Neutral Citation Number: [2019] EWCA Civ 725

Case No: A2/2017/3437

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HON MRS JUSTICE SIMLER, PRESIDENT
UKEAT/0277/16

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2019

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE BEAN
and
LORD JUSTICE HADDON-CAVE

- -

Between :

GRAYSONS RESTAURANTS LTD	**Original Appellant**
- and –	
MISS C JONES AND OTHERS	**Claimants**
- and –	
SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Interested Party/ Appellant**

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Katherine Apps (instructed by **Government Legal Department**) for the **Secretary of State**
Claire Darwin (instructed by **Attorney General's Office**) appeared as advocate to the Court

Hearing date : 2 April 2019

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Approved Judgment

Lord Justice Bean:

1. The question raised in this appeal is whether a claim for equal pay which has not been determined when the employer becomes insolvent can constitute "arrears of pay" payable by the Secretary of State under Part XII of the Employment Rights Act 1996.

The litigation

2. In 2007 – 12 years ago - a multiple claim under the Equal Pay Act 1970 was brought against Liverpool City Council. The 86 Claimants were catering assistants, employed by Liverpool City Council, where they were a statistically female dominated workforce. The Claimants sought to compare their roles with 14 statistically male-dominated comparator job titles (including gravediggers, road sweepers and refuse collectors). By the time of the decision under appeal it had been conceded that the Claimants were performing work of equal value to each of the comparators.

3. The Claimants' employment transferred from Liverpool City Council to a private company called Hopkinson Catering Ltd and then to Duchy Catering Ltd ("Duchy") on 27 February 2007. Duchy went into administration in early 2009. Administrators (from KPMG LLP) were appointed on 9 January 2009. On the same day Graysons Restaurants Ltd ("Graysons") purchased Duchy's assets and took over the contracts of employment of the Claimants as transferee.

4. The case, at that stage involving only the Claimants and Graysons, was heard in the employment tribunal ("the ET") at Liverpool on 25 May 2016 by Employment Judge Robinson, sitting alone. He held that:

> (a) Equal pay arrears are not a debt payable at the time of transfer or on the appropriate date where the equal pay claim has not been determined and quantified. The debt will only be due if the equal pay claims succeed and not before;
>
> (b) If he was wrong about that, any liability in excess of the eight week sum guaranteed by the statutory scheme transfers to the transferee and is not extinguished.

5. Graysons appealed to the Employment Appeal Tribunal ("the EAT"). Neither side had informed the Secretary of State of the ET's decision or the appeal prior to the hearing. Simler P rightly took the view that the Secretary of State had an interest in the outcome and arranged for the Government Legal Department to be notified. The Secretary of State applied to be, and was, joined as an interested party and appeared by counsel at a resumed hearing in the EAT on 7 November 2017.

6. By a reserved judgment dated 28 November 2017 and reported at [2018] ICR 670, Simler P held that EJ Robinson had erred in concluding that arrears of pay arising from an equal pay claim that had not yet been determined could not constitute arrears of pay under Part XII of the Act. She held that they can, and that they can be a debt within the meaning of s 182: the Secretary of State is thus potentially liable to pay them, subject to the limits imposed by the statute, namely a maximum period of eight weeks and a maximum weekly sum (this being £479 per week with effect from 6 April 2016). She also held that Graysons' liability as transferee for the equal pay

claims was not extinguished by the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE"); and, while liability for the sums guaranteed by the Secretary of State did not transfer (thanks to regulation 8(5) of TUPE), the remainder of the claims did transfer.

7. Graysons did not seek permission to appeal to this court, but the Secretary of State did, on two grounds, namely that the EAT erred in finding (1) that equal pay claims could, in principle, fall within the scope of ss 182 and 184(1)(a) of the 1996 Act, and (2) that the claims for equal pay in this case were claims for debt within s 182.

8. By an order made on the papers on 30 July 2018 Underhill LJ granted the application. It was later agreed that there would be no order as to costs between the parties whatever the outcome of the appeal.

9. On 9 January 2019 solicitors acting for Graysons notified the court that the litigation between the Claimants and Graysons had been settled, thus rendering the appeal at least arguably academic. I granted an application by the Secretary of State for the appeal to this court to proceed nevertheless. Since the point raised was of importance and has never been decided by this court, the Attorney General was asked to appoint an advocate to the court to provide assistance by oral and written submissions. Ms Claire Darwin was appointed and I am grateful to her for her assistance. The Secretary of State was represented by Ms Katherine Apps, who had also appeared in the EAT.

The legal framework

10. In accordance with its obligations under Directive 2008/94, which consolidated the original Insolvency Directive 80/987/EEC and subsequent amendments, the UK guarantees certain payments to employees of insolvent employers. These are governed by Part XII of the Employment Rights Act 1996. Section 182 is headed "Employee's rights on insolvency of employer" and sets out the conditions that give rise to an obligation on the Secretary of State to pay debts to which Part XII applies. It provides as follows:

> "If, on an application made to him in writing by an employee, the Secretary of State is satisfied that-
>
> (a) the employee's employer has become insolvent,
>
> (b) the employee's employment has been terminated, and
>
> (c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this part applies,
>
> the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt."

11. Accordingly, to be entitled to payment from the National Insurance Fund, the employee must (amongst other things) be entitled to payment of a Part XII debt on 'the appropriate date'. The appropriate date is defined by s 185 of the Act and varies

according to the nature of the debt claimed. For the purposes of arrears of pay, the appropriate date is the date on which the employer became insolvent.

12. Section 184(1) defines the categories of debt that qualify for payment under s 182. They are:

> "(a) any arrears of pay in respect of one or more (but not more than) eight weeks,
>
> (b) any amount which the employer is liable to pay the employee for the period of notice required by section 86(1) or (2) or for any failure of the employer to give the period of notice required by section 86(1),
>
> (c) any holiday pay…
>
> (d) any basic award of compensation for unfair dismissal or so much of an award under a designated dismissal procedures agreement as does not exceed any basic award of compensation for unfair dismissal to which the employee would be entitled but for the agreement, and
>
> (e) any reasonable sum by way of reimbursement… of the … premium paid by an apprentice or articled clerk."

13. Section 184(2) identifies certain specific amounts that are required to be treated as arrears of pay for the purposes of s 184(1)(a). They are a guarantee payment, any payment for time off, remuneration during suspension on various grounds, and remuneration under a protective award under s 189 of the Trade Union and Labour Relations (Consolidation) Act 1992. The list does not include a compensatory award for unfair dismissal, nor compensation for unlawful discrimination. There is no express mention of equal pay claims.

The Secretary of State's submissions

14. The Secretary of State submits that:

i) "Arrears of pay" in section 184(1)(a) falls to be interpreted consistently with ss 220-224 and 234 ERA.

ii) The phrase "arrears of pay" comprises:

a) An employee's "weekly pay" as calculated by reference to s 220-224 and 234 ERA ; and

b) Those claims listed in section 182 (2) ERA (and no others), subject to the cap on weekly pay in section 186 ERA. Those arrears cannot exceed 8 weeks.

(iii) A claim for equal pay under the Equal Pay Act 1970, Chapter 3 of the Equality Act 2010 or Article 157 TFEU is not a claim for arrears of pay under s 184(1)(a) or s 184(2). Such claims are "conceptually qualitatively and

practically different from pay claims which fall within ss 184(1)(a) and184(2) ERA".

Discussion

15. The present litigation has been going on for so long that the claims relate to equal pay pursuant to section 1 of the Equal Pay Act 1970, under which an employee's contract was deemed to include an equality clause. Under section 66 of the Equality Act 2010, which has replaced section 1 of the 1970 Act, the terms of the employee's work are to be treated as containing a sex equality clause. There are some differences between the old and new statutory regimes but Ms Apps and Ms Darwin agreed that it would have made no difference to the correct outcome of these appeals if the 2010 Act had been applicable to them.

16. Section 1 of the Equal Pay Act 1970 provided, so far as relevant:-

> "1. **Requirement of equal treatment for men and women in the same employment**
>
> (1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.
>
> (2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that –
>
> …
>
> (b) where the woman is employed on work rated as equivalent with that of a man in the same employment –
>
> (i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and
>
> (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term.
>
> (3) An equality clause falling within subsection (2)(a), (b) or (c) above shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor –

> (a) in the case of an equality clause falling within subsection (2)(a) or (b) above, must be a material difference between the woman's case and the man's;…"

17. Section 2 (1) gave industrial tribunals (now ETs) jurisdiction to determine:-

> "any claim in respect of the contravention of a term modified or included by virtue of an equality clause, including a claim for arrears of remuneration… in respect of the contravention."

18. The Equal Pay Act 1970 thus adopted a contractual model, automatically implying into workers' contracts of employment an equality clause which operated to confer equality in terms except where the employer could show that any difference was genuinely due to a material factor which was not the difference of sex.

19. As Lord Wilson SCJ explained in *Abdulla and others v Birmingham City Council* [2013] 1 All ER 649; [2012] ICR 1419 at [15]:

> "Parliament resolved that the mechanism of the provision for equal pay for women should be by its very insinuation into their contracts of employment. Section 1(2) originally provided that '[i]t shall be a term of the contract under which a woman is employed… that she shall be given equal treatment with men.' With effect from the date when the 1970 Act came into force, the section was radically recast by the 1975 Act, which had been enacted in the interim. But the contractual mechanism was retained. The substituted s.1(1) thenceforward provided that: 'If the terms of a contract under which a woman is employed… do not include… an equality clause they shall be deemed to include one."

20. Thus, in the early EAT case of *Sorbie and Others v Trust Houses Forte Hotels Limited* [1977] 1 QB 931, Phillips J had held that the effect of the Equal Pay Act 1970 was to modify the term in the women's contracts in order to strike out the less favourable rate of pay (85 pence an hour), and to substitute a term that the women were entitled to be paid 97.5 pence an hour. Phillips J held that when making an order as to compensation, the ET had to take the contract of employment *as modified* by the sex equality clause. This allowed the women in question to claim equal pay from the day that the Equal Pay Act 1970 came into effect (29 December 1975), until further modification of their contracts by statute or further agreement. As Simler P held in the present case, the entitlement to equal pay "is treated as having accrued to the claimant payday by payday…by way of (part) consideration for the work done by her over that period, even though that entitlement was not recognised or satisfied by the employer at the time."

21. In *Reading Borough Council v James and others* [2018] ICR 1839 Simler P said at 1843A-B:-

> "In other words… if the necessary conditions in section 1(2) of the Equal Pay Act 1970 are satisfied (that is, a term of the woman's contract is less favourable than a term of the man's,

> they are employed on work of equal value and there is no material factor to explain the difference) the equality clause operates automatically to equalise the less favourable term in the woman's contract with the corresponding more favourable term in the comparator man's contract without the need for a tribunal order declaring that to be the case. Once a tribunal comes to make an award, it is doing no more than declaring the existence of a statutory modification of the contract that has already taken effect, and assessing the amount of arrears to be paid."

22. Ms Apps relied on the decision of the EAT, Burton J presiding, in *Benson v Secretary of State for Trade and Industry* [2003] ICR 1082. In that case the Claimant employees had the benefit of a collective agreement between their trade union and the employer's trade organisation under which they were contractually guaranteed employment at a specified hourly rate for their full contractual hours after the first four hours lay-off in any week. The employers become insolvent and the employees applied for payment of wages pursuant to s 182 of the 1996 Act. The Secretary of State treated the application as one for a statutory guarantee payment under section 28 of the Act and awarded a lesser amount than what would have been due under the collective agreement. The EAT, affirming the ET, held that the contractual guarantee payment was not a debt falling within s 184 of the Act. In what appears to have been an unreserved judgment, Burton P held that s 184 was intended to define and limit the debts owed by an insolvent employer to its employee which were the subject of express protection and payment by the Secretary of State. Paragraphs (b)-(e) of s 184(1) were not intended to be declaratory or explanatory of "arrears of pay" in paragraph (a), but listed items which were not arrears of pay and would not have been debts for the purpose of s 182 but for their express inclusion in those paragraphs. The EAT considered that the separate express provision for holiday pay in s 184(1)(c) was a very strong pointer against the proposition that a contractual payment due in respect of a period of layoff could be recoverable under s 184(1)(a) as arrears of pay.

23. Ms Apps also referred us to paragraph [18] of the judgment in *Benson*, where Burton P, after referring to the definition of "wages" in section 27(1) of the 1996 Act, which includes "any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise", observed that "the section we are dealing with under section 184(2) is very substantially more restrictive and intentionally so".

24. All of this is no doubt correct, but I do not consider that it assists us in determining whether an equal pay claim yet to be determined comes within the definition of "arrears of pay" under s 184(1)(a). Nor does the unreported decision of the EAT (in that case Burton P sitting alone) in *Connor v Secretary of State for Trade and Industry*, UKEAT/0589/05/SM (20 December 2005), in which it was held (unsurprisingly) that a compensatory award for unfair dismissal and a protective award under TUPE did not fall within section 184. The President said at [26] that "it is quite clear that the only obligation that the guaranteeing institution has is in respect of the five categories of debts defined in subparagraph (1) of section 184". Again, this is correct, but does not take the present debate further.

25. Ms Apps also sought to rely on the sections of the 1996 Act – Chapter II of Part XIV – concerning the concept of "a week's pay". There is no interpretation provision in Part XII of the Act. Part XIV (ss 210-235) deals with interpretation for the whole Act. The phrase "arrears of pay" is not defined (if it had been, no doubt this litigation would have been unnecessary); nor is the single word "pay". In s 220 we find that "the amount of a week's pay of an employee shall be calculated for the purposes of this Act in accordance with this Chapter"; and ss 221-229 then make provision in elaborate detail as to how a week's pay is to be calculated. The calculation is relevant to several significant statutory rights, for example basic awards for unfair dismissal (s 119(2)) or redundancy payments (s 162(2)). But it is of no help in determining whether claims for equal pay fall within the phrase "arrears of pay".

26. Ms Apps further submitted that claims for equal pay are "conceptually qualitatively and practically" distinct from claims for arrears of pay. I accept that a claim for equal pay is not identical in all respects to an ordinary claim for arrears: the latter could be the subject of a common law contract claim, whereas the former required a statute to bring it into existence. But they have many similarities, including in many cases the same choice of jurisdictions. A claim for what might be called "ordinary" arrears of pay may be brought (depending on amount) in the county court or High Court or, if it amounts to an unauthorised deduction from wages within the terms of Part II of the 1996 Act, in an employment tribunal. A claim for equal pay may be brought either in an employment tribunal, or in the county court or High Court: see section 120 of the Equality Act 2010.

27. In my view, the extract from the judgment of Lord Wilson JSC in *Abdulla v Birmingham City Council* cited above is an authoritative description of s 1 of the 1970 Act as it came into force in 1975. His observation that "Parliament resolved that the mechanism of the provision for equal pay for women should be by its very insinuation into their contracts of employment" succinctly expresses why the decision of Simler P in the present case was correct and why the claims are for "arrears of pay" within s 184(1)(a).

28. Ms Apps submits that the construction of s 184 found by Simler P creates practical difficulties for the Secretary of State. He is not in an identical position to a transferee employer. He does have information gathering powers under section 190 of the 1996 Act, but a TUPE transfer does not of itself trigger the exercise of those powers: indeed the Secretary of State may be unaware that a TUPE transfer has occurred; or that an employer considers Part XII to apply. By the time an individual makes a claim against the Secretary of State there may no longer be an entity in relation to which information gathering powers can usefully be exercised. This may create difficulties in enabling the Secretary of State to test or assess accurately claims for equal pay made by these or similar claimants.

29. I accept that in many cases there will be practical difficulties of this kind, but they cannot prevail against the obvious meaning of the statute; nor are they unique to claims for guaranteed payments against the Secretary of State. The limitation periods for employment tribunal claims of many kinds are short and strict, but the six year period for a contractual claim in the courts contained in the Limitation Act 1980 is generous and can often cause difficulties for a defendant where witnesses have disappeared or records have been destroyed..

Ground 2

30. The alternative ground of appeal argues that, whatever the correct interpretation of ss 182 and 184 in principle, the EAT was wrong to find that the claim for equal pay in this case was a claim for debt.

31. An equal pay claim usually seeks arrears of pay, but the ET may also award damages. Ms Apps points out, however, that s 184 (1) can only require the Secretary of State to pay a debt and not damages.

32. The ET1 in the present claim seeks "compensation in respect of a period of back pay during which time the named comparator received more pay for performing equivalent work and/ or work of equal value." As confirmed at the EAT by the Claimants, no formal election has been made as to whether the award is sought as damages or as arrears of pay. Ms Apps submits that "a claim for damages would therefore still appear to be contemplated", and that the reasoning of the EAT wrongly "deprived the Claimants of the option of pursuing their claims in full in damages".

33. This seems to me rather far-fetched. It is not suggested that the present claims are for anything other than arrears of pay. The rules of pleading in ETs are not so technical as to require a claimant to be put to her election as between a claim for arrears of pay or a claim for damages. The vast majority of claims of this kind are for arrears of pay.

34. In any event, since I agree with Simler P that these claims *were* for arrears of pay, each of them was a debt to which Part XII of the 1996 Act applied; and accordingly the Secretary of State was, and is, required to pay each Claimant (subject to the limits imposed by s 186) the amount to which she was entitled in respect of that debt.

35. I would therefore dismiss the appeal.

Lord Justice Haddon-Cave:

36. I agree.

Lord Justice Longmore:

37. I also agree.