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CA rules that failure to pay London allowance during maternity leave is not direct sex discrimination

Commissioner of the City of London Police v Geldart [2021] EWCA Civ 611; April 28, 2021

Implications for practitioners

The CA disagreed with the ET and the EAT that a failure to pay an additional London allowance (LA) during maternity leave was direct sex discrimination. While the claimant was owed the shortfall upon proper consideration of the Police Regulations 2003 (the Regulations), the failure to pay her was due to her 'absence', rather than her 'maternity absence' so the reasoning for any non-payment was not relevant.

Facts

The claimant (CG) is a serving police constable in the City of London Police. She was on maternity leave between December 2016 and October 2017 and received Police Occupational Maternity Pay (OMP) equivalent to 18 weeks' pay, and a further 16 weeks' statutory maternity pay. Under the Regulations, CG was also in receipt of LA (not to be confused with London weighting) which was paid for the duration of her OMP, but not for the following 23 weeks.

CG brought a claim for direct sex discrimination

in the ET under s13 Equality Act 2010 (EA). She subsequently sought permission to amend her claim to rely in the alternative on indirect discrimination and withdrew an additional claim for pregnancy and maternity discrimination.

The Commissioner argued that the LA was part of CG's pay and under the Regulations was only payable for the time that she was entitled to OMP, a period of 18 weeks.

Employment Tribunal

The ET upheld CG's complaint of direct sex discrimination.

The ET accepted CG's argument that there was a clear distinction in the Regulations between 'pay' and 'allowances and expenses'. As the LA was paid to reflect the market conditions of recruiting and retaining officers in London, rather than a part of remuneration, CG was entitled to it throughout her leave.

The Commissioner initially argued that CG should have brought her claim as one of equal pay, under

Chapter 3 Part 5 of the EA. However, this point was conceded on the basis that there was a contractual entitlement to the allowance, so the claim could proceed under s39 EA.

On the issues of whether a comparator was required, and if CG's treatment was 'because of' sex, the ET rejected the Commissioner's argument that the introduction of s18 EA meant the extended definition of direct sex discrimination adopted in *Webb v EMO Air Cargo (UK) Ltd C-32/93*, [1994] QB 718 no longer applied, and that a comparator was required.

The ET concluded that CG's treatment was on the basis of her maternity leave and so, following *Webb* and other cases, it was inescapably 'because of' her sex. An award of £4,000 for injury to feelings in addition to the shortfall of £1,941.60 was made.

As CG succeeded in her direct discrimination claim, all other points, including the claim for indirect discrimination, fell away.

Employment Appeal Tribunal

The Commissioner appealed to the EAT on four grounds. The first two grounds were against the 'contractual claim' findings; the third was whether the claim should have been brought as an equal pay claim; and the fourth was on the comparator point.

The appeal, and a precautionary cross-appeal for indirect discrimination by CG, were dismissed on November 29, 2019.

Lavender J agreed with the ET that the complaint of direct sex discrimination was well founded; CG was entitled to the allowance on a contractual basis and ordered that all other claims (including the cross-appeal) be dismissed.

Permission to appeal was granted on March 3, 2020, with CG also permitted to raise her cross-appeal of indirect discrimination.

Court of Appeal

The CA dismissed the Commissioner's appeal against the 'contractual' findings. However, the appeal against the ET's finding of direct discrimination on the grounds of sex was allowed. Underhill LJ delivered the unanimous judgment.

CG argued that the reason for the non-payment was 'maternity absence' and following *Webb* 'because of' her sex and as such was direct discrimination.

The Commissioner argued that the reason for the non-payment was because of CG's absence, regardless of the reason. It was understood that the LA formed part of pay, so was only due to those officers willing and ready to work, aside from where the Regulations

specified otherwise, such as during OMP.

The CA agreed with the Commissioner. The classification of the allowance was incorrect however: *'The absence in question happened to be because of maternity, and to that extent the Claimant's sex was part of the cause of the non-payment, but 'but for' causation of that kind is not determinative.'*

Underhill LJ distinguished from *Webb* (and others) as cases concerned with dismissal, rather than pay. These did not determine how much a woman should be paid during a period of maternity absence and it was not an issue of sex discrimination to pay a woman less during that leave to which she is entitled.

As the reason for the non-payment was simply absence, the findings of the ET in respect of a comparator were incorrect.

Underhill LJ then turned to CG's cross-appeal, and the following issues:

- was the claim for indirect discrimination out of time?
- was it debarred by s71 EA (exclusion of sex discrimination provisions in relation to contractual pay)?
- was it well-founded in substance?

Upon consideration of the EA Explanatory Notes the CA concluded that s71 did not apply, and the claim could proceed. As the two other points had not been considered by the ET (or EAT) Underhill LJ made no finding and remitted the case to the ET.

Comment

While the facts of this case were specific, the judgment could have an impact on a wider range of serving London-based police officers entitled to LA, such as those on long-term sick leave.

Underhill LJ's comments on the issue of causation are of note, as is his distinction between cases of dismissal due to maternity, and those related to entitlement to maternity pay. He also passed comment on the value of the claim, and the choice of venue. It was open to the claimant to pursue the shortfall in the county court as a debt claim (albeit with no provision for an injury to feelings award) and Underhill LJ urged the parties to consider a compromise before returning to the ET.

CG was refused permission to appeal to the SC, but it remains to be seen whether this is the final word on the matter.

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