Published by Thompsons Solicitors

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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 79 April May 2003

Opaque pay systems go for a Barton

Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332

Equal pay may seem something of a misnomer where salaries of hundreds of thousands of pounds are concerned. The purpose of equal pay legislation however is to eradicate sex discrimination in pay, not address issues of fair pay and social justice. So the principles are the same whether the case is about female cleaners seeking pay parity with male refuse workers or female stockbrokers wanting equal pay with male colleagues.

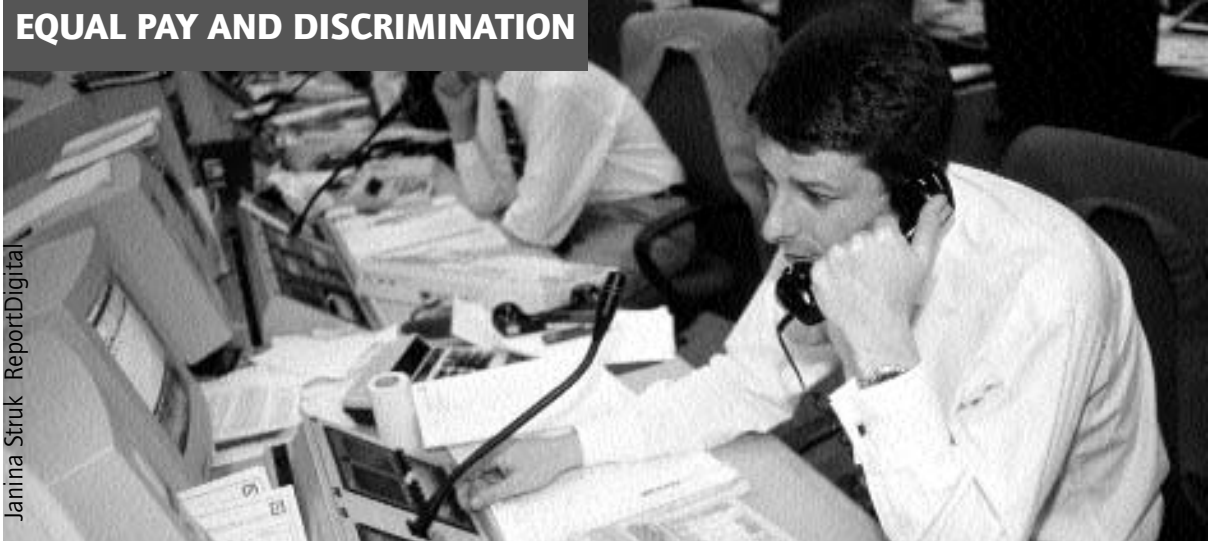
Ms Barton's case is in the latter category. Both her and her male comparator received basic pay of £150,000. But her annual bonus (on top of basic pay) was £300,000 compared to his £1 million and he also received £75,000 as a Long Term Incentive payment whilst she received none and he was given a third more share options than her. Her case concerned both equal pay and sex discrimination as non-contractual bonuses come under the Sex Discrimination Act 1975 whilst the contractual elements of pay are determined under the Equal Pay Act 1970.

The Employment Tribunal accepted that her comparator was a valid comparison – they were both engaged on like work, and they found that there was an unwritten, non-transparent bonus policy with neither an appraisal system nor an equal opportunities policy. However they were satisfied that the employer had established the material factor defence to an equal pay case and that her lower bonus and pay was not on grounds of her sex. The Tribunal stated that they considered it was a vital component of the City bonus culture that bonuses are discretionary, scheme rules are unwritten and individuals' bonuses are not revealed and that the bonus system would collapse if comparisons were possible.

The Employment Appeal Tribunal has given short shrift to this reasoning stressing that no Tribunal should be seen to condone a City bonus culture involving secrecy and/or lack of transparency. The EAT stopped short of substituting the Employment Tribunal decision with a conclusion that Ms Barton had been subject to sex discrimination and her equality clause breached, and so has remitted the case back to the ET for a fresh hearing. However, the Judgment provides very helpful guidance on both how Tribunals are to assess the burden of proof in sex discrimination claims, and the material factor defence in equal pay cases.

Sex discrimination burden of proof

Following the change to the burden of proof set out in section 63A of the Sex Discrimination Act 1975, it is for the Applicant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondents have committed an act of discrimination against the Applicant which is unlawful. If the Applicant does not prove such facts the claim fails. However, it is important to bear in mind in deciding whether the Applicant has proved such facts that it is unusual to find direct evidence of sex discrimination.



Janina Struk ReportDigital

Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important to note the word is "could". At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts proved by the Applicant to see what inferences of secondary fact could be drawn from them. These inferences can include, in appropriate cases, any inferences that it is just and equitable to from an evasive or equivocal reply to a Sex Discrimination Act questionnaire. Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

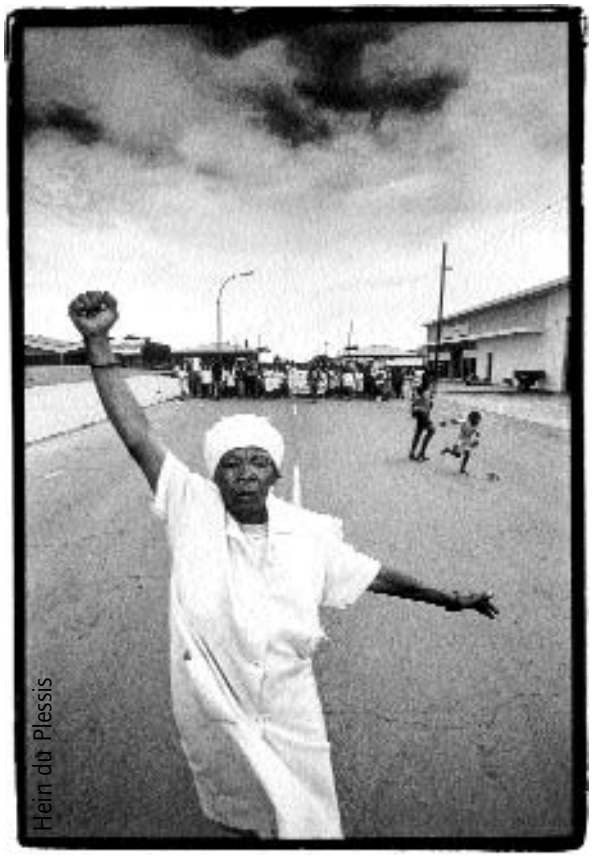
Where the applicant has proved facts from which inferences could be drawn that the Respondents have treated the Applicant less favourably on the grounds of sex, then the burden of proof moves to the respondent. It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive. That requires a Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Material factor defence in equal pay

Under the equal pay aspects to the case, as there was both a taint of sex discrimination and a lack of transparency in the pay system the Respondent had to prove the following seven elements to successfully argue that the reason for pay differential between Ms Barton and her comparator was not the difference of sex. (1) That there were objective reasons for the difference; (2) unrelated to sex; (3) corresponding to a real need on the part of the undertaking; (4) appropriate to achieving the objective pursued; (5) that it was necessary to that end; (6) that the difference conformed to the principle of proportionality; and (7) that was the case throughout the period during which the pay differential existed.

The guidelines set out in this case will have wide repercussions beyond the city bonus culture under investigation in this particular case. Employers ignore statutory questionnaires and Codes of Practice at their peril. The clear analysis of the approach required to establish discrimination will be relied on by Applicants from now on.

Landmark settlement for South African asbestos workers



The high profile battle in the South African courts to secure compensation for South African asbestos miners and their families has concluded with a landmark multi-million rand settlement which will lead to the first and only asbestos trust fund in South Africa.

It represents justice for thousands of South African former asbestos miners whose lives have been destroyed by the mining firms Gencor and Gefco.

Thompsons worked with South African lawyers and the South African miners' unions to reach the historic settlement. The fund, worth £35 million, is the first time that black miners in South Africa have been paid compensation by an employer for the injury and death caused by its negligence.

The firm is immensely proud to have been involved in this very practical example of international solidarity between workers. Our skills and experience drawn from the fight for justice for victims of the mining industry and those exposed to asbestos in the UK has enabled a deal that has faced intense resistance from the business community in South Africa.

The significance of the eventual success of this project lies not only in the amount of money secured for the victims of the South African asbestos mining industry, because ultimately no amount of compensation can right an injustice, but also in the long term impact of the settlement on workers' compensation in a country where there has been a disregard for health and safety at work.

Thompsons is now also speaking to the mining unions about the coal and gold mining industries where there is even more widespread suffering than in asbestos.

Mark Berry of Thompsons said: "This is a practical demonstration of international solidarity between workers. We have been able to use Thompsons' extensive experience of representing British workers with asbestos related diseases, to assist Ntuli Noble Spoor and the South African NUM.

"This is an open and transparent Trust, agreed as the most efficient and cost effective way of getting compensation to the victims. It will be run by people of probity and integrity and will be independent of both employers and lawyers".

One of the most important factors in the case was the threat of litigation in London for compensation levels in accordance with UK law which would be significantly higher than that available under South African law.

Employment Relations Act 1999 Review

In introducing the Employment Relations Act 1999 the government promised to review its operation and effectiveness after a period of time. They are now in the process of that review and consulting on their proposals. Here we outline the main conclusions of the review and the likely legislative changes to be announced.

Implications of Wilson and Palmer v United Kingdom

The government has used the opportunity of the review to set out its proposals to amend the law in light of the **Wilson and Palmer** case in the European Court of Human Rights (see LELR 73).In July 2002, the European Court of Human Rights found that UK law did not adequately protect trade unions and their members against anti-union activities. UK law did not comply with Article 11 of the European Convention of Human Rights on freedom of association, which includes the right to form and join trade unions for the protection of workers' interests.

UK law allowed employers to offer financial inducements to encourage trade unionists to give up their rights to collective bargaining. This breaches the human rights convention.

The existing law is section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 which prohibits subjecting employees to a detriment by any act or omission for the purpose or preventing or deterring him from trade union membership or activities or penalising him for the same reason.

The government proposes to delete the existing sections 148(3) of the Act which permit employers to take anti-trade union action where their purpose was also to "further a change in his relationship with all or any class of his employees". These sections had been introduced by a Tory Minister in the Lords (the so-called "Ullswater amendment") after Mr Wilson's case had succeeded in the Court of Appeal and were retained despite the decision being reversed in the Lords.

Repealing the Ullswater amendment is welcome and overdue. It does not, however, go far enough. The Court judgment said "it is the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate them in their relations with their employers", that the UK "had failed in its positive obligation to secure the rights under Article 11" and that this failure amounted to a violation of the rights of the employees and their unions.

The government's response is to propose a new "positive right for members of independent trade unions to use their union's services". This will presumably make it clear that it is unlawful to subject an employee to a detriment for being a union member or taking part in activities, but also for taking advantage of union services such as collective bargaining or individual representation. This remedies the House of Lords decision in **Wilson and Palmer** which undermined the decision in **Discount Tobacco v Armitage.**

The details of this new right are not yet clear. It would seem it applies to all union members, not merely where their union is recognised by the employer. It is to be hoped it will apply to workers not merely employees, but this is not specified. No detail is give on what will be included in the definition of "union services".

Arguably, the European Court decision requires more than this. It suggests that workers have a right to be represented and that their should be a right to representation on issues at work, enforceable both by the individual member and the trade union. The existing right to be accompanied at disciplinary and grievance hearings does not go far enough to provide this, even after the proposed amendments to "clarify" the role of the accompanying companion.

The government does not propose specific legislation to protect collective bargaining rights. Consequently the government will

repeal the defective section 17 of the Employment Relations Act 1999 which enabled regulations on this issue. The section was so mangled by a Conservative amendment that it would have been worse than useless if implemented. It is, however, a cause of concern that the government proposes an amendment to specify that the entering of individualised contracts would not constitute unlawful union discrimination as long as there was no inducement or pre-condition in the contract to relinquish union representation. This is worrying as it could be used to undermine collective bargaining and runs the risk of being interpreted similarly to the pre-existing legislation in a way which may conflict with the European Court's judgment.

Statutory Trade Union Recognition

The other main focus of the review is on the statutory recognition procedures introduced in 1999. The new law was introduced with much fanfare and gloomy prediction of disaster – from both sides of industry. Employers' bodies claimed the law went too far and gave too many rights to trade unions that would be bad for business, Britain and no doubt the universe too. Trade unions argued the opposite. There were also fears that the procedure would be unworkable and the Central Arbitration Committee (the body charged with adjudicating the new rights) would fail to operate the new law effectively – it would be swamped with the flood of applications, or become bogged down in endless judicial review challenges and perhaps lose the confidence of both sides of industry.

The review pronounces that the recognition procedures have been a resounding success. They point to the smooth running of the CAC, the acceptance from both sides of industry of the authority of the CAC judgments and the soundness of the decision making process which has so far succeeded in all but one challenge for judicial review.

It is certainly correct that the statutory recognition process has not generated headline negative publicity for the government and the cases show a pattern of unions succeeding – at all levels of the process – in approximately two thirds of the cases brought. It has, in the words of one minister, become an accepted feature of the industrial relations landscape.

The rather obvious conclusion from the government analysis is that it is better not to fix that which ain't broke. Therefore only very minor and mainly technical amendments are proposed that tinker at the margins. No change is suggested to the threshold of support required for a union to gain recognition which remains a majority of the workers who vote and 40% of the bargaining unit. Nor does the government intend to lower or remove the small employer threshold.

Under the proposals unions are likely to gain some access to the workforce before the balloting process, but only by letter through a third party (the Qualified Independent Person appointed by the CAC to run the ballot). The confidential workforce and membership checks conducted by the CAC case managers to assess levels of union support and membership are likely to gain a statutory footing. The government also proposes that collective bargaining on pay should not include pensions. The government seeks views on whether there should be scope to consider associated companies in deciding bargaining unit cases as they are undecided whether this would be desirable or not. There is also a suggestion that the approach the CAC takes to deciding a bargaining unit, if the parties fail to agree between them, is to be tightened.

The TUC argues that the government proposal do not go far enough. The fact that the law has not been a disaster does not make it a success. The law was intended to give rights to trade unions and to assist them in gaining recognition where the workforce supported it. However the number of workers and workplaces who have gained recognition from the new procedure are small. To look only at the outcome of the cases that Unions have brought and their success rate misses the many cases that unions would like to bring but cannot because of the difficulty of achieving the threshold, the complexity of the procedure and the small employer exemption.

Trade union blacklisting and other issues

Regulations are also proposed to implement the anti-union blacklisting provisions in the Employment Relations Act 1999 and various other matters relating to the Certification Officer, and other miscellaneous issues.

The government intends to publish a draft bill on its proposals later this year and we will keep you posted of developments.

1 *A full cpy of Thompsons submission to the Employment Relations Act Review is available from the Employment Rights Unit at Thompsons Congress House.*

The new world disorder

R v Fartygsentreprenader AB, Fartyskonstructioner AB, Port Ramsgate Ltd and Lloyd's Register of Shipping, unreported 28 February 1997
Edwards v National Coal Board [1949] 1 AER 743
R v The Board of Trustees of the Science Museum [1993] 3 AER 853

With 9/11, the Iraq war and the situation in Israel, there is now a heightened concern about the risk of a terrorist attack. There are specific criminal laws to deal with the threat – the Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001. In July last year Lord Macdonald, Minister for the Cabinet Office, said the government intends to introduce "civil contingencies legislation to enhance the safety and security of the UK". This is to replace the Civil Defence Act 1948 and associated legislation, which the government considers as outdated.

However there are no specific health and safety laws which deal with this type of risk and set out what employers are expected to do. In the September 2002 edition of the magazine *Industrial Safety Management* its editorial warned:

"A recent report by professors from Salford University indicates that large portions of industry still have not taken the potential [terrorist] threat seriously and have not made adequate plans.....At the moment we seem to be adopting the typical British approach of muddling through, if and when the event occurs!"

So what exactly is an employer's duty?

The Health and Safety at Work Act 1974

The purpose of the Health and Safety at Work Act 1974 (HSWA) is contained in Section 1 of the Act. Its aims are to protect the health, safety and welfare of people at work and to safeguard others, mainly the public, against risks to health or safety from the way work is carried out and the hazards associated with the work.

The Act requires employers to ensure "so far as is reasonably practicable" employees, (Section 2) and non-employees, (Section 3), are not exposed to risks to their health and safety from the employer's undertaking (ie business).

The test for what is reasonably practicable was set out in the case of **Edwards v National Coal Board [1949] 1 AER 743.** This case established the risk must be balanced against the 'sacrifice', whether in money, time or trouble, needed to avert or mitigate the risk. By carrying out this exercise the employer can determine what measures are reasonable to take. This is effectively an implied requirement for risk assessment.

If a terrorist attack is a possibility at a place of work, then the HSWA requires employers to take adequate precautions. The fact that the risk is not of the employers' making does not diminish employers' responsibility.

By way of analogy, on 10 April 2003 at Coventry Magistrates' Court Network Rail Infrastructure Ltd, formerly Railtrack plc, was convicted of a breach of the HSWA, in relation to a vandalism hotspot at Willenhall, Coventry. The court emphasised the dangers of crime on the railways and the importance of effective management of lineside security.

Risk Assessment

Regulation 3 of the Management of Health and Safety at Work Regulations 1999 (MHSWR) sets out the general requirement upon employers to carry out risk assessments with respect to the health and safety hazards involved in their business. A hazard is something with the potential to cause harm. The assessment is to identify control measures that eliminate the risk or, if this cannot be done (so far as is reasonably practicable), reduce the level of risk to the lowest level reasonably practicable.

In **R v The Board of Trustees of the Science Museum [1993] 3 AER 853** the Court of Appeal said that risk means the *possibility* of danger and not just *actual* danger.

Employers might argue that the likelihood of a terrorist attach is so small it does not require them to take action. However, in assessing the risk it is not only the

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frequency of the hazard occurring that needs to be considered, but also the harm that might occur if it does. If the potential harm could be catastrophic, then the employer is required to act. Risk is the product of the frequency and likely severity of harm of the hazard.

This was emphasised by Mr Justice Clark in his sentencing remarks in the Health and Safety prosecution following the collapse of a walkway to a ferry at Port Ramsgate in 1994, which killed six people. He said:

"...if thought had been given to its responsibilities especially having regard to the provision of the [HSWA], Port Ramsgate could have appreciated that there were potential risks, albeit, perhaps very small risks.....Further, once it was appreciated that there were potential risks, it would have been appreciated that such risks should have been guarded against because of the catastrophic consequences if anything went wrong".

(R v Fartygsentreprenader AB, Fartyskonstructioner AB, Port Ramsgate Ltd and Lloyd's Register of Shipping, unreported 28 February 1997)

Information to the Employees about the Risks

An article in the *Financial Times* on 6 February 2003 had the headline *Employers refuse to pass on terrorism warnings.* However, under Regulation 10 of the MHSWR employers "shall" give to employees "comprehensible and relevant" information on risks to the employee's health and safety identified by any risk assessment and the preventative and protective measures in place. Under Regulation 8, if employees are exposed to serious and immanent danger they are to be informed, so far as is reasonably practicable, of the nature of the hazard and what steps are being taken to prevent them.

In November 2001, the interim report of the National Steering Committee on Warning and informing the public was formally submitted to the Civil Contingencies Secretariat. One of its main recommendations was the creation of a planned programme of public education, supported by Government finance and endorsement, for the development of greater public awareness of the correct actions to take in the event of a major emergency and of the means by which this advice and information could be given.

It may be that employers fear giving certain information to employees because of the alarm it may cause. However, if giving information to the public is seen as an important aspect of dealing with the terrorist threat then, clearly it should be an integral part of an employer's approach.

Conclusions

The threat of terrorism is nothing new. For example, London has lived with the threat for over 30 years dating back to the concerns about the terrorist activities of the IRA in the 1970s. However what is new is the nature of the threat. There is now talk of a possible Chemical, Biological, Radiological and Nuclear (CBRN) attack. There is also the emergence of the suicide bomber.

The reality is that the risk of terrorism is one that has to be risk assessed like any other. This means employers need to, for example, look at their security arrangements, the training and information given to employees, and emergency procedures in the event of an attack happening.

By involving its workforce an employer might be worried about causing panic. But an employer is required to put in place appropriate control measure to deal with the risk, which inevitably requires the employer to engage with its workforce about how the risk is being addressed. If this is not done, then the employer will almost certainly be in breach of its health and safety duties.

Winner on the web

Thompsons Solicitors is the first law firm in the UK to be awarded the Legal Services Commission Quality Mark for legal websites.

The Quality Mark, launched by the Lord Chancellors Department with the Community Legal Service and LSC in 2002, is the quality standard for legal information, advice and specialist legal services.

It sets standards designed to ensure that the website is well run and has its own quality control mechanisms for the information provided on it.

The standards also relate to accessibility for those with disabilities.

Thompsons, was chosen to be part of the

Reason why first

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL.

Discrimination cases rarely reach the House of Lords, but when they do, they matter. The case of Shamoon is no exception. Two vital aspects of discrimination law are considered.

The first is what constitutes a "detriment" and is therefore capable of amounting to unlawful discrimination. There has been a worrying trend to limit the scope of the definition but **Shamoon** firmly reiterates the principle that a detriment exists if a reasonable worker would or might take the view that the treatment accorded to her had in all the circumstances been to her detriment. It is not necessary to demonstrate some physical or economic consequence.

The case also considered the meaning of discrimination and how tribunals should approach the consideration of whether a complainant has been less favourably treated on grounds of her sex. In cases of direct race or sex discrimination (unless the discrimination is sex-specific or race-specific) the tribunal have to compare the treatment received by the complainant to the treatment of an actual comparator or hypothetical comparator of a different race or sex.

Section 5 (3) of the Sex Discrimination Act (SDA) 1975 provides: "A comparison of the cases of different sex… must be such that the relevant circumstances in the one case are the same or not materially different, in the other". **Shamoon** narrows the scope for complainants to choose their comparators.

Chief Inspector Shamoon worked in the traffic division of the Royal Ulster Constabulary. The traffic division was split into three geographic regions each with its own Chief Inspector who undertook appraisals of junior officers. After complaints about the way Shamoon conducted appraisals and representations from the Police Federation, her Superintendant removed her appraisal responsibilities. She objected and argued this amounted to a detriment and was less favourable treatment on grounds of her sex.

The tribunal took the two other, male, Chief Inspectors in the traffic division as comparators who had retained their appraisal responsibilities. The tribunal found that Ms Shamoon had been treated less favourably than her comparators. It drew an inference this was on grounds of her sex and found in Ms Shamoon's favour.

The Lords criticised the tribunal's approach. It made it clear that, when selecting a comparator, it is insufficient to select a male (or males) in a similar position but their circumstances must be the same, or not materially different to the Applicant. The male Chief Inspectors had not had complaints made against them and the Superintendent lacked direct line responsibility for them. These differences were material and meant that the male Chief Inspectors were not valid comparators. The tribunal should have considered whether Shamoon had been treated less favourably than the two male Chief Inspectors if, hypothetically, they had been subject to complaints and the same line management.

The effect of decision is that real, as opposed to hypothetical, comparators will be rarer to find.

The Lords also considered the classic tribunal approach which is to first assess whether there has been less favourable treatment, and if so, consider if the treatment was on grounds of sex (or whatever the prohibited ground may be). The Lords stated that it may be more convenient in some cases to treat both questions together, or to look at the reason why issue before the less favourable treatment issue.

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