



Are some more "Equal" than Others?

We are all familiar with the concept of Equal Pay and the obligation to ensure that an employee is entitled to equal pay if a comparator of the opposite sex is employed to do like work, work rated as equivalent or work of equal value. Failure to do this will result in a claim of Equal Pay against the business with the risk of having to pay considerable back pay if a difference can be shown. Nonetheless, there is a defence available to an employer where it can show that the difference in the pay is "genuinely due to a

material factor which is not the difference of sex". The Chief Constable of West Midlands Police was faced with employment claims on this issue and sought to rely on this defence.

The police officers in England and Wales agreed in May 2002 through the Police Negotiating Board that "special priority payments" (SPP's) could be paid at the discretion of the force to "qualifying posts" where they were considered frontline officers. These payments could have amounted to between £500.00 and £3000.00 per annum.

West Midland Police Officers worked to a rotating shift pattern that included night shifts, unless they were excused because of childcare responsibilities or a medical condition. They agreed in July 2003 that a qualifying criteria for SPP would be "24/7 working". This was defined as applying to "officers whose published rostered working patterns involved either a shift pattern or regular working hours covering a bandwidth of at least four hours between midnight and 6 am over a cyclical period" – essentially this was officers who were available to be rostered for duty at any hour of the day or night.

Ms Blackburn, a female officer in West Midland Police had been excused from working 24/7 due to her childcare responsibilities and was thus not eligible for the SPP. She issued proceedings in the Employment Tribunal for Equal Pay claiming that in being excluded from the scheme she was being discriminated against on the grounds of sex. Her cited comparator in the proceedings was a male officer who was able to work on a 24/7 basis and who benefited from the scheme.

She provided evidence to the tribunal illustrating that 96.6% of male officers could comply with the 24/7 requirement whereas only 91.5 % of female officers could comply – a difference of 5.1%. Although the Tribunal stated that statistics were only part of the picture it believed that the burden of showing that the 24/7 requirement indirectly discriminated against women had been proven by Ms Blackburn.

The employer argued that the reason the SPP was paid was a genuine "wish to reward officers for working 24/7" and was therefore objectively justified. They stated that "night-working adversely affected officers' health and caused detriment to their family and social life". But

Ms Blackburn argued that the main objective of the scheme was simply to reward frontline officers.

The Tribunal found that there was a significant adverse impact on the health of workers whose shift patterns included nights and it found that the wish to reward night-working was a legitimate aim and that the 24/7 requirement corresponded with that aim.

Nevertheless the statutory scheme was widely drawn and delegated discretion to the local forces. It believed that it was possible to achieve the desired aim by less discriminatory means. In coming to this conclusion it looked at how other police forces had implemented the scheme; for example in some forces 24/7 working was merely one consideration in a scoring matrix. In Sussex, officers excused from 24/7 working for childcare reasons were also excused from having to meet that requirement in order to qualify for SPP. Therefore Ms Blackburn and her colleagues were entitled to receive SPP at the same rate as their male comparators.

Equal pay is a complex area of employment law and employers should always seek professional advice before taking action as a finding against an employer can be very expensive.

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