Appeal No. EAT/99/88

EMPLOYMENT APPEAL TRIBUNAL

4 ST.JAMES'S SQUARE, LONDON,SW1 4JU

At the Tribunal
On 16 January 1989
20 July 1989
Judgment delivered on 26 September 1989

Before

THE HONOURABLE MR JUSTICE WOOD MC (P)

MISS J W COLLERSON

MR G H WRIGHT MBE

MISS M L ALDRIDGE — APPELLANT

BRITISH TELECOMMUNICATIONS PLC — RESPONDENTS

Transcript of Proceedings

JUDGEMENT

REVISED

APPEARANCES

For the Appellant

MR A HOWS (SOLICITOR)
Messrs Lawford & Co
15 Devereux Court
Strand
London WC2R 3JJ

For the Respondents

MR I LEE (OF COUNSEL)
J B K Rickford
Solicitors Office
British Telecommunications
81 Newgate Street

EAT/99/88

MR JUSTICE WOOD (PRESIDENT): Miss Aldridge appeals from a decision of an Industrial Tribunal sitting at London (South), under the Chairmanship of Mr Walters, that her work as a Senior Drawing Office Assistant at British Telecommunications (BTs) Training Centre at Bletchley Park was not of equal value (Equal Pay Act 1970, S.1(2)(c)) with five selected comparators, who are all Inspectors (Engineering) at the same establishment. The essence of her appeal is that the Tribunal should not have admitted the report of an independent expert appointed by the Tribunal under the provisions of the Act and the relevant Regulations, which are the Industrial Tribunals' (Rules of Procedure) Regulations 1980, as amended by the Industrial Tribunals' (Rules of Procedure)(Equal Value Amendment) Regulations 1983. If that report were to be rejected, the obligation upon the Tribunal was to order a fresh report before it could proceed with its consideration of the case. This case is said to be of importance to practitioners in this field.

Miss Aldridge issued her originating application on 29th August 1985. On 11th March 1986 the Tribunal referred the matter to an independent expert for report. That report was received in March 1987. On 22nd June 1987 there was a hearing for directions at which it was decided that the full hearing should take place on 22nd and 23rd September 1987, and it was directed that the independent expert should attend for cross-examination. Other directions were also given. At the outset of the resumed hearing Mr Hows for Miss Aldridge applied under Rule 7A(8) of the Regulations that the report of the independent expert should not be admitted. The hearing

took place in September and a further day's hearing on 19th October. The reasons were dated 17th December 1987. Notice of appeal was given in January 1988; the Respondents' cross-notice was in March 1988, the appeal came on for hearing in February 1989 but was adjourned for want of time part-heard and finally disposed at the end of July this year.

If we allow this appeal the matter would no doubt go to the Court of Appeal with possible further delay of a year, and if a further independent expert's report were then ordered it might very well take as long as a further year for it to be obtained. There would then almost inevitably follow a further challenge to the report by the party against which that expert had formed a view, and it might very well be that the final hearing did not take place until Spring 1992; all this is subject to appeals which would then take many years thereafter. The delays therefore, which are being caused by the present procedures, are such as to cause grave dissatisfaction for those responsible for the administration of this branch of the law. This present case is only an instance of others of which we have experienced.

This Court has been ably assisted by those appearing before it. The Appellant's case is that the independent expert's report should not have been admitted for four reasons:-

1. It did not comply with Rule 7A(3)(c) in that it did not adequately set out its conclusions and reasons.
2. It did not comply with Rule 7A(3)(d) in that it failed to take no account of the difference of sex.
3. The Tribunal should not have taken into account the

expert's oral evidence in deciding to admit the report.

4. The Tribunal should not have admitted the report because the independent expert's methodology was flawed.

Grounds 1 and 3 were argued together, as were grounds 2 and 4.

It will be necessary to refer to many of the Regulations and the Rules made under them, and it is perhaps convenient that they should be set out at this juncture.

> "Procedure relating to expert's report
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> 7A-(1) In any case involving an equal value claim where a dispute arises as to whether any work is of equal value to other work in terms of the demands made on the person employed on the work (for instance under such headings as effort, skill and decision)(in this Rule hereinafter referred to as "the question"), a tribunal shall, before considering the question, except in cases to which section 2A(1)(a) of the Equal Pay Act applies, require an expert to prepare a report with respect to the question and the requirement shall be made in accordance with paragraphs (2) and (3) of this Rule.
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> (2)...
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> (3) The requirement shall stipulate that the expert shall -
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> (a) take account of all such information supplied and all such representations made to him as have a bearing on the question;
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> (b) before drawing up his report, produce and send to the parties a written summary of the said information and representations and invite the representations of the parties upon the material contained therein;
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> (c) make his report to the tribunal in a document which shall produce the summary and contain a brief account of any representations received from the parties upon it, any conclusion he may have reached upon the question and the reasons for that conclusion or, as the case may be, for his failure to reach such a conclusion;

(d) take no account of the difference of sex and at all times act fairly.

(4)...
(5)...
(6) Where a tribunal has received the report of an expert, it shall forthwith send a copy of the report to each of the parties and shall fix a date for the hearing of the case to be resumed; provided that the date so fixed shall be at least 14 days after the date on which the report is sent to the parties.

(7) Upon the resuming of the hearing of the case in accordance with paragraph (6) of this Rule the report shall be admitted as evidence in the case unless the tribunal has exercised its power under paragraph (8) of this Rule not to admit the report.

(8) Where the tribunal, on the application of one or more of the parties or otherwise, forms the view -

(a) that the expert has not complied with a stipulation in paragraph (3) of this Rule, or

(b) that the conclusion contained in the report is one which, taking due account of the information supplied and representations made to the expert, could not reasonably have been reached, or

(c) that for some other material reason (other than disagreement with the conclusion that the applicant's work is or is not of equal value or with the reasoning leading to the conclusion) the report is unsatisfactory,

the tribunal may, if it thinks fit, determine not to admit the report, and in such a case paragraph (1) of this Rule shall again apply.

(9) In forming its view on the matters contained in paragraph (8)(a), (b) and (c) of this Rule, the tribunal shall take account of any representations of the parties thereon and may in that connection, subject to Rule 8(2A) and (2B), permit any party to give evidence upon, to call witnesses and to question any witness upon any matter relevant thereto.

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(10) The tribunal may, at any time after it has received the report of an expert, require that expert (or, if that is impracticable, another expert) to explain any matter contained in his report or, having regard to such matters as may be set out in the requirement, to give further consideration to the question.

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(11) The requirement in paragraph (10) of this Rule shall comply with paragraph (2) of this Rule and shall stipulate that the expert shall make his reply in writing to the tribunal, giving his explanation or, as the case may be, setting down any conclusion which may result from his further consideration and his reasons for that conclusion."

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Procedure at hearing

8-(1) Subject to paragraphs (2A), (2B), (2C), (2D) and (2E) of this Rule the tribunal shall conduct the hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings; it shall so far as appears to it appropriate seek to avoid formality in its proceedings and it shall not be bound by any enactment or rule of law relating to the admissibility of evidence in proceedings before the courts of law.

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(2A) The tribunal may, and shall upon the application of a party, require the attendance of an expert who has prepared a report in connection with an equal value claim in any hearing relating to that claim. Where an expert attends in compliance with such requirement any party may, subject to paragraph (1) of this Rule, cross-examine the expert on his report and on any other matter pertaining to the question on which the expert was required to report.

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(2B) At any time after the tribunal has received the report of the expert, any party may, on giving reasonable notice of his intention to do so to the tribunal and to any other party to the claim, call one witness to give expert evidence on the question on which the tribunal has required the expert to prepare a report; and where such evidence is given, any other party may cross-examine the person giving that evidence upon it.

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(2C) Except as provided in rule 7A(9) or by paragraph 2D) of this Rule, no party may give evidence upon, or question any witness upon, any matter of fact upon which a conclusion in the report of the expert is based.
..."

In looking at the detailed wording of these Rules introduced in order to give effect to the equal value provisions of the Equal Pay Act, it is important to note first, that they only form part of the general structural procedures before an Industrial Tribunal, which encourage flexibility and a reasonable and reasoned informality - for instance, in the power to adjourn if problems arise which place one or other part at a disadvantage; and secondly, it is ultimately at the close of all the evidence for the applicant to prove her case upon the evidence, and for the Tribunal to reach its final conclusion upon the facts and opinions which it finds acceptable. It is not trial by independent expert. If it was, then the process would offend the provisions of EEC Directive 75/117 Art.2 and see also Tenants Textile Colours Ltd v. Todd [1989] IRLR p.3 - a decision of the Northern Ireland Court of Appeal.

In any event we would ourselves have read the Regulations as so indicating. Looking at the provisions of Rule 7A(7) and (8) it seems to us that their purpose was to enable the Tribunal in its discretion to refuse to accept the independent expert's report in evidence and to commission another, if it discovered sufficient impropriety to make the findings of the report unsafe. The grounds have a common thread in that they strike at the essential validity of the report and whether it has been properly prepared. Those Rules have no bearing on the way in

which the Tribunal approaches the weight to be given to the report once it has been admitted in evidence. There is no provision in the Rules which gives the report, once admitted, any special status. The Tribunal must hear all the evidence and assess it before reaching an ultimate conclusion. By Rule 8(2A) the expert may be cross-examined and there is no provision restricting such evidence and such examination only to the preliminary issue of the admissibility of the report as evidence. Moreover by Rule 8(2B) the parties may call their own expert evidence on the question of value, subject only to a limitation of one such witness for each party.

The possibility that the Rules might be construed as giving the position of the independent expert's report, as one where the decision was in reality made by him, was noticed by the Joint Committee on Statutory Instruments during its session in 1983 and 1984, and is mentioned in its 13th Report. An assurance was received from those responsible for the drafting of the Rules in the Department of Employment that there was no such intention, and indeed we venture to think that the views of all concerned were very much in line with the view which we have formed above.

Upon grounds 1 and 3 of his submission, Mr Hows argues, first, that there is provision in Rule 7A(6) for the report to be sent to the parties, who can then make representations upon it and upon which the Tribunal can require a written supplemental report under Rules 7A(10) and (11). Consequently if the Tribunal receives oral evidence from the expert it deprives a party of having his evidence in written form, and

also in allowing an expansion of the written report it would allow a breach of Rule 7A(3) to be remedied. It is argued that Rule 7A(3) is mandatory in its form, and therefore no oral evidence should be allowed for that purpose.

We find ourselves unable to agree, for a number of reasons. The independent expert's report is only part of the procedure; Rule 7A(8) gives a Tribunal a discretion whether or not to admit the report. We read the word 'shall' as being directory, not mandatory.

If a request is made to the expert under Rule 7A(10), he or she can remedy any alleged omission or inadequacy of the initial report in a written addendum. Rule 7A(9) gives power to the Tribunal to hear evidence. Finally, there is always power to adjourn, if any disadvantage or unfairness arises during any course which the Tribunal decides to take.

There is however a more difficult argument put forward, which is that the provisions of Rule 8(2)(C) indicate that it is intended that all relevant facts should be contained in the expert's report and addendum. This has given us cause for prolonged deliberation, but we have come to the conclusion that the submission is not well founded.

Because of the existence of this Rule it has become the practice, and it seems to us likely to continue to be the practice, that one side or the other will always attack the independent expert's report at the "admission stage" - Rule 7A (8) and (9). Due to the rigidity of the Rules and the

inevitable consequential delay if a fresh report is ordered, the most convenient course may well be for the Tribunal to admit the report, and then to give it such weight as it deems fit in the final weighing of the evidence. If the report is considered to be highly unsatisfactory, the weight would be small, and the evidence in the report of the expert witness called by one side or the other may be preferred. It must be remembered that the Tribunal may well have heard a great deal of evidence at the admission stage. It is only fair to the expert, that if there are matters of fact which arise out of his report or the case itself which he may have overlooked, that he should be given an opportunity to deal with and explain it. He (or she) might well change his mind; if so, he could do so in a written addendum - Rule 7A(11) - if this was thought to be the most convenient way to deal with the matter.

It is only after the admission stage that the facts on which the conclusion of the expert is based may not be challenged, but that does not prevent the Tribunal, before reaching its conclusion, taking into account all the evidence including that given at the admission stage and subsequently. As we read Rule 8(2C), its purpose is to prevent continuing attack upon the issues of fact upon which the expert's conclusion is based once the admission stage is completed.

No one suggests that the Tribunal is prevented from considering other evidence in addition to that contained in and given orally by the independent expert. It is the totality of the evidence to which the Tribunal is entitled to look.

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In his second argument Mr Hows submits that the Tribunal should have excluded the report because of failures in its methodology and in particular that the expert failed to take no account of the difference of sex. It was not a systematic and objective analysis as required by the Equal Pay Act. In particular he submits that the expert did not weight factors; he omitted some equal factors; and there was some duplication or overlap in choice of factors, and account had been taken of past discriminatory practices.

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These criticisms were based upon a report given by the Applicant's expert, Ms Sue Hastings of the Trade Union Research Unit, who gave evidence. Professor Angela Bowie in her evidence supported the approach of the independent expert.

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A process of job evaluation has been understood and used in industry for many years. It was not necessarily always based upon an analytical assessment, and it differed also in that job evaluation sought to satisfy both sides of industry, whereas the equal value assessment does not. However in so far as job evaluation was carried out on an analytical basis, it contained many of the same approaches as equal value assessment, such as the choice and number of factors and its suitable sub-factors, the propriety of weighting, and the attempts to avoid duplication or overlapping. The latter process is therefore not so different from job evaluation by analysis.

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No one claims that it is an exact science. Because of this, there must always be room for differing views and an Industrial Tribunal will need to look at the reports of experts and the

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other evidence in the round.

In a job evaluation it is often a question of fitting a particular job into a pay structure to the satisfaction of both sides of the issue, but in equal value claims the comparison is between one job and another; it ignores other factors. The Tribunal had before it the EOC guide on equal value assessments.

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> "In order to assess whether two jobs are of equal value it will not be appropriate to rely heavily on any existing system for job evaluation which has been validated by its ability to reproduce existing pay structures. It will be necessary to ensure that the headings or factors used cover all the aspects of the two jobs which are important, that they do not overlap in representing those aspects, and that where choices have been made to limit the number of factors used, this has not been made in such a way as to favour factors more frequently found in jobs of one sex rather than the other. if any weighting of factors is done, this must also be done in such a way as to ensure that the overall weighting does not favour factors found more frequently in jobs predominantly done by one sex rather than the other."

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The valued judgments on which choice of weighting and scoring factors are based, must be careful to avoid judgments that women's work is worth less than men's work because it is done by women.

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The requirement therefore is, ... "to consider the demands made on the woman and the man she has selected for comparison, by their respective work, and to do so under headings such as effort, skill and decision in such a way as to avoid any influence from the difference of sex. In other words the expert needs to identify suitable unbiased headings under which to evaluate the demands made by the two jobs and then to assess

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those demands. Equal value means that this evaluation has led the expert to conclude that the demands of the two jobs are at least equivalent."

Thus, in approaching the process of equal value assessment the first step is the choice of factor. In doing so effort should be made to ensure that all important aspects of both jobs should be represented; that if possible there should be no duplication (or double counting); and no representation therein of matters outside the demands made by the jobs or which relate only to some unimportant aspect of the work. One must seek to avoid matters of purely subjective judgment. Too few factors will not provide sufficient cover of content; too many will tend to contain duplication.

The EOC guide suggests five to ten factors.

The second step is to consider weighting. We turn again to the EOC guide.

> "..., the factors may be weighted where it is clear that some headings cover very important dimensions of a job vis-a-vis other headings. Thus for example a nurse's job contains a very large relationship component (caring for patients etc.) and it may be desirable to reflect this importance by weighting this factor more than others. This will be a safe decision to make where the comparision is being made to another job with a similar heavy relationship content. But where the two jobs differed in the aspects of the work which were most important, it would become important to ensure that equal weighting was given to the most important dimensions of both jobs. This could become extremely complex, and in such cases it might be better to avoid weighting the factors and to make a judicious choice of a more limited number of factors, bearing in mind

the need to cover the most important aspects of both jobs."

The third step is to review the decision so far made and to seek to ensure that there is no Bias in favour of one job or the other.

The Tribunal had before it the EOC guide to which we have referred together with other publications and the reports of the experts for each of the parties. One member of the Tribunal would have excluded the report because the methodology was not sufficiently clear, but the majority having, in our judgment, dealt with the matter wholly admirably, admitted the report. It is unnecessary to set out all the reasoning but we refer in particular to -

In paragraph 15 where the Tribunal say -

"The Tribunal is of the opinion that the report of an independent expert should show his chosen method for selecting the factors used and for rejecting others, his reasons for using weighting or not, and whether he had used job descriptions. This would enable the Tribunal to test the validity of the expert's conclusions. Having heard Mr Colville's oral evidence to the Tribunal, the Tribunal is satisfied that Mr Colville did in fact carefully analyse the jobs of the applicant and the comparators before selecting his five factors with which to make his comparison. The Tribunal rejects the applicant's argument that in order to avoid discrimination the factors should be selected before the observation of the jobs commences. The Tribunal considers that too large a list of factors results in too much weight being given to marginal considerations at the expense of the principal functions of the job and therefore necessitates weighting being applied. The Tribunal finds that the five factors selected by Mr Colville did provide a full and adequate coverage of the jobs of the applicant and the comparators and does not consider that in this case there was a necessity for weighting. Under only one factor was the applicant's job considered

equal to that of the comparators and under no factor was her job considered to be of greater value than the comparators."

And a little later they say -

"...Having heard the oral evidence, all the Tribunal were satisfied that Mr Colville had in fact used a proper analytical method for selecting the factors and for rejecting others and that he had considered weighting and had good reasons for not applying it in this case."

Later in paragraph 17 the Tribunal add -

The Tribunal considers that it is extremely difficult to avoid some overlap between the factors and finds that such overlap as there is is not unfair in that it does not lead to any distortion of the assessment of the jobs."

Mr Hows submitted that undue emphasis had been placed on two aspects of the job namely, past training and updating, and that this was potentially discriminatory. The Tribunal deal with that matter quite shortly and say, "The Tribunal does not find that Mr Colville in his selection of the factors and their analysis was potentially discriminatory and considers that he acted at all times fairly.

Finally, in their judgment the Tribunal conclude as follows -

"19. Although, as pointed out in Mrs Hastings' report, the wording of the report to some extent suggest that Mr Colville in coming to certain conclusions was agreeing with the submissions of one party or the other, it was clear from his evidence that he had carried out a thorough and impartial investigation, that he had selected a comprehensive list of factors which adequately covered the jobs, that he had systematically analysed the factors and had come to his own opinion. It is true that there is no reference in his report to the consideration of weighting, but in his oral evidence he explained that he did not consider it necessary in this case. The Tribunal finds that the conclusion

contained in the report is one which the independent expert could reasonably have reached."

The present case is typical of many and there is no doubt that a number of aspects of this jurisdiction merit urgent review. We are concerned here with procedural matters. The present restrictions on procedure imposed by the Rules give rise to delays which are properly described as scandalous and to amount to a denial of justice to women seeking remedy through the judicial process. During these delays women could be subjected to working in a most uncomfortable environment and with an unresolved grievance. To reverse the coin, there seems to be no limit on the number of successive applications which can be made with one or more different comparators, and the present procedures give scope for tactical use by applicants which amongst other things may involve employers in substantial expenditure.

Whilst the present Rules subsist we would make two comments which may be of assistance to the Tribunals in their efforts to remedy the wholly unacceptable delays which are occurring. The first is to encourage all the necessary evidence to be given at the admission stage. The second is to admit the independent expert's report, and thereafter, if necessary, to hear any further expert evidence and ultimately to reach a decision giving such weight as it sees fit to every aspect of the evidence before it.

Almost every one of the industrial members of this Court have been involved in job evaluation for many years, and with the assistance of experts they would feel well able to reach a

A conclusion on issues of equal value. It is their general view that suitable industrial members of Tribunals together with learned Chairmen are quite able to hear the factual expert evidence presented from each side and to reach a decision. The

B power to appoint an expert as assessor to the Tribunal itself might be welcomed in the most difficult cases - see Rule 5(3). The role of the expert could be purely advisory, that is to help a Tribunal to address itself to the relevant issues or, it could

C additionally be made the subject of directions from the Chairman.

The process of decision would be, as it is now, to hear the facts, to decide the factors and if necessary, sub-factors, to

D decide the weighting, if necessary, and thereafter to assess each job, remembering that it is the value of the job to the employer and not the value of the individual which is being assessed, and that any material unfairness (discrimination)

E arising out of sex must be ignored. It would be essential for a Chairman to keep a tight hold on all the interlocutory processes, and it might be necessary to take a case in phases - that must be a matter of experience, but we can see no reason

F why such a case should not be completed within a year from its initiation, nor can we see why interlocutory decisions should not in many cases be made by a Chairman sitting alone, so as to save time and to ensure continuity of reasoning and decision

G making.

In the present appeal we can find no error of law in the way the Tribunal dealt with this matter and this appeal must be

H dismissed.