Appeal No. UKEAT/0179/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1&12 October 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MS V BARNARD — APPELLANT

HAMPSHIRE FIRE AND RESCUE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL MATOVU (of Counsel)
For the Respondent	MR TIM DRACASS (of Counsel) Instructed by: Hampshire Legal Services The Castle High Street Winchester Hampshire SO23 8UJ

SUMMARY

EQUAL PAY

An Employment Tribunal was charged with determining whether a "stable working relationship" was preserved when an employee had been promoted through a series of ranks. The concept of a "stable employment relationship" was created by the European Court of Justice in **Preston & Others v Wolverhampton Healthcare NHS Trust & Others** [2000] ICR 961, a case concerned with women whose equal pay claims had been held to be time limited because their employment had not been continuous. The term was inserted into the **Equal Pay Act 1970**, in 2003, and, in the **Equality Act 2010**, was changed to "stable working relationship". In neither Act was the relevant term defined, and, in the Authorities which have considered it, the focus has been on the temporal nature of the employment relationship, and any breaks therein, and not on a changing work pattern over a continuous period of employment. Although words such as "fundamental" "radical" and "significant" have been used in describing the degree of change in terms of employment required to bring an end to the stable employment/working relationship, there has been no guidance as to the practical application of the test.

In the present case, the Employment Tribunal (which had very limited assistance from the case law) made only brief factual findings and failed to identify the proper nature of the test which it was purporting to apply. Accordingly, the findings under appeal were held to be perverse and also not "**Meek"-** compliant, in failing properly to explain the basis for the Tribunal's decision. The case would be remitted to a fresh Employment Tribunal, with the recommendation that a constitution which included Lay Members would be advisable.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is an appeal against the Decision of the Employment Tribunal sitting at Southampton, Employment Judge Kolanko sitting alone, which held that, pursuant to sections 129 and 130 of the **Equality Act 2010** ("EqA"):

> **"1) The Claimant's stable working relationship ended when the claimant transferred from being a Business Support Officer to Fire Safety Officer, and when the claimant transferred from being a Fire Safety Officer to Office Manager. Accordingly the complaints in respect of equality of terms relating to the above roles have been brought out of time, and are therefore dismissed.**
>
> **2) The claimant's stable relationship continued when she moved from being an Office Manager to Community Safety Delivery Manager. Accordingly complaints in respect of equality of terms in relation to the role of Office Manager were brought in time."**

2. This appeal was permitted to go to a Full Hearing by Laing J at the sift stage, when she commented:

> **"4. The Appellant contends, in short, that the ET erred in its approach to the phrase 'stable working relationship'. I consider that this Ground of Appeal, variously expressed, is arguable. In paragraphs 20 to 21 of the Judgment, the ET appears to have equated 'stable working relationship' with 'stable work', or 'doing' the same work', which may not be right."**

3. In this Judgment, I shall refer to the parties as they were below. Each was represented before me by counsel who had appeared below: Mr Daniel Matovu for the Claimant and Mr Tim Dracass for the Respondent. Each made focused and helpful submissions on the law, which broadly mirrored those made before the Tribunal, which set out the legislative history of the relevant provisions and the development of the case law in the Reasons.

4. The issue before me, as below, is as to the meaning of the phrase "stable working relationship," which is not defined in the **EqA** nor in its predecessor the **Equal Pay Act 1970**, into which the term "stable employment relationship" was inserted by section 2(Z)(A) with effect from July 2003. Although the phrase has been the subject of authority, both counsel confirmed

to me that their researches have uncovered none which is centred on the meaning of the phrase in terms of a changing work pattern over a continuous period of employment.

5. The concept of a stable employment relationship arose from a Decision of the European Court of Justice in **Preston & Others v Wolverhampton Healthcare NHS Trust & Others** [2000] ICR 961. This was a referral from the House of Lords [1998] ICR 227. At page 1001 of the report the European Court of Justice ("ECJ") held at paragraph 72:

> **"72. The answer to the third question must therefore be that Community law precludes a procedural rule which has the effect of requiring a claim…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."**

6. The matter was thereafter remitted to the ET by the House of Lords, following which the matter came before the Employment Appeal Tribunal ("EAT") (His Honour Judge McMullen QC) as **Preston & Others v Wolverhampton Healthcare NHS Trust &Others (No 3)** [2004] IRLR 96, which I shall refer to as **Preston (No. 3)**. Judge McMullen's Judgment was lengthy and dealt with many matters which do not arise in the present appeal.

7. However, his analysis of the features which constitute a "stable working relationship" is of importance. It begins at paragraph 115:

> **"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 contacts. 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 which are 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.

116. As to (2), the intervals which must be regular, this is described as 'periodicity' which of course implies regularity. The periods are regular because they are clearly predictable and can be calculated precisely; and they are also regular where the intervals between work, and the length of the spells of work, are not to be predicted with accuracy; but nevertheless it is possible to say that the teacher, for example, is frequently, or even customarily, called upon whenever a need arises. This arises, by definition in the field of supply teaching, several times a term and thus may be described as regularly; but the precise dates cannot be calculated or predicted and so the work may accurately be described as intermittent.

117. As to (3) 'same employment', no guidance is given. As to (4), the same pension scheme, it seems that the adoption of the expression 'over-arching' is encompassed within the same scheme.

118. In order to succeed in bringing the test cases within the above framework, Mr Cavanagh submits that the chairman was wrong to find that the stable employment relationship ceases when the terms of the contract, or the work done, alter radically; that is, when a succession of short-term contracts is superseded by permanent contract (Reasons paragraph 251(3)(e)). But in the context of the analysis of the ECJ's judgment as applied by the House of Lords, the submission fails because feature (1) is missing. The succession of short-term contracts ceases, or is interrupted, when a new permanent contract is negotiated. It is not apt to describe a succession of short-term contracts and a permanent contract as a succession of short-term contracts. The succession is broken, and the nature of the contract changes from short-term to permanent. The submission also fails because there is no periodicity about the contracts. There is no interval, let alone a regular interval, between the contracts since on the footing of the test cases each relationship is regulated by a single permanent contract. Thirdly, the cases may also founder under feature (3) as not being in 'the same employment'. I will examine this matter in more detail below. I would further agree with the chairman that, in respect of Mrs Cockrill, her claim would fail because the pattern of her working was too spasmodic and could not be characterised as meeting each of the features set out above. She would fail principally on feature (2): the lack of periodicity of the employments.

119. 4. *Similarity of terms and/or work*

The chairman held (Reasons paragraph 233, 235) that;

> **'It is simply inconsistent with the nature of a stable employment relationship that the fundamentals of the succeeding contracts should vary…**
>
> **The work must be for the same employer and be broadly the same throughout; that is it will be supply teaching though not necessarily at the same schools, or the same subject at the same key stages; or home teaching, but not necessarily the same subjects, or to the same pupils.... broadly the same throughout.'**

It was contended that these words represent a gloss impermissibly put upon the words 'stable employment relationship'. Or alternatively that they 'imposed too strict a test of similarity'. In my view, that is an unfair criticism for one of the features of a stable employment relationship is 'same employment' which can be construed in different ways. It must be borne in mind that the report for the hearing in the ECJ described the stable employment relationship cases as follows (at p.510):

> **'…in other cases, the appellants worked regularly, but periodically or intermittently, for the same employer, with each period of work technically being under a separate contract of employment *but with each contract containing the same terms* and with the employment in total being relevant for pension purposes (but for it being part-time work)' (emphasis added)**

The applicants contended (at p.520):

> **To require the applicants who are employed under a series of *identical, or substantially similar*, contracts to bring applications within six months of the end of each such contract–some of which may be contracts for only one day's work–would plainly impose an unrealistic requirement which would make the**

> **enforcement of rights excessively difficult or impossible in practice and thus infringe the principle of effectiveness.'**
>
> **It is for that reason that 'same employment' was given the characteristic cited above: it was not a gloss but the exemplification of the issues placed before the European Court of Justice.**
>
> **120. As for the test cases themselves, Mrs Bunyan moved to a wholly new position on terms which are very significantly different. It follows that I accept the submission of Mr Paines that the basis upon which the ECJ was considering the issue of stable employment relationship was the existence of a series of contracts containing the same or substantially similar terms."**

8. It is clear from this passage that, although the Judge accepted that no guidance was given by the ECJ as to the concept of 'same employment' (see paragraph 117), he accepted the Chairman's view at paragraph 119 as to the inconsistency of a stable employment relationship with a situation where 'the fundamentals of succeeding contracts vary….'

9. In **Thatcher v Middlesex University and Another** UKEAT/0134/05/DM, Judge McMullen revisited the area, applying the rulings in the **Preston** litigation in the case of a part-time lecturer. In **Thatcher**, the Claimant had had what was accepted to have been a stable employment relationship from 1978 to 1992 with a fixed-term contract running from 1992 to 1994 before being given a further permanent contract in 1994. She brought an equal pay claim in 1994.

10. It was argued by the Respondent in **Thatcher** that the two-year fixed-term contract broke the stable employment relationship "for it was a paradigm case as set out in **Preston** of a series of short-term contracts being succeeded by a permanent contract" (see paragraph 3). At paragraphs 6 and 7, Judge McMullen cited from the holding of the Chairman in **Preston (No.3)** and went on to set out when a stable employment relationship ceases:

> **"6. That was a reflection on the holding by the Chairman in Preston, Mr J K Macmillan, who had summarised the position as follows:**
>
> > **"3. A stable employment relationship ceases and time for commencing proceedings therefore begins to run when:**

a. A party indicates that further contracts will either not be offered or not accepted if offered;

b. A party acts inconsistently with the continuation of the relationship;

c. a further contract is not offered when the periodicity of the preceding cycle of contracts indicates that it should have been offered;

d. a party ceases to intend to treat an intermittent relationship as stable;

e. the terms of the contract or the work to be done under it alters radically: e.g a succession of short-term contracts is superseded by a permanent contract."

7. Thus, a stable employment relationship ceases where the terms of the new contract or (and I emphasis the word 'or') the work done under it radically differs, and thus the Tribunal Chairman's approach was bound to be one of looking at all of the circumstances."

11. At paragraph 19, he decided not to remit the matter back to the ET but to decide it himself. In so doing he said:

"19. Having detected the error, the question is whether this matter should be sent back to the Chairman for her to make decisions. Mr Burgher submits that I should substitute my judgment for hers because the material upon which this case could be decided has been the written witness statement, as to which there was no cross-examination. I agree with that. I am in as good a position as the Chairman to look at this evidence and to decide whether or not there had been a radical change in the work done, and I have decided that there was not. Neither the contract itself, nor the duties, nor the combination of the contract and the duties, constituted at the time a radical change. I further find that the intention of the parties was not to cease the relationship but to continue it in a very similar form. It is also my judgment that the nature of this particular two-year fixed-term contract makes it a short-term contract; that is because of its division in two as between one year probation and one year regular employment.

20. For all those reasons, the submissions of Mr Burgher are correct. He also indicated that it was his case that inadequate reasoning had been provided by the Chairman. That is correct as well because, in the light of the evidence presented to her, she was bound to consider those circumstances which the Claimant has put forward. I do not accept Mr Burgher's criticism that the Chairman did not set out all of the law for in this area there really is only the Preston litigation to consider and the Chairman plainly had that case in mind and cited it."

12. I place importance on the word "radical" in the context of changes to the various factors and on the statement at paragraph 20 that the Authorities comprised in the **Preston** litigation constituted, by then, the totality of relevant case law.

13. The next case to which I was taken was **Slack & Ors v Cumbria County Council & Anor** [2009] EWCA Civ 293. In that case, the ET had made findings in relation to three Claimants *without* considering whether there had been a stable employment relationship in any

of their cases. Rather, it held that (in relation to two of the three) the relevant facts amounted to a consensual variation of contract rather than a new contract.

14. In relation to the third, Mrs Athersmith, the ET held that there had been a fundamental change to her contract when she became a permanent carer rather than a relief carer; there being significant changes to terms as to holiday and sickness pay. However, this was not applying the stable employment relationship test. As explained by Mummery LJ at paragraph 82 of **Slack**:

> **"As a fresh ground of appeal each claimant sought permission to argue that, even if she entered into a new contract of employment when her terms of employment were varied, there was in existence throughout an implied overriding or global contract governing her relationship with the council. It survived the termination of the previous contract of employment and continued and could not come to an end until the claimant's employment with the council ceased on the termination of the overriding contract."**

15. Having then turned to the stable employment point, as he described it, Mummery LJ said this:

> **"97. As explained above, the concept of 'a stable employment relationship' in the context of time limits for equal pay claims emerged in the judgment of the Court of Justice in *Preston*. That was a case of a succession of contracts with breaks between the contracts. The Council emphasised that that was the context in which there was room for the concept and that it was not necessary for the Court of Justice to consider the operation of time limits in case like this of an unbroken succession of contracts. It was argued that the stable employment case does not cover these cases either by reason of the ruling of EC law or as a result of the 2003 Regulations implementing the ruling of the Court of Justice into the provisions of domestic law.**
>
> **98. The claimants disagreed. They submitted that there is no logic in a distinction confining the concept of a stable employment to cases in which there are contract-free breaks in the succession of employment contracts. The irresistible logic of the reasoning of the Court of Justice and of the purpose of the 2003 Regulations is that an uninterrupted succession of contracts is an a fortiori case of a stable employment relationship.**
>
> **99. Discussion**
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> **We agree with the claimants. In our judgment, on the facts found by the ET, the relationship between the council and both Mrs Slack and Mrs Elliott was a case of stable employment. 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. The only variation made in the new contracts in 2001 was in the reduction of working hours.**
>
> **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."**

16. He went on to deal with submissions made by the Equality and Human Rights Commission, which had intervened, in relation to the EAT's contractual analysis at paragraphs 107 to 110:

> **"107. The objections to the EAT's contractual analysis, which we have accepted as correct, can be stated quite briefly in the light of the points covered earlier in the judgment.**
>
> **108. First, its effect is to trigger the six months' time limit in circumstances in which it is very unlikely to be apparent to a claimant adversely affected by it. This offends against the requirements of clarity and certainty.**
>
> **109. Secondly, the effectiveness of the 1970 Act is undermined by the construction placed on the running of the time limit. It does not give proper effect to the decision of the Court of Justice in *Preston*. The practical effect of requiring a claimant to issue proceedings within six months of the termination of a contract of employment, even if followed immediately by a new contract on substantially the same terms, is that it is likely in many cases to deprive the claimant of the right to equal pay for the whole of or a substantial part of the period of the relevant work. This is at odds with the intention behind the ruling of the Court of Justice in *Preston*. The aim of the ruling was to ensure that claimants, who were regularly employed in substantially the same employment, during which employment an equality clause operated, should not be prevented by a time limit from pursuing an equal pay claim in respect of all that work done by them during the currency of those employment contracts. It would frustrate a claimant's entitlement to back pay extending over a period of six years, if an employer was able to issue new contracts of employment which triggered a new time limit in the case of each particular contract.**
>
> **110. Thirdly, the principle of equivalence was breached by giving this effect to this time limit. That would not be the effect in discrimination cases under the Race Relations Act 1976 or the Disability Discrimination Act 1995, which contained provisions that, in the case of discrimination extending over a period, time did not start to run until the end of that period. Time limits for claims under s.23 of the Employment Rights Act 1996 in respect of unlawful deductions from wages were not dependent on a contractual analysis of the kind applied to time limits in s.2 of the 1970 Act. The proper approach to ensure compliance with the principle of equivalence is to construe the time limit provisions so that time only begins to run from the last occasion on which the equality clause operated. Thus, in cases like the instant cases, where there has been a termination of a contract of employment and continuation of employment under a new contract with the same employer for substantially the same work, the time limit is not triggered until the end of the last contract in the series."**

17. I note in particular at paragraph 110 the words "substantially the same work." However, it does not appear from a reading of the Judgment that there had been any issue raised before the ET in relation to the nature of the work done.

18. I turn next to **North Cumbria University Hospitals NHS Trust v Fox & Ors** [2010] IRLR 804. The ET in that case concluded that the introduction of a pay system following Agenda for Change, which replaced the old Whitley Council model, had amounted to a rescission of the old contracts. The effect was that the limitation period for bringing equal pay claims ran from

A the date of change from the old to the new contracts. This was reversed in the EAT, which held that the change was a variation rather than the imposition of a new contract.

B 19. Before the Court of Appeal, for the first time, the Claimant sought to rely on section 2(Z)(A) and the concept of the stable employment relationship. At Paragraph 17 of the Judgment, Carnwath LJ, having analysed the **Preston** litigation from the House of Lords sending it to the ECJ to it then remitting it back to the ET said:

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> **"17. When the case returned to the EAT ([2004] IRLR 96), Judge McMullen QC adopted a limited view of the scope of the new principle. He thought it was intended 'to rescue employees who do not have a permanent job'; and that it was confined to cases of the kind considered by the ECJ, that is those relating to applicants who – 'worked regularly but periodically or intermittently for the same employer, under successive legally separate contracts' (para 113-4)**
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> **18. In Thatcher v Middlesex University [2005] All ER(D) 82 (quoted at length in Minister for Health v Rance [2007] IRLR 665, para 52) he introduced a further refinement. Basing himself on some comments of the employment tribunal in Preston itself, he said (para 7):**
>
> **'...a stable employment relationship ceases where the terms of the new contract or (and I emphasise the word "or") the work done under it radically differs...'**
>
> **19. For a time this approach seems to have been accepted as orthodoxy by the profession. However, in Slack v Cumbria CC [2009] IRLR 463, the Court of Appeal had occasion to consider the application of the principle on facts rather different from those of Preston. The case concerned the effect of alterations to the terms of employment of three carers employed by Cumbria County Council. Each of the claimants had been employed for a number of years before the changes. Because the new terms were expressed as "superseding" any previous contracts, it was held that the previous employments had been terminated and replaced. However, following an intervention by the Equality and Human Rights Commission, the argument was widened to include a submission that, notwithstanding the commencement of new contracts, 'stable employment relationships' continued."**

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20. He then cited certain paragraphs of Mummery LJ in **Slack** and continued at paragraphs 23 to 33:

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> **"23. In the present case, Mr Linden QC for the claimants relies on the reasoning of *Slack* as equally applicable to the present case, and as showing that Judge McMullen's approach was too narrow. It is not necessary for there to be a succession of short-term or intermittent contracts. The key question is whether the employment relationship is stable. The terms of the contracts are relevant only to the extent that they throw light on this issue. For the council, Mr Clarke QC accepts that *Slack* represents a limited departure from Judge McMullen's approach, in that the new principle is now seen to apply even if there are no gaps between contracts. However, he maintains that, in line with Judge McMullen's judgment in *Thatcher* (paragraph 18 above), a radical change in the terms of the employment may be sufficient even if the 'work done' remains unchanged. On the facts of this case, as I understood his submission, the changes of terms were sufficiently 'radical', for much the same reasons as the tribunal found them to be sufficiently 'fundamental' under the *Dow* test.**

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24. Discussion

At the end of the argument on this issue, we indicated that we agreed with the claimants' submissions on the new ground of appeal, and that it was unnecessary therefore to hear argument on the issue which divided the tribunals.

25. I would have been content simply to adopt the reasoning of Mummery LJ. On the facts found by the tribunal in this case, these were 'stable employment relationships'. As in *Slack*, the nurses in the present case continued to do the same work for the trust, without any break in either the work itself or the succession of contracts. Although the tribunal found that there was a 'fundamental' change, that judgment was based entirely on the differences in the terms of employment, most notably the introduction of the KSF requirement. There was no suggestion that the nature of their jobs as nurses changed materially, nor that there was any other practical break in the employment relationships.

26. It would probably be enough to say that we are bound by the judgment in *Slack*, and that there is no reason to distinguish it. However, since the message of that case seems to have taken a little time to sink in with the profession, it may be helpful to add some supporting explanation.

27. In the first place, although the principle is now enshrined in a domestic statute, it is relevant to have in mind its European roots. That to my mind is the necessary consequence of the fact that the amendment was made, not by primary legislation, but by regulations (the Equal Pay Act 1970 (Amendment) Regulations 2003) under s2(2) of the European Communities Act 1972. That section authorises regulations for the purpose of implementing the 'Community obligations of the United Kingdom'. In this case, according to the explanatory note accompanying the regulations, the changes were deemed necessary to reflect the equal pay provisions of the Rome Treaty (Article 141) 'as applied in a number of recent cases before the European Court of Justice and the domestic courts'. The footnote refers to *Preston* both in the ECJ and in the House of Lords. That it is appropriate therefore to have regard to the scope of the relevant European obligation, is apparent from those authorities. Indeed, if the new provision were found to differ significantly from the European obligation, its validity as an exercise of the 1972 Act power would be open to question.

28. Secondly, although the ECJ adopted the new concept with reference to a case in which there was a 'succession of short-term contracts' (reflecting the facts of the cases before it), their language does not confine it to that factual situation. On the contrary, if stability of the relationship is the guiding principle, it would be perverse to hold that a succession of long-term contracts cannot achieve the same result.

29. Thirdly, it is significant that the concept of a 'stable employment relationship', as adopted by the ECJ in *Preston*, appears to have been entirely new. We were not referred to any direct parallel in UK legislation or in that of any other member state. Nor was it prefigured in the submissions of the parties to the ECJ, or the opinion of the Advocate General (who reached the opposite conclusion to that of the court). The ECJ gave no further guidance as to the constituents of a stable employment relationship.

30. It is of interest, however, to contrast that phrase with the various expressions used by the parties in addressing the third question (as recorded in the Report for the Hearing: [2000] IRLR 506, 520ff):

> **i) The applicants referred to employment 'under a series of identical, or substantially similar, contracts…'; and argued that time should run from the end of 'the contractual relationship in general'. They referred by analogy to the Pensions Act 1995 s.63(4), by which the six-month rule in section 2(4) of the EPA was applied to pension benefits by reference not to individual contracts of employment, but to employment 'in a description or category of employment to which the (pension) scheme relates.' (This argument had been more fully developed, but rejected, in the House of Lords: [1998] IRLR 197).**
>
> **ii) Southern Electric, on the other side, contrasted the possibility, recognised in domestic law, of a 'global' or 'umbrella' contract, the test being whether there are 'mutual obligations between the parties during the intervals between in the individual contracts.' In the instant cases the agreed facts excluded that possibility.**

iii) The Commission, supporting the applicants, pointed to the artificiality of directing attention to the individual contracts – 'despite the fact that all claims will be directed towards the one overarching pension scheme and that the employment relationship continues.' Their proposed answer to the third question referred to the case of 'a series of successive but non-continuous employment contracts in the context of a single pension scheme…'

iv) Advocate General Léger also referred to the possibility of a series of contracts covered by 'an umbrella' contract, under which the parties are under mutual obligations to renew the individual contracts. Under such 'a permanent employment relationship', time would run from the end of the employment relationship. He contrasted the instant cases in which, in the absence of an umbrella contract, the parties were 'free to renew or not their various employment contracts.' It was therefore impossible to determine precisely the time when the employment relationship ends (paragraphs 122, 138).

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.

32. 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 make nonsense of the sentence. The natural alternative is a reference to the type of work, or 'job'. (I note that the French text uses two different words, distinguishing between, on the one hand, the existence of one or more '*contrats du travail*' and, on the other, the need for them to concern '*le même emploi*'. Whether this is of more than linguistic interest I am not qualified to judge.

33. I am satisfied, therefore, that on the facts of the present cases, the new terms imposed following Agenda for Change did not interrupt the stability of the employment relationship. Accordingly, albeit on different grounds, the decision of the EAT should be upheld."

21. As Mr Matovu has placed considerable emphasis on Smith LJ's short concurring Judgment, I shall set it out in full;

"34. I have read the judgment of Carnwath LJ in draft and I agree with it. As Carnwath LJ has explained, the argument before this Court was whether the expression 'stable employment relationship' should be given a narrow meaning, applying only to cases factually similar to *Preston* as HH Judge McMullen QC had decided in *Thatcher* and *Rance* (see paragraph 18 above) or whether it should be given the wider construction to be derived from the ordinary and natural meaning of the words. In *Slack,* this Court held that the wider construction was correct. We are bound by that decision and in any event I think it is right.

35. In the present case, the issue before the tribunal was whether the claimants' attempts to add a new cause of action were in time. Because it was not suggested that the situation was covered by the stable employment provision, the tribunal found it necessary to make a detailed examination of the contractual arrangements and the changes consequent upon Agenda for Change. It concluded that the changes had brought the existing contracts to an end that the claimants were now working under new contracts. On appeal, after an equally careful and painstaking examination of the contractual position, the EAT reached the opposite conclusion and held that the old contracts of employment had been varied.

36. In my view it is unfortunate that this exercise was undertaken. Much time and cost would have been saved if it had been realised that there is now a far simpler route to the answer to the limitation question. Consideration of whether a stable employment relationship has continued to exist will be straightforward in most cases. In the present

cases, the answer to that question was obvious. I hope that, in future, tribunals will be able to dispose of these limitation issues without difficulty."

22. I am not persuaded that Judge McMullen's Judgment in **Thatcher** was "overturned" to the extent that Mr Matovu submits. At paragraph 29, Carnwath LJ cites the Claimant's argument, namely that Judge McMullen's approach was too narrow in terms of there not being a need for a succession of short-term or intermittent contracts, and that the terms of the contract are relevant only to the extent that they throw light on the issue whether the employment relationship is stable. Carnwath LJ goes on to approve of that argument in the following paragraph. The Respondents had accepted (see also paragraph 23) that **Slack** had represented a departure from Judge McMullen's approach in (I infer) **Preston (No.3)** in that the new principle is seen to apply even if there are no gaps in the contracts. They had also contended that, in line with **Thatcher**, a radical change in the terms of the employment may be sufficient even if the work done remained unchanged. Carnwath LJ found (see paragraph 26) that "there was no suggestion that the nature of their jobs as nurses had changed materially" and thus there was no need to examine "the character of the work" or "the nature of the work" or "the type of the work" to cite three expressions used in in paragraphs 31 and 32 of **Fox**.

23. The final case to which I was referred was **Dass v 1) The College of Haringey Enfield and North East London 2) Secretary of State for Education** UKEAT/0108/12, a Decision of Slade J. In that case, the Tribunal was determining whether there was a break in continuity of employment and/or no stable employment relationship between two dates. Beyond confirming the non-contentious proposition that continuity of employment as defined in section 110 of the **Employment Rights Act 1996** ("ERA"), does not involve the same test as that required to establish a stable working relationship, the Decision does not add to the jurisprudence of how

such a relationship is to be determined, bearing in mind that the Tribunal was concerned with the timing of successive contracts and not the nature of the work undertaken.

24. I turn now to the Decision under appeal. The Tribunal made the following findings of fact:

> **"4.1. The claimant commenced employment with the respondent as a station administrator on 6 July 2009.**
>
> **4.2. On 9 November 2011 Assistant Chief Fire Officer Adamson put in a request for approval of a variation of establishment, to pilot a new post of Code Compliance Inspector-Protection "CCO (later known as Business Support Officer "BSO"), in the Community Safety Protection Department "CSPD" addressing the issue of protection within the community, as opposed to prevention which was a separate department within CSPD. Mr Adamson in evidence indicated the rationale for this new post, was that most of the legal enforcement had been taken up against small businesses and the introduction of a BSO was to prevent this, and support Fire Security Officers who could then deal with high-risk buildings hospitals et cetera, enabling BSOs to deal with the small businesses, thus freeing up the FSOs for the other work. During the piloting period the prospective BSOs were to be provided with warrant cards as was the case with FSOs.**
>
> **4.3. The claimant expressed interest in the new role and was successfully interviewed by Mr Adamson, and commenced her new role on 12 December 2011. The claimant signed a contract on 18 January 2012 (bundle page 53-74) which indicated that the employment was a temporary contract ending on 11 December 2012, on grade F. It stated: -**
>
> **On completion of your secondment you will return to your current substantive post of service delivery administrator. However, if you decide not to return to your substantive post need to inform line manager in writing as soon as possible and by 12 November 2012 at the latest. This notification will be processed as a resignation from your substantive post. Give your contractual notice with the termination date coinciding the end of the agreed secondment stop**
>
> **4.4. Under the job description of the Compliance Officer-Protection (bundle page 176) the purpose of the new role was described as: -**
>
> **To provide high quality fire safety advice service, ensuring that designated premises are visited and possible operational risks are identified, enabling the service to meet its statutory obligations, work within the scope of the better regulation agenda, achieve the aims of the publish Hampshire Fire and Rescue Service Plan and raise standards of fire safety awareness in the community."**

25. It then set out the law outlining the submissions made on behalf of the parties and setting out many of the passages in the Authorities to which I have already referred. The Tribunal concluded as follows:

> **"17. The body of case law presented to me is not factually on all fours with the present case. It is proper to observe that both counsel invited me to reach different conclusions, based upon the same principle for determination which was whether or not the various roles the claimant undertook were essentially the same or materially different. I agree that that is the approach that should be considered, and find it reflected in the judgments recited earlier. The varying commentaries gleaned from the judgments referred to me, satisfies me that no one particular factor is necessarily conclusive. The authorities make clear that construction or over analysis of contractual terms is inappropriate and one should have regard to the nature of the work undertaken. Similarly I do not find that issues as to whether a contract is described as temporary/fixed term or not permanent,**

particularly compelling, absent other factors. It is clear from the comments made by Smith LJ that the exercise should be relatively simple and in most cases obvious.

18. It is proper to observe that HHJ McMullen in the Preston (number 3) case observed that stable employment should not be construed in layman's terms but in a strictly jurisprudential sense. Clear it is that a person who is employed over a lengthy period with the same employer achieving advancement by way of promotion to various different jobs, and who is highly regarded and valued by his or her employer could be said in lay terms to enjoy a stable work relationship, but I judge that that is not determinative of the matter. In the North Cumbria case the character of the work pre-and post agenda for change was essentially the same, the nurses were continuing to do nursing duties pre-and post change, and doubtless this was what prompted Smith LJ to make her concluding comments.

19. Applying the above considerations to the present case, I find that Mr Matovu's approach of suggesting that as the claimant was working throughout for the respondent in the same protection department, undertaking general fire protection roles, that this necessarily gave the claimant status of stable working relationship, to be too wide an approach. I agree with his analysis however that one should consider the nature of the work undertaken.

20. I am not satisfied that the move from BSO role to FSO preserved a stable work case. There was difference in pay, responsibilities especially in the context of enforcement (notwithstanding warrant cards were issued to the claimant during this pilot role). The claimant acknowledged in practical terms that she was advised that in her role as a BSO the enforcement side should be left to the FSO's.

21. If I were in any doubt in relation to the above I am wholly satisfied that the change from FSO to office manager was a significant change of role and responsibilities. The range of responsibilities and management duties including supervising FSO's, cannot in my judgment warrant any conclusion other than that stable work ended at that stage.

22. In respect of the change from office manager to CSDM, the evidence before me satisfies me that the claimant was doing the same work. Such view is not altered by the fact that the initial office manager role was not permanent in contrast to the CSDM role. The merging of the 2 departments in view of the personnel involved was a minor difference. My conclusion is fortified by the view plainly held of the claimant's then line manager's comments at the time, and the backdating of pay to the commencement of the claimant working as an office manager.

23. In conclusion therefore the complaints based upon the claimant working as a business support officer and fire safety officer are dismissed for want of jurisdiction they being presented out of time. The claimant's complaint based upon the role as office manager was presented in time."

26. Before setting out the grounds of appeal and submissions of the parties, it seems to me important to note two things. First, that the Tribunal paid no regard to the fact that, despite the Claimant having had an unbroken period of employment over a period of around five years, she was on fixed-term contracts for some of that time. That, in my judgment, was entirely correct. Second, the test which the Tribunal adopted was simply whether there had been "significant" changes of role and responsibility between the four roles which she had undertaken over the period of her employment.

27. There are four grounds of appeal, although they shade into each other. They are;

Ground 1

28. The Tribunal misdirected itself by holding that the concept of a stable working relationship within section 133 of the **EqA**, should be construed in a "strictly jurisprudential sense" rather than in accordance with the ordinary and natural meaning of the words.

Ground 2

29. The Tribunal wrongly held that, in circumstances where a temporary fixed-term contract was replaced by two successive permanent contracts with no breaks in between, a stable working relationship was nevertheless not preserved by reason of the employee having received an increase in pay and more responsibilities.

Ground 3

30. The Tribunal's determination of a stable working relationship was not preserved through an uninterrupted succession of contracts, including successive permanent contracts, whilst working for the same employer in the same department and being entrusted with greater responsibilities was perverse.

Ground 4

31. The Tribunal adopted the wrong approach to determining whether a stable work case existed by not focusing on the key question or guiding principle, namely the stability of the working relationship between the parties from 12 December 2011 to 9 June 2017, contrary to the Court of Appeal's guidance in **Fox** and the EAT's guidance in **Dass**.

32. Mr Matovu's oral submissions began with a lengthy analysis of the case law, which in deference to his submissions, I have set out in some detail above, rather than adopting the rather

shorter summary in the Reasons of the Tribunal. At one point, I understood him to be arguing that the change in terminology from "stable employment relationship" in the **Equal Pay Act** to "stable working relationship" in the **EqA,** was a change in substance rather than clarity of language. He demurred from that but for the avoidance of doubt, I reject any suggestion that the change has any practical effect.

33. In any event, as he also noted, there is no further assistance as to the meaning to be gleaned from either **Act**. He contended that the term stable working relationship should be given its ordinary and natural meaning without any gloss or adding any further refinement to the words of the statute. The stability of the relationship should be the guiding principle and this test should be applied in a broad, practical and non-technical manner without requiring any painstaking examination of the contractual position.

34. He points to the fact that the Respondent's own witness conceded in evidence that the working relationship between the Claimant and the Respondent remained secure and stable throughout the period in question; that the Claimant was a strong member of the team and that her promotions did not weaken the relationship at all.

35. The primary submission made below was, he says, that the guiding principle and key test was whether there was a stable working relationship during the relevant period, but that there had, in any event, been no fundamental change in the nature of the work that the Claimant undertook, other than that she progressed up the ladder within the same department from Compliance Officer (BSO) to SFO to Office Manager.

36. None of those, he argued, interrupted the stability of her working relationship with the Respondent at any stage throughout the relevant period. Rather, they had been progressive steps in the same line of work and, if anything, had further helped to cement the relationship. He contended that it was that it was perverse to find that the Claimant's promotions had in any way damaged, weakened or undermined the stability of her working relationship with the Respondent, a relationship that was governed at all times by an unbroken series of employment contracts.

37. In his submissions, on behalf of the Respondent, Mr Dracass has pointed out that it had been conceded before the Tribunal that a radical or fundamental change in the nature of the work or job being undertaken for the same employer may cause one stable working relationship to end and another to begin; something recorded at paragraph 9 of the Reasons. He said that this principle was reflected in the Authorities that were relied on by both parties.

38. He contends that the Tribunal correctly applied this principle to the facts of the case in coming to the conclusion that it did, namely that the stable working relationship ended when the Claimant moved from Business Support Officer (role 1) to Fire Safety Officer (role 2) and again when she moved from Fire Safety Officer to Office Manager (role 3). To hold otherwise, he said, would be to equate the concept of a stable working relationship with that of continuous employment, which is not the correct approach; see **Dass**. The test for a stable working relationship requires more than being employed by the same employer under successive contracts, even if working in the same department. The test involves looking at the character of the work and the employment relationship in practical terms, which is what the Tribunal did.

39. I will go first to the individual grounds before looking compendiously at what I consider to be the sole underlying issue in this case. Ground 1 seems to me to be misconceived, or the

result of a misreading. The test suggested in **Fox** emanating, as it does, from a line of authority going back to the ECJ's Decision in **Preston** self-evidently requires analysis of the caselaw.

40. What I understand the Tribunal to be saying in paragraph 18 of the Reasons is simply that a layman's answer to the question whether a stable working relationship existed over a given period is not necessarily the same as would arise from application of the correct legal test. That is not in my judgment a controversial statement, far less an error of law.

41. Ground 2 seems to me to attack the very proposition that is advanced on behalf of the Claimant, namely that a painstaking examination of the contractual position is to be avoided. The Tribunal was looking at factors which were in play at various stages when the Claimant's role within the organisation changed.

42. Ground 3 seems to me to be the real focus of the appeal and I shall deal with it after first examining Ground 4. That ground asserts, in essence, that the Tribunal ought to have regarded as the key or guiding principle the stability of the working relationship between the parties over the entirety of the relationship. That seems to me to be too wide an approach and, even if not the same as the continuous employment test, it is based upon only one factor in the relationship, namely the temporal. That is not what the Authorities provide for.

43. The straightforward question that arises from this appeal can be put, in my judgment, very shortly: How should a Tribunal approach the task of applying a non-technical broad-brush test examining the character or nature or type of the work and the employment relationship in practical terms such as to determine whether an unbroken stable working relationship subsisted?

44. Finding the answer to that question is not helped by the different descriptors which have been adopted. "Radical", "fundamental" and "significant" are to be found in the authorities. The Tribunal noted at paragraph 9 of the Reasons, Mr Matovu's apparent acceptance that a "radical change" could result in the ending of a stable working relationship.

45. At paragraph 19 of the Reasons, the Tribunal rejected the Claimant's argument that, her having worked throughout in the same department undertaking a broadly similar overall role, albeit with a series of promotions, was sufficient to amount to a stable working relationship throughout the period of her employment. The Tribunal did so in the briefest of terms with a very limited analysis of the factors in play.

46. The nature and extent of the changes and why the Tribunal regarded these individually and collectively as "significant changes" was unexplained. There was also no explanation as to why the term "significant" formed the basis of the test, the Reasons having earlier referred to the terms "radical" and "fundamental".

47. There is much force in Mr Matovu's submission that a series of promotions within a small department with incremental changes to salary and responses, which, in the overall scheme of things, seem to be relatively modest, particularly when looked at incrementally, should not have the effect that the application of this test has had, namely that the Claimant is prevented from bringing an equal pay claim simply through having been promoted.

48. The nature of the work done does not seem to have formed any part of the justification for the concept of the stable working relationship when it was devised. I refer to Mummery LJ at paragraph 109 of **Slack** above when he made clear that the intention of the Court of Justice in

Preston was to avoid frustrating a Claimant's entitlement to back pay over a number of years, merely because employment had been over a series of contracts.

49. It is surprising, therefore, that a concept, which was originally devised to assist women in being able to pursue equal pay claims has had the opposite effect in this case and it is difficult to see from the case law what the justification for this can be. It is now trite that an appeal on grounds of perversity will only succeed "where an overwhelming case is made out that the ET reached the Decision, which no reasonable Tribunal on a proper appreciation of the evidence of the law would have reached," **Yeboah v Crofton** [2002] IRLR 634 per Mummery LJ at paragraph 93.

50. The Tribunal in the present case has sought to discern the test which should be applied with remarkably little assistance afforded to it by any Authority. Although not cited before the Tribunal, nor to me, it is of interest that when it was before the EAT, **Fox**, then entitled **Potter and North Cumbria NHS Trust** UKEAT/385/09, did consider the question of whether there had been a "fundamental change" to the terms and conditions of employment of certain of the Claimants. I recognise at once that this was not the approach taken on the appeal to the Court of Appeal and the contractual route is not necessarily the same as the stable relationship point.

51. However, it seems to me that this may be as close as one gets to finding appellate authority on the question how the words "fundamental change" are to be applied, assuming, as seems to be the case, that this is broadly similar to "significant" or "radical"; each expression having been used in the Reasons by the Tribunal without seeking to draw a distinction.

52. In **Potter** the EAT presided over by Slade J summarised the relevant findings of the ET as follows:

> **"21. In reaching the conclusion that AfC brought about a rescission of original contracts of employment and replaced them with new contracts under the Agenda for Change terms, the Employment Tribunal took into account the nature of the changes and also the attitude of the parties towards those changes. The Employment Tribunal at paragraph 102 referred to a schedule agreed between the parties which set out the changed terms and conditions. They referred to some of the changes from the WC terms. The Tribunal also referred to the new system for pay progression, Knowledge and Skills Framework ('KSF'). To progress up the pay scale, employees had to demonstrate the necessary skills to pass through certain pay progression gateways. Under WC, employees automatically progressed by incremental steps until they reached the top of the scale.**
>
> **22. Under KSF each individual employee has to demonstrate the knowledge and skills required for their job. The first gateway at which this is to be demonstrated is within 12 months of appointment. To progress further up the pay scale they also have to pass a gateway which is fixed at different levels for different grades. If an employee fails to demonstrate the required skills and knowledge they will not progress up the pay scale.**
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> **23. In paragraph 108 the Tribunal observed:**
>
> **"We consider that KSF is a significant and major change to the terms and conditions of the claimants. It is a fundamental change from the incremental changes that occurred under Whitley. Under Whitley an employee progressed up the pay scale because of length of service and did not need to demonstrate on an annual basis any knowledge and skill to do the job for which he or she was employed."**
>
> **The Tribunal held of changes set out in paragraph 109:**
>
> **"There have been significant changes to the terms and conditions of employment from Whitley to Agenda for Change. Leads and allowances have been removed and higher pay given. On call and standby payments are changed. Overtime calculation is also changed. Previously overtime had to be taken as time in lieu by nurses, in contrast to other employees of the NHS, but now they get paid overtime for the extra hours that they work although they still have the options of taking time in lieu. Holiday pay and sick pay calculations are now calculated using the regular pay that an employee receives not just the basic pay. The standard hours of work in the NHS have also been amended but that does not affect the nurses as they were working under those hours in any event. We regard these changes much more than just variation of contract of employment. In their totality they add up to a significant and fundamental change in the terms and conditions of employees of the NHS."**

53. At paragraph 98, the EAT concluded:

> **"98. It is well established that an appeal on grounds of perversity will only succeed:**
>
> **"…. where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached." (Yeboah v Crofton [2002] IRLR 634 per Mummery LJ at para 93.)**
>
> **In our judgment the Tribunal erred in law and came to a perverse conclusion in the respects set out above in considering whether and deciding that there had been a fundamental change in the terms and conditions of employment of the Cross and the Casson claimants when they moved from WC to AfC. Their finding that the changes were fundamental to the claimants' contracts of employment was the basis for their conclusion that the WC terms and conditions had been rescinded and replaced by AfC. From their perception of the fundamental nature of the changes they inferred that the intention of the parties was to make a new contract. In our judgment the basis upon which the Employment Tribunal concluded that time for the presentation of claims under EqPA started to run in respect of each claimant from the date of their assimilation into AfC was erroneous in law and was perverse.**

Ground 3

If the Cross Claimants' application to amend did constitute the addition of a new cause of action, it erroneously concluded that it had no discretion to allow the application to amend because the new cause of action was out of time."

54. So, in **Potter** it was held to have been perverse to conclude that the imposition of a contract which required the demonstration of an increased skill level in order to progress through a pay band amounted to a fundamental change, albeit in the context of a contractual change. I see no reason why a promotion or change in role within the same organisation could not, similarly, amount to something short of a fundamental (or "radical" or "significant") change.

55. In my judgment, based on the limited facts set out in the Reasons it was perverse to conclude, as the Tribunal did, that the move from the BSO role to the FSO "did not preserve a stable work case." If I am wrong in that conclusion, I would also hold that paragraph 20 of the Reasons is not **Meek** compliant: see **Meek v City of Birmingham District Council** [1987] IRLR 250 It fails to identify the test applied and to identify with any detail the factors in play.

56. So, by way of example, I would have expected to have seen set out the percentage pay increase, the precise differences in responsibilities and how, in relation to each identified factor, it was said to be "significant" or "fundamental" and an explanation of the sense in which that term was being used.

57. Paragraph 21 of the reasons goes a little further, in that the word "significant" is used to define the test but, again, there is no proper analysis of what the changes in work performed were or how and why they were said to amount to a significant change. For the same reasons as with paragraph 20, I find the conclusion that the matters mentioned amounted to a significant change to be perverse, based on the limited factors identified. For the same reasons as apply to paragraph 20, I also conclude that the finding is not **Meek** compliant.

58. I therefore allow the appeal. This is not a case in which the outcome is binary and I am thus not able, as sought by the Claimant, to substitute my own Decision for that of the Tribunal. I must therefore remit the case to the Tribunal for redetermination.

59. I have considered carefully whether the matter should be remitted to the same Tribunal or one differently constituted. Although there is no reason whatsoever to doubt the professionalism of the Judge who made the original Decision, the firm and concluded manner in which he expressed his opinion on the key issue for redetermination could give rise to a perception that a rehearing by him would offer a "second bite of the cherry."

60. For this reason, I direct that the matter is remitted to a differently constituted Tribunal for rehearing. I am not sure whether the rules permit this, and it is a matter for the Regional Employment Judge, but it seems to me that the exercise which must be carried out would be greatly assisted by the presence of Lay Members who would bring their experience of the workplace to bear.