Appeal No. UKEAT/0108/12/MC

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
On 7 February 2014
Judgment handed down on 20 June 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MR D K DASS — APPELLANT

(1) THE COLLEGE OF HARINGEY ENFIELD & NORTH EAST LONDON
(2) SECRETARY OF STATE FOR EDUCATION — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPLICATION TO AMEND NOTICE OF APPEAL

APPEARANCES

For the Appellant	MS KARON MONAGHAN (One of Her Majesty's Counsel) & MS LAURA PRINCE (of Counsel) Bar Pro Bono Unit
For the First Respondent	No appearance or representation by or on behalf of the First Respondent
For the Second Respondent	No appearance or representation by or on behalf of the Second Respondent

SUMMARY

EQUAL PAY ACT – Part time pensions

PRACTICE AND PROCEDURE – Amendment

The Claimant applied to the Employment Appeal Tribunal for leave to amend his Notice of Appeal. The Claimant seeks retrospective admission to the Teachers Pension Scheme for periods of part-time employment. At a preliminary hearing, HH Judge David Richardson gave the Claimant leave to lodge a draft amended Notice of Appeal to substitute grounds challenging the decision of an Employment Judge that there was no stable employment relationship between the Claimant and the Respondent between dates during the period for which retrospective admission to the scheme was claimed. The decision of the Employment Judge means that retrospective admission cannot be claimed under the current ET1 for the whole period. Although Additional Amended Grounds of appeal on another point were lodged, no draft amended grounds on the stable employment issue were provided in compliance with the Order of HH Judge Richardson. There was a lengthy delay in serving a draft amended Notice of Appeal and application to amend for which there was no acceptable explanation. Further, the draft amended grounds had little merit. Applying the principles in **Khudados v Leggate and others** [2005] ICR 1013 and the overriding objective of the Employment Appeal Tribunal Rules as amended in 2013, the application was dismissed.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. This is an application by Mr Dass ('the Claimant') for permission to amend his Notice of Appeal of 28 October 2011. The Claimant seeks to appeal the decision of an Employment Judge ('EJ') sent to the parties on 20 September 2011 ('the judgment') reached on a Pre-Hearing Review ('PHR') on an issue relevant to the period for which he should be granted retrospective admission to the Teachers' Pension Scheme ('the pension scheme') to which at the material time part-time employees were not admitted. The issue was whether there was a stable employment relationship between the Claimant and his former employer, the College of Haringey Enfield and North East London ('the Respondent') or continuity of employment in the period between 3 July 1995 and 4 January 1996 for the purposes of his claim under the **Equal Pay Act 1970** ('EqPA') for admission to the pension scheme in respect of the period of his part-time employment. The EJ decided that there was no such stable employment relationship or continuity of employment.

2. The effect of the decision of the EJ is that the Claimant cannot obtain under his current ET1 retrospective admission to the pension scheme for his part-time employment after 3 July 1995. The ground of appeal sought to be raised in the proposed amendment to the Notice of Appeal is whether the EJ erred in holding that the Claimant was not in a "stable employment relationship" with the Respondent between 3 July 1995 and 4 January 1996. "Stable employment" is a concept introduced into domestic law in section 2ZA of the EqPA and related amendments following the judgment of the European Court of Justice ('ECJ') in **Preston v Wolverhampton Healthcare NHS Trust** [2000] IRLR 506. The ECJ held that the then requirement in the EqPA that a claim for equal pay be brought within six months of the end of each contract of employment to which the claim relates was precluded by Community Law

"where there has been a stable employment relationship" as explained by the ECJ at paragraph 72. The judgment of the House of Lords in **Preston (No. 2)** [2001] IRLR 237 applied the decision of the ECJ to the claims of part-time employees to occupational pension schemes to which only full-time workers had been admitted.

3. By an ET1 on 29 December 1994, the Claimant brought what was sometimes described as a "piggy back equal pay claim" for admission to the pension scheme in respect of the period from 20 September 1993 during which he was employed by the Respondent at certain times under various contracts as a part-time or sessional lecturer. His claim was dependent on the outcome of claims by women part-time workers in **Preston** seeking equal pay with male full-time comparators who, unlike them, had been given membership of their occupational pension schemes, both as to their entitlement and to the applicable limitation period and on the claims in **Somerset County Council and another v Pike** [2009] IRLR 870.

4. Following the decision of the House of Lords in **Preston (No. 2)** and of the Court of Appeal in **Pike**, the Claimant's claim, which along with other similar claims had been stayed, was restored for hearing before an EJ to determine the period for which he should be granted retrospective admission to the pension scheme. By the time the claim was restored for hearing the Claimant claimed admission to the pension scheme until 14 March 2003 when any employment he had with the Respondent had come to an end.

The relevant statutory provision

5. **Equal Pay Act 1970**:

> **"2. Procedure before tribunal in certain cases.**
> **(1) Any claim in respect of the contravention of a term modified or included by virtue 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.**
> **…**

(4) No determination may be made by an Employment Tribunal in the following proceedings-

(a) on a complaint under subsection (1) above,

…

unless the proceedings are instituted on or before the qualifying date (determined in accordance with section 2ZA below)

…

2ZA.

(1) This section applies for the purpose of determining the qualifying date, in relation to proceedings in respect of a woman's employment, for the purposes of section 2(4) above.

…

"stable employment case" means a case where the proceedings relate to a period during which a stable employment relationship subsists between the woman and the employer, notwithstanding that the period includes any time after the ending of a contract of employment when no further contract of employment is in force;

….

(4) In a case which is a stable employment case (but not also a concealment or a disability case or both), the qualifying date is the date falling six months after the day on which the stable employment relationship ended."

Outline facts

6. The Claimant was employed by the Respondent as a full-time lecturer for some years until 31 March 1993. He was a member of the pension scheme. On that date he retired early on efficiency grounds. On 20 September 1993 he was employed as a part-time lecturer. It appears that he was employed on contracts for each academic year. As a part-timer he was not granted membership of the pension scheme.

7. The Claimant's contract for 1994/5 came to an end on 3 July 1995 and he applied for another contract for 1995/6. By letter dated 17 July 1995, referring to his "application to teach next year", the Claimant was informed that the Respondent was unable to offer him an appointment "at this time". By letter dated 15 August 1995 he was given a Visiting Lecturer Contract as an hourly paid lecturer. Contract Requisitions for Visiting Lecturers appear to show that the Claimant was to work as a Visiting Lecturer on 4 July and 7 and 14 December 1995.

8. From 4 January 1996 the Claimant was employed by the Respondents under various contracts. From 1 September 2001 until March 2003 the Claimant was employed as a permanent part-time lecturer on variable hours.

The judgment of the Employment Tribunal

9. By the time the claim came before the EJ on the PHR it had been determined that the Claimant was entitled to retrospective membership of the pension scheme from 20 September 1993 to 3 July 1995. Whether there was continuity of employment or a stable employment relationship from 3 July 1995 to 14 March 2003 was still to be determined. The issue decided by the EJ in the judgment under appeal was one step in deciding entitlement to membership of the pension scheme for the period from 3 July 1995 to 14 March 2003. If there was no stable employment relationship or continuity of employment between 3 July 1995 to 4 January 1996, retrospective membership of the pension scheme could not be awarded under the current unamended ET1 beyond 3 July 1995. The issue of whether, if the Claimant's continuous employment or stable employment relationship with the Respondent came to an end on 3 July 1995, he should be permitted to amend his existing ET1 or present a fresh claim out of time based on the termination of his employment in 2003 also remained to be determined by the EJ.

10. The EJ held:

> **"…there was no stable employment relationship between the parties between 3 July 1995 and 4 January 1996 and therefore no continuity of employment of the Claimant by the Respondent during that period."**

11. The EJ held:

> **"4. At the material time, the Equal Pay Act 1970, section 2(4), provided a six month time limit for bringing claims under the Act to the Tribunal. An exception to any strict rule that time begins to run from the end of each contract of employment is provided by the stable employment relationship scenario. In Preston and Others v Wolverhampton Health Care NHS Trust and Others (No. 3) [2004] IRLR 96, EAT, it was held that in such stable employment relationships, the six month time limit runs from end of the last contract forming part of that relationship. The features that characterise a stable**

> **employment relationship are that there is; (1) a succession of short-term contracts, meaning three or more contracts for an academic year or shorter; (2) concluded at regular intervals, in that they are clearly predictable and can be calculated precisely, or where the employee is called upon frequently whenever a need arises; (3) relating to the same employment; and (4) to which the same pension scheme applies. A stable employment relationship ceases for this purpose when a succession of short-term contracts are superseded by a permanent contract."**

The EJ then referred to authorities on continuity of employment in the context of the **Employment Rights Act 1996** ('ERA'). He observed:

> **"Similar points are made in them as were made in the more recent and relevant case of Preston cited above."**

12. The EJ reached the following conclusions:

> **"5.1. The evidence is clear in this case. Even the Claimant in the documents I have seen appears to acknowledge that there was a break in the continuity of his employment between July 1995 and January 1996. There was no full-time contract covering that period. The highest the Claimant can put it is that he was offered some days of irregular and sporadic employment in October and December 1995. There is no suggestion here of any overriding contract. The Claimant was told that his previously termly or annual contracts to teach at the College would not be renewed from the Autumn of 1995 because of funding difficulties and therefore the consequent reduction in work for part-time lecturers. He was guaranteed no work in the future, and there was no obligation on the Respondent to offer him work.**
>
> **5.2. Nor was this a temporary cessation of work, because work continued for full-time lecturers, and possibly other part-time lecturers. This is not the sort of case where there is generally a seasonal fluctuation of work. Either there is work or there is not, and there was no work for the Claimant, save for a few ad hoc days, in the Autumn of 1995. When the Autumn term started again in September 1995, there was no work for the Claimant, so there was no continuity of employment through the summer holidays into that term. On the definition of stable employment relationship given in Preston, that relationship came to an end and there was no such relationship from July 1995.**
>
> **5.3. Thus, I conclude that there was no stable employment relationship, giving continuity of employment for the purposes for the Act, between July 1995 and January 1996."**

13. By Notice of Appeal on 28 October 2011 the Claimant appealed from the judgment of 20 September 2011. In a letter dated 15 March 2012, solicitors on behalf of the Respondent wrote that they did not understand the basis of the Claimant's appeal. They submitted that the EJ was correct to find that there had been a break in continuity of service and no stable employment relationship.

14. The appeal was set down for a preliminary hearing ('PH') to determine whether the grounds raised a point of law which gave the appeal a reasonable prospect of success. By letter dated 9 March 2012 the Second Respondent, the Secretary of State, who had not appeared before the EJ, wrote that they could not usefully add anything to the appeal process. They wrote that the First Respondent (the Respondent College) would no doubt submit cogent reasons why the appeal was without merit.

15. The PH in the appeal from the judgment of 20 September 2011 was to be heard with two rule 3(10) hearings in appeals by the Claimant from judgments of the EJ on different issues on 1 April 2011 and 2 November 2011. Ms Prince, appearing under the ELAAS scheme for the Claimant, submitted a draft skeleton argument for the PH on 16 July 2012. Counsel sought permission to add a new ground of appeal, that the EJ erred in finding that the Claimant was not in a "stable employment relationship" during the relevant period. The contentions in support of that additional ground of appeal were set out in summary form in paragraph 2 of the draft skeleton argument and developed at letters A to F in paragraphs 8 to 14.

16. The PH of the appeal from the judgment of 20 September 2011 together with rule 3(10) applications in the appeals from the two other judgments came before HH Judge Richardson on 16 July 2012. From his judgment, as agreed by Ms Monaghan QC, it appears that the Judge considered that the grounds in the Notice of Appeal did not raise issues of law which had a reasonable prospect of success at a full hearing ('FH'). However HH Judge Richardson considered that arguable questions of law regarding the decision of the EJ on whether there was a stable employment relationship between July 1995 and January 1996 were contained in counsel's draft skeleton argument under headings A to F. At paragraph 20 HH Judge Richardson held:

> **"The points that she has set out there seem to me to be arguable. With her client's permission she applies for permission to amend the Notice of Appeal by substituting these grounds for the existing grounds. Subject to one point, to which I shall now come, I grant that permission."**

HH Judge Richardson set out in paragraph 21 the additional point which challenged the way in which the EJ applied the continuity of employment provisions in ERA. HH Judge Richardson stated that he had given Ms Prince permission to formulate a ground that sets this out more clearly. He stated that she:

> **"…should have an opportunity to refine it and present the Notice of Appeal to me within seven days; and, as long as it does no more than develop the point, I anticipate that I will allow the Notice of Appeal to be amended and go through."**

17. By Order seal date 18 July 2012 HH Judge Richardson ordered that:

> **"3. There will be leave to lodge a draft Amended Notice of Appeal within 7 days from today (marked for the attention of His Honour Judge Richardson) to include grounds A-F of the Appellant's Skeleton Argument by way of substitution for the original grounds of appeal and also to include the 'application of continuity of employment provisions' point;…**
>
> **…**
>
> **4. Within 14 days of service of such amended Notice of Appeal, the Respondent must lodge with the Employment Appeal Tribunal and file an Answer…"**

The Order was sent to and received by the Claimant. On 17 July 2012 Ms Prince on behalf of the Claimant sent a document entitled "Additional Amended Grounds following hearing on 16 July 2012" ('the Additional Amended Grounds') to the Employment Appeal Tribunal ('EAT'). These were introduced with the words:

> **"1. In the alternative to the Appellant's argument that the Tribunal was wrong to consider 'continuity of employment' it is asserted that:-**
> **…"**

The Additional Amended Grounds dealt with continuity of employment under the ERA but not with stable employment relationship under the EqPA. No amended grounds of appeal substituting the points raised in paragraphs A to F of the Claimant's skeleton argument for the

PH were submitted to the EAT. The Claimant failed to comply with paragraph 3 of the Order of 18 July 2012.

18. Solicitors for the Respondent lodged a Respondent's Answer in compliance with the Order of 18 July 2012. In paragraph 14 of the Respondent's Answer it is stated that:

> **"The College understands that Mr Dass's grounds of appeal as set out in the Additional Grounds of Appeal are:-…"**

the arguments set out in the document entitled Additional Amended Grounds challenging the reasoning of the EJ by which he concluded that there was no continuity of employment between 3 July 1995 and 4 January 1996. The Answer continued:

> **"15. Further the College now understands that paragraphs A to F of Mr Dass's draft skeleton argument are also grounds of appeal."**

The Answer advances arguments in response to the Additional Amended Grounds on continuity of employment and to paragraphs A to F of the draft skeleton argument on stable employment relationship. It appears from the Respondent's Answer that they were unsure of the status of the original grounds of appeal. Paragraph 35 of the Answer states:

> **"For the avoidance of doubt, to the extent that any of the original grounds (dated 28 October 2011) are sought to be pursued by Mr Dass, the College contends that those grounds are also misconceived."**

19. The appeal was listed for a FH on 26 March 2013. The skeleton argument prepared by leading and junior counsel on behalf of the Claimant listed the grounds of appeal. These were those set out in paragraph 2 of the draft skeleton argument for the PH and in the Additional Amended Grounds. The skeleton argument then reproduced paragraphs A to F, which were elaborated in paragraphs 8 to 14 of the Claimant's draft skeleton argument for the PH.

20. The skeleton argument lodged on 13 March 2013 on behalf of the Respondent for the FH stated:

> **"10. Following the rule 3(10) hearing and by Order dated 18 July 2012, HHJ Richardson ordered that Mr Dass have permission to provide an Amended Notice of Appeal in substitution for the original grounds of appeal. (See para 3, Order of 18 July 2012).**
>
> **11. The amended grounds of appeal were provided on 18 July 2012. (Those grounds are headed 'Additional Amended Grounds' but it is understood by the College that those are the only live grounds to be considered at the full hearing).**
>
> **[Footnote 2] The College has received no other (amended) notice of appeal following the rule 3(10) hearing."**

In the skeleton argument of 13 March 2013, counsel for the Respondent set out contentions on the grounds in the Additional Amended Grounds, which dealt with continuity of employment under ERA. No submissions on stable employment relationship in paragraphs A to F of the Claimant's draft skeleton argument for the PH were made. The Respondent contended that these were not included in any Notice of Appeal.

21. By letter dated 19 March 2013, solicitors for the Respondent informed the EAT that they did not intend to attend or be represented at the hearing of the appeal listed for 26 March 2013. They stated that as they are a publicly funded organisation they have to take a view on the costs involved. They asked for the skeleton argument prepared by counsel for the Respondent be taken into account at the hearing.

The submissions before the EAT on 26 March 2013

22. The Claimant was represented at the FH of the appeal on 26 March 2013 by Ms Monaghan QC and Ms Prince appearing under the Bar Pro Bono Scheme. As they had indicated, the Respondent was neither present nor represented. Counsel for the Claimant developed arguments on the points described as grounds of appeal in their skeleton argument which, on the issue of stable employment relationship, reproduced those in the skeleton argument for the PH.

23. In a Note of submissions made at the full hearing dated 11 July 2013 counsel for the Claimant stated that:

> **"2. At the hearing on 26th March 2013 the Appellant relied predominantly on their written skeleton argument, dated 12th March 2013 (exchanged with the Respondent on 13th March 2013).**
>
> **3. At the hearing on 26th March 2013, the points made during oral submissions were:-**
>
> **3.1. That both the Respondent and the Appellant agreed that the 'continuity of employment' test was not the correct test to apply in Mr Dass's case. The correct test being whether or not Mr Dass was in a stable employment relationship with the Respondent during the relevant period;**
>
> **3.2. That the Employment Tribunal was wrong to focus on the short period from 1995 to 1996; They should have looked at the whole period; Picking out only a short period was the wrong way to view stability between 1995 and 2003;**
>
> **3.3. That the Employment Tribunal failed to refer to the key authorities in respect of the stable employment relationships, namely:-**
> **(a) Section 2ZA of the Equal Pay Act;**
> **(b) Slack and others v Cumbria County Council [2009] IRLR 463; and**
> **(c) North Cumbria University Hospitals NHS Trust v Fox [2010] IRLR 804;**
>
> **3.4. That the Employment Tribunal applied the wrong test to the facts of Mr Dass's case as illustrated by the ET's erroneous conclusion that a succession from a short term contract to a permanent contract was not possible within a stable employment relationship. During the hearing the Appellant referred to *Slack* and *Fox* above to show that this point was wrong. The case of *Martin v Essex County Council* UKEAT/0138/09/ZT is a further example of the application of Slack in a case where the Appellant had both short-term and permanent contracts.**
>
> **3.5. That the right test is found in s.2ZA EPA and the later authorities (set out at paragraph 3.3 above) which make it clear that 'stability' is the issue not the particular legal characteristics of the relationship.**
>
> **3.6. There was a discussion of the issue of whether or not a change in the contractual relationship would impact on remedy and/or limitation. The Appellant asserted that if there was a stable employment relationship that amounts to a single relationship for the purposes of both remedies and time limits.**
>
> **3.7. That the nature of the particular contract is not the main or only issue when considering whether an employment relationship is stable. The ECJ [in Preston] said that the courts had to look at the practical reality of the situation. That is not to say the nature of the contract is not relevant to the issue of stability but it is not a threshold or criteria for determining stability.**
>
> **3.8. That the test in respect of stability is a flexible one. The Claimant's relied on paragraphs 31 of the Fox case as setting out the correct test to be applied in Mr Dass's case:-**
> **'a broad, non-technical test looking at the character of the work and the employment relationship in practical terms.'"**

After the hearing on 26 March 2013

24. By letter dated 1 May 2013 the parties' representatives were informed by the EAT that in the course of writing the reserved judgment I noted that: "…whilst the Claimant was granted

permission by HH Judge Richardson at the rule 3(10) and preliminary hearing on 16th July 2012 to amend the Notice of Appeal by substituting grounds A to F of the skeleton argument for the existing grounds, no amended Notice of Appeal to that effect was lodged". They were asked to send written submissions to the EAT stating their position on the question of whether grounds of appeal other than those challenging the decision on continuity of employment which were in the Additional Amended Grounds could be relied upon at all as they were not in an Amended Notice of Appeal. It was pointed out that as grounds A to F were not in an amended grounds of appeal they were not dealt with in the Respondent's skeleton argument. If they had been, the Respondent may have wished to advance argument on grounds A to F and been represented at the hearing.

25. In written submissions of 9 May 2013 in response to the letter of 1 May 2013, leading and junior counsel for the Claimant stated:

> **"4. …At [the hearing on 16 July 2012] HHJ Richardson gave permission in respect of grounds A-F and suggested an additional argument based on the 'application of the continuity of employment provisions'. It was junior counsel's understanding that the skeleton argument was to stand as grounds of appeal in respect of grounds A-F and that permission was given to add the additional ground identified by HHJ Richardson based on the 'application of the continuity of employment provisions'.**
>
> **5. …In fact counsel for the Claimant did not receive the Order of HHJ Richardson until 27th February 2013 when junior counsel met with Mr Dass in preparation for the hearing on 26th March 2013.**
>
> **6. Unfortunately it was not identified that the terms of the written order differed (if they do) from junior counsel's understanding of what was ordered orally at the s.3(10) hearing. The Order provides:-**
>
> > **'there is leave to lodge a draft Amended Notice of Appeal within 7 days from today (marked for the attention of His Honour Judge Richardson) to include grounds A-F of the Appellant's Skeleton Argument by way of substitution for the original grounds of appeal and also to include the "application of continuity of employment provisions" point.'**
>
> **Arguably this is consistent with junior counsel's understanding of what was ordered at the hearing (as set out at paragraph 4 above). However, it is accepted that a more natural reading of the above order is that the amended grounds were to include grounds A-F."**

In those circumstances counsel stated that "if necessary" they seek to amend the grounds of appeal to add grounds A to F. They set out their submissions on the issues relevant to such an

application set out in **Khudados v Leggate** [2005] ICR 1013. Counsel apologised if this misunderstanding had caused the EAT any inconvenience or delayed the proceedings. No draft amended grounds of appeal were submitted at that time.

26. On 10 May 2013 counsel for the Respondent provided their written submissions in response to the letter from the EAT of 1 May 2013. Ms Motraghi wrote:

> **"3. Para 3 of the order of HH Judge Richardson sealed on 18th July 2012 provided that the Appellant be given leave to lodge a draft Amended Notice appeal within 7 days of today to include grounds A-F and to include the application of continuity of employment provisions point.**
>
> **4. To the Respondent's knowledge, no such Amended Notice of Appeal was lodged within 7 days. Nor to the best of the Respondent's knowledge was any application for permission made to lodge an Amended Notice of Appeal out of time to include Grounds A-F of the Rule 3(10) skeleton argument, in the eight months between the Rule 3(10) hearing on 18 July 2012 and the full merits hearing on 26 March 2013.**
>
> **5. If the Appellant seeks to rely on grounds A-F, it is contended that an application for permission to amend the Notice of Appeal would need to be made as grounds A-F did not form part of the original notice of appeal and the introduction of grounds A-F in the Appellant's Rule 3(10) skeleton argument does not equate to inclusion in an amended Notice of Appeal in accordance with the order of 18 July 2012."**

27. By letter from the EAT dated 4 June 2013 the parties' representatives were informed that:

> **"The Court can only determine an appeal on the grounds set out in the Notice of Appeal. Time limits for serving a Notice of Appeal and Orders of this Employment Appeal Tribunal are to be complied with. As it stands the Notice of Appeal does not include grounds A-F in the Appellant's skeleton argument before HH Judge Richardson. It would be necessary for the Appellant to apply to amend the grounds of appeal out of time to add or substitute these grounds if they are to be considered in determining the appeal. Whilst the possibility is referred to in the written submissions on behalf of the Appellant, no formal application has been made for permission to amend the grounds of appeal out of time or draft amended grounds of appeal provided. Such an application accompanied by draft amended grounds of appeal would have to be made and considered by the Court. If such an application is made it must be accompanied by a skeleton argument."**

28. One month after the Respondent's submissions, on 7 June 2013 counsel for the Claimant made a formal application to amend the grounds of appeal. The draft amended grounds of appeal reproduced paragraph 2 of the skeleton argument for the hearing before HH Judge Richardson. In turn these effectively reproduced the submissions under headings of A to F in the skeleton argument for the hearing before HH Judge Richardson.

The submissions before the EAT on 7 February 2014

29. At the hearing of the application for permission to amend the grounds of appeal, the Claimant was represented by Ms Monaghan QC and Ms Prince. The Respondent did not appear and was not represented.

30. Counsel made submissions on the factors relevant to the issue of the factors to be taken into account in the exercise by the EAT of the discretion to permit amendments which were identified in paragraph 86 of **Khudados**. These are set out in paragraphs (a) to (f). As for (a), counsel acknowledged that there had been delay in applying for permission to amend the Notice of Appeal. The requirement in the Order of HH Judge Richardson of 18 July 2012 for proposed additional grounds of appeal in paragraphs A to F in the skeleton argument to be incorporated in an amended Notice of Appeal had not been picked up. Ms Monaghan QC accepted that the Order made by HH Judge Richardson required the submission of draft amended grounds of appeal within seven days of 18 July 2012 and that this was not done. Ms Monaghan QC rightly accepted that there was a delay in applying to amend the grounds of appeal from 27 February 2013, when counsel for the Claimant first saw the Order requiring the draft amendment to be submitted to HH Judge Richardson within seven days of 18 July 2012, and 7 July 2013 when the application for permission to amend with draft amended grounds of appeal was sent to the EAT. As for (b) it was contended that in accordance with the overriding objective, the draft amendment should now be allowed. Ms Monaghan QC distinguished the strict approach to relief from sanctions for failure to comply with the CPR adopted in **Mitchell v Times Newspapers** [2013] EWCA Civ 1537. She pointed out that the Court in **Mitchell** referred to the amended terms of the overriding objective in the CPR. The material words did not appear in the Employment Appeal Tribunal Rules as amended in 2013 ('EAT Rules 2013'). Paragraph 37 of **Mitchell** was relied upon as showing that the approach in the CPR to compliance with

rules is different for the Civil Courts. A full and honest explanation for the delay has been given. As for (c), the amendment would cause no or no substantial delay. No party other than the Claimant and possibly the Respondent would make submissions on the new grounds. It was said that whilst the Respondent based their arguments in the skeleton argument of 23 March 2013 on the limited amended grounds of appeal they were aware prior to the hearing on 26 March 2013 and prior to their decision not to attend the hearing that the Appellant was going to argue grounds A to F. The reason for their non-attendance was to save costs not the perceived merits or lack of them of the Appellant's arguments. As to (d) it was submitted on behalf of the Claimant that the Respondent would not be prejudiced by the amendment. The Respondent had been aware at least since receipt of his skeleton argument of 12 March 2013 that the Claimant wished to rely on the grounds now set out in the draft Notice of Appeal. No additional prejudice would be suffered by the Respondent having to answer the new grounds than that they faced in any event in resisting the existing grounds of appeal. However the Claimant would suffer prejudice if the amendment were not permitted as he would lose the prospect of succeeding on his appeal whereas there was none on the existing grounds. It was said that the criterion in (e) was satisfied as HH Judge Richardson considered the proposed amended grounds of appeal sufficiently meritorious to go through to a FH. Ms Monaghan QC acknowledged that the original grounds of appeal were not permitted to proceed to a FH as they were judged not to raise points of law which gave the appeal a reasonable prospect of success. No argument was advanced on the public interest factor set out in paragraph 86(f) of **Khudados**.

31. Ms Monaghan QC submitted that no Costs Order should be made against the Claimant. He had not been at fault or acted unreasonably or vexatiously. It was also submitted that no Order for wasted costs should be made against counsel. No application for wasted costs had been made by the Respondent in accordance with paragraph 22.5 of the Employment Appeal

Tribunal Practice Direction 2013 ('PD'). Further, the failure of counsel to apply to amend the Notice of Appeal before 7 July 2013 did not meet the threshold of conduct in the EAT Rules 2013 rule 34C(3) to trigger such an Order. Reference was also made to rule 34C(4) of the previous 1993 EAT Rules which excluded those not acting in pursuit of profit (such as ELAAS representatives) from the definition of representative against whom a wasted costs Order could be made.

32. If permission to amend the Grounds of Appeal were not to be granted, Ms Monaghan QC invited me to express a view on the merits of the draft amended grounds of appeal. In light of this request I set out the arguments advanced at the hearing on 26 March 2013 in support of the putative grounds of appeal A to F. As the grounds of appeal had not been amended to include those in A to F of the skeleton argument for the FH, the Respondent did not deal with them in their skeleton argument for the hearing on 26 March 2013.

33. Ms Monaghan QC for the Claimant submitted that the EJ erred in plucking out one period, 3 July 1995 to 4 January 1996, in determining whether there was a stable employment relationship between the Claimant and the Respondent between July 1995 and March 2003. In determining whether the Claimant was in stable employment in the period which the EJ did consider, it was said that he erred in a number of respects.

34. Ms Monaghan QC pointed out that the EJ failed to refer to the relevant statutory provision, EqPA section 2ZA. Instead he appears to have considered whether there was continuity of employment within the meaning of the ERA which was not relevant to the issue before him. EqPA section 2ZA specifies the qualifying date from which the limitation period for bringing an equal pay claim starts to run. Ms Monaghan QC contended that the section also informs the remedy question of the period for which continuing loss runs. In this case, if there

was no stable employment in the period in issue, retrospective admission to the pension scheme could not be given under the ET1 of 1994 for the period beyond 3 July 1995.

35. It was contended on behalf of the Claimant that not only did the EJ fail to consider the relevant statutory provision but he also failed to refer to the relevant authorities; **Slack v Cumbria Council** [2009] IRLR 463 and **North Cumbria University Hospitals NHS Trust v Fox** [2010] IRLR 804. Instead he relied upon **Preston (No. 3)** [2004] IRLR 96 in holding:

> **"4. …The features that characterise a stable employment relationship are that there is; (1) a succession of short-term contracts, meaning three or more contracts for an academic year or shorter; (2) concluded at regular intervals, in that they are clearly predictable and can be calculated precisely, or where the employee is called upon frequently whenever a need arises; (3) relating to the same employment; and (4) to which the same pension scheme applies. A stable employment relationship ceases for this purpose when a succession of short-term contracts are superseded by a permanent contract."**

36. Further it was submitted that the EJ misstated the first element of the test for "stable employment relationship" set out in that case. Ms Monaghan QC pointed out that the summary relied upon by the EJ appears to have been taken from the headnote of the law report. It does not accurately reflect the text of the judgment. In his judgment HH Judge McMullen QC held:

> **"115. It is therefore necessary to consider the 'features that characterise a stable employment relationship' (ECJ judgment paragraph 70) and these can be broken down as follows:**
> **(1) A succession of short-term contracts.**
> **(2) Concluded at regular intervals.**
> **(3) Relating to the same employment.**
> **(4) To which the same pension scheme applies.**
>
> **As to (1), this devolves into two parts. The subject matter must be short-term contracts. The House of Lords in its Order for Reference and in its consideration of the ECJ judgment when referred back to it has in mind as 'short-term' contracts whether as termly, or for the academic or sessional year. It follows that those contracts and anything for a shorter period are 'short-term'. There must be a 'succession' or a 'sequence' (ECJ judgment paragraph 70). I interpret this to mean three or more, for the existence of two such contracts is not usually described as a sequence or a succession of such contracts. It would ordinarily be described as the repetition of a contract."**

Ms Monaghan QC pointed out that HH Judge McMullen QC did not state that short-term contracts meant three or more contracts in an academic year "or shorter".

37. Further, Ms Monaghan QC contended that the EJ erred in that he held there was no stable employment relationship because there was no "overriding contract". Counsel relied upon the judgment of Carnwath LJ (as he then was) in **Fox** in which he held at paragraph 31:

> **"By adopting an entirely new expression, the court was, as I read the judgment, signalling a wish to distance itself from all these various formulations: on the one hand, to reject the Advocate General's proposal which depended on the concept of an "umbrella contract", involving mutual obligations of renewal, and, on the other, to adopt a broad, non-technical test, looking at the character of the work and the employment relationship in practical terms."**

Whether there is an "umbrella" or "overriding" contract forms no part of the test for a "stable employment relationship" within the meaning of the EqPA.

38. Whilst Ms Monaghan QC stated that she was not submitting that the contract of employment was not relevant for determining whether there was a "stable employment relationship" for the purposes of the EqPA, she pointed out that the correct approach was to look at the relationship as a whole. Further, Ms Monaghan QC relied upon paragraph 32 of the judgment in **Fox** in which Carnwath LJ held:

> **"In particular, as I understand it, the word 'employment' in this phrase was intended to refer to the nature of the work, rather than the legal terms under which it is carried out. Thus, in stipulating that a 'succession of contracts' must be in respect of 'the same employment', the court cannot have intended to use the word 'employment' in the legal sense of a *contract* of employment, since that would made nonsense of the sentence. The natural alternative is a reference to the type of work, or 'job'."**

Ms Monaghan QC submitted that there was no difference in this regard between **Fox** and **Slack**, **Slack** having been cited to the court in the subsequent case.

39. It was submitted on behalf of the Claimant that the EJ erred in observing at paragraph 4 that:

> **"A stable employment relationship ceases for this purpose when a succession of short-term contracts are superseded by a permanent contract."**

Ms Monaghan QC submitted that the determination to this effect by Elias P (as he then was) in **Mrs Jeffery and Others v Secretary of State for Education and Bridgend College** UKEAT/0677/MAA – 0681/05 17 March 2006 had been departed from in **Fox**. Further, the approach in **Fox** that would permit a stable employment relationship to continue notwithstanding the employee entering into a permanent contract after a succession of short-term contracts, was to be preferred to that in **Slack** in which the case of one claimant who had such a pattern of employment was remitted to the Employment Tribunal to determine whether she was employed in a stable employment relationship after engagement under the permanent contract.

40. Ms Monaghan QC contended that the EJ erred in referring to a number of cases concerning continuity of employment under the ERA and wrongly conflated the concept of stable employment under the EqPA with continuity of employment under the ERA.

41. Ms Monaghan QC submitted that the appeal should be allowed and suggested that the appropriate course of action would be for the EAT to determine "the continuity of employment and amendment issues" rather than remitting the case to the Employment Tribunal.

42. By email of 6 February 2014, solicitors for the Respondent wrote in respect of the FH on 26 March 2013 that they relied on the submissions already made and the Respondent's Answer including passages in it which they address any substantive points.

43. Submissions on behalf of the Respondent resisting the possible application by the Claimant to amend the Notice of Appeal were provided on 9 May 2013. It was contended that:

> **"…in the absence of the Appellant having provided an amended Notice of Appeal to include grounds A-F of the rule 3(10) [Preliminary Hearing] skeleton argument, those appeal grounds cannot be considered by the EAT."**

Further it was submitted that:

> **"…the introduction of grounds A-F in the Appellant's rule 3(10) skeleton argument does not equate to inclusion in an amended Notice of Appeal in accordance with the Order of 18 July 2012."**

Counsel for the Respondent drew attention to paragraph 2.7 of the PD which states that:

> **"Any application for permission to amend must be made as soon as practicable and must be accompanied by a draft of the amended Notice of Appeal … which makes clear the precise amendment for which permission is sought."**

It was said that should an application for permission to be made it would be contrary to the overriding objective for the EAT to grant it at this stage.

44. The Answer referred to the submission in A to F of the skeleton argument of the Claimant for the PH and responded to them in outline.

45. As for A, the Respondent contended that the EJ referred to the correct test. The proposition cited by the EJ derived from Lord Slynn's judgment in **Preston (No. 2)** at paragraph 33.

46. As for B it was said that the features described in the judgment at paragraph 4 are referred to in **Preston (No. 3)**. This was not a reference to the test for continuity under the ERA.

47. The fact that the EJ did not refer to EqPA section 2ZA, to **Slack** and to **Fox** was said not to amount to an error of law. There was no obligation on the EJ to refer to the statute or to authorities.

48. With regard to D, the EJ did not conflate the concepts of "stable employment relationship" under EqPA and continuity of employment under ERA. The EJ rightly addressed an argument raised by the Claimant that his position from July to December 1995 amounted to a temporary cessation of work and should be counted as continuous employment. The Claimant referred the EJ to **Fitzgerald v Hall, Russell and Co. Ltd** [1970] AC 984. The EJ appreciated that "continuity of employment" cases such as **Fitzgerald** were decided in the context of the ERA. He considered that **Preston (No. 3)** which dealt with stable employment under the EqPA was more relevant to Mr Dass' case. The EJ did not err in law in this regard.

49. On behalf of the Respondent it was submitted that there had been no suggestion by the Claimant that there was an overriding contract and the EJ did not decide the issue before him on that basis. Accordingly whether it would have been an error of law to conclude that an overriding contract was required to constitute a stable employment relationship was therefore irrelevant.

50. Whether the EJ erred in observing that a stable employment relationship ended when a permanent contract was entered into after a series of short-term contracts was immaterial to the decision under appeal. Even if the observation made by the EJ was not an accurate statement of the law, it is not a matter on which the EJ based his judgment. It was submitted that the EJ did not err in considering whether there was a stable employment relationship between the Claimant and the Respondent in the period between 3 July 1995 and 4 January 1996. There is no obligation to consider the entirety of a period when assessing whether there was such a relationship or continuity of employment if it is plain that an employer contends that there was a break in the relationship or continuity at a particular point or points.

Conclusion on application to amend the Grounds of Appeal

51. The PD which together with the EAT Rules 2013 applies from 29 July 2013 to all appeals before the EAT whenever begun and contains the following material provisions:

> **"3.10. No party has the right to amend any Notice of Appeal or Answer without the prior permission of the EAT. Any application to amend must be made as soon as practicable and must be accompanied by a draft of the amended Notice of Appeal or amended Answer which makes clear the precise amendments for which permission is sought.**
>
> **…**
>
> **16.2. Skeleton arguments must be provided by all parties in all hearings, unless the EAT is notified by a party or representative in writing that the Notice of Appeal or Respondent's Answer or relevant application contains the full argument, or the EAT otherwise directs in a particular case."**

52. It has been long established since the judgment of the Court of Appeal in **Chapman v Simon** [1994] IRLR 124 that an ET has no power to determine allegations of unlawful conduct which are not in the Claim Form, ET1. The EAT cannot determine grounds of appeal which are not in the Notice of Appeal. A skeleton argument is not a Notice of Appeal. PD 3.10 provides that any application to amend the Notice of Appeal must be made as soon as practicable and must be accompanied by a draft of the proposed amended Notice of Appeal. In this case no draft amended Notice of Appeal dealing with the new stable employment relationship ground was submitted to the EAT following the PH on 16 July 2012 before HH Judge Richardson. As is now rightly acknowledged by counsel for the Claimant, the skeleton argument for the PH was not an amended Notice of Appeal.

53. A party needs to know what case is made against him. The case which can be pursued on appeal is that set out in the grounds in the Notice of Appeal. The fact that an opposing party may have been alerted to the case to be made against him by a letter before action or a skeleton argument does not relieve the opposing party from specifying the case in the appropriate formal pleading.

54. The Claimant was informed by HH Judge Richardson at the hearing on 16 July 2012 that permission to amend the Notice of Appeal by substituting "grounds under headings A to F" for the existing grounds was granted. If such amended grounds of appeal had been produced to the Judge at the hearing, the Notice of Appeal could have been amended on that day. They were not. The Claimant was required by Order of 18 July 2012 to submit draft amended grounds of appeal within seven days for approval by HH Judge Richardson. The Claimant did not comply with the Order.

55. No draft amended grounds of appeal were submitted following the oral application to amend on 16 July 2012. Draft amended grounds of appeal were submitted with an application to amend made on 7 June 2013, nearly a year later. The amended grounds of appeal are taken from the headings of Grounds A to F of the skeleton argument. The amended grounds also include twice the "continuity of employment" amended grounds previously submitted in the Additional Amended Grounds.

56. I apply the principles set out in **Khudados** adopting the numbering used in that case in deciding whether to exercise a discretion to grant the application to the amend the grounds of appeal.

57. (a) The Claimant is clearly in breach of the Order of 18 July 2012 which required him to submit a draft amended Notice of Appeal to the EAT within seven days. Further he was in breach of PD 3.10 by not submitting a draft amended Notice of Appeal on or soon after the oral application to amend on 16 July 2012. He was further in breach of the PD by not making the subsequent written application to amend as soon as practicable. It was made almost a year after 16 July 2012 when the need for amendment was recognised and the subsequent Order of 18 July 2012. The application to amend on 7 June 2013 was made more than three months after

junior counsel for the Claimant saw the Order of 18 July 2012 which set out the requirement to submit draft amended grounds of appeal within seven days of the date of the Order. There was further delay after the EAT pointed out to the parties by letter dated 1 May 2013 that no amended grounds of appeal which included the submissions made in paragraphs A to F of the skeleton argument of 16 July 2012 had been lodged. No application or amended grounds were submitted in response to that letter. It was only after by letter dated 4 June 2013 the EAT pointed out:

> **"It would be necessary for the Appellant to apply to amend the grounds of appeal out of time to add or substitute these grounds if they are to be considered in determining the appeal."**

that finally on 7 June 2013 counsel on behalf of the Claimant made an application for permission to amend accompanied by draft amended grounds of appeal.

58. The Claimant is in clear breach of the Order of 18 July 2012 and the requirement to apply for permission to amend the Notice of Appeal in accordance with the requirement of the PD. The draft amended grounds of appeal were not provided when initially ordered. Counsel knew of the requirement to supply draft amended grounds of appeal since 27 February 2013. Attention was drawn by the EAT on 1 May 2013 to the absence of a draft amended Notice of Appeal.

59. It was said on behalf of the Claimant in the written submissions of 9 May 2013 that:

> **"This application to amend has been made as soon as possible following the identification of the issue by the Employment Appeal Tribunal."**

No application to amend was made on 9 May 2013. The submission of that date states "if necessary, we seek to amend the grounds of appeal…" No draft amended grounds were provided at that time. Further, at the hearing before me, Ms Monaghan QC rightly

acknowledged that there had been delay in applying for permission to amend the grounds of appeal since counsel saw the Order of 18 July 2012 on 27 February 2013.

60. (b) As the EAT, Judge Serota QC and members, held in **Khudados**:

> **"Any extension of time is an indulgence and the appeal tribunal is entitled to a full honest and acceptable explanation for any delay or failure to comply with the 1993 Rules or 2002 Practice Direction…"**

In their submissions of 9 May 2013, counsel for the Claimant rightly restrict their answer to this requirement saying that a full and honest explanation for the delay had been given. The explanation was that it was junior counsel's understanding at the hearing before HH Judge Richardson that the skeleton argument was to stand as grounds of appeal in respect of grounds A to F.

61. Counsel for the Claimant did not receive the Order of 18 July 2012 requiring submission of draft amended grounds of appeal within seven days until 27 February 2013. The submissions on behalf of the Claimant made on 9 May 2013 continue:

> **"6. Unfortunately it was not identified that the terms of the written order differed (if they do) from junior counsel's understanding of what was ordered orally at the Rule 3(10) hearing."**

62. Quite rightly it is said in the written submissions of 9 May 2013 that:

> **"…it is accepted that a more natural reading of the above order [that of 18 July 2012] is that the amended grounds were to include grounds A-F."**

63. As was stated in the skeleton arguments by counsel for the Claimant of 9 May and 7 June 2013, a full and honest explanation has been given for the delay in applying to amend with, as was required, draft amended grounds of appeal. However it was not asserted nor could it be, that the explanation is acceptable. Even if counsel understood that grounds A to F in her skeleton argument for the PH were to stand as grounds of appeal, it should have been

appreciated that amended grounds of appeal must be provided to the EAT and served on the Respondents. The document entitled "Additional Amended Grounds following hearing on 16 July 2012" do not include grounds A to F of the skeleton argument nor even a reference to them. Further they do not state that the original grounds of appeal are not pursued.

64. Even if counsel did not appreciate on 16 July 2012 that amended grounds of appeal including A to F were required, there could have been no such doubt after seeing the Order of 18 October 2012 on 27 February 2013. The length of the delay thereafter was unacceptable. Even if delay after 27 February 2013 had been acceptable, which it was not, it ceased to be so once the absence of the inclusion of grounds A to F from the grounds of appeal was drawn to the attention of counsel for the Claimant and the parties' representatives by letter from the EAT of 1 May 2013. An application to amend with draft grounds should immediately have been made. It was not. Instead, at paragraph 7 of the written submissions of 9 May 2013 it was said "if *necessary* (emphasis added) we seek to amend the grounds of appeal to add grounds A-F". It was not until after a further letter from the EAT dated 4 June 2013 pointing out that:

> **"Whilst the possibility is referred to in the written submissions on behalf of the Appellant, no formal application has been made for permission to amend the grounds of appeal out of time or draft amended grounds of appeal provided."**

that these were sent on 7 June 2013. Even if delay from 16 July 2012 or 27 February 2013 had been acceptable, the delay from 1 May 2013 to 7 June 2013 was not.

65. (c) As for the third factor in **Khudados**, whilst the failure to amend the grounds of appeal in accordance with the Order of 18 July 2012 has caused delay, the amendments themselves would not. The comment by the EAT in **Khudados** at paragraph 86(c) that:

> **"…the party against whom permission to amend is sought will be in no worse position than if the amended grounds had been included in the original notice of appeal."**

is apposite.

66. (d) HH Judge Richardson considered grounds A to F fairly arguable. This view was reached at a PH in the absence of submissions from the Respondent. If those putative grounds were fairly arguable, it may be said that prejudice would be caused to the Claimant by depriving him of the opportunity of relying upon them. However I agree with the observation of the EAT in **Khudados** at paragraph 86(d) that:

> **"We would also suggest that the prejudice caused by refusing permission to amend to an applicant who seeks permission to amend by adding fairly arguable grounds, but who has failed in a significant way to comply with the Rules or Practice Direction, or who has delayed excessively is likely to carry less weight than in the case of an applicant who has not delayed and has acted in accordance with the 1993 Rules and 2002 Practice Direction."**

In this appeal there has been a breach of the Order of 18 October 2012, breach of the PD and considerable inexcusable delay. Accordingly less weight is to be attached to the merits of the proposed amendment than otherwise may be the case.

67. (e) The EAT in **Khudados** explained that if it is necessary to consider the merits of any proposed amendments, they will be assumed to cross the threshold of raising a point of law which gives the appeal a reasonable prospect of success at a FH. This observation indicates that it is material to consider the prospects of success beyond satisfying that minimum threshold.

68. I have been asked by counsel for the Claimant to give an assessment of the merits of the grounds sought to be raised in the proposed amendment. I do so in brief having regard to the written submissions on behalf of the Claimant and their arguments advanced orally on 26 March 2013. The Respondent did not appear and was not represented at that hearing which was treated as the hearing of the appeal principally on grounds A to F. Although the Respondent by

their solicitors had made some observations on those grounds in the Respondent's Answer, these were not addressed in the skeleton argument settled by counsel as she rightly observed that grounds A to F had not been included in any amended Notice of Appeal. It would not be appropriate to nor can I on the material before me express other than summary view of their merits. The grounds sought to be added by amendment will be considered as listed under paragraph 1 in the draft grounds of appeal rather than the skeleton argument grounds A to F.

69. 1.2. The ET wrongly referred to a case which has been overruled in part (**Preston v Wolverhampton Health Care** [2004] IRLR 96);

1.3. The ET at paragraph 4, wrongly set out the test to be applied in cases of this nature;

At paragraph 4 the EJ held:

> **"The features that characterise a stable employment relationship are that there is; (1) a succession of short-term contracts, meaning three or more contracts for an academic year or shorter; (2) concluded at regular intervals, in that they are clearly predictable and can be calculated precisely, or where the employee is called upon frequently whenever a need arises; (3) relating to the same employment; and (4) to which the same pension scheme applies. A stable employment relationship ceases for this purpose when a succession of short-term contracts are superseded by a permanent contract."**

It was contended on behalf of the Claimant that part of **Preston (No. 3)** had been overruled by **Powerhouse Retail Ltd v Burroughs** [2006] IRLR 381 and that it was the House of Lords in **Preston (No. 2)** [2001] IRLR 237 which ruled that the time limit runs from the end of the last contract forming part of the relationship. Further, it was said that comments made in **Preston (No. 3)** regarding the concept of a stable employment relationship were rejected by the Court of Appeal in **North Cumbria NHS Trust v Fox** [2010] IRLR 804.

70. The elements in the passage attributed to **Preston (No. 3)** by the EJ and quoted by counsel for the Claimant are also to be found in the judgment of Lord Slynn in the House of Lords in **Preston (No. 2)**. These have not been doubted.

71. The four elements of a stable employment relationship referred to by the EJ in paragraph 4 of the judgment are also consistent with those identified by the ECJ in **Preston** at paragraph 69. These are (1) a succession of short-term contracts; (2) concluded at regular intervals; (3) relating to the same employment; and (4) to which the same pension scheme applies. When the case returned to the House of Lords, at paragraph 32 Lord Slynn referred to the fact that some of the employees concerned were employed under consecutive but separate contracts of service with breaks in between, such as teachers on a termly or academic year contract. The observations of the EJ that a succession of short-term contracts meant three or more contracts for an academic year or shorter was consistent with the situation envisaged by Lord Slynn and paragraph 115 of the judgment in **Preston (No. 3)**. The elaboration by the EJ of the second feature – predictability – is consistent with the judgment of the ECJ in which they held that the limitation period would start when:

> **"…the periodicity of such contracts has been broken."**

On these authorities, a feature of a stable employment relationship is a succession of short-term contracts concluded at regular intervals.

72. The judgment of the Court of Appeal in **Fox** does not nor could it overrule that of the House of Lords in **Preston (No. 2)**. In **Fox** as in **Slack** the Court was concerned with an uninterrupted succession of contracts. The Court of Appeal in **Fox** and **Slack** held that the concept of "stable employment relationship" is not confined to a succession of contracts with breaks between them. It also applies to an uninterrupted succession of contracts. In this regard counsel for the Council in **Fox** accepted that **Slack** represented a limited departure from the approach of HH Judge McMullen QC in **Preston (No. 3)**.

73. The Claimant was not employed during the relevant period under an uninterrupted succession of fixed-term contracts. The decisions **Fox** and **Slack** do not affect the approach to determining whether a Claimant such as Mr Dass who, in the material period, was engaged under a number of contracts which were interrupted and were concluded at different intervals was in a stable employment relationship. The judgments of the Court of Appeal in **Slack** and **Fox** do not overrule the elements of a stable employment relationship set out in **Preston (No. 3)** paragraph 115 which are relevant to this case.

74. As for the contention that **Preston (No. 3)** was overruled by **Powerhouse**, the House of Lords overruled **Preston (No. 3)** on a point not material to the Claimant's case. The point on which **Preston (No. 3)** was overruled was that in a TUPE transfer, time for bringing a claim against a transferor with regard to an equal pay pension claim runs from the date of the transfer. There was no TUPE transfer in this case.

75. 1.4. The ET failed to refer to the relevant section of the **Equal Pay Act 1970**, namely s2ZA;

EqPA section 2ZA(2) provides that a "stable employment case" means:

> **"…a case where the proceedings relate to a period during which a stable employment relationship subsists between the woman and the employer, notwithstanding that the period includes any time after the ending of a contract of employment when no further contract of employment is in force."**

Although the EJ did not refer to EqPA section 2ZA, he directed himself in accordance with the judgment of the ECJ in **Preston** and of the House of Lords in **Preston (No. 2)** to consider whether a stable employment relationship was in existence between the Claimant and the Respondent in the period between 3 July 1995 to 4 January 1996. By including in his second self direction the situation in which the employee is called upon frequently whenever a need arises, the EJ clearly considered whether such a relationship continued during periods when

there was no contract between the parties. The EJ correctly directed himself in accordance with EqPA section 2ZA although he did not refer to that statutory provision.

76. 1.5. The ET failed to refer to recent and important cases concerning the concept of "a stable employment relationship", namely **Slack** and **Fox**;

As explained above, in **Slack** and **Fox** the Court of Appeal held that the Claimants were in a stable employment relationship when engaged under a succession of contracts without a break (**Fox** paragraph 25). That is not the situation in this case. The decision in those cases did not affect the application of the test in **Preston (No. 3)** correctly adopted by the EJ.

77. 1.6. The ET wrongly referred to a number of cases concerning continuity of employment under the ERA (namely **Pfaffinger**, **Ford** and **Fitzgerald**;

The EJ recorded that the Respondent's counsel had referred to **Pfaffinger** and **Ford**. He rightly observed that these cases were about continuity of employment under the ERA. The EJ recorded that the Claimant referred to **Fitzgerald**. He rightly observed that this was a case on cessation of work. The EJ did not rely on these authorities in reaching his conclusions as to whether there was a stable employment relationship between the parties in the material period. They are referred to in the judgment as cases on which the parties relied. They did not form part of the self direction on "stable employment relationship".

78. 1.7. The ET wrongly conflated the concept of continuity of employment under the ERA with the concept of a stable employment relationship under the Equal Pay Act 1970;

The EJ differentiated between authorities relevant to continuity of employment under the ERA and **Preston** which was concerned with stable employment relationship in respect of which he observed:

> **"…what is said in there is more recent and more relevant to the circumstances of the case before me."**

The EJ had correctly set out the elements of a stable employment relationship derived from **Preston (No. 3)**. The findings of fact in paragraph 3.2 of the judgment are as relevant to the question of whether there was a stable employment relationship for the purposes of the EqPA as they are to whether there was a temporary cessation of work within the meaning of the ERA. The EJ applied to the facts the test in **Preston (No. 3)** which was applicable to determining whether there was a stable employment relationship between the parties at the material time.

79. 1.8. Contrary to the Court of Appeal's judgment in **Fox** the ET wrongly found that the lack of an overriding contract meant that there could be no stable employment relationship (see paragraph 5.1 of the ET's judgment…);

The structure of paragraph 5 of the judgment is that the EJ first considers continuity of employment within the meaning of the ERA. The question of whether there was an "umbrella" contract spanning the period in issue was considered in paragraph 5.1. The EJ observed that there was "no suggestion here of any overriding contract". Whether there was continuity of employment under ERA because the absence of a contract during the material period was due to a temporary cessation of work was considered in paragraph 5.2. The question of whether there was a stable employment relationship during the period was decided in the last sentence of paragraph 5.2 and the first of paragraph 5.3.

80. His decisions on whether there was any overriding contract – which was not suggested – or a temporary cessation of work, were not relied upon by the EJ in determining whether there was a stable employment relationship between the parties at the material time. The EJ determined that issue by application of the factors set out in **Preston (No. 3)**.

81. 1.9. Contrary to the Court of Appeal's judgment in **Fox** the ET wrongly found that a stable employment relationship ceases … when a succession of short-term contracts are superseded by a permanent contract;

The Court of Appeal in **Fox** did not decide that a stable employment relationship did not end when a succession of short-term contracts were superseded by a permanent contract. The Court decided that a stable employment relationship can be constituted by an uninterrupted succession of contracts. The succession does not have to be broken.

82. That **Fox** did not decide that a stable employment relationship does not cease when a succession of short-term contracts are superseded by a permanent contract is demonstrated by the reference in the judgment to one of the cases considered in **Slack**. The Court of Appeal in paragraph 22 of **Fox** explained that one of the cases in **Slack**, that of Mrs Athersmith, who had started as a "relief carer" but at the time of a new contract had become a "permanent carer", was not considered clear enough for the Court to decide whether or not there was a stable employment relationship. The case was remitted to the Employment Tribunal to investigate and determine that issue.

83. In any event, on the findings of the EJ, there was no stable employment relationship during the period leading up to the permanent contract which took effect from 4 January 1996. The view of the EJ as to whether a stable employment relationship comes to an end on entering a permanent contract was not material to his decision. It appears from the judgment that the issue considered at the hearing was the status of the parties' relationship between 3 July 1995 to 4 January 1996.

84. HH Judge Richardson was of the view at the PH that the arguments in paragraphs A to F of the skeleton argument before him raised arguable grounds of appeal. With due respect to

HH Judge Richardson, on the material before me, including the oral submissions on behalf of the Claimant made on 26 March 2013, in my judgment the proposed amended grounds 1.2, 1.3, 1.4, 1.5, 1.6, 1.8 and 1.9 have little merit. Whilst draft ground 1.7 may be arguable, in my view, it would have little prospect of success at a FH.

85. (f) In my judgment it would not be in accordance with the overriding objective to grant the application to amend the Notice of Appeal. To allow the amendments would not lead to the fair, expeditious and proportionate disposal of the claim.

86. Having regard to the extreme delay in submitting draft amended grounds of appeal in breach of the Order of 18 July 2012 and the PH, the absence of any real prejudice to the Claimant in that, on the material before me, in my judgment the proposed grounds would not have had a reasonable if any prospect of success, this Court declines to exercise its discretion to grant the application to amend the grounds of appeal.

87. Accordingly the position is that the original Grounds of Appeal were not permitted by HH Judge Richardson to proceed to a full hearing. It was agreed on behalf of the Claimant at the hearing before the Employment Appeal Tribunal on 26 March 2013 that the continuity of employment point which was the subject of the Additional Amended Grounds of Appeal was not the correct test to be applied in the Claimant's case. It was not pursued. Since the amendment of the Notice of Appeal in respect of the stable employment point has not been allowed, the refusal of the amendment disposes of the appeal which stands dismissed.