Birmingham City Council v Abdulla: equal pay equals costs?

The Supreme Court has recently held in *Birmingham City Council v Abdulla & ors* that claimants who were time-barred from bringing their claims under the Equal Pay Act 1970 in employment tribunals were not prevented from bringing their claims in the High Court. Talia Barsam and Mohinderpal Sethi consider the implications of the ruling

Barsam and Sethi: Private sector employers should re-assess their exposure to historic equal pay claims

Background to the appeal

Mrs Abdulla and 173 other claimants brought equal pay claims against Birmingham City Council in the High Court. All the claims were brought outside of the limitation period provided by ss.2(4) and 2ZA of the Equal Pay Act for 'standard cases' of equal pay brought in the employment tribunals, namely six months from the date of termination of the contract. An equal pay claim under the 1970 Act is based on a breach of contract by the employer in not complying with the equality clause deemed by s.1(1) to be incorporated in all contracts of employment. That claim may be brought like any other contract claim in the ordinary courts, where under the Limitation Act 1980, the limitation period is six years from the date of the breach of contract.

The council sought a declaration from the High Court under s.2(3) of the Equal Pay Act that the court had no jurisdiction, or should not exercise the jurisdiction, which it might have had, to hear the claims. The High Court's decision to dismiss the council's application was upheld by the Court of Appeal.

S.2(3) of the 1970 Act

The Supreme Court was invited to consider the construction of s.2(3) of the 1970 Act, which provides that the court can strike out a claim in respect of the operation of an equality clause where it 'could more conveniently be disposed of separately by an employment tribunal'; alternatively, it may refer a question as to the operation of an equality clause to the tribunal for determination.

In the Court of Appeal Lord Justice Mummery suggested that the use of 'separately' in s.2(3) suggests that the provision is intended to cater for cases in which the proceedings in the ordinary courts include mixed claims and allows for the equal pay claim to be hived off from the other claims, which the employment tribunal has no jurisdiction to hear.

While it may well have been 'convenient' for the council to have matters disposed of by the tribunal, Lord Wilson (with whom Lady Hale and Lord Reed agreed but with Lords Sumption and Carnwath dissenting) concluded that it cannot be more convenient for a claim to be disposed of separately by an employment tribunal where the tribunal was bound to refuse jurisdiction to deal with the claim. The subsection mandated a straightforward practical inquiry into the forum more convenient for the investigation of the merits of the claim. The reason for the claimants' failure to bring the claim was not relevant to the notion of convenience. The Supreme Court rejected the council's reliance on the House of Lords decision of *Spiliada v Maritime Corporation v Cansulex Ltd* and on the decision of Slade J in *Ashby v Birmingham City Council*, a case materially similar to *Abdulla*. The Supreme Court considered that *Spiliada* was concerned with the principle of *forum non conveniens* in a case involving conflict of laws and was of no assistance to the construction of s.2(3).

General implications

The Equality Act 2010 replaced the 1970 Act and contains similar provisions. On the face of it the decision of the Supreme Court exposes employers to a deluge of claims as highlighted in recent media headlines. A claimant will now have six years to bring a claim under the 1970 Act or the Equality Act 2010. It follows that there will be far less reliance on the concealment and incapacity provisions (now contained in s.129 of the Equality Act 2010).

Both Mummery LJ in the Court of Appeal and Lord Wilson in the Supreme Court acknowledged that tribunals offer litigants many advantages not on offer in the ordinary courts, including greater expertise, a specially adapted procedure for hearing equal pay claims and free provision of an expert report in certain circumstances. This partly explains why Mummery LJ, and with him most employment law practitioners, had never previously come across equal pay claims outwith tribunals. It is likely that in practice parties will continue to benefit from a tribunal's expertise even where the claim has been started in the ordinary courts, as under s.128 of the Equality Act 2010 the court maintains its power to refer a question about an equality clause to the tribunal for determination.

Perhaps the most significant consequence of bringing a claim in the ordinary courts is the potential exposure to costs. The loser will usually be required to pay the winner's costs and those are likely to be considerable given the complexity of many equal pay claims and the presence of conditional fee

The greatest impact of Abdulla may simply be that claims can now commence after a longer 'cooling off' period, in terms of both emotional distance and the influence a previous employer may have on one's career

agreements. The reason for a claimant not bringing a claim in time in the tribunal might well be a relevant factor in determining costs. Under Civil Procedure Rule 44.3(4)(a), in deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including the conduct of the parties. A claimant's unreasonable failure to proceed in the tribunal might well influence the court's decision as to the appropriate order for costs.

Furthermore, the reason for not presenting a claim to the tribunal in time might also remain relevant as giving rise to an abuse of process for which the claim can be struck out. Although there is no abuse of process in claimants simply exercising their rights to institute proceedings in the ordinary courts in time, where a claimant had been invited to present a complaint in time to the tribunal but had spurned the invitation in order to secure what the court considered to be an illegitimate advantage by bringing a court claim, that might give rise to an abuse of process. Practitioners will no doubt explore the boundaries of this argument.

Implications for the public sector

Local government leaders have been quick to say that they are unlikely to see a flood of claims because of the progress that local authorities have made in tackling equal pay in recent years. The problem is often not as historic as public sector employers would hope; bonuses may no longer be paid, but challenges have been mounted in employment tribunals to the gender neutrality of job evaluation schemes, and also 'pay protection' schemes, often benefiting those employees previously in receipt of bonuses. There are also reported to be plenty of potential public sector claimants still waiting in the wings for this decision.

Implications for the private sector

Previously equal pay claims have been less common in the private sector, but it is now particularly exposed to litigation, having failed to take the steps to address pay inequality taken in the public sector. Unlike city institutions, public sector employers have long been familiar with job evaluation studies, which can provide a defence to equal value claims. If a job evaluation study has assessed a woman's job as being of lower value than her male comparator's job, then an equal value claim will fail unless the tribunal or court has reasonable grounds for suspecting that the evaluation was tainted by discrimination or was in some other way unreliable. The private sector is therefore more exposed to work of equal value claims, which are fact-sensitive, require complex analysis and are particularly costly to litigate.

Furthermore, city institutions are notoriously secretive about their pay structure. This is likely to present a particular risk in defending equal pay claims. The European Court of Justice has held that pay systems that are not transparent are particularly at risk of being found to be discriminatory. Where the pay structure is not transparent and a woman is able to show some indication of sex discrimination in her pay, the employer carries the burden of proving that the pay system does not discriminate (*Handels og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)*). Although the union funding provided to public sector claims may not be available, claimants may well seek out other forms of funding; the proposed abolition of statutory questionnaires and introduction of tribunal fees will provide an incentive to do so sooner rather than later.

The greatest impact of *Abdulla* may simply be that claims can now commence after a longer 'cooling off' period, in terms of both emotional distance and the influence a previous employer may have on one's career. Disgruntled employees may feel that they have less to lose in bringing a claim against their previous employer once established in alternative employment. Employees who have transferred to a new employer under TUPE will now have six years to discover and claim in respect of pay inequality during their employment with the transferor, rather than the six months fatal to the claim in *Sodexo Ltd v Gutridge*.

Conclusion

The Supreme Court ruling may not lead to the flood of claims much feted in the press. However, private sector employers are now exposed to complex equal pay litigation long after the employment relationship has ended. Although there is no requirement for private sector employers to carry out regular equal pay audits, the Equality and Human Rights Commission recommends that all employers do so. Private sector employers will now need to urgently take stock of this development and ensure that their document retention policies are sufficient.

Talia Barsam and Mohinderpal Sethi, Devereux Chambers

Search tags for elaweb.org.uk: **equal pay; jurisdiction**

The authors are grateful to Michael Newman of Leigh Day & Co for his comments on an early draft of this article.

Cases referred to:

- *Birmingham City Council v Abdulla & ors* [2012] UKSC 47; [2011] EWCA Civ 1412
- *Ashby v Birmingham City Council* [2011] EWHC 424 (QB), [2012] ICR 1
- *Spiliada v Maritime Corporation v Cansulex Ltd* [1987] AC 460
- *Handels og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)* [1989] IRLR 532; [1991] ICR 74
- *Sodexo Ltd v (1) Gutridge & ors (2) North Tees and Hartlepool NHS Foundation Trust* UKEAT 0024/08