



# EMPLOYMENT TRIBUNALS

BETWEEN

*Claimants*

*Respondent*

Mrs B Pearson & Others

AND

Cumbria County Council

## PUBLIC PRELIMINARY HEARING

Heard at: Carlisle

On: 9 August 2017

Before: Employment Judge Hargrove

Members: Mr T D Wilson  
Mrs D Newey

### *Appearances*

For the Claimants & In Person: Mrs B Pearson

For the Respondent: Mr S Sweeney of Counsel – instructed by  
Mr Brodie, Solicitor

## JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:-

- 1 The HLTA claimants Chambers and Townson are entitled to proceed with a claim as an HLTA in respect of the comparators Stephen West, Buyer, and Graham Fielding, Highways Maintenance Team Leader, but their claim in respect of Simon Airey, Planning Technician is struck out as having no reasonable prospects of success. Their application to amend to add any other comparators is refused.
- 2 The Senior Teaching Assistants (STAs) without special educational needs (SEN), Starkie, Finlay, and Holliday (and any other STA without SEN to be identified by the respondent to the Tribunal) are entitled to proceed with a claim in respect of the comparators John Melloy, Painter, and the Assistant Buyer, Michael Crosbie. Their applications to amend to add additional comparators is refused.
- 3 **STAs with SEN (pre 2013 claims)**

Their claims in respect of the Planning Technician Simon Airey are struck out as having no reasonable prospects of success. Their application to amend to

add other comparators is refused. Accordingly this group of claims is not well-founded and their claims are dismissed.

4 **STAs with SEN (Armistead claims)**

These claimants –

Pearson – 2504691/2013  
Balance – 2504578/2013  
Harper – 2504636/2013  
Heaney – 2504641/2013  
Norman – 2504686/2013

are allowed to proceed with claims in respect of the Road Worker 3, Painter and Street Mason but no other comparators. In particular, their claims in respect of the Planning Technician Simon Airey are struck out as having no reasonable prospects of success, such an order having already been made in the case of Pearson.

## ORDERS

### Made pursuant to the Employment Tribunal Rules 2013

- 1 By no later than **1 September 2017** the respondent must provide to the remaining claimants by Mrs Pearson a schedule of the rates of pay and the pay information including details of any enhancements for the following comparators:-  
  
Stephen West, Buyer  
Graham Fielding, HMTL  
Michael Crosby, Assistant Buyer  
John Melloy, Painter  
The Road Worker 3 comparator  
The Street Mason comparator.
- 2 By no later than **22 September 2017** the remaining claimants by Mrs Pearson must respond to the pay information provided and must notify the respondent and the Tribunal whether they agree or disagree the pay calculation; and must also state what further information is required of the respondent if any; and whether they continue to assert that there is a significant difference in pay between their pay and that of their cohort of comparators.
- 3 By no later than **20 October 2017** the respondent must prepare a bundle of documents for any further hearing to strike out the claims as having no reasonable prospects of success and the bundle is to be copied to Mrs Pearson.
- 4 By no later than **10 November 2017** the respondent must provide to the claimants a copy of the witness statement of any witness upon whom the respondent intends to rely. I note and record that currently the respondent intends to rely only upon a witness statement from Sheena Benson, who gave

evidence during the earlier Pearson hearing, concerning pay calculations. If any claimant wishes to rely upon a witness statement, such witness statements must be disclosed to the respondent by **10 November 2017**.

5 **Listing of hearing**

It is ordered that a hearing before this full Tribunal should be listed at the **Carlisle Hearing Centre, 1<sup>st</sup> Floor, Stocklund House, Castle Street, Carlisle, Cumbria, CA3 8SY** **for two days for the first date available after 15 December 2017**; and the parties must notify the Tribunal by **31 August 2017** of their dates of availability from **15 December 2017 to 15 January 2018**.

## REASONS

- 1 This hearing deals with complex issues relating to the identification of the comparator(s) job(s) for each of the 25 remaining unrepresented claimants who are within the cohort of Teaching Assistants with or without special needs in this sub multiple of equal pay claims which dates from 2004 onwards. Thompsons came off record as acting for them as from a date shortly before 10 September 2013, when the Employment Tribunal wrote to the claimants enquiring as to their intentions. All of the current list of claimants expressed an interest in continuing. There have however been difficulties in identifying from the claim forms and the history of the litigation the comparators' jobs to be relied upon, and the matter has only been in part at least clarified with input from Mr Pull, solicitor of Thompsons, who took part in a recent telephone hearing notwithstanding that his firm has been off record for nearly four years.
- 2 We are grateful to Mrs Pearson who, as well as being a claimant acting on her own behalf, has agreed to act as representative for the other claimants some of whom also attended this hearing. This has involved her in taking instructions from the claimants and communicating with them on behalf of the Tribunal and the respondent.
- 3 The essential issues with which we had to deal at this hearing were:-
  - 3.1 What was each claimant's job title under which she brings or seeks to bring her claim?
  - 3.2 What is or are the comparator(s) job(s) upon which each claimant now seeks to rely?
  - 3.3 Is it necessary for any claimant to apply to amend to change or to add to any existing comparator?
  - 3.4 If yes, should that application be allowed or refused; and if allowed what effect does it have upon the arrears period?

- 3.5 Should any claim be struck out as having no reasonable prospects of success?
- 4 We start with identifying the claimants' job titles in order of seniority:-

4.1 **Higher Level Teaching Assistants (HLTA)**

These claimants are identified as Chambers and Townson. In an ET1 submitted on 8 June 2011 the claimant Chambers identified as her comparators a Highways Maintenance Team Leader (HMTL); a Buyer and a Planning Technician (see pages 346-347). Similar comparators' jobs were identified by the claimant Townson in an ET1 submitted to the Tribunal on 24 March 2011. That ET1 is not within the trial bundle but the Tribunal has a copy.

4.2 **STAs without SEN**

Those currently identified are Starkie, Finlay and Holliday. By a claim form submitted by Starkie on 21 February 2008 at pages 196-209, she identified as her comparators a Painter and Assistant Buyer – see page 207 in particular. The claimants Finlay and Holliday submitted their claims on 29 March 2012 (see pages 350-361). At page 361 there is a list of eleven comparators' jobs of which numbers 7 and 8, Assistant Buyer and Painter, are highlighted.

4.3 **STAs with SEN**

The claimants Field, Hoyle and McGill, in an ET1 submitted to the Tribunal on 9 April 2008 identified as their single comparator a Planning Technician (see page 226). The claimant Beecroft in an ET1 received on 2 April 2009 also identified only one comparator, a Planning Technician (see page 288). Likewise the claimant Walton who submitted a claim in July 2009 (see page 299). The claimants Townson and Chambers who had submitted claims in respect of their employment as HLTAs, had also submitted earlier claims as STAs with SEN and had identified in respect of the STA job only a Planning Technician.

It is to be noted in respect of this group, a public preliminary hearing was listed as a test case with Mrs Pearson nominated as the lead claimant. She was also a STA with SEN, but she did not present a claim (or a claim was only submitted on her behalf) until July 2013 and different considerations applied to her in respect of her comparators. In the test case, Mrs Pearson's claim was being considered only in the context of the single comparator who was a Planning Technician, Mr Airey. Her claim was struck out in respect of that comparator in a judgment sent to the parties on 5 May 2017 (see pages 1-10 of the bundle). The judgment in that case will bind all of the claimants who rely upon Simon Airey, the Planning Technician, as a comparator, at least in respect of that comparator.

4.4 **STAs with SEN (post 23 February 2012)**

These are the following:-

Pearson – 2504691/2013  
Balance – 2504578/2013  
Harper – 2504636/2013  
Heaney – 2504641/2013  
Norman – 2504686/2013.

These claims were all submitted as part of the Armistead sub multiple on 25 July 2013. This ET1 is to be found at pages 370-389 of the bundle. Attached to it, page 388, is a schedule of comparators containing at least 26 job titles. Amongst the job titles were, at number 7, Road Workers 1-3, at number 12, Painter and at number 15, Street Mason. It is of significance that there has been no explanation from Thompsons as to why such a large list of comparators' jobs should have been identified. At least a partial explanation is, however, that the large number of claimants (at least 113 in total) included claimants in a wide variety of jobs including Teaching Assistants; and it must have been considered desirable accordingly to identify at the initial stage at least a wide range of potential comparators' jobs.

4.5 **Teaching Assistants**

These include Armstrong whose claim was submitted on 23 May 2008 (see page 239) and whose claim form (at page 242) included Assistant Buyer. The same identification was made by the claimant Walton in 2008 (see page 257), Shanklin on 2 April 2009 (see page 272), McMillen (see page 312) and Balance, who was one of the Armistead claimants in respect of whom in the list of 26, number 25 identified Assistant Buyer (see page 388).

That completes the list of remaining unrepresented claimants and their jobs and details of the ET1s.

5 **The principles relevant to the consideration of the issues in the present case**

The Employment Tribunal needs to refer to certain principles which have been applied for the identification of comparators in equal pay claims, some of them deriving from authority (EAT and above) and some through a practice adopted in local authority and NHS equal pay multiples by the Newcastle Tribunal since at least 2005, the Newcastle Tribunal having responsibility for at least 14 local authority multiples and all of the NHS equal pay multiples in England and Wales, and these principles which we have applied consistently have not been the subject as yet of any appeal:-

- 5.1 It is not necessary to identify either a claimant's job or a comparator's job at the stage of presenting a claim to the Tribunal, provided the cause of action ie equal pay is identified. It is sufficient to identify a claimant by name and her employer by name. This principle derives support from the EAT cases of **Prest v Mouchel Business Services Limited [2011] ICR page 1345** and **Two Sisters Food Group Limited v Abraitte & Others EAT0209/15**. It is not uncommon for some comparators' jobs to be identified but for claimants also to seek pay information from an employer in order to confirm the identity of the job and the name of the comparator or to identify other comparators. In these circumstances the Newcastle Employment Tribunal adopted the practice of allowing time for the claimant, usually by her representative, to nominate a comparator or comparators usually limited to three. At this stage the identity of the comparators to be relied upon crystallises. In this event, the Tribunal treats the nomination as taking effect from the date when the original ET1 was submitted. This identifies the date for the purposes of calculating the arrears period which, under section 132 of the Equality Act, is a date no more than six years before the claim was presented and applies if the claimant has been in employment in that job throughout that period. It is accepted however that the doctrine of non relation back applies in circumstances where after the original nomination of a comparator, any application is made by a claimant to change or to add to the comparators, if the new comparators are in a different jobs to the original comparators. (If the application is to change only the name of a comparator in the same job, it is however not a new cause of action. See **Prest** above ) If any application to amend to change a comparator's job is allowed, for the purposes of time and arrears points, the relevant date is the date of the application to amend. The arrears period does not date back from the original ET1 date and if the application is made more than six months after the claimant has ceased to be in the employment of the employer, or in the employment in respect of which she brings the claim, then the application will be made out of time. It is to be noted that in these cases, claims were originally presented by this group of claimants from 2008 right up to 2013. A second factor relevant to the arrears period is the coming into force of the single status agreement within this local authority on 1 October 2011. That date is of significance because it marks the end date up to which the arrears period will apply. No claims have been pursued for equal pay against this local authority as yet in respect of any period after 1 October 2011. By way of example, the Armistead sub multiple of claims was presented to the Tribunal on 25 July 2013. The period of claim in issue is thus 25 July 2007 to 1 October 2011.
- 5.2 Applying these principles to the present claims, we had to identify the date and circumstances when these groups of Teaching Assistant claimants first nominated comparators (or more accurately, had their comparators nominated for them by their representative, Thompsons). In this connection a most significant event took place on 23 February 2012. On that date Mr Pull of Thompsons e-mailed the respondent

(see pages 72-76 of the bundle) identifying, and in our view nominating, comparators for each of the jobs within the Teaching Assistant group:-

- (a) in respect of HLTAs the nominated comparators were Fielding (Highway Maintenance Team Leader), Stephen West (Buyer) and Simon Airey (Planning Technician);
- (b) in respect of the Senior Teaching Assistants (STAs) not receiving SEN the nominated comparators were Molloy (Painter) and Crosby (Assistant Buyer);
- (c) in respect of the Senior Teaching Assistants (STAs) receiving SEN allowance the only comparator identified was Simon Airey (Planning Technician);
- (d) in respect of the Teaching Assistants (TAs) not receiving SEN the comparators were Clements (Highways Maintenance Team Operative) and Crosbie (Assistant Buyer);
- (e) in respect of the TAs receiving SEN the nominated comparator was Crosbie (Assistant Buyer).

This nomination, we find, was the first nomination of comparators in respect of all claimants in those jobs who had prior to 23 February 2012 presented claims to the Tribunal and such nominations dated back to the date of each of the claimants' ET1s. There are however two sets of claims which were made after that date. The first set were the claims presented by the claimants Holliday and Finlay on 29 March 2012. Their claim form also included claims by nine other claimants in an assortment of jobs and, as stated above, page 361 contained a list of eleven potential comparators including an Assistant Buyer and a Painter. In respect of these claimants there was a specific e-mail sent by Mr Pull of Thompsons on 30 March 2012, the day after the ET1 was presented, which was copied to the respondent and to the Independent Experts, and which reveals that these two claimants were to rely upon the Painter Molloy and the Assistant Buyer Crosbie. We interpret the ET1 and the e-mail combined as being the nomination by those two claimants of those two comparators' jobs. Indeed, the identification led to the commencement of the process of preparing job descriptions in respect of the claimants' lead and the two comparators, which however came to a halt when it was agreed later in 2011 that the parties would enter into settlement negotiations.

That leaves outstanding the second group of claims presented in the Armistead sub multiple on 25 July 2013 and which includes Pearson and four others whose claims are still outstanding. The respondent submits, notwithstanding that these claims were presented to the Tribunal after the nominations described above, that the claimants are nonetheless bound by those earlier nominations made before they presented their claims. There is however no correspondence or other

information to confirm that a litigation decision was made on their behalf by Thompsons before Thompsons came off record as acting for these claimants on or about 10 September 2013, only six weeks after the Armistead claims were presented. Furthermore, the list of 26 or more jobs contained in the schedule of comparators attached to the Armistead claims is not consistent with the nominations by Thompsons in the e-mail of 23 February, in which the only comparator identified for STAs receiving SEN was the Planning Technician Airey. Airey's job does not appear on the comparator list (page 388). What does appear on the list however are the three jobs upon which this group of claimants, the other STAs, and the HLTAs now seek to rely. So much was confirmed by Mrs Pearson in an e-mail to the respondent copied to the Tribunal dated 27 July at 14:05, and at this hearing.

6 With these matters in mind we summarise our conclusions in relation to each jobholder:-

6.1 Claimants who bring claims as HLTAs (Chambers and Townson) may rely upon the two comparators nominated by Thompsons on 23 February 2012 being an HMTL (Fielding) and the Buyer (West), and their claims date back from the date of their ET1s in 2011 for six years up to the date of the single status agreement, 1 October 2011. However, their claims in reliance upon the Planning Technician (Airey) are struck out as having no reasonable prospects of success on the basis set out in the Pearson judgment.

A word of caution is to be noted however in that these two claimants had made other claims, in the case of Thompson – claim number 2501562/2010, and in the case of the claimant Chambers, two others in 2011 which appear to be claims in respect of possibly earlier employments as an STA with SEN. This suggests that their claims as an HLTA may be or have been for a limited period which requires clarification to the Tribunal.

6.2 **The claimants who were/are STAs with SEN and whose claims were presented before 23 February 2012**

These are Field, Hoyle, McGill, Beecroft, Walton, Townson and Chambers (in respect of their claims as STAs). Their claims are struck out for the following reasons:-

First, their only nominated comparator was Airey (Planning Technician), and such claims have no reasonable prospects of success for reasons explained in the Pearson judgment. Their application to add or change comparators, finally confirmed in Mrs Pearson's e-mail of 27 July 2017 is refused upon the basis that it is an amendment to add a new cause of action under the principle recognised in **Prest v Mouchel**, which takes effect from the date of the application, not the date of the original ET1. The arrears date would accordingly be six years back from 27 July 2017 or at the earliest in June 2017 – ie back to June 2011 only



some three months before the single status agreement brought an end to the actionable inequality of pay. Those claims would at best have negligible value and on the principles relating to amendments in **Selkent Bus Company v Moore** we decline to allow the amendments.

6.3 **STAs with SEN – claims presented AFTER 23 February 2012**

**The Armistead claims presented on 25 July 2013** – the nomination on 23 February 2012 of the Planning Technician's (Airey) job does not apply to them. There were accordingly no nominations prior to Mrs Pearson's application to rely upon the comparators, which was in June/July 2017. That application was not an application to amend or add comparators, but a first nomination. Their claims may proceed in respect of the jobs of Road Worker 3, Painter (Meloy) and a Street Mason. (Road Worker 3 and Street Mason to be identified by name). Their period of claim dates back from 27 July 2007 to 1 October 2011 (the date of the single status agreement).

6.4 **STAs without SEN – Starkie, Finlay and Holliday (it is noted that the list may require clarification)**

They are entitled to proceed with the first nominations made on their behalf on 23 February 2012 in respect of the comparators Meloy (Painter) and Crosbie (Assistant Buyer). Their applications to amend to add three further comparators are refused upon the same grounds set out above for the pre 23 February 2012 claimants who are or were STAs with SEN.

6.5 **Teaching Assistants (Armstrong, Walton, Shanklin, McMillen/Walker and Balance**

Their claims are allowed to proceed in reliance upon the Assistant Buyer (Crosbie) only, he having been first nominated on 23 February 2012. That nomination dates back to the date of their respective ET1s and up to six years preceding that date. There is no application to amend or add comparators by the group.

7 There is liberty to apply for clarification of any parts of this judgment within **14 days** of its promulgation.

It is to be noted by all claimants that their remains outstanding an application by the respondent to strike out their claims in reliance upon the newly identified comparators as explained and ordered in the case management orders made above. The respondent submits that their claims should likewise be struck out on the same grounds in the original Pearson judgment. It must not be thought that their claims are bound to succeed. They would be well-advised to take legal advice, perhaps by pooling resources to pay for it.

**EMPLOYMENT JUDGE HARGROVE**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON**

**16 August 2017**

**JUDGMENT SENT TO THE PARTIES ON**

**16 August 2017**

**AND ENTERED IN THE REGISTER**

**P Trewick**

**FOR THE TRIBUNAL**