Northern Ireland
Legal Quarterly
Autumn Vol. 73 No 3 (2022) 538–545
Commentaries and Notes DOI: 10.53386/nilq.v73i3.988

Equal pay and sex discrimination: advancing a new argument on appeal: *Department of Justice v McGrath* [2021] NICA 40, [2021] NICA 44

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BACKGROUND

In July 2010, the claimant accepted a formal offer of employment with the Northern Ireland Court Service (NICS) at the grade of Legal Officer (Deputy Principal). While the appointment process was ongoing the terms of the offer of employment (as indicated in the Candidate Information Booklet) were amended as a consequence of the devolution of policing and justice functions.

The claimant was aware of the new terms when accepting the offer of employment. In order to obtain promotion she knew she would have to 'openly compete' with others for any available Grade 7 legal posts under the 'merit principle' enshrined in the NICS terms and conditions.

In January 2017, the claimant raised a grievance regarding equal pay and promotion. Senior management within the Department of Justice (DoJ) dealt with the grievance under the Dignity at Work policy rather than under the grievance procedure. In doing so, the Tribunal held that the DoJ failed to properly address the principal issues relating to a complaint of equal pay.

The claimant subsequently issued a statutory questionnaire in June 2017. This questionnaire raised specific relevant questions in relation to the claimant's claim of equal pay, which remained unanswered by the respondents. The claimant's claim form echoed the contents of the statutory questionnaire.

The Tribunal issued its decision on 25 July 2019 finding that the claimant had been engaged by the DoJ in like work with her comparators from 7 October 2011 within the meaning of the Equal Pay Act 1970.

It said the DoJ had not proved that the variation between the claimant's contract and those of her comparators was genuinely due to a material factor which was not the difference of sex under the 1970 Act and held that the DoJ was therefore in breach of the 1970 Act and the claimant was entitled to equal pay.

In doing so, the Tribunal was keen to highlight that the DoJ had wrongly concentrated on issues of indirect sex discrimination as the claimant had established 'like work'. Judge Drennan QC explained:

> As stated in paragraph 505 of Harvey –
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> 'Thus, as has been made clear, the trigger for the employer having to prove his case under the "material factor" defence is not disparate impact as between men and women, nor the identification of a "provision criterion or practice" that has such effect. All that is needed is proof of a difference in pay and the establishing of equal work between claimant and comparator.'
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> Once an employee has established 'like work' or 'work rated as equivalent' to her male comparators, the rebuttable statutory presumption of sex discrimination has arisen and to defeat that presumption the respondent employer has to establish a genuine material factor defence.

The Tribunal also found that the claimant was not directly discriminated against on the grounds of sex pursuant to the Sex Discrimination (NI) Order 1976 and dismissed this part of the claim.

Specifically on the issue of the genuine material factor defence, the Tribunal concluded:

> The tribunal has no doubt that, following the abolition of fluid grading/fluid complementing, if a vacancy occurred in DSO/OSO, or elsewhere in the Department of Justice, for a substantive permanent Grade 7 (legal) that the NICS policy would require any DP or other member of staff applying to take part in an open recruitment/selection procedure. Indeed, such a policy, on the evidence, would not seem to be discriminatory. But, in the judgment of the tribunal, reliance on this promotion/selection policy/procedure for such a promotion by the respondents was in error as it does not provide a defence of genuine material factor in the circumstances of the claimant, who has established, pursuant to the 1970 Act, on the facts of this case, that she has been doing 'like work' with the work of her said comparators and is not receiving the same pay or benefits. The reliance upon what would happen in the event, if it occurred, of a substantive vacancy at Grade 7 (legal), therefore does not establish, in the tribunal's judgment, the defence of genuine material factor. It was not the cause of the disparity in this particular case. There was no such relevant recruitment selection exercise. There was a failure by the respondents to properly consider the individual particular circumstances of the claimant, who had established like work with her said comparators and therefore to ensure she received equal pay with her comparators. To temporarily promote the claimant, who has shown she was doing like work with her comparators did not establish, in the circumstances, the defence of genuine material factor. To be able to rely on such a recruitment/selection policy, relating to a hypothetical exercise for promotion to a substantive Grade 7 (legal) post, which had no application or relevance to the claimant's actual circumstances and

> her claim for equal pay, would allow the respondents to drive a 'coach and horse', in the tribunal's judgment, to her said claim of equal pay and the protections given to her under the 1970 Act. Clearly, if the claimant's work had been restricted to DP work, so that no like work could be established, then no issue of equal pay would have arisen and would have avoided the very risks relating to equal pay, envisaged by senior management at the time when fluid grading was abolished (see the series of emails in May 2010).

In light of the foregoing, the tribunal is not satisfied the first respondent has proved, as it was required to do, that the variation between the claimant's contract and those of her said comparators is genuinely due to a material factor which is not the difference of sex.

GROUNDS OF APPEAL

On appeal, the DoJ attempted to advance the following arguments:

1. Firstly, if the claimant was allocated 'Grade 7' work this only occurred as a result of the actions of Ms Donnelly (the claimant's former line manager). The findings of fact demonstrate that Ms Donnelly did so for 'reasons of her own', whilst deliberately misrepresenting the situation to Line Management.
2. However, Ms Donnelly's evidence clearly indicated that the reason for the allocation of work at the higher grade to the claimant was not due to her sex. Ms Donnelly was a female allocating work to a female. At no time was it suggested that in so doing she was discriminating against the claimant on the ground that she was a woman. As sex discrimination is a critical ingredient in any equal pay claim, if there was no evidence of sex discrimination the claim ought to have failed.
3. Having made the findings as to why Ms Donnelly acted as she did, the tribunal ought to have considered whether Ms Donnelly's actions were a 'genuine material factor' explaining the difference in pay and amounting to a complete defence to the equal pay claim.
4. Secondly, whilst the claimant was on 'temporary promotion', there is no doubt that she was performing Grade 7 work: however, this is because she was 'doing the work' of her absent colleagues – who were all Grade 7. During these periods she was paid as a Grade 7 and there was no pay disparity. Therefore, the tribunal should have discounted and distinguished between those periods of time in its judgment.
5. Thirdly, following the JEGS (Job Evaluation and Grading Support) assessment, the claimant continued to work in the OS' office [Office of the Official Solicitor] on 'temporary promotion'. In due course, the claimant would be able to apply for that post

or any other Grade 7 post in the NICS in competition with other employees within the NICS. The success of her application for promotion would stand or fall on its own merits. This is what occurred; the claimant applied for the post and was successful and remains in that post.

6 The policy on 'open competition' for promotions is a common term and condition applicable to all NICS employees irrespective of sex, religion etc. Therefore, the judgment of the tribunal – by effectively giving the claimant promotion 'in post' – has given her better NICS terms and conditions than those of her colleagues - not equal terms.

In response, the claimant argued:

1 the DoJ erred in conflating the equal pay claim and the sex discrimination claim;
2 the DoJ repeatedly failed to raise a genuine material factor defence; and
3 the DoJ's suggestion that the tribunal ought to have considered whether or not Ms Donnelly's actions were a genuine material factor defence when this was not raised by the DoJ is unsustainable.

ISSUES

The two key issues for the Court of Appeal were as follows:

1 whether the DoJ could raise a genuine material factor defence when that did not form part of its pleaded case before the Tribunal?
2 If yes, whether Ms Donnelly's actions could be regarded as a genuine material factor defence?

Decision of Court of Appeal

From the outset, the Court of Appeal was keen to clarify the nature of its role within the employment law arena in Northern Ireland. In doing so, it commented:

> The role of the Court of Appeal as the appellate tribunal for the Employment Tribunal has been the subject of detailed judicial consideration. The role was summarised by Coghlin LJ in the case of Miskelly v The Restaurant Group [2013] NICA 15[1] as follows:
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> > [24] The tribunal constituted the appropriate industrial court instituted for the purpose of resolving relevant employment issues and this court is confined to considering questions of law arising from the tribunal decision. The tribunal has the advantage of seeing and hearing the witnesses at first instance and it is fundamental to understanding the function of this court to appreciate that it

> does not conduct a general rehearing. Article 22 of the 1996 Order provides that a party to proceedings before an industrial tribunal who is dissatisfied in point of law (our emphasis) with a decision may appeal to this court. We remind ourselves of the observations of Girvan LJ in Carlson Wagonlit Travel Ltd v Robert Connor [2007] NICA 55[2] when he said at paragraph [25]:
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> > In this case the decision of the Tribunal must stand unless the Tribunal made an error of law in reaching its conclusions; based its conclusions on material findings of fact which were unsupported by the evidence or contrary to the evidence; or the decision was perverse in the sense that no reasonable Tribunal properly directing itself could have reached such a decision.

With regards to the genuine material factor defence, the Court of Appeal confirmed that the following is an accurate formulation of the key principles:

> Once a difference in terms is identified, a rebuttable presumption passes to the employer who must then explain the reason (the material factor) for the difference between the claimant and her comparator. It does not matter whether the explanation is a good one or whether the Employment Tribunal agrees with it. What does matter is that it is a non-discriminatory reason for the difference; in other words that it is nothing to do, directly or indirectly, with sex. In addition, *the employer must show*:
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> (i) that this was the real reason for the difference and is not a sham or pretence, ... the reason still has to be a genuine one;
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> (ii) that the reason was causative of the difference between the comparator's term and the term in the claimant's contract;
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> (iii) that there is a significant and relevant difference between the woman's case and the man's case;
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> (iv) the difference is not a difference of sex. (original emphasis)

The Court of Appeal also discussed the issue of raising new points on appeal. In this regard, it highlighted the following legal principles:

1 'First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.'
2 'Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (Mullarkey v Broad [2009] EWCA Civ 2 at [30] and [49]).'

3 'Third, even where the point might be considered a "pure point of law", the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (R (on the application of Humphreys) v Parking and Traffic Appeals Service [2017] EWCA Civ 24 at [29]).'
4 '[T]here is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.'

With regards to the points that the DoJ attempted to advance, the Court of Appeal were keen to point out that Ms Donnelly's actions were never pleaded as a genuine material factor defence and there was no attempt to make an application for permission to amend the pleadings before the tribunal.

In addition, the Court of Appeal was particularly critical of the DoJ's approach to Ms Donnelly's evidence. Indeed, the court commented:

> Notwithstanding the strong challenge by the [DoJ] to [Ms Donnelly's] evidence in cross-examination the [DoJ] now, audaciously, seeks to rely on this evidence to establish a genuine material factor defence on which to dismiss the claimant's equal pay claim, which had never been pleaded in the first case. Ms Donnelly's evidence was adduced by the claimant primarily to prove that she was doing 'like work' with her comparators. Critically, the [DoJ] now wishes to use this evidence as a basis for a genuine material factor defence. However, Ms Donnelly's evidence was not adduced, tested or considered before the tribunal *as a genuine material factor defence*. (original emphasis)

The Court of Appeal accordingly commented:

> The [DoJ's] suggestion that the tribunal 'ought to have considered whether Ms Donnelly's actions were a genuine material factor' when this was not pleaded by the [DoJ] and there was no application to the tribunal for leave to so amend the pleadings is unattractive.
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> The Court of Appeal accordingly concluded that it was not just to permit the new point in the circumstances of this case. In arriving at this decision, they focused upon the failure of the DoJ to plead any genuine material factor in its response, its failure to reply to the statutory

questionnaire, amend its pleadings or call any evidence in respect of such any genuine material factor defence.

Ultimately, the Court of Appeal held that the conclusion of the tribunal that no genuine material factor had been established was unassailable. The Court of Appeal accordingly affirmed the Tribunal's decision and dismissed the DoJ's appeal.

COMMENT

Equal pay is an extremely complex area of employment law.

If faced with an equal pay claim, it is important that specialised legal advice is taken from an employment law solicitor.

There appear to be three key takeaways from the Court of Appeal's decision for employers in the *McGrath* case:

1 **The importance of replying to statutory questionnaires:** if an equal pay questionnaire is received, it should be responded to. Alongside this, it is important to also ensure that any concerns/grievances are dealt with under the correct policy. Taking genuine equal pay issues seriously at an early stage is likely to avoid protracted costly litigation.

2 **The importance of a good case strategy from the outset:** it is also important to see the big picture from the outset. Attention should be given to the following:

   a Is there a genuine equal pay issue?
   i Has the claimant identified a comparator (of the opposite sex) who receives a higher salary and/or benefits?

   b Does the claimant do equal work to their comparator?
   i Is there any way to distinguish the claimant's role from the named comparators?

   c Is there a genuine material factor defence that can be relied upon?
   i What is it?

   Common categories include:

   - location
   - market forces
   - protection of terms under TUPE
   - working unsocial hours or being on call
   - pay increases to retain employees
   - pay protection arrangements
   - good industrial relations
   - different collective bargaining processes/pay structures
   - union intransigence
   - productivity bonuses or performance-related pay

- length of service/experience
- recent experience
- mistake/admin error
- financial constraints.

ii Is there any documentary evidence to support any genuine material factor defence relied upon?

d Other considerations:

- What witnesses are required to support the respondent's case? Are there any issues with witness availability?
- Are any Galo adjustments required for witnesses?
- Is there a need to get expert input? (Financial reports are often required in equal pay cases in order to accurately assess loss.)
- Costs of running to conclusion
- Reputational risk of running
- Impact upon working relationship if claimant is a current employee
- Has mediation/resolution been explored?

3 **The challenges of raising new points on appeal:** pleadings are extremely important. All key points should be included. If they are not, an application to amend the pleadings should be made. If this does not occur, it will be extremely challenging to subsequently raise a new point on appeal. As a result, the following issues should be considered in advance of a substantive hearing:

a Has the claimant prepared a comprehensive statement of legal and factual issues? Is the case you are facing clear?
b Has all relevant discovery been produced?
c Are replies received sufficient? If not, consider application for specific discovery.
d Identify gaps in the claimant's statement? Have they provided sufficient information to discharge the burden of proof?
e Have all points been addressed in the respondent's statements?
f Are all relevant documents in the trial bundle?
g Would agreed facts/chronology be of assistance for hearing?

As the Tribunals in Northern Ireland get back to full capacity following the pandemic, it is likely that we will see more decisions in respect of equal pay in the months and years ahead.