

Judicial Communications Office

2 July 2021

COURT DISMISSES EQUAL PAY APPEAL

Summary of Judgment

The Court of Appeal¹ today delivered its reasons for dismissing an appeal by the Department of Justice from the decision of the Industrial Tribunal holding that it was in breach of the Equal Pay Act (NI) 1970.

Background

In July 2010, Teresa McGrath (“the claimant”) accepted a formal offer of employment with the Northern Ireland Court Service (“NICtS”) at the grade of Legal Officer (Deputy Principal) (“DP Legal”). While the appointment process was ongoing the terms of the offer of employment (as indicated in the Candidate Information Booklet) were amended as a consequence of the devolution of policing and justice functions. The change meant that the terms and conditions of the DP Legal post were aligned with the NI Civil Service (“NICS”) (and not the NICtS which prior to devolution was “the Lord Chancellor’s Department in NI” and “a separate Civil Service in its own right”) and also that anyone appointed to a DP Legal post after 12 April 2010 (the date of devolution of policing and justice) would not be subject to fluid grading² and not therefore eligible to be considered for promotion to Grade 7 Legal. The claimant was aware of the new terms when accepting the offer of employment at the grade of DP Legal. In order to obtain promotion she knew she would have to “openly compete” with others for any available Grade 7 Legal posts under the “merit principle” enshrined in the NICS terms and conditions.

The claimant was assigned to work in the Official Solicitor’s Office (“OSO”). At that time the claimant was the only DP Legal in the OSO – the others, aside from the Official Solicitor (“OS”) held Grade 7 Legal posts. On a number of periods during her employment in the OSO from 6 September 2010 the claimant worked on a “temporary promotion” (“TP”) in a Grade 7 Legal post covering for absent employee(s). She received Grade 7 Legal remuneration when she performed this role. She issued a “grievance” in July 2013 when she claimed she had been “downgraded” after one of the periods of TP finished but did not appeal the decision not to uphold her grievance.

In March 2015, the claimant (and all employees) were informed of a job evaluation (grading) review (“JEGs”) of all legal posts in the NICS. On the basis of the JEGs assessment, the claimant’s post in the OSO was regraded upwards from a DP Legal to a Grade 7 Legal post. Any employee deemed to have been working in a post which was “upgraded” was informed of their entitlement to receive a salary commensurate with the new JEGs assessment, however, the backpay was only to commence from 1 June 2016 in accordance of the terms of the JEGs review. The claimant took issue with this date on the basis that she had been in the post since 6 September 2010 and she lodged a second grievance. As part of this grievance, and her claim to the Tribunal, she asserted that she had always been performing Grade 7 Legal work and that following the JEGs she could be demoted to a DP

¹ The panel was Lord Justice Treacy, Lord Justice McCloskey and Mr Justice O’Hara. Lord Justice Treacy delivered the judgment of the court.

² Prior to devolution Legal Officer DP posts were subject to “fluid grading” which could mean that a successful candidate may be considered for promotion to Grade 7 (Legal) after one year’s satisfactory performance.

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Legal at any time as her contract of employment had not been modified to place her in the same position as her Grade 7 Legal comparators and she sought promotion.

The Tribunal issued its decision on 25 July 2019 finding that the claimant had been engaged by the Department of Justice (“the appellant”) in like work with her comparators from 7 October 2011 pursuant to the Equal Pay Act 1970 (“the 1970 Act”). It said the appellant had not proved that the variation between the claimant’s contract and those of her comparators was genuinely due to a material factor which was not the difference of sex under the 1970 Act and held that the appellant was therefore in breach of the 1970 Act and the claimant was entitled to equal pay. The Tribunal also found that the claimant was not directly discriminated against on the grounds of sex pursuant to the Sex Discrimination (NI) Order 1976 and dismissed this part of the claim. The court outlined the key findings of the Tribunal in paragraphs [30] – [54] of its judgment.

Grounds of Appeal

The appellant’s grounds of appeal are set out in paragraph [55] of the judgment and its main arguments in paragraphs [57] – [65]. These included that:

- If the claimant was allocated Grade 7 Legal work it only occurred as a result of the actions of her line manager who at no time indicated that the reason for the allocation of work at a higher grade was not due to the claimant’s sex. The appellant contended that, as sex discrimination is a critical ingredient in any equal pay claim, and there was no evidence of it in this case, the claim ought to have failed.
- The Tribunal ought to have considered whether the claimant’s line manager’s actions were a “genuine material factor” explaining the difference in pay and amounting to a complete defence to the equal pay claim.
- The Tribunal should have discounted and distinguished between the periods of time when the claimant was on TP as she was doing the work of absence colleagues, being paid as a Grade 7 Legal and there was no pay disparity.
- Following the JEGs assessment, the claimant continued to work in the OSO on TP. In due course, the claimant would have been able to apply for that post or any other Grade 7 Legal post in the NICS in competition with other employees in the NICS and her success would stand or fail on its own merits. This is what happened. The claimant applied for the post in OSO, was successful and remains in that post. The appellant submitted that the judgment of the Tribunal, by effectively giving the claimant promotion “in post” had given her better NICS terms and conditions than those of her colleagues and not equal terms.

The claimant made three central arguments:

- The appellant had erred in conflating the equal pay claim and the sex discrimination claim;
- The appellant repeatedly failed to raise a genuine material factor (“GMF”) defence; and
- The appellant’s suggestion that the Tribunal ought to have considered whether or not the line manager’s actions were a GMF defence when this was not raised by the appellant was unsustainable.

The Role of the Court of Appeal

The role of the Court of Appeal as the appellate tribunal for the Industrial Tribunal has been the subject of detailed judicial consideration. This was summarised by Coghlin LJ in the case of *Miskelly*

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v The Restaurant Group [2013] NICA 15 where it was held that the role of the Court of Appeal is confined to considering questions of law arising from the tribunal decision and that it does not conduct a general hearing.

In this case, the court said the appeal gave rise to a number of related issues:

- Was it open to the appellant to raise a defence of GMF (ie the claimant's line manager was allocating work above her pay level) which did not form part of its pleaded case; and
- If it is, can the actions of the line manager be regarded as a GMF defence?

An appellate court has a general discretion whether or not to allow new points to be taken on appeal. The court said that the claimant's line manager's actions were never pleaded as a GMF defence before the Tribunal and that there was no attempt by the appellant to make an application for permission to amend the pleadings to do so. Moreover, the court noted that during the Tribunal hearing, the appellant's representative "strongly challenged by way of cross-examination the evidence given by [the line manager]":

"Notwithstanding the strong challenge by the appellant to [the line manager's evidence] in cross-examination the appellant now, audaciously, seeks to rely on this evidence to establish a GMF defence on which to dismiss the claimant's equal pay claim, which had never been pleaded in the first case. [The line manager's] evidence was adduced by the claimant primarily to prove that she was doing "like work" with her comparators. Critically, the appellant now wishes to use this evidence as a basis for a GMF defence. However, [the line manager's] evidence was not adduced, tested or considered before the Tribunal as a GMF defence. The GMF that is now relied on is that the claimant's manager, unknown to senior management, was allocating the claimant work above her pay level."

The court noted that the Tribunal had concluded that the line manager's evidence should be accepted. The line manager confirmed the claimant's evidence that at all material times she was performing Grade 7 Legal work, following the conclusion of her probationary period, whether she was working formally as a DP Legal or on TP to a Grade 7 Legal post "and this was known to senior management" who were not called to refute her evidence. The court considered that it would not be just to permit the new point in the circumstances of this case, including the failure of the appellant to plead any GMF at the Tribunal, to reply to the statutory questionnaire, amend its pleadings or call any evidence in respect of such a GMF defence. It considered that the conclusion of the Tribunal that no GMF had been established was unassailable.

Genuine Material Factor Defence

The court accepted the formulation of the criteria adopted by the Tribunal for a genuine GMF as being that once a difference in terms is identified, a presumption passes to the employer who must then explain the reason (the material factor) for the difference between the complainant and her comparator. This must be a non-discriminatory reason and nothing to do, directly or indirectly, with sex. The employer must also show that this was the real and genuine reason for the difference, that the reason was causative of the difference between the terms, that this is a significant and relevant difference between the woman's case and the man's case; and that the difference is not a difference of sex.

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The court said the appellant's assertion that it did raise and establish a GMF was contradicted by the findings of the Tribunal which concluded that it was not raised in the pleadings nor in the evidence of their only witness. The court commented that the appellant did not reply to the claimant's statutory questionnaire and the specific questions as to whether the appellant was relying on such a defence and if so to provide full details. It said there was no satisfactory or proper explanation from the appellant for this failure:

"The appellant had every opportunity to plead a GMF defence, file witness statements in support of such a defence and call evidence for consideration of the tribunal. It conspicuously failed to do so and there is simply no explanation for this failure or refusal."

The court noted email correspondence dated 10-14 May 2010 from which it said it was apparent that there were discussions amongst senior management of the NICtS about the removal of "fluid grading" following the devolution of justice and the implications of this factor on the DP and Grade 7 Legal Officer recruitment exercise which had begun before devolution. The court said that it was surprising that throughout the course of the hearing before the Tribunal the appellant did not address these issues or adduce any evidence from witnesses of sufficient seniority to address them.

The court commented that since the claimant satisfied the Tribunal that she was employed on like work the equality clause will operate in her favour unless the employer can demonstrate the variation in contract terms was due to a genuine material factor other than sex. It said the Tribunal's finding that the claimant was performing Grade 7 Legal work from October 2011 and that she was doing like work with two male comparators raised the rebuttable presumption of sex discrimination and the entitlement to an equality clause in her contract and the onus of establishing a GMF defence rested on the employer. The court said it was open to the appellant to call evidence from senior civil servants to address the issues of equal pay and the GMF but chose not to do so.

In its decision, the Tribunal said it had no doubt that, following the abolition of fluid grading/fluid complementing, if a vacancy occurred in OSO or elsewhere in the Department of Justice for a substantive permanent Grade 7 Legal the NICS policy would require any DP Legal or other member of staff applying to take part in an open recruitment/selection procedure. It said that such a policy, on the evidence, would not seem to be discriminatory but reliance on this by the appellant was in error as it did not provide a defence of GMF in the circumstances of the claimant who had established that she had been doing "like work" with the work of her comparators and was not receiving the same pay or benefits. The Tribunal said that reliance upon what would happen in the event, if it occurred, of a substantive vacancy at Grade 7 Legal, therefore, did not establish the defence of GMF and there was a failure by the appellants to properly consider the individual particular circumstances of the complaint to ensure she received equal pay with her comparators. It commented that if the claimant's work had been restricted to DP Legal work, so that no like work could be established, then no issue of equal pay would have arisen and would have avoided the very risks to equal pay envisaged by senior management at the time when fluid grading was abolished. The Tribunal concluded that it was not satisfied that the appellant had proved that variation between the claimant's contract and those of her comparators was genuinely due to a material factor which was not the difference of sex.

The court was satisfied that the Tribunal dealt with all the relevant factual and legal issues properly and comprehensively and that its decision should be affirmed. It agreed with the claimant that the

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point raised by the appellant, namely that the Tribunal should have distinguished between different periods of the claimant's employment, was a matter for argument at a remedies hearing.

The court dismissed the appeal.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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