Employment Law Brief

with

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One of the odd features of the Equality Act is that when it comes to sex – but not the other protected characteristics – there is a particular kind of claim that needs to be brought when complaining about discrimination in contractual terms and conditions. An employee denied promotion because of sex can simply bring a direct discrimination claim and the issue will be why they were denied promotion. If the same employee was complaining about their contractual pay, however, then they would have to bring an equal pay claim.

The process of bringing an equal pay claim can seem complex. I have often found it helpful to think of it like a tennis match.

It is for the employee to serve by showing that they are employed on equal work with a valid comparator but that their pay (or other contractual term) is not equal. If the employer cannot explain the difference in pay then the claim succeeds - there is no need for the employee to show any intention to discriminate. The employer can return serve, however, by demonstrating that there is a reason for the difference in pay – a 'material factor' – which does not involve treating employees less favourably because of sex. The ball then returns to the employee's court, and they can counter that although there is no direct discrimination, there is indirect discrimination. To do this, they have to show that the factor relied on by the employer puts women (or men – thought this kind of claim is usually brought by women) at a significant disadvantage compared to men doing equal work. If that argument clears the net, however, then the employer can still win the point by showing that the reason for the difference in pay is a proportionate means of achieving a legitimate aim.

Each of these steps can carry its own complications, but ultimately the process is designed to answer the same question as a normal discrimination claim. Once the technicalities of the process have been stripped away the question is why one employee is being paid more than another. The reason does not have to be a fair one, it just has to be the genuine reason for the difference and not tainted by sex discrimination. It all boils down to whether or not the employer's pay system discriminates – either directly or indirectly – on the grounds of sex.

The Court of Appeal examined this issue in the case of **McNeil v HMRC.** The claimants (who were women) were employed on the same grade as the men they claimed as comparators. The men, however, were near the top of the grade whereas the claimants were near the bottom. The reason for the difference in pay was essentially length of service – the comparators had simply been in the job longer.

The issue was whether using length of service as a factor in determining pay was discriminatory. Now there is a general view that relying on length of service to determine pay will tend to disadvantage women because on average they are likely to have shorter service than men. They may have taken career breaks for family reasons or it may simply be that they are now entering professions that have been traditionally done by men and have shorter service simply because they are relatively new. But just because length of service carries this general risk of discrimination is not enough to get the ball over the net in an equal pay claim. The

employees had to show that *in this particular case* the use of length of service placed woman at a particular disadvantage. Their problem was that the statistics were not straightforward.

The claimants argued that women were underrepresented at the bottom of the pay scale and men were overrepresented at the top. The trouble was that if you looked at the average pay of men and women across the grade as a whole, there was no statistically significant difference. The claimants argued that looking at an overall average merely smoothed out the differences in distribution. The right approach was to consider how many women were disadvantaged by the grading system compared to men – which could best be seen by seeing how they were 'clustered' around the lower parts of the grade.

The Court of Appeal did not agree. In an equal pay claim it was the actual amounts paid to employees that counted – not the distribution of employees across a pay grade. The only sensible way of seeing whether women were disadvantaged in the amount they were paid was to look at their average pay across the grade and compare it that of the men. On this analysis it was accepted that there was no significant difference and so it followed that the equal pay claims failed.

For me the writing was surely on the wall for the claimants when experts disagreed about how to analyse the allegedly discriminatory impact of the grading system. It was for the employees to show that they were at a particular disadvantage and the courts expect statistics that demonstrate that disadvantage convincingly. If you have to argue about methodology to demonstrate the difference, then you are already on the back foot.

But even if the claimants had shown that there was a difference in impact, that would not have been the end of the matter. It would still have been open to the employer to argue that allowing employees to progress up a grade over time was a proportionate means of achieving a legitimate aim. This is a balancing exercise – the more discriminatory the system is, the harder it is to justify. On the other hand, if the discriminatory impact is so marginal that rival experts can disagree over whether it even exists, then justification should not present too much of an obstacle. Rewarding loyalty and experience is a legitimate aim and a Tribunal is unlikely to have a problem with longer serving employees being made more than their newer colleagues. The problem comes when a pay spine is disproportionately long. Pay progression over, say, five years is unlikely to result in any significant discriminatory impact and would be easy to justify in any event. Progression over longer periods is more problematic. Not only is there more likely to be a discriminatory impact (and in very long pay scales age discrimination might also be a factor) but there are few jobs where an employee with 10 years' experience is likely to be more effective than someone who has been in the post for six or seven years. If, however, an employer can show that its pay system is genuinely aimed at rewarding employees for the work they are actually doing then there is little prospect of it being successfully challenged.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman