

McAvoy, Llewellyn and others v. South Tyneside BC, Hartlepool BC, and Middlesbrough BC

1) Reference Details

Jurisdiction: Employment Appeals Tribunal, UK

Date of Decision: 24 June 2009

Case Status: Concluded

Link to full case:

<http://www.employmentappeals.gov.uk/Public/RecentJudgments.aspx>

2) Facts

A group of male workers [M2] sought to 'piggyback' on the successful claims of their female co-workers' to equal pay. The claims of their female co-workers concerned women employed in predominantly 'female jobs' by public authorities (Councils) who contested the payments made under 'bonus schemes' which were only available to persons employed in predominantly 'male jobs' [M1]. These bonuses were discontinued in 2005 as the pay structures were replaced, but in some cases they continued for two or three years as part of 'pay protection'.

At various stages between September 2005 and August 2007 the cases of the female workers were successful, although due to the phasing out of the payments they were awarded payments in arrears rather than future enhancements. Many of the claimants were also men who worked with the female claimants and who argued that if the women's claims succeeded they would be entitled to the equivalent payments, this time using the successful women as a comparator. The men [M2] claimed that they would be unfairly discriminated against in relation to the women should the women be successful.

The women's claims were successful but the matter of the men's [M2] contingent claims remained unresolved. The issue was put as follows:

"Whether contingent male claimants, who rely upon female claimants in comparable work on female dominated jobs who have been successful in their equal pay claims, can rely upon those females as their comparators, or whether there is a genuine material factor untainted by sex explaining the difference in sex."

The Employment Tribunal judge held that the male claimants were entitled to equality with their female co-workers, but only as of the date when the female comparators presented their successful claims and not arrears prior to that date.

The Councils appealed this decision (that the claimants were able to make any such claim), and the male claimants [M2] cross-appealed against that part of the decision which did not to extend their entitlement beyond the dates of their comparators' claims, effectively denying them the arrears payments.

In relation to one of the councils - South Tyneside - the original case brought by the female claimants had been settled, a settlement which was agreed for both male [M2] and female claimants until the Council decided at the last minute to apply the settlement only to the female claimants. As such, this claim by the male claimants [M2] went forward under the Sex Discrimination Act 1975. It was also decided in favour of the claimants [M2] on the same limited terms, a decision which the Council appealed.

3) Law

National law

- Equal Pay Act 1970
- Sex Discrimination Act 1975

Case law

- *James v Eastleigh Borough Council* [1990] ICR 554

4) Legal Arguments

The Male Appellants - M2

The claimants [M2] argued that as their case has been favourably decided they were entitled to back pay for the full period for which their female comparators were awarded payment in arrears. They argued that the Employment Tribunal, in making its award for arrears to the female employees, did no more than declare the existence of a 'modification' which had already taken effect, therefore, the comparison for the male claimants [M2] is against that same period of time.

The Appellant Councils

Equal Pay Act Claims

The Councils argued that claims such as those of the male workers were not admissible under the Equal Pay Act 1970 (the Act). They argued that the male claimants [M2] were only able to compare terms with the female workers who did not benefit from the modification. As such they submitted that 'piggyback' claims are not admissible under the Act.

The Councils claimed that there is a 'material difference' between the male [M2] and female claimants which explains the difference in pay for reasons other than their sex. This difference the Councils argued was that the female claimants were the beneficiaries of a tribunal award while the men [M2] were not. In effect, the Councils argued that the women were able to compare themselves under the Act with the other male comparators [M1] whilst the male claimants [M2] could not.

In relation to the period of time where the comparison operates, the Councils argued that the pre-existing modification of the contract was a legal fiction. The Act, they submitted, could not be interpreted as allowing comparison with an unrecognised term of the contract; it could only take effect from the time that the modification has been confirmed. The Councils argued that were the men [M2] able to claim on the basis of this hypothetical 'modification' they need not have waited for the successful claim of the women, they could have claimed on the basis that the 'modification' of the women's contract was deemed to have already taken place.

The Appellant – South Tyneside Council – Sex Discrimination Claim

Regarding the claims against South Tyneside Council under the Sex Discrimination Act the Council submitted that the claimants [M2] suffered no detriment, or that any detriment suffered was as a litigant rather than as an employee. Furthermore they argued that the difference in

treatment was not a consequence of sex but rather their status as contingent rather than direct claimants.

5) Decision

Equal Pay Act Claims

The Appeals Tribunal dealt first with the question as to whether a man could claim equal pay after a woman co-worker had been successful in her claim by comparing herself with another man doing a different job, but of a comparable nature, for a higher wage. The Court determined that if the man were to make his claim once the woman was receiving the higher pay then he would, under the terms of the Equal Pay Act, be entitled to have his contract treated as 'modified as not to be less favourable'. This is so as the Act does not distinguish between terms which are statutorily imposed or terms which are agreed. The Appeals Tribunal held that there was no sign in the Act that it was intended to exclude claims which arise out of the modification of a contract in application of the 'equality clause'.

The Appeals Tribunal also affirmed that it is not always necessary to ask why the difference in pay is awarded. It is in some cases, such as this one, sufficient to be able to note that the difference is 'because he is a man'. In other words it does not matter that the reason is due to a previous decision of the court where the female comparators received their benefit by reference to a different male comparator. The difference between these claimants [M2] and their female comparators is entirely a 'gender-based criterion'. Using the 'but for' test set down by Lord Goff in *James v Eastleigh Borough Council* [1990] ICR 554, but for the claimants' sex they would be entitled to the same pay as their comparator female colleagues.

On the matter of the time period for which the claimants may claim arrears, the Appeals Tribunal held that the female claimants accrued a right to the equivalent pay of their male comparators over a period of time. Therefore, it made no difference that they were not paid at the time but rather in arrears. The Appeals Tribunal provided that if the female had received the equal pay at the time, then the male claimants [M2] would have been entitled to equal pay. Therefore the Appeals Tribunal determined that the male contingent claims also covered the same periods of arrears as their female comparators.

With regards to the hypothetical case where a male claimant [M2] may pursue a claim based on the notional higher pay of a female colleague who has not pursued an equal pay claim in reality but could potentially do so, the Appeals Tribunal dismissed this possibility on the grounds that the male claimant [M2] would lack the concrete comparison necessary to succeed in his claim.

Sex Discrimination Act Claim

The Appeals Tribunal determined that the offer and acceptance of the settlement by the female claimants was a benefit and that denial of that benefit was a detriment.

It is no defence to argue that had the primary claimants been men and the contingent claimants been women they would have been treated the same way, as that behaviour would also have been discriminatory on the grounds of sex. In this case there was a clear difference in treatment applied based on sex.

In conclusion, the Appeals Tribunal determined that where – had the claims been decided by a Appeals Tribunal – the respondents would have been obliged to pay sums of money to both direct and contingent claimants, male and female, they could not be allowed to avoid this result by making settlements only in respect of one group.

The Appeals Tribunal dismissed all appeals by the Councils and granted the cross-appeal of the appellants [M2] awarding them full arrears covering the full period for which their female counterparts were awarded payment.