

Employment

Birmingham CC: testing the water

Chris Bryden & Michael Salter
explain why equal pay remains an
unattained goal

IN BRIEF

- Birmingham City Council is subject to litigation that will potentially give rise to compensation payments in the £100s of millions, but which may also amount to a test case with the resulting nationwide compensation running at a far higher multiple.

Equal pay disputes in employment tribunals have in recent years gained a high profile, with, in particular, large employers such as the NHS (following its Agenda for Change programme) and city councils experiencing multiple claims, many of which are still being litigated, and are likely to be litigated for some considerable time. Of these the most prominent may well be the claims facing Birmingham City Council, the largest local authority employer in Western Europe, with more than 60,000 employees on its books.

At the end of April 2010 the employment tribunal in Birmingham rejected the defence of Birmingham City Council in a long running dispute about pay. The said defence was based upon the argument that there was a genuine material factor justifying the difference between the salaries received by around 4,000 female employees in around 50 different roles and various comparator groups of refuse workers, road workers road cleaners, and gardeners, some of whom, with bonuses and overtime could take home in excess of £50,000 per annum while women on the same level earned £12,000.

Single status

The Birmingham litigation is the largest of the claims against local authority employers arising out of the implementation of "single status", the framework which was aimed at removing

pay differentials between men and women, and which was intended to be in place across all local authorities by April 2007. However, few authorities have implemented it, and Birmingham City Council has in effect found itself subject to litigation that will potentially give rise to compensation payments in the £100s of millions, but which may also amount to a test case with the resulting nationwide compensation running at a far higher multiple.

Barker et al

- The case in question goes by the name *Barker and others v Birmingham City Council* (ET 1305819/2006).

“The burden of demonstrating a genuine material factor falls on the employer”

- The 4,000 women were employed in 49 different jobs and were on the same pay grade as men.
- They complained they were excluded from bonuses paid to men and that this could, in theory, lead to them being paid a quarter of what the men earned.

The judgment is lengthy and complex, but provides an extremely detailed and thorough analysis of the relevant law and its application to each of the



various categories of worker. What is presented herein is a summary of parts of the judgment and is by no means a comprehensive discussion of the reasoning behind the decision.

For the defence

The defence relied upon by Birmingham City Council, and which was not upheld by the tribunal, was that a genuine material factor, not being the difference in sex, was the reason for the variation between a woman's contract

and a man's contract, despite them being engaged on like work, equivalent work or work of equal value. The burden of demonstrating a genuine material factor falls on the employer. The defence failed.

The first question to which the tribunal, in the course of the lengthy (167-page) judgment of EJ Goodier, sitting alone, was required to direct its mind was whether there existed prima facie discrimination. The employment judge, in considering the various categories found prima facie discrimination. He further

found prima facie discrimination from the lack of transparency of the bonus scheme. It was not in dispute that the bonus scheme was not transparent, this having been accepted in the course of cross-examination of the human resources director. It was also found that senior management at Birmingham City Council were aware, from around 2000, that the bonus scheme and their pay practices were likely to be in breach of the Equal Pay Act 1970, yet allowed the payments to persist for the better part of a decade. The tribunal highlighted union intransigence as one major reason for this and quoted Mr Albon, the HR director, as comparing this to “the disagreeable sprouts [being] constantly pushed to the side of the plate” [para 30].

The council sought to rebut the presumption of sex taint arising from the pay respectively of the claimants and their comparators by contending inter alia that the claimants’ pay was the result of market forces (at 32.1); the “mental processes” of the decision-takers (32.2); and “bonusability” (at 33)—being the argument that if a bonus is (a) genuine, (b) is not tainted by sex, and (c) could not be applied to the claimants’ posts, there was no need for objective justification of it. It was accepted by the claimants that bonusability could make out a defence, but this argument, and the other defences relied upon by the council failed. The tribunal found that it had not rebutted the presumption of sex taint and thus found that the defence of genuine material factor failed.

Quantum has yet to be determined in the case, and the underlying question of equal value remains in issue for some of the claimants. It is therefore not possible to speculate as to the total sum in issue for Birmingham City Council, and the unions involved have played down some of the estimates of the total compensation bill. However it is reported that there are a potential 57,000 other claims in the pipeline and the total bill for local authorities, it has been suggested, could run to over a billion pounds. The GMB union has itself indicated that councils across England and Wales could face compensation claims of between £3bn—£5bn.

The Equality Act

While the Birmingham litigation, and numerous similar claims, will continue to rumble on, future claims are likely to

Sexism: playing the long game

- It is almost 35 years since the Equal Pay Act 1970 came into force (on 29 December 1975), giving women (usually, though the Act also applies to men) the right to claim equal pay with men. Yet according to the Equality and Human Rights Commission, in 2010 women are still paid 16.4% less than men in some professions with the differential being even greater in many of the traditional male bastions such as the finance sector.
- If raw statistics are the measure of the Act’s success four decades after its enactment, then it would appear to have failed in its eponymous aim. That the pay gap has closed since that time, and that glass ceilings have been smashed repeatedly by women CEOs and high flyers is only partial comfort.
- In the recent election equal pay was very much a live issue, demonstrating further that while progress has been made in this contentious and socially divisive field, the pursuit of equality has a long way to go. Thus, the Conservatives promised to force equal pay audits on organisations found to be discriminating on the basis of gender, while the Liberal Democrats proposed fair pay audits for every company with over 100 employees to combat discrimination in pay. It was also a manifesto pledge that that party would require all public companies to declare in full all remunerations of £200,000 per year or more, providing for greater transparency in relation to the pay afforded to employees of either gender.

be brought under the new, consolidated provisions contained within the Equality Act 2010, the bulk of which come into force in October 2010. The Act is likely to have a significant effect on equal pay, and promises a new era of openness, rendering pay secrecy clauses unenforceable in certain circumstances. Further, where an employee discusses pay because she feels that she has been discriminated against, any action taken by the employer to stop such discussion will give rise to a victimisation claim. The explanatory notes to the Act in considering pay secrecy clauses give the example of a clause that would still be enforceable if the “disclosure” of the employee’s pay was made to seek to obtain an offer of a higher salary from a competitor. However the clause would be unenforceable if the disclosure was made by a female employee to a male fellow employee when she feels that she is being underpaid in comparison to him. Thus employees will not be able to be prevented from discussing their pay or bonuses with fellow employees. Equally the male employee discussing his own, higher pay (in the scenario envisaged above) would be protected from reprisals by his employer by the victimisation provisions of the Act.

While such transparency is a laudable concept, and one which has found favour in government in respect of the public sector, including the BBC, it is questionable how much impact in reality the prohibitions contained in the Equality Act will actually have. Express contractual restrictions on the

discussion of pay and salary are relatively rare nowadays, and it is rarer still for them to be enforced by disciplinary proceedings. However stories do abound in relation to, for example, large investment banks, where such clauses do remain very much in place.

An additional reform contained within the Equality Act 2010, and which again is aimed at ensuring transparency as far as possible, is that there will exist a power to require employers with 250 or more employees to provide reports on the gender pay gap in their business. However the previous government made clear that such powers will only be brought into force after 2013 and then only if sufficient voluntary progress has not been made.

Equal pay remains very much an unattained goal, though progress has been made in the past four decades. Birmingham and other councils may well end up paying the price for retaining outmoded processes despite knowing of the likelihood of infringement, and the *Barker* case is an important decision for its exposition of the law and its application to such a wide range of claimants. The litigation is, however, far from at an end and is by no means the last of its kind. There will likely be further litigation in this complex and wide-ranging area of the law in the next few years as more claimants seek to uphold their right to equal pay. NLJ

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