Appeal No. UKEAT/0108/12/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal on 1 August 2014
and
Written Submissions

Judgment handed down on 27 November 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(in Chambers)

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

© Copyright 2017

APPEARANCES

For the Appellant	MS KARON MONAGHAN (One of Her Majesty’s Counsel) and MS LAURA PRINCE (of Counsel) Bar Pro Bono Scheme
For the Respondents	MISS NADIA MOTRAGHI (of Counsel) Instructed by: Mills & Reeve LLP 78-84 Colmore Row Birmingham B3 2AB

SUMMARY

EQUAL PAY ACT - Article 141/European law

JURISDICTIONAL POINTS - Claim in time and effective date of termination

The Employment Judge erred in directing himself in deciding whether there was a 'stable employment relationship' during a relevant period. He erroneously took into account features of continuity of employment within the meaning of the **Employment Rights Act 1996**: whether there was a full-time contract, an 'umbrella' contract or a 'temporary cessation of work' during the relevant period. This approach was contrary to the judgments of the CJEU and the House of Lords in **Preston v Wolverhampton Healthcare NHS Trust** [2000] IRLR 506 and [2001] IRLR 96 which made it clear 'stable employment relationship' has an autonomous meaning. The Employment Judge failed to take into account the consequential amendment made to the **Equal Pay Act 1970** by Section 2ZA and subsequent decisions of the Court of Appeal, **Slack and others v Cumbria County Council and others** [2009] IRLR 463 and **North Cumbria University NHS Hospitals Trust v Fox** [2010] IRLR 804. A necessary feature of stable employment is that there a succession of contracts concluded at regular intervals. Time starts running when the periodicity of those contracts has been broken. Decision that there was no stable employment relationship between the parties in the relevant period set aside.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. On 29 December 1994, Mr Dass ('the Claimant') brought a claim under the **Equal Pay Act 1970** ('EqPA') for admission to the Teachers' Superannuation Scheme ('the TPS') for the period he was employed as a part-time lecturer by the College of Haringey Enfield and North East London. He was in pensionable service when he started full time for college. The claim is what was sometimes described as a 'piggy-back claim' dependent on the outcome of equal pay claims by women part-time workers claiming equal pay with male full time comparators who, unlike them, had been given membership of their occupational pension schemes.

2. Following the decision of the House of Lords in **Preston v Wolverhampton Healthcare NHS Trust and Others (No 2)** [2001] IRLR 237 and **Somerset County Council v Pike** [2009] IRLR 870, the Claimant's claim, which with other similar claims had been stayed, was listed for hearing by an Employment Tribunal ('ET').

3. By the time the claim was restored for hearing, the Claimant claimed admission to the TPS until 14 March 2003 when any employment he had with the Respondent had come to an end. Following a previous Pre-Hearing Review on 15 March 2011, by a Judgment sent to the parties on 1 April 2011 with Reasons on 24 May 2011, Employment Judge Sigsworth ('the EJ') made a declaration that the Claimant be entitled to retrospective access to the TPS for the period from 20 September 1993 to 3 July 1995.

4. The Decision which is the subject of this appeal was made by the EJ in a Pre-Hearing Review on 22 August 2011 on an issue relevant to the period for which he should be granted

retrospective admission to the TPS. By a Judgment with Reasons sent to the parties on 20 September 2011 the EJ decided that:

> **"… 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."**

All references below to "the Judgment" are to that of 20 September 2011 and to paragraph numbers to those in the Judgment unless otherwise indicated. The Appellant is referred to as the Claimant and the College as the Respondent.

5. 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 beyond 3 July 1995 under the current unamended ET1. 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 remained to be determined by the EJ.

6. At an earlier stage of the proceedings, understandably the Secretary of State for Education indicated that the Department would not actively participate in the proceedings. On costs grounds the College did not appear at various hearings in the Employment Appeal Tribunal ('EAT') and relied on written submissions by their Counsel, Miss Motraghi.

7. The appeal has had a chequered history which is set out in my Judgment of 7 February 2014 on the application by the Claimant to amend the Notice of Appeal. In circumstances set

out in an extempore Judgment given on 1 August 2014, on application by the Claimant I reviewed the Order dismissing the application to amend. I granted permission to substitute the Amended Grounds of Appeal attached to the Order of 1 August 2014 for the existing Grounds. As is recorded in the Order following the hearing on 1 August 2014, the Amended Grounds of Appeal and the Note from Counsel titled 'Note of arguments on the relevance of 'continuity of employment' to 'stable employment relationship'' attached to the Notice of Appeal, the Claimant challenges the Decision of the EJ that there was no stable employment relationship between the Claimant and the Respondent between 3 July 1995 and 4 January 1996. He does not challenge the Decision that there was no continuity of employment, within the meaning of the **Employment Rights Act 1996** ('ERA') Section 212 in that period. Points raised on continuous employment within the meaning of that Act are relied upon in support of the contention that the EJ erred in holding that there was no 'stable employment relationship'.

8. The concept of 'stable employment relationship' was introduced into the **Equal Pay Act 1970** ('EqPA') following the judgment of the European Court of Justice ('CJEU') in **Preston v Wolverhampton Healthcare NHS Trust** [2000] IRLR 506 on three questions referred by the House of Lords. The CJEU held:

> **"The answer to the third question must therefore be that Community law precludes a procedural rule which has the effect of requiring a claim for membership of an occupational pension scheme (from which the right to pension benefits flows) to be brought within six months of the end of each contract of employment to which the claim relates where there has been a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies."**

9. An amendment was made to the **EqPA** to include in the definitions of 'qualifying date', which is the start of the period within which an equal pay complaint must be brought, six months after the day on which the stable employment relationship ended. As the grounds on

which this appeal is to proceed have been the subject of considerable debate, the Amended Grounds of Appeal before the court are set out in full. The Claimant contends that:

> **"1. The ET erred in finding that the claimant was not in a 'stable employment relationship' in particular:-**
>
> > **1.2. The ET wrongly referred to a case which had 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;**
> >
> > **1.4. The ET failed to refer to the relevant section of the Equal Pay Act 1970, namely s.2ZA;**
> >
> > **1.5. The ET failed to refer to recent and important cases concerning the concept of 'a stable employment relationship, namely *Slack* and *Fox* (discussed below);**
> >
> > **1.6. The ET wrongly referred to a number of cases concerning continuity of employment under the Employment Rights Act 1996 ('ERA') (namely *Pfaffinger, Ford and Fitzgerald*).**
> >
> > **1.7. In determining whether there was a stable employment relationship the ET failed to have regard to the fact that a stable employment relationship cannot be narrower than continuous employment within the meaning of s.212 ERA, in particular:-**
> >
> > > **1.7.1. The Tribunal wrongly failed to consider the entirety of C's period of employment with R in determining whether or not his employment was continuous;**
> > >
> > > **1.7.2. The Tribunal wrongly concluded that the break in C's employment with R did not amount to a temporary cessation of employment;**
> > >
> > > **1.7.3. The Tribunal erred in law in that they misunderstood the case of *Fitzgerald v Hall, Russell and Co.***
> >
> > **1.8. 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 (EPA);**
> >
> > **1.9. Contrary to the Court of Appeal's judgement 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, p.120 bundle 2);**
> >
> > **1.10. 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'."**

10. Sensibly the parties have agreed that the appeal be determined on the basis of the Amended Grounds of Appeal and Note of 1 August 2014, the Respondent's Answer, the skeleton arguments produced by Ms Monaghan QC and Miss Prince dated 12 March 2013 on behalf of the Claimant and by Miss Motraghi on behalf of the Respondent received by the EAT on 13 March 2013. The Note dated 11 July 2013 prepared on directions given by the EAT on 9

July 2013 of additional oral submissions put forward by Ms Monaghan QC at the hearing on 26 March 2013 has also been considered. Ms Monaghan QC with Miss Prince appeared for the Claimant at the hearings before me including that on 26 March. Neither Respondent appeared or was represented.

Outline Facts

11. The Claimant was employed by the Respondent as a full time lecturer for some years until 31 March 1993. As a full-timer he was a member of the TPS. On that date he retired early on efficiency grounds. On 20 September 1993 the Claimant was employed as a part-time lecturer. As a part-timer he was not a member of the TPS. Initially he was employed on contracts for each academic year. By an ET1 on 29 December 1994 the Claimant presented a claim for equal pay for admission to the TPS.

12. The Claimant's contract with the Respondent for 1994/5 came to an end on 3 July 1995 and he applied for a contract for 1995/6. The EJ made the following findings of fact which are not challenged on appeal.

> **"On 17 July 1995, having received the Claimant's application to teach for the following academic year, beginning September 1995, the college wrote to the Claimant as follows. "Thank you for your application to teach next year. Unfortunately, with the ending of section 11 and task force funding and with the requirement that full-time staff must teach more hours, we have fewer part-time hours available. I therefore regret that we are unable to offer you an appointment at this time. I will be in touch with you should the situation change." The letter is signed by the head of section for ESOL. Thereafter, in the Autumn term of 1995, the Claimant was not employed by the College on a regular basis throughout the term as he had been in the previous two years. On three or four occasions in October and December 1995 he was telephoned the evening before, and asked if he could work, at short notice, on the following day for a few hours, doing different tasks on each occasion. Such casual and irregular work is confirmed by payslips. The Claimant only returned to regular teaching with the college on 4 January 1996, when alternative funds became available with which to pay him."**

13. The EJ observed at paragraph 3.3:

> **"There is some evidence in the bundle of documents that the Claimant himself recognised that his contract with the College had come to an end in July 1995."**

EJ Sigsworth set out that evidence. Further, in paragraph 3.4 the EJ stated:

> **"In the Claimant's oral evidence and his witness statements the Claimant also appears to acknowledge that his contract of employment with the College terminated on 4 July 1995."**

The EJ then summarised the evidence given by the Claimant.

The relevant statutory provisions

14. **Equal Pay Act 1970**

> **"2. Disputes as to, and enforcement of, requirement of equal treatment**
>
> **(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. "Qualifying date" under section 2(4)**
>
> **(1) This section applies for the purpose of the determining the qualifying date, in relation to proceedings in respect of a woman's employment, for the purposes of section 2(4) above.**
>
> **(2) In this section-**
>
> > **…**
> >
> > **"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;**
> >
> > **"standard case" means a case which is not-**
> >
> > > **(a) a stable employment case,**
> > >
> > > **(b) a concealment case,**
> > >
> > > **(c) a disability case, or**
> > >
> > > **(d) both a concealment and a disability case.'**
>
> **(3) In a standard case, the qualifying date is the date falling six months after the last day on which the woman was employed in the employment.**
>
> **(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."**

15. **Employment Rights Act 1996**

> **"210. Introductory.**
>
> **(1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter.**
>
> **…**
>
> **212. Weeks counting in computing period.**
>
> **…**
>
> **(3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—**
>
> > **…**
> >
> > **(b) absent from work on account of a temporary cessation of work,**
> >
> > **…**
>
> **counts in computing the employee's period of employment."**

The Judgment of 20 September 2011

16. The EJ decided to deal with one issue at the hearing on 22 August 2011. That was:

> **"Whether there was a break in continuity in employment and/or no stable employment relationship between 3 July 1995 and 4 January 1996."**

17. The EJ directed himself in law as follows:

> **"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 cited by the Respondent on continuity of employment in the context of the **ERA**. He observed:

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

Referring to **Fitzgerald v Hall, Russell and Co. Ltd** [1970] AC 984 HL he stated:

> **"This was a case on cessation of work, and whether it was temporary, so that continuity was not broken, in the context of a redundancy payment. Again, the case of Preston and what is said in there is more relevant to the circumstances of the case before me."**

18. 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."**

The submissions of the parties

19. At the hearing on 26 March 2013 both the Claimant and the Respondent agreed that the 'continuity of employment' test under the **ERA** was not the correct test to apply in the Claimant's case. This was confirmed by the Amended Grounds of Appeal of 1 August 2014 and the accompanying note. The correct test for determining whether the Claimant could gain retrospective admission to the TPS in respect of periods after 3 July 1995 was whether he was in a stable employment relationship with the Respondent during the relevant period.

20. Ms Monaghan QC for the Claimant submitted that the EJ erred in picking 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 in the period between July 1995 and March 2003.

21. It was submitted that the EJ misdirected himself in determining whether the Claimant was in a stable employment relationship with the Respondent in the period he did consider. His erroneous self-direction was set out in paragraph 4.

22. Ms Monaghan QC submitted that the EJ erred by failing to refer to the relevant section of the **EqPA**, Section 2ZA. It was stated in the skeleton argument on behalf of the Claimant:

> **"The EPA therefore expressly anticipates that a stable employment relationship may exist despite the fact that for part of the period of time there is no employment contract in place and therefore no continuity of employment for the purpose of the ERA."**

23. Ms Monaghan QC submitted that the authority relied upon by the EJ in paragraph 4, the judgment of the EAT in **Preston v Wolverhampton Healthcare NHS Trust and Others (No 3)** [2004] IRLR 96, had been overruled in part.

24. Counsel for the Claimant clarified that whilst **Powerhouse Retail Ltd and others v Burroughs and others** [2006] IRLR 381, referred to in the skeleton argument, overruled **Preston (No 3)** in part it did not do so on an issue material to this appeal. However, it was said that parts of the judgment in **Preston (No 3)** were overruled by the Court of Appeal in **North Cumbria University Hospitals NHS Trust v Fox** [2010] IRLR 804. Lord Justice Carnwath (as he then was) in paragraph 17 rejected the '…limited view of the scope of the new principle' of stable employment relationship which confined it to a succession of short-term contracts not separated by intervals. The Court of Appeal in **Fox** held in paragraph 28 that the concept could also apply to an unbroken succession of contracts. Attention was also drawn to paragraph 34 of **Fox** in which Lady Justice Smith held that the court was bound by **Slack v Cumbria County Council** [2009] IRLR 463 to hold that the wider construction of 'stable employment relationship' was to be given so that the term applied to consecutive successional contracts and

not only to those separated by intervals. The wider construction was to be derived from the ordinary and natural meaning of the words. Further, counsel for the Claimant submitted that the EJ wrongly found that a stable employment relationship ceases 'when a succession of short-term contracts are superseded by a permanent contract.' This observation was said to be contrary to the guidance on 'stable employment relationship' given in **Fox**.

25. Ms Monaghan QC pointed out that the first element of the test for a stable employment relationship said by the EJ in paragraph 4 to have been outlined by HH Judge McMullen QC in **Preston (No 3)** as:

> **"(1) a succession of short-term contracts, meaning three or more contracts for an academic year or shorter"**

appears to have been taken from the headnote of the report of that case. Referring to paragraph 115 of the judgment in **Preston (No 3),** Counsel stated that the EAT referred to 'three or more contracts' as being a basis for a stable employment relationship but did not state that those three contracts had to be within 'an academic year or shorter'.

26. In addition to contending that the EJ erred in relying on **Preston (No 3)**, Ms Monaghan QC contended that he erred in failing to refer to **Slack** and **Fox**. Reliance was placed on paragraphs 28 of **Fox** referred to above and on paragraph 31 in which the Court of Appeal held:

> **"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."**

In paragraph 32 Carnwath LJ held:

> **"…the court [CJEU in *Preston*] cannot have intended to use the word 'employment' in the legal sense of a contract of employment…The natural alternative is a reference to the type of work or 'job'."**

27. Ms Monaghan QC submitted that the EJ erred in referring to a number of cases concerning continuity of employment under the **ERA**, **Pfaffinger v City of Liverpool Community College** [1997] ICR 143, **Ford v Warwickshire County Council** [1983] ICR 273 and **Fitzgerald v Hall, Russell and Co Ltd** [1970] AC 984 and wrongly conflated the concept of a stable employment relationship under **EqPA** with continuity of employment under the **ERA**.

28. It was submitted on behalf of the Claimant that the EJ conflated the concept of stable employment relationship with continuity of employment was shown by a number of his observations. In addition to referring to cases on continuity of employment under the **ERA**, in paragraphs 4 and 5 the EJ set out a list of features which seem more relevant to a continuity of employment case than a stable employment case. In paragraph 5.1 the EJ considered the fact that the Claimant acknowledged that there was 'a break in continuity of his employment' as relevant to the issue to be decided. Further, the EJ referred to mutuality of obligation and in paragraph 5.2 to the concept of 'cessation of work'. These are concepts relevant to continuity of employment under the **ERA** but not to a stable employment relationship under **EqPA**. The reference to there being 'no suggestion of any overriding contract' in paragraph 5.1 shows that the EJ had the **ERA** continuity of employment test in mind, rather than that for 'stable employment' under **EqPA**.

29. Whilst a 'continuity of employment' ground of appeal is not pursued, in their Note of arguments on the relevance of 'continuity of employment' to 'stable employment relationship', Counsel for the Claimant contended that a stable employment relationship cannot be narrower than continuous employment within the meaning of **ERA** s212. In particular, Counsel contended the entire period of employment should have been considered. Further in deciding

whether there was a temporary cessation of work, the EJ failed to base himself on whether there was a temporary cessation of work for the Claimant to do. The EJ erroneously considered there was no temporary cessation of work

> **"because work continued for full-time lecturers and possibly other part-time lecturers"**

This approach was contrary to the judgment of the Court of Appeal in **Fitzgerald**.

30. Miss Motraghi submitted in the skeleton argument on behalf of the Respondent that the EJ made findings of fact which supported the conclusion that there was no continuity of employment or stable employment relationship between the Claimant and the Respondent in the period between 3 July 1995 and 4 January 1996. Reliance was placed on the following findings of fact:

(1) the Claimant was informed by letter dated 17 July 1995 that the Respondent was unable to offer him an appointment from September 1995;

(2) on three or four occasions during the period between 3 July 1995 and 4 January 1996 the Claimant was asked to work the following day doing different tasks on each occasion;

(3) on 4 January 1996 the Claimant returned to regular teaching at the college;

(4) by his actions the Claimant recognised that his contract with the Respondent ended in July 1995.

31. Counsel contended that the EJ did not misdirect himself in law. The features of a stable employment relationship set out by the EJ in paragraph 4 of the Judgment correctly reflect those referred to in **Preston (No. 3)**.

32. It was submitted that the EJ did not err in considering whether there was a stable employment relationship between the parties 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 a stable employment relationship has been established if it is plain that an employer contends that there was a break in that relationship at a particular point or points, which would defeat a claim of continuing entitlement to equal pay in respect of a period after the break.

33. Miss Motraghi submitted that the EJ did not err by conflating 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 1995 to January 1996 amounted to a temporary cessation of work and should be counted as continuous employment. It was the Claimant who referred the EJ to **Fitzgerald v Hall, Russell and Co. Ltd** [1970] AC 984, a case on continuity of employment under what is now the **ERA**. 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 a stable employment relationship under the **EqPA** was more relevant to the case of the Claimant. The EJ did not err in law in this regard.

34. 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. He did not err in his approach to the issue before him.

35. Miss Motraghi submitted that whether the EAT in **Preston (No 3)** erred in holding that a stable employment relationship ceases when a succession of short-term contracts are superseded by a permanent contract is immaterial to the decision under appeal. This is not a

matter on which the EJ based his judgment. He held there was no stable employment relationship between the Claimant and the Respondent in the period between 3 July 1995 and 4 January 1996 not that there was such a stable employment relationship but that it came to an end when the Claimant entered into a contract on 4 January 1996. In any event such a proposition would have the support of the judgment of Elias J (as he then was) in **Jeffrey v Secretary of State for Education** [2006] ICR 1062. Elias J explained at paragraph 18:

> **"In my judgment, it cannot be said that there is a continuation of the stable employment relationship into a new permanent contract. To put it in my own words, the concept of a stable employment relationship has the effect of requiring a series of intermittent contracts or temporary contracts to be treated as if they were a single contract terminating at the conclusion of the last of those sequential contracts."**

36. The Respondent submitted that the contention on behalf of the Claimant that

> **"In determining whether there was a stable employment relationship the [EJ] failed to have regard to the fact that a stable employment relationship cannot be narrower than continuous employment within the measuring of s212 ERA."**

was erroneous. The Respondent's response on this issue is set out in their Answer as follows:

> **"17. As to ground (a), there is no relationship between the concept of the stable employment relationship under the Equal Pay Act 1970 and the test for continuity of employment under the Employment Rights Act 1996.**
>
> **18. These are different concepts applied to different claims; the former concerning a breach of the equality clause in equal pay and the latter (primarily) concerning the requisite service required to bring a claim of unfair dismissal; the approach under the ERA is not wider or narrower than the test under the EPA as they concern different issues. The authorities under the ERA neither bind nor influence the application of the stable employment relationship concept used in claims brought under the EPA. No claim of unfair dismissal was brought in this case."**

It was submitted that the EJ did not err in concluding that there had been a break in continuity of employment which was not due to a temporary cessation of work. This conclusion was open to the EJ on the evidence. This finding was correct but not relevant to the decision under the **EqPA**. It was submitted in the skeleton argument and the Respondent's Answer that in any event the EJ made findings of fact which supported the conclusion that there was no continuity of employment or stable employment relationship between 3 July 1995 and 4 January 1996.

37. Miss Motraghi submitted that the EJ did not err in law in deciding that there was no stable employment relationship between the Claimant and the Respondent in the material period. If the EJ were found to have erred in law, the Respondent asked that the case be remitted to the EJ for the issue of whether there was a stable employment relationship between the Claimant and the Respondent in the period 3 July 1995 to 4 January 1996 to be determined.

Discussion and conclusion

38. In his Judgment of 24 May 2011 EJ Sigsworth recorded at paragraph 3:

> **"Although the claim form was presented to the Tribunal on 29 December 1994, it sets out a case for retrospective access on the basis of continuing employment."**

The EJ made a declaration that under the 1994 ETI the Claimant was entitled to retrospective access to the TPS between 20 September 1993 and 3 July 1995. If there were no stable employment relationship between the Claimant and the Respondent from 3 July 1995, retrospective access to the TPS could not be claimed under the unamended December 1994 ETI beyond that date.

39. The decision of EJ Sigsworth that there was no stable employment relationship between the Claimant and the Respondent in the period 3 July 1995 and 4 January 1996 has the effect that, absent a new claim or possibly an amended claim, he cannot obtain retrospective access to the TPS in respect of the period from 3 July 1995 to 14 March 2003. The EJ did not decide whether, if there were a stable employment relationship in the period between 3 July 1995 and 4 January 1996, retrospective access to the TPS could be ordered under the 1994 ETI in respect of the entirety of the period from 3 July 1995 to 14 March 2003.

40. The equal pay provisions of the **EqPA** (now in the **Equality Act 2010**) operated by statutory modification of the terms of a claimant's contract of employment. The right to claim equal pay is conferred by statute and is to be exercised in accordance with its provisions.

41. The phrase 'stable employment relationship', which was at the heart of the issue EJ Sigsworth was to decide, is taken from **EqPA** Section 2ZA. As was explained by Carnwath LJ in **<u>Fox</u>** at paragraph 15:

> **"15. section 2ZA [was], inserted into the Equal Pay Act by amendment in 2003, to bring domestic law into line with the decision of the European Court of Justice in Preston v Wolverhampton Healthcare NHS Trust [2000] IRLR 06. The section introduces the concept of a "stable employment relationship case", an expression explained by section 2ZA(2):**
>
> > **"'stable employment case' means a case where the proceedings relate to a period during which a stable employment 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."**
>
> **In such a case (as contrasted with a "standard case"), the qualifying date for the purpose of the commencement of proceedings under section 2ZA(4) of the Act is –**
>
> > **"the date falling six months after the day on which the stable employment relationship ended.""**

It is therefore important to consider the features of a 'stable employment relationship' identified by the CJEU in **<u>Preston</u>**, the end of which marks the start of the limitation period.

42. The concept of 'stable employment relationship' was formulated by the CJEU in answering the third question referred to them by the House of Lords. This was:

> **"3. In circumstances where:**
>
> > **(a) an employee has served under a number of separate contracts of employment for the same employer covering defined periods of time and with intervals between the periods covered by the contracts of employment;**
> >
> > **(b) after completion of any contract, there is no obligation on either party to enter into further such contracts; and**
> >
> > **(c) she initiates a claim within six months of completion of a later contract or contracts but fails to initiate a claim within six months of any earlier contract or contracts:**
>
> **is a national procedural rule which has the effect of requiring a claim for membership of an occupational pension scheme from which the right to pension benefits flow to be brought within six months of the end of any contract or contracts of employment to which the claim**

relates and which, therefore, prevents service under any earlier contract or contracts from being treated as pensionable service compatible with:

> **(i) the right to equal pay for equal work in Article 119 of the EC Treaty; and**
>
> **(ii) the principle of EC law that national procedural rules for breach of Community law must not make it excessively difficult or impossible in practice for the claimant to exercise her rights under Article 119?"**

43. The CJEU observed at paragraph 65:

> **"This question relates to a number of actions before the national court which are distinguished by the fact that the claimants work regularly, but periodically or intermittently, for the same employer, under successive legally separate contracts. According to the order for reference, in the absence of an umbrella contract, the period prescribed in s2(4) of the EPA starts to run at the end of each contract of employment and not at the end of the employment relationship between the worker and the establishment concerned. It follows that workers are unable to secure recognition of periods of part-time work for the purpose of calculating their pension rights unless they have instituted proceedings within six months after the end of each contract under which the work concerned was performed."**

The CJEU referred at paragraphs 67 and 68 to the fundamental principle of legal certainty which requires that it be possible to fix precisely the starting point of a limitation period. Where there was a 'succession' of short-term contracts concluded at 'regular intervals' the court considered that there was no reason why the starting point for the limitation period should not be fixed as:

> **"the date on which the sequence of such contracts has been interrupted through the absence of one or more of the features that characterise a stable employment relationship of that kind, either because the periodicity of such contracts has been broken or because the new contract does not relate to the same employment or that to which the same pension scheme applies. [70]"**

The CJEU concluded:

> **"The answer to the third question must therefore be that Community law precludes a procedural rule which has the effect of requiring a claim for membership of an occupational pension scheme (from which the right to pension benefit flows) to be brought within six months of the end of each contract of employment to which the claim related where there has been a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies.[72]"**

44. The CJEU accordingly held that domestic law should enable claimants who work regularly but periodically or intermittently for the same employer under successive legally

separate contracts to bring equal pay claims within a limitation period starting on the date on which the sequence of such contracts has been interrupted. The court explained that the features characterising a stable employment relationship are a succession of contracts concluded at regular intervals. The 'periodicity' of such contracts is a necessary feature of such relationships. In my judgment it is apparent that the CJEU considered that a stable employment relationship could continue beyond the end of a particular contract. It would however come to an end if no new contract were entered into by the time expected in accordance with the established pattern, or periodicity, of the parties entering into such contracts.

45. Some of the Claimants in **Preston** were employed under consecutive but separate contracts of service with breaks in between. The stable employment relationship continued over such breaks. When the case returned to the House of Lords after the CJEU had given their judgment on the reference, Lord Slynn held that the Respondents could not rely on the six month limitation period in **EqPA** Section 2(4) starting at the end of each contract of employment to which the claim relates

> **"where there has been a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals…"**

He identified as features of a stable employment relationship, the existence of contracts concluded at regular intervals.

46. The EJ did not refer to **EqPA** section 2ZA or **Preston** in the CJEU or the House of Lords in considering whether there was a stable employment relationship between the Claimant and the Respondent in the period from 3 July 1995 to 4 January 1996. As submitted by Miss Motraghi this would not be in itself an error of law if the EJ had applied the correct approach to

ascertaining whether there was a stable employment relationship. However the EJ erred in stating in paragraph 4 that the EAT held in **Preston (No 3)**

> **"in such stable employment relationships, the six month time limit runs from [the] end of the last contract forming part of that relationship."**

The EJ misunderstood the judgment of the EAT in this respect. **EqPA** Section 2ZA, reflecting the judgment of the CJEU in **Preston**, makes it clear that a stable employment relationship may subsist in the intervals between contracts. The EAT in **Preston (No 3)** did not decide that such a relationship was co-terminous with the ending of a contract of employment. Further such a proposition would have been inconsistent with the judgment of HHJ McMullen QC that it was a necessary feature of a stable employment relationship that there be intervals between successive short-term contracts of employment. Amongst the reasons why the submission that there were stable employment relationships between the Claimants and the Respondents failed in **Preston (no 3)** included that there was no interval between the short-term contracts. This reasoning depended upon a stable employment relationship existing notwithstanding the absence of a contract in the intervals which the EAT considered a necessary element of such a relationship. The basis for the decision that there was a need for interval between separate contracts for a stable employment relationship to be established was overruled in **Fox** in which it was held that such a relationship could be established by successive periodic contacts without a break between them.

47. The EJ referred at paragraph 5.1 to the fact that the Claimant did not suggest that he had an overriding contract with the Respondent in the period between 3 July 1995 and 3 January 1996. In other words there was no contention that an 'umbrella contract' covered that period. The Court of Appeal in **Fox** explained that the concept of a 'stable employment relationship'

was different from that of an 'umbrella contract' with mutual obligations. Carnwath LJ made this clear when he held of the judgment of the CJEU in **Preston**:

> **"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."**

The reliance by the EJ on the absence of an 'overriding contract' in deciding that there was no stable employment relationship between the Claimant and the Respondent in the material period was an error of law.

48. The EJ observed in paragraph 5.1 that 'there was no full-time contract' during the period between July 1995 and January 1996. The final sentence of the paragraph:

> **"He was guaranteed no work in the future, and there was no obligation on the Respondent to offer him work."**

is the language of the mutual obligation test for the existence of a contract of employment or an 'umbrella contract'. It is not the test for a stable employment relationship.

49. In considering the absence of a contract of employment or an overarching 'umbrella' contract relevant to the question of whether there was a stable employment relationship between the parties in the period from 3 July 1995 and 4 January 1996, the EJ erred in law.

50. In paragraph 5.2 of his conclusions the EJ held that this was not case of a 'temporary cessation of work'. Temporary cessation of work is not a term used in the **EqPA**. It has a particular statutory meaning for the purpose of claims under the **ERA**. It is not clear why the term was used in the context of this equal pay claim. The CJEU and the House of Lords in **Preston** made clear that 'stable employment relationship' was a new and different concept.

This was emphasised in **Fox**. It was not suggested that ‘continuous employment’ under the **ERA** had any relevance to determining whether a ‘stable employment relationship’ existed for the purposes of an equal pay claim.

51. I do not accept the proposition advanced by Counsel for the Claimant that

> **“in determining whether there was a stable employment relationship the EJ failed to have regard to the fact that a stable employment relationship cannot be narrower than continuous employment within the meaning S212 ERA.”**

The two concepts are different. The test for each is different. They arise in different contexts and for different purposes.

52. In support of the approach that a ‘stable employment relationship’ cannot be narrower than ‘continuous employment’ under the **ERA** Ms Monaghan QC referred to the decision of the House of Lords in **Fitzgerald v Hall, Russell & Co Ltd** [1970] AC 194. In contending that in the relevant period there was ‘continuous employment’ it was rightly submitted that the EJ was wrong to conclude in paragraph 5.2:

> **“Nor was this a temporary cessation of work, because the work continued for full-time lecturers, and possibly other part-time lecturers.”**

In **Fitzgerald** it was held that the expression ‘cessation of work’ must be construed as referring to the cessation of the employee’s work or work for the employee and not the employer’s work. However, since the EJ erred if and insofar as he considered ‘continuous employment’ under the **ERA** relevant to the decision whether there was a stable employment relationship during the relevant period, this error does not affect the outcome of this appeal.

53. In my judgment the reference in **Fitzgerald** to deciding retrospectively whether there is a temporary cessation of work for the purpose of the **ERA** is not relevant to the determination

of the existence of a stable employment relationship within the meaning of the **EqPA**. The submission that whether an employee's employment is continuous for the purposes of Section 212 **ERA** is relevant to that issue is in my judgment contrary to the judgment of the CJEU in **Preston**. The CJEU considered that the principle of legal certainty required the possibility of fixing precisely the starting point of a limitation period. The Court held that this principle was not infringed by adopting the concept of a stable employment relationship because in such a case the start of the limitation period could be fixed.

> **"…as the date on which the sequence of such contracts has been interrupted through the absence of one or more of the features that characterise a stable employment relationship of that kind, either because the periodicity of such contracts has been broken or because the new contract does not relate to the same employment as that which the same pension scheme applies."**

54. The approach of the CJEU in **Preston** achieves the certainty which would not be secured by waiting for the end of the entirety of the Claimant's employment before putting in a claim in respect of the period of a stable employment relationship. Such a claim may well have to be lodged before all employment of the Claimant with the Respondent has ceased. The parties will know when the periodicity of a stable employment relationship has come to an end and a claim in respect of such employment should be brought. Whether there was a 'temporary cessation of work' or continuity of employment within the meaning of the **ERA** is, in my judgment, not material to the question under appeal: whether the EJ erred in deciding that there was nor stable employment relationship in the relevant period. The CJEU in **Preston** and the Court of Appeal in **Fox** made it clear that 'stable employment relationship' has an autonomous meaning. Accordingly the EJ erred if and insofar as he relied in deciding whether there was a stable employment relationship on the absence of a temporary cessation of work and therefore no continuity of employment within the meaning of the **ERA** during the summer of 1995. Nor, in my judgment, does it assist in deciding whether there was a stable employment relationship

during that period to make a comparison with continuous employment within the meaning of the **ERA**.

55. In paragraph 5.2 the EJ held that:

> **"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."**

and that:

> **"On the definition of stable employment relationship given in *Preston*, that relationship came to an end and there was no relationship from July 1995."**

56. The test for ascertaining whether there was a stable employment relationship between July 1995 and January 1996 is whether there was a succession of contracts of employment concluded at regular intervals, with or without gaps between them (**Slack**) and irrespective of the length of the contracts. Carnwath LJ in **Fox** held at paragraph 28:

> **"…if stability of the relationship is the guiding principle, it would be perverse to held that a succession of long-term contracts cannot achieve the same result."**

It is to be noted that all the relevant authorities including **Slack** and **Fox** refer to the need for a succession of contracts which, according to the CJEU and **Preston (No 2)** in the House of Lords have periodicity.

57. That the contracts are intermittent is not necessarily a bar to the presence of a stable employment relationship. In **Preston,** the House of Lords considered the claims of three groups of part-time teachers or lecturers. One group included supply teachers who worked intermittently. The question in their case, as in those of those employed under a succession of contracts for the academic year with a break over the long vacation and those employed under a

succession of fixed-term contracts for each term, was the periodicity of such contracts. When **Preston** returned to the House of Lords after the judgment of the CJEU Lord Slynn held of the intermittent contracts such as those under which supply teachers worked:

> **"33. Accordingly it is clear that where there are intermittent contracts of service without a stable employment relationship, the period of six months runs from the end of each contract of service, but where such contracts are concluded at regular intervals in respect of the same employment regularly in a stable employment relationship, the period runs from the end of the last contract forming part of that relationship."**

In **Slack** the Court of Appeal considered three cases. They held that both Mrs Slack and Mrs Elliot had been in a stable employment relationship with the Council as:

> **"They did the same work for the Council over very many years without any break in the work they did or in the succession of contracts."**

However the Court of Appeal remitted the third case to an Employment Tribunal for further fact finding. The necessary periodicity or succession of contracts was not clear from the facts. Mummery LJ held:

> **"100. However, the facts found in Mrs Athersmith's case are not clear enough to enable this court to say it was a stable employment case. She started as a relief carer. A new contract was issued by the Council and signed by her when she became a permanent carer. She also acquired the right to sick pay. It will be necessary for her case to be remitted to the ET to find all the facts relevant to a stable employment relationship. It is for the ET to investigate and to decide that issue, which was not raised before it first time round."**

I do not accept the proposition advanced by Ms Monaghan QC that the Court of Appeal in **Fox** decided that a stable employment relationship continued beyond the Claimant entering a permanent contract. That was not the issue before the court in **Fox**. When a somewhat similar situation was before the Court of Appeal in **Slack** in the case of Mrs Athersmith, the claim was remitted to an Employment Tribunal to find facts to enable the court to say whether it was a stable employment case.

58. I have concluded that the EJ failed to decide the issue before him, whether there was a stable employment relationship between the Claimant and the Respondent in the period between 3 July 1995 and 4 January 1996, on the correct basis in law.

Disposal

59. The Decision of the EJ that there was no stable employment between the parties between July 1995 and 4 January 1996 is set aside.

60. Following the circulation of the draft Judgment, written submissions were invited from Counsel on disposal. Ms Monaghan QC and Ms Prince submitted that the case should be determined by the Employment Appeal Tribunal using its powers under Section 35 of the **Employment Tribunals Act 1996**. Ms Motraghi for the College submitted that the matter should be remitted to an Employment Tribunal. If the matter were to be remitted, the parties were in agreement that this should be to a different Employment Judge.

61. Counsel for both parties referred to the relevant legal test as to the circumstances in which the Employment Appeal Tribunal may reach its own decision after holding that an Employment Tribunal erred in law and sets aside its conclusion. Albeit with some lack of enthusiasm, the Court of Appeal in **Burrell v Micheldever Tyre Services Ltd** [2014] IRLR 630 held that the 'conventional' approach so clearly reaffirmed in **Jafri v Lincoln College** [2014] EWCA Civ 449 should be followed. In **Jafri** Laws LJ held at paragraph 21:

> **"It is not the task of the EAT to decide what result is 'right' on the merits. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise there must be remittal."**

62. In **Burrell** Maurice Kay LJ held at paragraph 20:

> **"However, even within the confines of the conventional approach the EAT can contain its application in a number of ways. First, provided that it is intellectually honest, it can be robust rather than timorous applying what I shall now call the Jafri approach. … Secondly, as Underhill LJ said in *Jafri*, parties to appeals to the EAT can be encouraged to consent to the EAT disposing of the case pursuant to its powers under section 35(1) of the Employment Tribunals Act 1996, even where the EAT does not consider that the appeal before it is an 'only one outcome' case. …"**

63. It was submitted on behalf of the Claimant that had the Employment Judge asked himself the correct question he would inevitably have found that the Claimant was in a 'stable employment relationship'. The first alleged fact relied upon was that the Claimant 'put forward evidence that he worked for the Respondent on six separate occasions during the 6 month period between July 1995 and January 1996. The pages referred to do not support this assertion. Two of the occasions recorded on page 83 were before July 1995 and the other two engagements set out on that page were for different times on the same day. The pages relied upon show that the Claimant worked on three days in the period referred to. This may be regarded as a small difference but the decision as to whether there was a stable employment relationship between the College and the Claimant must be founded on accurate and relevant facts. I cannot say with any degree of confidence that the original Employment Judge made all the relevant findings of fact nor that the outcome of applying the correct approach to the findings originally made would be clear. Further, this appeal does not fall within the first example given by Maurice Kay LJ in **Burrell** of when it is possible within the conventional approach for the Employment Appeal Tribunal itself to decide an issue rather than remit. The parties do not agree that the Employment Appeal Tribunal should decide whether the Claimant was in a stable employment relationship with the College at the material time. The second example given by Maurice Kay LJ does not apply.

64. The matter is to be remitted to an Employment Tribunal, an Employment Judge sitting alone, to determine whether or not the Claimant was in a stable employment relationship within the meaning of the **Equal Pay Act 1970** Section 2ZA, (now in the **Equality Act 2010**), from 1995 until 2003 and, if not, whether he should be given permission to amend his claim and/or to present a fresh ET1 to include that period. The amendment issue has not yet been heard or determined. There would be no advantage or saving of time or costs in remitting to the Employment Judge who heard the case as long ago as August 2011. Further, remission to a different Employment Judge would give the assurance that a fresh mind will be brought to bear on the issues. The matter is to be remitted to a different Employment Judge as the parties have rightly agreed.