

## **Jenkins v Kingsgate (Clothing Productions) Ltd (No 2) [1981] IRLR 388**

### **1) Reference Details**

Jurisdiction: United Kingdom of Great Britain and Northern Ireland, Employment Appeal Tribunal and European Court of Justice

Date of Decision: 31 March 1981

Case Status: Concluded

### **2) Facts**

The applicant, Mrs Jenkins, worked for the respondent company on a part-time basis of around 30 hours per week. She brought a claim for discrimination on the basis that a male worker who worked more hours than her but in the same position, was getting paid nine and a half pence an hour more than her. The defendants argued that the difference in pay was justified on the grounds of discouraging absenteeism and ensuring that the machinery was used to its fullest potential.

The Industrial Tribunal found that the difference in pay was “motivated” by the need to discourage absenteeism and to encourage greater productivity and that it was a valid defence against an equal pay claim.

The Employment Tribunal agreed that the applicant could not succeed under the Equal Pay Act alone and sought clarification from the European Court on the matter under European Community law.

### **3) Law**

#### *National Legislation*

- Equal Pay Act 1970 s. 1(3)
- Sex Discrimination Act 1975 s. 1(1)(b)
- European Communities Act 1972 ss. 2(1) and (4)

#### *European Legislation*

- Treaty of Rome, article 119
- Equal Pay Directive, Council Directive 75/117/EEC

#### *Case Law*

- *Shields v E Coomes (Holdings) Ltd* [1978] IRLR 263
- *Kearns v Trust House Forte Ltd* (unreported) [overruled]
- *Clay Cross (Quarry Services) Ltd v Fletcher* [1978] IRLR 361
- *Handley v H Mono Ltd* [1978] IRLR 534
- *Durant v North Yorkshire Area Health Authority and Secretary of State for Social Services* [1979] IRLR 401
- *Macarthys Ltd v Smith (No 2)* [1980] IRLR 209
- *Griggs v Duke Power Company* (1971) 401 US 424

#### **4) Legal Arguments**

##### *The Claimant*

The claimant argued that the difference in pay between men and women in the same position was not justified. The defendant's justifications, in her submission, were purely personal economic reasons which did not satisfy the requirements laid down in article 119 of the Treaty of Rome. The difference in pay was therefore indirectly discriminate against women.

##### *The Defendant*

The defendant submitted that the difference in pay was justified by the need to discourage absenteeism and to encourage greater productivity. They further contended that there was a "material difference" between the work of the applicant and that of the male position.

#### **5) Decision**

In allowing the appeal and remitting the case to the Industrial Tribunal the Employment Appeal Tribunal held that, taking into account European law, a difference in pay between men and women cannot be justified simply by showing that the women are part-time workers. It opined that something more is required.

The Tribunal held that "something more" can be based on economic considerations:

*"In our judgment a differential in pay between part-time workers (who are predominantly women) and full-time male workers can be justified as being due to a material difference by showing that the pay differential does in fact achieve economic advantages for the employer."*

However, this economic advantage must be proven. For the 'material difference' justification between the male and female workers to be successful, therefore, the employer would have to show that the pay difference actually achieved that different objective:

*"We therefore hold that in order to show a 'material difference' within s. 1(3) of the Act of 1970 an employer must show that the lower pay for part-time workers is in fact reasonably necessary in order to achieve some objective other than an objective related to the sex of the part-time worker."*

The tribunal then laid down a series of principles for an Industrial Tribunal to follow in cases considering part-time workers under the 1970 Equal Pay Act:

(1) Do the part-time workers consist mainly of women?

(2) Do the part-time workers do "like work" to full-time male employees of the same employer?

(3) If the answers to (1) and (2) are “yes”, the equality clause will apply unless the employers can justify the differential in pay by showing a material difference for the purposes of s. 1(3).

(4) If the Industrial Tribunal finds that the employers intended to discriminate against women by paying part-time workers less, the employers cannot succeed under s. 1(3).

(5) Even if the employers had no such intention, for s. 1(3) to apply the employer must show that the difference in pay between full-time and part-time workers is reasonably necessary in order to obtain some result (other than cheap female labour) which the employer desires for economic or other reasons.