Case No: A2/2011/0078

Neutral Citation Number: [2011] EWCA Civ 1412
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR COLIN EDELMAN QC sitting as a Deputy High Court Judge
HQ10X02926

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 /11/2011

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE DAVIS
and
DAME JANET SMITH

- -

Between :

BIRMINGHAM CITY COUNCIL	**Appellant**
- and -	
HUDA ABDULLA & ORS	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

- -

MR PAUL EPSTEIN QC and MS LOUISE CHUDLEIGH (instructed by Birmingham City Council Legal and Democratic Service) for the Appellant
MR ANDREW SHORT QC and MS NAOMI LING (instructed by Leigh Day & Co) for the Respondent

Hearing date: 7th October 2011

- -

Judgment
As Approved by the Court

Lord Justice Mummery:

Introduction

1. This appeal is from an order made on 17 December 2010 by Mr Colin Edelman QC sitting as a Deputy Judge in the High Court. He dismissed, with costs, an application by the Birmingham City Council (the Council) under s.2(3) of the Equal Pay Act 1970 (the 1970 Act) for a declaration that the court has no jurisdiction, or should not exercise the jurisdiction which it may have, to determine equal pay claims brought against it by Mrs Abdulla and 174 other Claimants. Most of the Claimants are women and were formerly in the employment of the Council.

2. Permission to appeal was granted by Hooper LJ at a renewed oral hearing on 18 May 2011, Rimer LJ having refused permission on the paper application.

3. The appeal raises a significant point on the construction and application of the 1970 Act. In the majority of cases on equal pay to date the principal questions relate to the meaning of "pay", to the difficult exercise of selecting the appropriate comparator, and to the application of the "genuine material factor" (GMF) defence. In the current spate of equal pay litigation in the Employment Tribunals (ET) other questions have surfaced: the mechanics of the operation of the equality clause deemed by s.2(1) to be included in contracts of employment that do not include one, limitation periods, the appropriate remedies for breach of the equality clause, the allocation of equal pay cases in the respective jurisdictions exercised by the ordinary courts and by the ET, and the interaction of claims under the 1970 Act with claims under the Sex Discrimination Act 1975.

4. Although the Equality Act 2010 (the 2010 Act) repealed and replaced the earlier legislation on equal pay and sex discrimination, these cases were brought under the 1970 Act, which continues to apply to them. The 2010 Act does not alter the legal position on the particular points arising on this appeal.

5. The spotlight in this appeal shines on three of the less litigated corners of equal pay law.

6. In the first place, the jurisdiction of the ordinary courts to determine equal pay claims has been overshadowed and almost eclipsed by the volume of litigation in the ETs. An equal pay claim under the 1970 Act is based on a breach of contract by the employer in not complying with contractual obligations, as modified by the equality clause. That claim, as was common ground before us, may be brought like any other contract claim in the ordinary courts. The 1970 Act expressly gave claimants the option of bringing equal pay claims in the ET, which, until the Industrial Employment Extension of Jurisdiction (England and Wales) Order 1994, had no general jurisdiction to determine contract claims of any kind.

7. It was provided in s. 2 of the 1970 Act that:-

> "(1) Any claim in respect of the contravention of a term modified or included by way of an equality clause, including a claim for arrears of remuneration or damages in respect of the contravention, may be presented by way of a complaint to an [employment tribunal.]"

8. Although the jurisdiction of the ET was concurrent with that of the ordinary courts, this is the first time that I have ever come across equal pay claims that were not brought in the ET. The reason for the Claimants' preference for the ordinary courts in these cases is that they have an insurmountable difficulty with the limitation period applicable in the ET. That brings me to the second point.

9. The limitation period applicable to the institution of proceedings in the ordinary courts for breach of contract differs from the limitation period for presenting complaints of unequal pay to the ET. The period of 6 years under the Limitation Act 1980 for instituting breach of contract proceedings in the ordinary courts runs from the date of the breach. If, however, a Claimant in an equal pay case opts for the ET, the complaint in a "standard case" such as this (cf cases of concealment, disability, or a stable employment relationship) had to be presented on or before "the qualifying date" (i.e. 6 months after the last date on which the Claimant was employed in the relevant employment: ss. 2 (4) and 2ZA of the 1970 Act). The ET had no power under the 1970 Act to extend the 6 month period. It is therefore perfectly possible, as is assumed to be the case here, for proceedings to be instituted in time in the ordinary courts, but after the limitation period has expired for presenting a complaint to the ET. If these cases are not allowed to proceed in the ordinary courts, which undoubtedly have jurisdiction to determine them, the Claimants are out of time for presenting complaints to the ET. (I should add that under s. 2(5) of the 1970 Act six years arrears of pay can be recovered in an equal pay case, but, of course, the complaint must have been presented to the ET or the proceedings instituted in the ordinary courts before the expiry of the relevant limitation period.)

10. In the third place, the ordinary courts were given a statutory discretion either to strike out an equal pay claim, if it "could be more conveniently disposed of" separately by an ET, or to refer an equal pay question for determination by the ET and to stay the pending proceedings in the meantime.

11. Section 2 of the 1970 Act provided that:-

> "(3) Where it appears to the court in which any proceedings are pending that a claim or counter-claim in respect of the operation of an equality clause could more conveniently be disposed of separately by an employment tribunal, the court may direct that the claim or counter-claim shall be struck out; and (without prejudice to the foregoing) where in proceedings before any court a question arises as to the operation of an equality clause, the court may on the application of any party to the proceedings or otherwise refer that question, or direct it to be referred by a party to the proceedings, to an employment tribunal for determination by the tribunal, and may stay or sist the proceedings in the meantime."

12. To strike out an in-time claim for breach of an equality clause is an extreme exercise of judicial discretion. To stay equal pay proceedings pending in the ordinary courts while awaiting the determination of a reference to the ET is a less drastic step. In the latter case the difference in the limitation periods applicable in the ordinary courts and in the ET could not lead to a situation in which the Claimants might be deprived of a determination of their equal pay claims on the merits. The ET would have jurisdiction to determine the matters referred to it by the ordinary courts. There would be no need

for the Claimants to present a complaint to the ET. The equal pay proceedings instituted in time in the ordinary courts would remain extant pending the determination of the referred matter by the ET. The jurisdiction of the ET would stem from the reference to it by the ordinary courts in the exercise of their discretion. It would not depend on the Claimants' presentation of a complaint to the ET in time.

13. In the case of a strike out of an equal pay claim by the ordinary courts I note that it must appear to the court that the claim could be more conveniently disposed of "separately" by an ET. The references to comparative convenience and to "separately" suggest to me that the strike out discretion would certainly suit cases of multiple mixed claims, so that, on considerations of convenience, the ordinary courts could allocate different claims for determination in different jurisdictions, the equal pay claims being for the ET, while other breaches of contract are retained for determination in the ordinary courts. The question in these cases is whether striking out in-time equal pay claims in proceedings in the ordinary courts is apt in cases where it is too late to invoke the jurisdiction of the ET by presenting equal pay complaints to it.

14. The dilemma neatly presented by the chronology of these cases is that, if the court struck out these equal pay claims under s.2(3) on the ground that they could be "more conveniently" disposed of in the ET, the claims would have to be rejected by the ET for want of jurisdiction and the Claimants would be left without remedy for claims that might otherwise be well founded: s. 2(4) and 2ZA of the 1970 Act. As the deputy judge said:-

> "16. The critical factor in respect of all of the Claimants in this action is that their employment with the Defendant terminated more than six months prior to the commencement of proceedings."

15. On its application to the High Court the Council's case was that the equal pay claims should be struck out, as they could be more conveniently disposed of by the expert and specialist ET and that the expiration of the time limit applicable to equal pay claims in the ET was an irrelevant factor in the exercise of the court's discretion under s.2(3). The deputy judge correctly rejected the contention that the ET time limit factor was irrelevant to the exercise of the court's discretion. As will be explained below, the Council then modified its position in its submissions to this court in the light of a subsequent decision of the High Court on the construction and application of s. 2(3).

The judgment

16. The deputy judge was not asked by the parties to consider the individual circumstances of each Claimant. He proceeded to deal with the Council's application on the assumption that, for the purposes of the application, all of the Claimants were likely to be out of time for the presentation of complaints to an ET and would have been out of time when the Claim Form was issued in the High Court. He correctly stated that, if he acceded to the Council's application in those circumstances, the Claimants would be left without any forum in which to pursue their claims on their merits.

17. The reasons for refusing to strike the claims out can be summarised as follows.

(1) The claims would *not* be "more conveniently disposed of" separately by the ET, as the ET would not be able to determine any equal pay claim on the merits: it would be bound to dispose of the claims by dismissing them for want of jurisdiction on the limitation ground. The deputy judge said of s.2(3):-

> " 34. … I do not consider it to be consistent either with the meaning conveyed by the language or by the context in which the language appears that it could be regarded as more convenient for a claim to be disposed of only by an Employment Tribunal in circumstances where it is known to the Court that the Tribunal would have to decline jurisdiction to deal with the claim on the basis that it is out of time pursuant to Section 2(4)."
>
> "39. …it cannot be more convenient for a claim to be disposed of separately by an Employment Tribunal in circumstances where the Employment Tribunal could not determine the claim on its merits but would be bound to refuse jurisdiction to deal with the claim because it was time barred…"

(2) Further, striking out the claims in those circumstances would offend the EU principle of equivalence as it applies to rights originating in EU law. The purpose of the principle is to ensure that the national rules giving effect to EU rights are not less favourable than those that govern similar domestic actions.

(3) Even if the deputy judge had concluded that it was more convenient for the claims to be disposed of by an ET and that the principle of equivalence did not apply, he would have exercised his discretion by refusing to strike the claims out. The claims were brought in the High Court within the six year limitation period and the effect of striking them out would be to confer on the Council a windfall benefit of debarring the Claimants from pursuing their claims. The interests of justice would not be served by exercising the court's discretion under s.2(3) in such a way.

The Council's submissions

18. The Council submits that the construction of s.2(3) adopted in the court below is not supported by any authority. It argues for a narrower construction. The court should take a number of factors into account, such as whether the claims were of a *type* that could more be conveniently disposed of by an ET, having regard to the nature of the claim, the specialist expertise of the ET as compared with that of the courts, the rules and procedures in the ET as compared with those of the courts and the interests of the administration of justice in the allocation of the court's resources. Complex equal pay cases like these really belong in the ET, which has relevant experience in determining issues arising on comparators, the GMF defence, remedies and so on.

19. Consistently with its narrower approach to construction the Council also argues that there is no reason to suppose, as the deputy judge did, that "disposed of" in s. 2(3) was limited to a disposal of a claim by the ET on its merits: the words were apt to cover the case of a disposal of a claim by the ET on jurisdictional grounds.

20. It is asserted that the time limits in the ET are well known. The court should have no compunction in striking out the claims, even if the consequence was that the

Claimants would not be able to pursue them in the ET. The fact that the ET would dispose of the claims on time bar grounds rather than on the merits was not a decisive factor in the exercise of the discretion. The discretion should not be exercised in order to give the Claimants an opportunity to go forum shopping in the ordinary courts for a more favourable limitation period than that in the ET where they should have brought their claims in the first place.

21. The Council submits that the correct construction of s. 2(3) requires the court to take into account as a relevant factor the reasons why the Claimants failed to present complaints to the ET in time. The Claimants ought reasonably to have presented their complaints to the ET and to have done so in time. They have not explained their failure to do that in these cases. If it was found that the Claimants had acted unreasonably in not presenting complaints in time in the ET, the claims brought in the ordinary courts were more likely to be found to be ones that could be "more conveniently disposed of" in the ET and were therefore liable to be struck out in the court's discretion. The burden was on the claimants to demonstrate that they did not act unreasonably in letting the time limit expire in the ET.

22. A breach of the EU principle of equivalence is denied by the Council, which insists that the critical point was that, in exercising his discretion, the deputy judge ought to have made findings as to the reasons why the Claimants had not issued timely proceedings in the ET and whether they acted reasonably in not doing so. If this court would not itself strike out the claims, the matter should be returned to the High Court for findings of fact to be made as to the reasons for delay and whether the Claimants had acted reasonably.

23. Authority contrary to the approach taken by the deputy judge in this case was cited to him. In *Ashby v. Birmingham CC* [2011] EWHC 424 (QB); [2011] IRLR 473 HHJ Owen QC, sitting in the County Court, accepted the Council's arguments on the construction and application of s.2(3) and struck out the equal pay claims saying that the expiry of time for presenting the claims to the ET was an irrelevant factor.

24. On the appeal in *Ashby* heard in the Queen's Bench Division and promulgated since the first instance decision in this case Mrs Justice Slade, having cited the *Spiliada* (see below), rejected the proposition that equal pay claims cannot be more conveniently disposed of in the ET because, due to the expiry of the limitation period, they could only be struck out in that forum (see paragraph 71). Slade J said:-

> "72. In my judgment the inability of the appellants to commence proceedings before an employment tribunal could be a factor affecting the convenience of the tribunal as a forum for equal pay claims or one affecting the judge's discretionary decision to strike out such claims in the county court. Whether that factor is taken into account in determining whether the equal pay claims can be more conveniently disposed of in the employment tribunal or if such a conclusion is reached on other grounds, in deciding whether to strike out the claims, in my judgment the reasons why the proceedings had not been issued in the employment tribunal in time would be relevant to the decision under …s.2(3)."

> "78. Claimants cannot rely on letting the limitation period for claims to an employment tribunal go by in order to ensure that their equal pay claims are heard in the courts. It cannot be said that because such claims to an employment tribunal would be out of time a judge could not decide that it would be more convenient for them to be disposed of in the employment tribunal and to strike out the claims in the county court or High Court. In my judgment applying the approach of Lord Goff in *Spiliada* practical justice would require the reason for not commencing employment tribunal proceedings to be taken into account. If not presenting such proceedings was reasonable, the interests of justice are likely to be served by enabling claimants to continue litigating in a forum which has jurisdiction to hear their claims. Such considerations could affect the decision as to whether the claims could be more conveniently disposed of in the employment tribunal, or, if a judge so concluded, whether discretion should be exercised to strike out the claims in the county court."

25. In that case the reasonableness of not pursuing timely applications to an ET was challenged by the employer. No findings of fact were made by HHJ Owen QC at first instance on issues of fact to enable an assessment to be made of whether the appellants acted reasonably in not commencing proceedings in the ET, even if it were more convenient for their claims to be heard there. The judge had erred in his construction and application of the power in s.2(3) and his order to strike out their claims, which was therefore set aside.

26. The Council is now content to rely on that approach in this court rather than continuing to rely on its original and more radical submission to the deputy judge that the expiry of limitation in the ET was an irrelevant factor in exercising the discretion under s.2(3).

27. Reliance was placed in this court, as in *Ashby*, on a "direct parallel" with *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] 1 AC 460 to reinforce the relevance of the Claimants' reasons for failing to bring proceedings in the other jurisdiction, in these cases the ET. It was said in *Spiliada*, at pp. 483 E to 484 B per Lord Goff of Chieveley, in relation to the application of the conflict of laws principle of *forum non conveniens* that, where there is some other jurisdiction apart from England which is more appropriate for the trial of the action, but time has expired for bringing proceedings in that jurisdiction, a stay may be granted to prevent proceedings from being brought in England, where the claim is not time-barred, if practical justice requires it. Practical justice requires it, if the Claimant has acted unreasonably in failing to bring proceedings in that other jurisdiction.

28. It is argued that the same principle should be applied as regards the two domestic jurisdictions of the ordinary courts and the ET. It could hardly be the case that the Claimants can simply ignore the time limits laid down for an ET equal pay claim. Those time limits were intended as safeguards for defendants to equal pay claims.

Discussion and conclusions

29. As explained above, these cases have been argued on the basis that, if they are struck out in the ordinary courts, the ET would be unable to dispose of them on their merits.

It would have to dismiss them for want of jurisdiction, the limitation period in the ET being different from that in the High Court proceedings and having already expired with no possibility of extension.

30. In those circumstances my instinctive reaction was that the deputy judge must have been right to reject the Council's strike out initiative. That reaction may have been conditioned by the well established policy of the courts that, if proceedings are started within the time permitted by the Statute of Limitations and they are not an abuse of process, they will not as a general rule be struck out because, for example, of a procedural mistake: see *Restick v. Crickmore* [1994] 1 WLR 420 at 427E-G per Stuart-Smith LJ.

31. Instinctive reactions, even when educated by relevant experience, can be wrong. In the case of s.2(3) there is certainly a discretion to strike out equal pay claims that have been brought in time in the ordinary courts and could be decided in the ordinary courts on their merits. However, it is a judicial discretion. That means that it can only be properly exercised for the purpose for which it was conferred and in accordance with principles of relevance. This discretion in terms points the court in the direction of considerations of the comparative convenience of two available jurisdictions. The basic assumption underlying convenience considerations in the cases of the High Court and of the ET is that, whereas either would have jurisdiction to decide the equal pay claims on their merits, the claims could be "more conveniently" allocated to the ET.

32. In an analysis of s2(3) I start from the position that its statutory objective is the distribution of judicial business for resolution in the forum more fitted for it. The s2(3) power is not like the strike out power available to the court in other contexts, such as instances of abuse of process. The discretion of the ordinary courts is directed at the comparative convenience of an alternative available in the ET. If it is more convenient for the claims to be disposed of by a complaint to the ET, that is where they should be decided and consequentially an order would be made striking out the extant claims in the ordinary courts in order to avoid the unnecessary duplication of proceedings.

33. Next, the Council now sensibly accepts that the expiration of the limitation period for presenting equal pay complaints to the ET has expired is *a* relevant circumstance to be considered in the exercise of the discretion. I would go further than the Council and describe it as a circumstance of considerable weight in most cases. The draconian consequences of striking out the claims in the ordinary courts in these cases would be that (a) the Claimants would be deprived of their rights to pursue claims which they had brought in time in a court having jurisdiction to determine them on their merits; and (b) there would be nowhere else available for the Claimants to have their claims determined on their merits, the ET being bound to dispose of them for lack of jurisdiction.

34. From the viewpoint of the Council I can well understand that that overall outcome would be a very convenient way of disposing of the claims. However, on a fair reading of s.2(3), that outcome would not be a case of the claims being disposed of "more conveniently" in a different forum. The court is being invited to use a discretion conferred for the convenient allocation of judicial business to stifle claims that had been made in time. If the Council is right in these cases, the Claimants'

option under the 1970 Act of bringing their claims either in the ordinary courts or in the ET would have little real meaning or effect. For the court to exercise its discretion so as to leave the Claimants without the possibility of a determination on the merits in either jurisdiction does not seem to me to be what Parliament intended when it gave Claimants a jurisdictional choice. Still less does it seem to me to be a sensible or just outcome in the majority of cases.

35. In my judgment, there was no error in the deputy judge's construction of s. 2(3) and there was no error of legal principle in his application of it to the facts of the case as appeared from the materials before him. Nor was his decision plainly wrong. The Council took no point before him that account should be taken of the reasons why the complaints had not been presented to the ET in time. The Council's stance at that stage was that the limitation situation in the ET was simply an irrelevant factor in the exercise of the s.2(3) discretion.

36. As for the new submission on the Claimants' reasons for not presenting in-time complaints to the ET, I find it difficult to understand what difference such reasons could make, unless the Council were contending that bringing in-time cases in the ordinary courts was an abuse of process. On the face of it there was no abuse of process in the Claimants simply exercising their undoubted right to institute proceedings in the High Court in time and then to resist them being struck out. No ground has been established on which the matter should be properly remitted to find further facts.

37. I would add the following comments on other points.

Mixed claims

38. In my view, both the power to strike out and the power to refer are not principally directed to a case like the present where the ordinary courts have jurisdiction and the limitation period in the ET has expired. The language of s.2(3) suggests that it is intended to cater more for cases in which the proceedings in the ordinary courts include mixed claims and it is more convenient for the equal pay claim to be determined in the ET, which has more specialist expertise in these matters. That would give some force to the use of "separately" as indicating a process of hiving off the equal pay claim from other claims that may have nothing to do with equal pay, such as a claim for wrongful dismissal or for damages for other breaches of contract, which the ET would have no jurisdiction to hear, but in respect of which the ordinary courts have exclusive jurisdiction. The exercise of the court's discretion might be properly influenced by the kind of issues to be determined. If the issues relate to choice of comparators or the GMF defence, it may be more convenient for them to be decided by the ET with the benefit of its accumulated legal and industrial experience in those areas. But if, for example, it is simply a question of the meaning of "pay" in the light of EU law, there may be no greater convenience in sending it to the ET to be decided.

Principle of equivalence

39. In those circumstances I prefer to express no view on the application of the principle of equivalence requiring that the national rules giving effect to EU rights must not be less favourable than those governing domestic actions, or whether the court should

construe s.2(3) so as to preclude the striking out, or should disapply it, or should not exercise its discretion to strike out in these circumstances. It is not necessary to go into those matters: if it is not necessary to do that, why do it?

The authorities: Spiliada and *Ashby*

40. The analogy with the case of *Spiliada* is not helpful. The passage relied upon is concerned with the principle of *forum non conveniens* in cases on the conflict of laws. This case is nothing to do with the conflict of laws. It turns on the construction and operation of s. 2(3) in circumstances in which Parliament had given the Claimants freedom of choice as to whether they bring their equal pay claims in the ordinary courts or in the ET. They have brought them in the High Court, which has jurisdiction to determine them. They have brought them in time. The Council did not contend that it was an abuse of process for the Claimants either to commence or continue with the proceedings.

41. The Council's argument in this court relied on *Spiliada* and *Ashby* as authorities for the proposition that the deputy judge erred in not considering as a relevant factor the reasons why the Claimants had not presented their complaints to the ET in time. In my judgment, there was no error of law on this point. First, the deputy judge was not asked to take that factor into account. Secondly, I am of the view that it is not for these Claimants, who had an option as to whether they commence proceedings in the ordinary courts or to present a complaint to the ET, to explain why they did not go to the ET in time.

42. On this matter I take a different approach to that followed in *Ashby*. I agree with Mrs Justice Slade that there may be cases in which the reasons for not presenting an equal pay complaint in the ET in time may be a factor relevant to the exercise of the s.2(3) discretion, but, in my view, they would be exceptional cases in which, for example, it was contended that it would be an abuse of process for the Claimant to commence or would be an abuse of process for the Claimants to continue with an equal pay claims in the ordinary courts. The Council has not sought to make out such a case here or below.

Result

43. I would dismiss the appeal. It has not been established that the deputy judge's construction of s.2(3) was wrong or that his refusal to exercise his discretion was flawed by a failure to observe the principles of relevance, or was plainly wrong.

Lord Justice Davis:

44. I agree.

Dame Janet Smith

45. I also agree.