [was] not a relevant issue'.

[8] The tribunal expressed itself satisfied that the reason for the difference in salary levels was the TUPE transfer in 1994. It observed that the appellants' case "rests on the length of time for which the red-circling of the comparator's pay has continued" but concluded that "the mere fact of the red-circling continuing is not sufficient to *make a case for the claimant*". (We have added the emphasis to the final words of this passage).

The Equal Pay Act (Northern Ireland) 1970

[9] This Act implements Article 141 of the Treaty of Rome, securing the right to equal pay for work of equal value. Section 1 (1) provides that if the terms of a contract under which a woman is employed at an establishment in Northern Ireland do not include an equality clause they shall be deemed to include one. In broad outline the material provisions (so far as this case is concerned) in subsection (2) require that a woman employed on the same or like work as a man should enjoy the same pay and conditions. Subsection (3) deals with the circumstances in which certain provisions of subsection (2) will not apply and, so far as is material, it provides: -

> "(3) An equality clause falling within subsection (2)(a), (b) or (c) shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex …"

[10] It is clear that the onus of establishing that there is a genuine material factor present which gives rise to the variation and which is not the difference of sex rests on the employer. On the hearing of the appeal, the employers chose not to be represented but, as far as one can tell from the decision of the tribunal and the case stated, this elementary proposition was not in dispute on the pre-hearing review.

The duration of a genuine material factor due to red-circling

[11] In deciding that the elapse of time from the initial red-circling of Mr Warnock's salary did not alter the character and relevance of the genuine material factor other than difference of sex, the tribunal relied on the decision of the Employment Appeal Tribunal in *Snoxell and another v Vauxhall Motors Ltd; Charles Early & Marriott (Witney) Ltd v Smith and another* [1977] 3 All ER 770. In that case the employers before 1970 had graded male and female inspectors of machine parts in separate grades of the wage scale. In 1970, by agreement with the unions, the wage scale was revised. The agreement recognised that certain jobs done by male inspectors had been incorrectly graded and should be located in a lower grade. It was agreed however that existing male inspectors employed in those jobs should have their wages red-circled despite the lower grading of their jobs and that this should continue so long as they continued to be employed. The EAT held that the exclusion of two female inspectors from the red-circling had been due to their sex because prior to 1975 they, as females, had been unable to enter any male grades and therefore to enter the grade protected by red circling. Accordingly, the employers had not established that the variation in pay was due to a material difference, other than sex. On the issue of whether the red-circling could

continue to be a genuine material factor other than sex, in what was plainly an *obiter* passage, Phillips J said this at page 781: -

> "Does it make any difference that the 'red circling' is continued, even continued indefinitely? In principle, we do not see why it should. Assuming that there are no additional factors, and that in other respects affairs are operated on a unisex, non-discriminatory basis, the situation will continue to be that the variation is genuinely due to a material difference other than the difference of sex. The 'red circling' will persist, ageing and wasting until eventually it vanishes."

[12] This was the passage quoted by the tribunal in support of the statement that the mere fact of the red-circling continuing is not sufficient to make a case for the claimant. But we do not construe the judgment in *Snoxell* to suggest that the length of time that a discrepancy in salary has endured because of red-circling is irrelevant to the question whether it can continue to be a genuine material factor. To qualify as a contemporaneous genuine material factor accounting for the discrepancy in salary, the reasons for it at the time that the difference in earnings is challenged must be examined. Otherwise, it would be possible for an unscrupulous employer to allow a difference in earnings to persist while knowing that the initial reason for it no longer obtained.

[13] It is to be remembered that the onus of establishing that there is such a genuine material factor rests on the employer throughout. The formulation used by the tribunal that the continued existence of red-circling does not "make the case for" the appellants suggests that it had considered that they were required to show that the once genuine factor had transformed into something that no longer qualified for that description. We are satisfied that this approach would not be correct. It is for the respondent to show that the mooted factor retains the essential attributes of genuineness and materiality.

[14] These considerations are reflected and exemplified in the later case of *Outlook Supplies v Parry* [1978] 2 All ER 707. At page 711, Phillips J said: -

> "We wish to draw attention to the following matters: (i) we stress the point that cases arising under s 1(3) can never be solved by rule of thumb, or by attaching a label, such as saying 'This is a "red circle" case'. It is necessary to look at all the circumstances; (ii) the 'protection' of wages, even when done for good reason, gives rise to much misunderstanding and upset, which increases as

> time goes on, and it is accordingly desirable that where possible such arrangements should be phased out; (iii) for the same reason joint consultation is desirable where it is intended to introduce such a practice or, if it has been introduced, to continue it; (iv) in such cases, when determining whether the employer has discharged the onus on him under s 1(3), it is relevant for the industrial tribunal to take into account the length of time which has elapsed since the 'protection' was introduced, and whether the employers have acted in accordance with current notions of good industrial practice in their attitude to the continuation of the practice."

[15] It was therefore incumbent on the tribunal to examine not only the motive for the introduction of red-circling, but also the reasons that it has been continued. It is wrong to assume that because it was right to institute the system, that it will remain right to maintain it indefinitely.

[16] No evidence appears to have been proffered to the tribunal to justify the continuation of the red-circling. Apart from recording the employers' claim that the reasons justifying the difference in pay in 1994 continued to apply, the tribunal makes no reference whatever to the issue. No examination of why the employers considered that it was necessary to prolong the arrangement took place. No discussion of whether the preservation of the red-circling accorded with 'current notions of good industrial practice' was undertaken. There was no inquiry as to whether it would have been possible to phase out the difference in pay levels or why adjustments could not be made to the respective rates of increase in earnings so as to equalise the salaries paid to the appellants and their comparator. The tribunal appears to have accepted without demur the unvarnished claim that the reasons for the red-circling continued to apply, unsupported as it was by any evidence. Given that, as we have said, the onus of establishing this central tenet of the respondents' case rested on the employers, we cannot accept that this was a correct approach.

Conclusions

[17] The question posed in the case stated is: "Was the tribunal correct in law to hold that the protection afforded by the material difference of red-circling is not time limited?" We answer that question 'No' and allow the appeal.