



EMPLOYMENT TRIBUNALS

Claimant: Ms V Barnard

Respondent: Hampshire Fire and rescue authority

Heard at: Southampton **On:** 19th and 20th of November 2018

Before: Employment Judge Hargrove
Members Mr Bompas and Mrs Earwaker.

Representation

Claimant: Mr D Matovu of Counsel

Respondent: mr T Dracass of Counsel

JUDGMENT

The unanimous judgement of the Employment Tribunal is as follows:

1. There was no end in the stable working relationship on the claimant's removal from BSO to FSO.
2. There was an ending of the stable working relationship when the claimant took up post as office manager on 16th of June 2014.

1. This hearing was remitted by the EAT in a judgement dated the 12th of November 2018 setting aside in part the judgement of the original ET dated the 5th of May 2018. That judgement had been to the effect that the claimant's like work claim in respect of her employment as an office manager (OM) from the 16th of June 2014 onwards could proceed to a hearing; that there had been

no break in the stable work relationship (SWR) when her job title changed thereafter to CDSM; but that there had been a break in the SWR in respect of her earlier employment as a BSO from 12th of December 2011, on her change to FSO from 15th of October 2012, and again on her change to the OM role on 16 June 2014. The claimant appealed the break findings on the changes from BSO to FSO and from FSO to OM, which was the part set aside by the EAT, but the respondent did not cross-appeal the finding of no break on the change from OM to CDSM.

2. The claimant's employment with the respondent commenced on the 6th of July 2009 and ended with her resignation with effect from the 9th of June 2017. She commenced her ET proceedings on the 15th of August 2017 and is claiming like work with a series of male comparators employed on Grey Book terms and conditions. She was employed under separate Green Book local authority terms and conditions. She also claims that she was unfairly constructively dismissed arising from the alleged breach of the equal pay provisions under the Equality Act and her treatment thereafter, and a breach of the implied term of trust and confidence. The equal pay issues (but not including any material factor defence) are listed for five days from the 15th to the 19th of July 2019. Further case management orders in that connection accompany this judgement and reasons.

3. Salient background facts relevant to this hearing:

3.1 The claimant commenced working as an administrator in 2009. She makes no claim for equal pay in respect of that employment.

3.2 Throughout all of her employment with the respondent she was employed on Green Book local authority terms of conditions. She was also a member of the local authority pension scheme. There are also employees, described here as uniformed or operational staff, principally male and liable to emergency call out, who are employed on different Grey Book terms and conditions.

3.3 There were three changes in her employment material to this hearing.

The first relates to her employment from the 12th of December 2011 as a business support officer, referred to here as a BSO role. Confusingly, it was also called a Code Compliance Inspector. That opportunity arose following a variation to establishment request made by the respondent's witness Stuart Adamson in November 2011 to add the job to the community safety (protection) department as a "secondment to a non-established post(Green Book)". See page 46.

3.4 Mr Adamson explained that the community safety department was split into two sections; prevention, dealing with the safety of people at home, and protection, dealing with the regulation of the business environment. The proposed new post of BSO was in the protection section. So was the next post up from BSO, FSO(Fire safety officer). These roles were non-operational and required some technical knowledge. The BSO post was aimed in particular at the regulation of small businesses. It was to be at grade F under the Green Book.

3.5 The vacancy for the post; and for another post for Grey Book staff was circulated internally two staff in November 2011.

3.6 The claimant applied for the post and was selected (either on paper or following interview). The contract was issued to her on the 11th of January 2012 but she had commenced in post on the 12th of December 2011. It was a temporary full-time post-due to end on the 12th of December 2012, described as a secondment, at the end of which she was to return to her "current substantial post as administrator" (See page 54 to 74).

3.7 Gavin Ison was appointed to the other post as a Grey book employee. He is the claimant's comparator in this role and there is an issue, not for this hearing, whether he was on like work with the claimant.

3.8 On the 21st of August 2012, while still seconded as BSO, the claimant submitted a detailed expression of

interest for the more senior post of FSO within the community fire protection (CFP) team. See pages 76 to 78. She gave examples of work she had done visiting business premises as a BSO. Her case is that she had been issued with a warrant by this time, but had not had the need to produce it.

- 3.9 In September 2012 she was shortlisted for interview, and was interviewed by Mr Adamson on the 21st of September.
- 3.10 On the 24th of September 2012 she was notified that she had been successful and was offered a contract to start as an FSO on the 15th of October 2012 on grades F to G.
- 3.11 There are issues as to the degree of difference between the two roles. The job description for the BSO role is at page 176, and for the FSO roll at page 180, with a person specification at page 183.
- 3.12 In June 2013 she was notified that she had successfully completed the development programme and her pay increased to Grade G backdated to the 1st of March 2013.
- 3.13 On the 2nd of May 2014 an initial advertisement was circulated in the business fire safety department for the position of office manager, inviting expressions of interest “from competent inspecting offices (Green or Grey book)... to help lead the BFS department as part of the community safety function for a period of 12 months“. See page 133. The claimant was interviewed, having submitted her expression of interest, and on the 11th of June it was notified that she would be starting as the Redbridge office manager as from the 16th of June 2014.
- 3.14 No new written contract was issued to her at that time, a factor to which the claimant attaches significance. However it was initially agreed that the new pay grade would be H with a later review to find the equivalent to the Grey Book Station Manager role. See page 134 “I have spoken to GM Tim Gates and he has said that the pay grade for Vicki will be H and will review

later to find the equivalent to rebook SN“ . Subsequently, the claimant raised the issue of her pay grade and it was indicated on the 7th of July that she would be paid thereafter at Grade J. This is confirmed by a handwritten note on page 134. The post was for a period of temporary promotion for a period of 12 months ending on the 8th of May 2015. The next relevant document is the confirmation of temporary promotion dated the 23rd of April 200 2015 at page 136. The document is headed “continuation of temporary promotion“. The continuation dates were from the 23rd of April 2015 to the 31st of May 2016. There are then remarks regarding the notice including “1.The end date is subject to change. 2.The other conditions of service in your original contract of employment remain unchanged . Your range of duties will be advised by your immediate supervisor. 3. This is a continuation of your current period of temporary promotion.”

- 3.15 The job description for the office manager post, last reviewed on the 29th of April 2015 . This job description is to be compared with the job description of the BSO at page 176 and, more importantly, the job description for the FSO role at page 180.
- 3.16 On the 4th of June 2015 the claimant received, 11 months after she had been seconded to the OM role, a draft development plan for the office manager post which is to be found at pages 138-142.
- 3.17 On the 30th of October 2015 the post was re-advertised as a Community Safety Delivery Manager (CSDM) post at Grade J and the claimant submitted a detailed application at pages 144 to 146. This is an important document because it describes under the heading of “experience and personal skills” the work which she has been doing or claimed to have been doing over the preceding 16 months since June 2014. The impetus for the re-advertisement was a review in 2015 whereby the two separate departments of prevention and protection were merged into one. No one apart from the claimant applied and her application was

supported by Mr Adamson. She was interviewed and a new contract was issued with the start date of the 1st of January 2016. This was a permanent contract: – the claimant’s temporary status came to an end. It is not in dispute that the issue of the new contract did not constitute a break in the SWR, as found by the earlier ET and confirmed by the EAT. There is a job description for that post to which we have not been referred by the parties, at pages 174a-e. This represents an evolution of the OM role on the restructure of the department. The claimant’s contract of employment as a CSDM is dated the 1st of January 2016 and is to be found at pages 157-174. This confirms that the claimant was being paid at grade J. Subsequently on the 13th of October 2016 the claimant’s role was re-evaluated under the Green Book job evaluation scheme at grade K.

- 3.18 There are structure charts at pages 186 and 188. That at page 186 dates from December 2011. It shows the hierarchy of jobs headed by area manager then group manager delivery, both of which are Operational posts, followed by office manager or station manager – the grey book job title equivalent, followed by FSO /watch manager and, at the bottom, Compliance officer, the BSO role or crew manager, the Grey Book equivalent. The structure chart at page 188 must have come into existence sometime in 2016. It is headed Group delivery community service structure chart and it identifies groups at seven different venues. The Southampton group was headed by the claimant who is shown as office manager at grade J, managing 3 staff under her, including a Watch Manager. This chart must have come into existence sometime in 2016 before the re-evaluation in October .
- 3.19 Finally there is a chart at page 200 setting out the grades of the Green Book jobs, their salary scale points and basic pay as of the 1st of April 2017.
- 3.20 This concludes the summary of the jobs held by the claimant and the relevant documentary evidence in respect of them.

4. The law and the Tribunal's self direction as to the relevant tests to be applied.

4.1 Section 129 (3) Prescribes in a stable work case a qualifying period of six months from the date on which the SWR ended. Section 130 (3) Defines a stable work case as "a case where the proceedings relate to a period during which there was a stable working relationship between the worker and the (Employer)."

4.2 It is not in dispute that sections 129 and 130 have the same meaning as in the predecessor provisions in Section 2ZA of the Equal Pay Act 1970, which was passed in consequence of the Litigation in Preston v Wolverhampton Healthcare NHS Trust. The ECJ concluded: "community law precludes the procedural room 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 staple employment relationship resulting from a succession of short-term contract concluded at regular intervals in respect of the same implement to which the same pension scheme applies".

Later, in Preston number 3, 2004 IRLR page 96 at paragraph 115 Judge McMullen said: "It is therefore necessary to consider the features that characterise the stable employment relationship... 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.

Under this principle it was also anticipated that there should be periodicity in the sense of short-term contracts, three or more, with gaps in between. Later authorities however confirm that the principle is of wider application.

This tribunal borrows substantially from the analysis contained in Judge Barklem's judgement in the present

case. In *Thatcher v Middlesex University* UKEAT 0134/05 Judge Macmillan set out principles to identify when a stable employment relationship ends, 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 : eg a succession of short-term contract is superceded by a permanent contract.

Thus an SER ceases where the terms of the new contract. or (and I emphasise the word or) the the work to be done under it alters radically...". (tribunal's emphasis).

In *Slack V Cumbria County Council* 2009 EWCA Civ. 293 the Court of Appeal in a judgement of Mummery LJ agreed with the claimants that an uninterrupted succession of contracts is an a fortiori case of a SER, thus extending the Preston conditions. Further, at paragraph 110 of his judgement, he stated:

“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 the 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”. (Tribunal's emphasis).

In *North Cumbria University Hospitals NHS trust v Fox* 2010 IRLR p804 the issue was whether the stable employment relationship of nurses employed by the trust had ended following the replacement of a series of

contracts of employment in Whitley Council terms with new Agenda for Change terms of contract. The principal judgment of the Court of appeal is that of Lord Justice Carnwath. At paragraphs 17 and 18, he cited the passage from McMullen's Judgment in Thatcher emphasised above. In paragraph 19 he commented :

“For a time this approach seems to have been accepted as orthodoxy by the profession. However in Slack v Cumbria County Council the Court of Appeal had occasion to consider the application of the principle on facts rather different from those of Preston.”

The issue in Slack concerned alterations to the terms of a succession of contracts where the new terms were expressed as “superseding” any previous contracts. The Court of Appeal nonetheless accepted the EHRC'S argument that the SER continued.

It is clear from paragraph 23 of Carnwath LJ's judgment that the claimant's argument in Fox was that Judge McMullen's approach in Thatcher was too narrow insofar as it considered that a change in the terms of the contract alone would be sufficient alone to end the SER but would be relevant in throwing light on the issue whether there continued to be a stable relationship . The employer's argument was that “ a ‘radical’ change in the terms may be sufficient even if the work done remains unchanged.”

The key response to these rival contentions is contained in paragraphs 24-25 of Carnwath LJ's Judgment:

“24 At the end of the argument on this issue we indicated that we agreed with the claimant's submissions on the new ground of appeal, and that it was unnecessary therefore to hear argument on the issue which divided the tribunals “(ET and EAT).

“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 judgement 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.”

Further key passages in the judgment are at paragraphs 31 to 32, commenting on the original judgment of the ECJ 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 project 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”.”

- 4.3 Mr Mutavu’s oral submission was to the effect that a wider construction was to be applied derived from the ordinary and natural meaning of the term SWR. He relied upon passages from the Court of Appeal judgments in Slack and Fox, rather than the narrower construction to be derived from judgment of Judge McMullen in Thatcher. However in his written submissions he contended that the claimant should succeed even applying the Thatcher test on the basis that none of the contracts under which the claimant worked, nor the work done under them radically or

fundamentally differed.

- 4.4 Mr Dracass submitted that if Mr Mutavu's primary contention were correct, it would be in effect simply be a test of continuity of employment which would apply whatever the changes in the claimant's job or contract or the work done under it. He submitted that there was clearly a fundamental all radical change in the nature of the work done by replying when she moved from the FSO to the IOM job, although he did not pursue the argument with the same falls in relation to the change from BSO to FSO.
- 4.5 We prefer the arguments of Mr Dracass on this dispute. We do not accept that the authorities of Fox or Slack have overruled the judgement of Judge McMullen in Preston 3 or Thatcher, except possibly in respect of changes in contractual terms alone. Lord Justice Carnwath's judgement in Fox emphasised the importance of the finding that there had been no change in the work done by the nurses. Furthermore were we to accept the claimant's primary oral submission, We would be failing to follow the guidance contained in paragraph 22 of Judge Barklem's Judgment in the present appeal. It was accepted in Dass UKEAT/0108/12 that the continuity of employment tes was not the same as the SER test.
- 4.6 We conclude that a very important factor to be taken into account in this case, is whether there has been a fundamental or radical change in the work done by the claimant during the succession of contracts under which she was employed, whether temporary or for fixed terms or permanent. Of particular significance in this case is the fact of the claimants promotion, albeit within a fixed structure in the same service. We have taken note in particular of the following passage in Judge Barklem's Judgment:—
- “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 judgement, based on the limited facts set out in the reasons it was per verse to conclude, as the tribunal date, 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 at paragraph 20 of the reasons is not Meek compliant...”.

5. The Tribunal’s conclusions.

5.1 We conclude that there was a no break in the SWR when the claimant moved from the BSO role to the FSO Role. We note that the claimant was employed in the BSO roll under a temporary contract from January 2012. She was Seconded to it from her Administration role. The move to the FSO role was under a permanent contract so that her current secondment ended, but we do not except that as a fundamental change of contract, nor were the terms fundamentally different. What is of more significance is to examine the job descriptions and person specifications for the two roles. There are differences in the job purpose details but in practice we accept that the claimant did provide audits as a BSO in carrying out her duties of providing fire safety advice and identifying operational risks. We note that there are significant common features in the generic accountability statements in the job descriptions. As to the person specifications, the key and post specific key accountabilities are almost exactly the same except for two of the 10 accountabilities. In the case of functional management it was essential that the FSO demonstrate knowledge of current fire safety techniques, whereas in the case of the BSO it was only desirable. Contrarily, under the post specific key accountability of Fire Safety Inspections, physical capability of gaining access was essential for BSOs, but only desirable for FSOs. The

respondent argues that the key difference was that the FSO roll had enforcement powers arising from the issue of a warrant, in practice to enforce entry and search premises. But in reality we do not regard that as a fundamental difference in work not least because, as it transpired, the claimant had been issued with a warrant card some months before she changed to FSO. The fact that she did not ever produce it merely demonstrate that she was able to enter and inspect as a matter of course. A further factor is that there was an increase of only one grade in her pay, contrary to the circumstances of her next change to OM.

5.2 We reach a contrary conclusion in respect of the change to OM. This was a much more substantial promotion than that from BSO to FSO. This is demonstrated by the jump in paygrade from G to J; and, when she became a C STM, to K. In terms of the 2017 salary the difference between G and J was just under £5000 per annum or an increase of over 15%. It is also demonstrated by a comparison of the job descriptions of FSO and OM. The job purpose in the job description and page 129 demonstrates that this is a managerial role as leader of a team of business for safety staff stop that team is identified in the structure chart at page 188 as being Southampton, and includes, next down, the watch manager/FSO post and two other staff. The principal accountabilities in the job description at page 129, “resolving operational incidents,” “implementing and managing change”, “physical resource management,” “managing activities,” “human resource management,” “human resource development” and “personal development” are to be contrasted with the principal accountabilities within the FSO job description. The BSO and FSO roles were essentially technical roles. OM Role is a strategic and management role; that of the FSO is clearly not a managerial role. The claimant makes much of the fact that she continued under the FSO contract after her appointment as OM with no new written contract of e employment from the 16th of June

2014 as a temporary promotion until the issue of a new contract as a CSDM on the 1st of January 2016. However, the change in her job title was clearly identified in writing, and the role was identified as being a temporary time limited role. We do not consider that the continuation of her original contract in those circumstances to amount to a feature demonstrating the continuation of the SWR. The changes in the job content were far more significant. We accept that in certain circumstances a promotion may not bring an end to the SWR, but in this case it did.

5.3 it follows from this finding that, the SWR having ended on the claimants appointment as OM on the 16th of June 2014, and the proceedings not having been commenced until the 15th of August 2017, the claims in respect of the claimants e employment as BSO and FSO work commenced out of time and should be struck out.

Employment Judge Hargrove

3 December 2018.