

HOME OFFICE v BAILEY

Barristers Jennifer Eady QC, Robert Moretto, Tess Gill, Ben Cooper

Practice area(s) Employment and discrimination

Court Employment Appeal Tribunal

Judge HHJ Peter Clark

Citation [2005] IRLR 757

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Keywords *Equal Pay Act 1970*

Summary Tess Gill and Ben Cooper represented the claimants and Jennifer Eady and Robert Moretto represented the respondents in Home Office v Bailey. The case concerns a large number of employees in (predominantly female) administrative grades in the Prison Service seeking equal pay with comparators in the (predominantly male) operational grades (i.e. officer support grades, prison officers, governors, etc).

Summary of the issues: What is required to establish that a claimant is doing work rated as equivalent to that of her comparator under an employer's job evaluation scheme for the purposes of EqPA, s1(2)(b) read with s1(5)? Two of the claimants in Bailey had scored marginally lower than their comparators under the employer's job evaluation scheme, which had never been implemented and hence had never had pay bands allocated to the scores. The EAT held that the 'gateway' under EqPA s1(2)(b) & (5) is precise and the claimant can rely on it 'if, but only if', her work has been given an equal value to that of her comparator. Under the job evaluation scheme in this case, the claimants' work had not been given an equal value and there was no scope for introducing extraneous expert evidence to found the proposition that the difference in scores is insignificant such that the study has given the jobs an equal value.

The EAT also had to consider the correct approach to establishing whether a term of the claimant's contract is less favourable than a term of a similar kind in her comparator's for the purposes of EqPA, s1(2). The terms in question in this case related to pay progression systems. The EAT found that the Tribunal was entitled to hold that the claimants' system of performance related pay progression was less favourable than their comparators' system of incremental progression on the basis of factors unrelated to the final product of the two systems in terms of pay (in this case, because the Claimants' system was more uncertain and bonuses at the top of a the scale were non-consolidated). The comparison of terms and conditions under EqPA, s1(2) can involve a

comparison of whether the woman is being paid or treated less favourably than her comparator.

Bailey contains a reminder to employers of the need periodically to review the justification of maintaining any 'red circling'. In 1987 the Prison Service had abolished pension 'doubling' (advantageous pension terms) for all comparator grades but retained it for those employed before that date, effectively on a 'red circling' basis. The claimants had never enjoyed pension 'doubling'. The majority of the EAT (Mr Yeboah dissenting) upheld the ET's decision that, in effect, whilst the Prison Service was justified in having the 'red circling' in 1987, it had failed to lead sufficient evidence to discharge the burden on it to prove that the 'red circling' of these pension rights was still justified in 1999 (the relevant date for the purposes of these claims). The majority of the EAT in Bailey approve the (much) earlier EAT judgment in *Outlook Supplies Ltd v Parry* [1978] IRLR 12 to the effect that "prolonged maintenance of a 'red circle', especially if contrary to good industrial practice, may well in all the circumstances of the case lead to a doubt whether the employers have discharged that burden [of establishing objective justification]".

In relation to a large number of points raised by the Respondent/Appellant in respect of the Tribunal's assessment of the value of its Genuine Material Factor defence (relating to working arrangements of the comparator grades), the EAT (Mr Yeboah again dissenting in relation to one point) effectively emphasises that assessment of the value of a GMF defence is a matter for the first instance tribunal and the EAT will be reluctant to interfere if there is no clear error of law: "we are acutely aware of the danger that a close examination of the evidence and of the findings of fact of the Employment Tribunal may lead us to substitute our own assessment of the evidence and to overturn what are essentially findings of fact made by the fact-finding Employment Tribunal. That would be wrong. See *Yeboah v Crofton*, paragraph 12 per Mummery LJ."

The Prison Service is currently seeking permission to appeal to the Court of Appeal.

The employee submitted, inter alia, that the absolute immunity rule attached only to defamatory statements, and that the application of the rule to her claim violated her rights under arts 6, 8 and 14 of the European Convention on Human Rights and was contrary to the purpose of the Equal Treatment Directive.

Held: The appeal would be dismissed.

(1) There was no basis for the proposition that the absolute immunity rule attached only to defamatory statements. It attached to anything said or done by anybody in the course of judicial proceedings, whatever the nature of the claim made in respect of such behaviour or statement, except for suits for malicious prosecution and prosecution for perjury and proceedings for contempt of court.

That was because the rule was there, not to protect the person whose conduct in court might prompt such a claim, but to protect the integrity of the judicial process and hence the public interest.

(2) The employment tribunal and the appeal tribunal had not only been entitled, but had been well justified, in finding that the board, in its consideration of the employee's allegations against the inspector, was a body acting judicially.

The appeal tribunal had rightly said that the essential features of the disciplinary hearing rendered it closely analogous to a judicial proceeding before a court of justice.

(3) The application of the absolute immunity rule to the employee's claim did not violate her rights under arts 6, 8 or 14 of the Convention; nor was it contrary to the purpose of the Equal Treatment Directive.

The purpose of the absolute immunity rule was legitimate and was necessary and proportionate in the public interest for the protection of the integrity of the judicial system.

Comment: This decision, which is not being appealed, is significant primarily for establishing that the rule of "judicial immunity" applies just as much to claims of statutory discrimination as to other causes of action such as defamation.

The decision also reaffirms that the scope of the rule extends to bodies who are performing, pursuant to law – in this case statute – , a "quasi-judicial" role. Such bodies are not at all rare and thus the relevance of this decision is not confined to police disciplinary cases.

Finally, the decision considers and rejects the argument that the Human Rights Act has had the effect of reducing the scope of the rule of "judicial immunity", particularly in cases where it might be argued that the application of the rule would prevent a claimant/application from his/her right to a fair trial. The Court of Appeal were unanimous in holding that application of the rule in sort of circumstances established by the common law over the previous century or so was a legitimate, necessary and proportionate restriction on the qualified right to a fair trial.