

Employment Law Update: Stop Press |

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EMPLOYMENT LAW UPDATE STOP PRESS

Birmingham City Council (Appellant) v Abdulla & Others, (Respondents)
Michaelmas Term [2012] UKSC p47

Yesterday the Supreme Court by a majority of three to two (Lord Reid, a Scottish Judge being part of the majority) gave considerable hope to many workers that their rights to equal pay will no longer be ignored.

In this case 174 claimants joined as parties to a single action against Birmingham City Council in the High Court, Queens Bench division.

The claimants (all except 4 are women) alleged that their former employees were in breach of the "equality clause" which by Section 1(1) of the Equal Pay Act 1970 ("the Act") as substituted by Section 8(1) of the Sex Discrimination Act 1975, was deemed to have been included in their contracts of employment. On 1st October 2010 the Act was repealed and the provisions of it which the Supreme Court had to consider was replaced by provision to similar effect in Chapter 3 of Part 5 and in particular in Chapter 4 of Part 9 of the Equality Act.

Birmingham City Council had attempted to have the claim struck out. The claimants sought equal pay founding on the section of the Act which referred to "where the woman is employed on work rated as equivalent with that of a man in the same employment".

The claimants allege that Birmingham City Council employed them on work rated as equivalent with that of certain men in the same employment pursuant to, the National Joint Council for Local Authorities Services (West Midlands Provincial Council) Manual Workers Handbook 1987, known as the Blue Book and to a Job-Evaluation Scheme referred to in it but that their contracts did not provide for the payment of substantial bonuses for which the contract provided for by Section 1(2)(b)(i) and (ii) of the Act. I may say that this is a situation not uncommon in Scotland.

These claims would have been time barred if made to an Employment Tribunal. Time bar takes effect either 6 months or 9 months after the last day on which the woman was employed in the employment.

Birmingham City Council's application to the Court was founded on Section 2(3) of the Act as amended which stated -

"Where it appears to the court in which any proceedings are pending that a claim or counterclaim in respect of the operation of an equality clause could more conveniently be disposed of separately by an employment tribunal, the court may direct that the claim or counterclaim shall be struck out; and (without prejudice to the foregoing) where in proceedings before any court a question arises as to the operation of an equality clause, the court may on the application of any party to the proceedings or otherwise refer that question, or direct it to be referred by a party to the proceedings, to an employment tribunal for determination by the tribunal, and may stay or sist the proceedings in the meantime."

Birmingham City Council argued at first instance that the reasons why each claimant had failed to present her claim in time to the tribunal were irrelevant, that the claims "could more conveniently be disposed of by the tribunal notwithstanding that such disposal would be by way of immediate dismissal for want of presentation in time and that in the circumstances the first part of Section 2(3) conferred on the Court the right to strike out the claims.

In the Appeal Court and in the Supreme Court, Birmingham City Council modified its argument. It invited the Court to rule that, except where a claimant could provide a reasonable explanation for her failure to do so, her claim should be struck out.

Lord Wilson in the Supreme Court opined -

"We may readily expostulate that it cannot be more convenient for a claim to be disposed of in a forum in which, at the outset, and without reference to its merits, it would be required to be dismissed. But the issue in this appeal is somewhat more complicated than that. What, asks Birmingham, was Parliament's purpose in providing a strict time limit for the presentation of claims to the tribunal if those who

fail to comply with it can have their claims heard elsewhere? The suggested absence of any good answer to that question leads, says Birmingham, to a need for us to stifle our expostulation and, in a more measured way, to conclude that the immediate disposal in the tribunal of a time-barred claim would be otherwise than more convenient only in the case of those claimants who were to provide a reasonable explanation for their failure to present their claims to it in time."

He then after narrating the history of equal pay for women and the history of the time bar provisions states the following -

"No doubt in most cases it will be more convenient for the tribunal to dispose of a claim in respect of the operation of an equality clause, provided that it can still be brought there, rather than for the court to do so. If the claim can no longer be brought there, the effect of Birmingham's submissions in this appeal, founded on the decision of Slade J, would be to convert the reasons why the claimant had failed to present her claim in time to the tribunal into the factor determinative of whether it be struck out by the court. But I do not regard the reasons for her failure as relevant in any way to the notion of convenience. In my view Birmingham aspires in effect to re-write section 2(3); and to introduce into the law a principle which would in some cases in effect serve to shorten the period of limitation allowed by Parliament for the bringing of claims in court."

He later states -

"I would hold that the present claims cannot more conveniently be disposed of by the tribunal and that Birmingham's invocation of section 2(3) of the Act was rightly rejected both by the deputy judge and by the Court of Appeal. I prefer the categorical terms favoured by the deputy judge to the qualified terms favoured by Mummery LJ. The latter referred to cases of abuse of process. Nothing can detract from the inherent jurisdiction of the court to strike out a claim in respect of the operation of an equality clause if it were to represent an abuse of its process; one example might be that of a claimant who had been invited to present a complaint in time to the tribunal but who had spurned the invitation in order to secure what the court considered to be an illegitimate advantage by bringing the claim before itself. But the subject of section 2(3) was not abuse of process; and I would hold, for the purpose both of the first part of the subsection and of its successor, namely section 128(1) of the Equality Act 2010, that a claim in respect of the operation of an equality clause can never more conveniently be disposed of by the tribunal if it would there be time-barred."

The Dissenting View

Lord Sumption (with whom Lord Carnworth agrees) stated *inter alia* -

“The majority of the Court proposes to dismiss the appeal. I shall therefore be brief in explaining why, for my part, I would have allowed it. In bald summary, the decision of the deputy judge and the Court of Appeal frustrates the policy underlying the provisions of the Equal Pay Act relating to limitation. Since those provisions are an important part of the statutory scheme, I find it impossible to accept that this result can have been intended by Parliament.”

and later states -

“The legislative policy underlying section 2(4) of the Act, both in its original and its amended form, is clear. It is to confer a degree of protection on the employer. There is no other purpose that can be imputed to the legislature, and none was plausibly suggested in argument. In "standard" and "stable employment" cases the object was to restrict the employer's exposure to equal treatment claims to those which were brought while the employment relationship still subsisted, or within a short time thereafter, so as to enable him to draw a line under any employment relationship at that point.”

Although the law relating to prescription is different from England, the law relating to equal pay is not. The decision of the majority will allow many thousands of women in Scotland to remedy the gross injustice done to them.