Court of Appeal Judgment in Commissioner of City of London Police v Geldart

The Court of Appeal handed down judgment in *Commissioner of City of London Police v Geldart* on 28.4.21. Douglas Leach represented Mrs Geldart, instructed by Penningtons Manches Cooper LLP (on behalf of the Police Federation).

Mrs Geldart brought a successful claim of direct sex discrimination in the ET, in respect of the reduction and then cessation of her London Allowance ("LA") in line with the maternity pay provisions of the Police Regulations 2003 (reg.29 and Annex L). The ET concluded that there was no basis for the reduction/cessation of LA under the Police Regs, because it was not "pay" for the purposes of those provisions, but a separate non-pensionable allowance. As a police officer, Mrs Geldart could not rely on s.18 EqA 2010 (pregnancy/maternity discrimination) beyond the first two weeks of her maternity leave, but could instead rely on s.13 and the protected characteristic of sex, without the need for any comparator on the basis of well-established ECJ case law including *Webb v EMO Cargo.* The treatment was because of maternity leave, and the claim was thus made out. The alternative claim of indirect discrimination was dismissed.

In the process, the ET rejected arguments that:

- The claim was in truth an equal pay claim as a matter of jurisdiction, and should fail for that reason; and
- The advent of s.18 EqA 2010 meant that that provision constituted the only means of pursuing a pregnancy/maternity claim without the need for a comparator.

The EAT dismissed the Commissioner's appeal: the ET's judgment was upheld on all points, and the Commissioner had not appealed against the rejection of the equal pay jurisdiction argument.

The Court of Appeal allowed the Commissioner's further appeal in part.

The Court dismissed the appeal against the conclusions of both the ET and EAT that under the correct construction of the Police Regs, LA remained payable at all times. This conclusion will potentially affect many officers of the City of London Police and Metropolitan Police, as well as those serving in the surrounding forces entitled to the related South East Allowance. Officers within any of those forces on long-term sick leave for example, may well benefit from the ruling to a greater extent than officers on maternity leave.

The Court allowed the appeal against the conclusions of the ET and EAT below that there had been direct sex discrimination under s.13 however, determining that the criterion applied pursuant to which Mrs Geldart's LA had been reduced/stopped, was her absence, and not specifically her absence on maternity leave. Consequently, the issue of whether Mrs Geldart needed to point to a male comparator or not (hypothetical or otherwise), did not arise. The EAT's judgment on that point will remain binding on tribunals therefore.

Mrs Geldart's cross-appeal against the ET's dismissal of her indirect discrimination claim was allowed, and that claim was remitted to the ET.

Comment

On the direct discrimination issue, the judgment is arguably problematic.

The Court accepted that this was a "criterion" case and not a "mental processes" case. The basis of the Court's conclusion that the criterion applied was simply "absence", was the Commissioner's mistaken belief that it was permissible under the Police Regs, to treat LA in the same way as "pay". In that regard, reliance was placed on para.64 of ***R (E) v Governing body of JFS and ors [2010] 2 WLR 153 (Sup Ct)***, where Lady Hale observed that the ultimate question in direct discrimination cases generally (both criterion and mental processes cases) is "*what caused the treatment in question?*".

However, the Court's approach here arguably confuses the motivation for the application of the criterion, with the application of the criterion. Indeed, Lady Hale went on to say at para.65 that:

"If the criterion he adopted was, as in Birmingham or James, in reality ethnicity-based, it matters not whether he was adopting it because of a sincerely held religious belief. No-one doubts that he is honestly and sincerely trying to do what he believes that his religion demands of him. But that is his motive for applying the criterion which he applies and that is irrelevant. The question is whether his criterion is ethnically based."

It was not in dispute that the criterion applied was the length of absence triggering reduction/cessation of maternity pay as stipulated in the maternity pay provisions. The motivation for applying that criterion – the belief that LA should be treated the same way as pay – is irrelevant.

If that motivation is irrelevant, the Court's approach of treating the case as if it had been an equal pay case – which it would have been if the Commissioner's erroneous construction of the Police Regs had been correct, and which claim would have failed – falls away. The answer would then inevitably be that there was indeed direct sex discrimination as the ET and EAT found.