Appeal No. UKEAT/0145/19/JOJ
UKEAT/0146/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 30 October 2019
Judgment handed down 19 December 2019

Before

THE HONOURABLE MRS JUSTICE EADY DBE

MR D BLEIMAN

MR D SMITH

MS V BARNARD — APPELLANT

HAMPSHIRE FIRE AND RESCUE AUTHORITY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS DAPHNE ROMNEY QC DANIEL MATOVU (of Counsel) Instructed by: Leigh Day, Solicitors Priory House 25 St John's Lane London EC1M 4LB
For the Respondent	MR TIM DRACASS (of Counsel) Instructed by: Hampshire Legal Services The Castle High Street Winchester Hampshire SO23 8UJ

SUMMARY

EQUAL PAY – JURISDICTIONAL POINTS – CLAIM IN TIME – SECTIONS 129 AND 130 EQUALITY ACT 2010

The Claimant had been continuously employed by the Respondent from 2009 until June 2017, progressing by promotion from an administrative grade into technical roles and then into a managerial position. Upon each promotion, the Claimant was issued with a new contract save that when she first moved into a managerial role as Office Manager, in June 2014, she remained working under her existing contract. Following the termination of her employment, the Claimant submitted a claim to the Employment Tribunal (ET), which included a claim for equal pay going back to her first promotion. The Respondent objected that the claim was out of time for all but the last position held by the Claimant, the stable working relationship between the parties having been broken by each of the Claimant's promotions. This question was initially considered by an ET, which agreed with the Respondent, save in respect of the Claimant's final promotion. The Claimant successfully appealed against that decision and the issue was remitted to a different ET for determination. Although the ET found that there had been a continuing stable working relationship for the earlier promotions, it concluded that this had been broken when the Claimant moved into a managerial role; consequently, the Claimant's equal pay claim was limited to her employment in managerial positions. The Claimant appealed.

Held: allowing the appeal:

The ET had failed to adopt a broad, non-technical test, looking at the character of the work and the employment relationship in practical terms (**North Cumbria University Hospitals NHS Trust v Fox and Ors** [2010] IRLR 804 CA applied); it had elevated the change in job content on the Claimant's promotion into a managerial position into a determining factor when that had to be seen in context - the Claimant's promotion was a "natural progression" and was part of an

incremental progression into higher grades (initially on a temporary basis, under her existing contract) that was entirely indicative of the continued stable working relationship between the parties. In the alternative, the ET's conclusion was perverse: none of the factors it had taken into account suggested other than that the stable working relationship had continued. There being only one answer to this question, the ET's decision would be set aside and a finding substituted that there was no end in the stable working relationship on the Claimant's move to the position of Office Manager in June 2014.

THE HONOURABLE MRS JUSTICE EADY DBE

Introduction and Overview

1. When determining the qualifying period applicable for a claim for equality of terms under the **Equality Act 2010** ("the EqA"), what is meant by the phrase "*stable working relationship*"? That is the question at the heart of this appeal. Where the claim is made in a "*stable work case*", it can be pursued in the Employment Tribunal ("the ET") only if brought within a period of six months beginning with the day on which the stable working relationship ended (section 129 **EqA**). By section 130(3) **EqA** a "*stable work case*" is defined as:

> **"…a case where the proceedings relate to a period during which there was a stable working relationship between the worker and the responsible person (including any time after the terms of work had expired)"**

The specific question raised by this appeal is whether an otherwise stable working relationship is broken by an internal promotion within the continuation of the employee's employment with the same employer.

2. The EAT President (Choudhury P) set this matter down for a Full Hearing before a three-member panel following a hearing under Rule 3(10) **EAT Rules 1993** (as amended). We respectfully consider he was right to do so; this is a case in which the contribution of the lay members of this panel has been of particular value in reaching our unanimous Judgment as to what should be understood by the phrase "*stable working relationship*" for these purposes.

3. In giving this Judgment we refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against a Judgment of the Southampton ET (Employment Judge Hargrove, sitting with lay members Mr Bompas and Mrs Earwaker on 19

and 20 November 2018; "the Hargrove ET"), sent out to the parties on 19 December 2018. The question for the Hargrove ET was whether the Claimant's claims for equal pay had been brought within time; that is, whether those claims had been brought within six months of the day on which a stable working relationship between the Claimant and the Respondent – her employer – ended. On anyone's case, the Claimant's employment relationship with the Respondent had terminated on 9 June 2017. By her ET claim, lodged on 15 August 2017, the Claimant complained she had been (constructively) unfairly dismissed and also sought a declaration and compensation under the equality of terms provisions of the **EqA**. There was no dispute that her **EqA** claim had been presented in time in relation to the last position held by the Claimant, that of Community Safety Delivery Manager ("CSDM"). The question was whether her claim was out of time in respect of previous roles carried out by the Claimant within her employment with the Respondent.

4. A Preliminary Hearing to determine this issue initially took place before a differently constituted ET (Employment Judge Kolanko, sitting alone on 8-9 May 2018; "the Kolanko ET"). In its Judgment on that occasion (promulgated 1 June 2018), the Kolanko ET concluded that the Claimant's stable working relationship with the Respondent had ended when she transferred from being a Business Support Officer ("BSO") to Fire Safety Officer ("FSO") - also referred to as Inspecting Officer - and, again, when she was subsequently promoted to Office Manager ("OM"); her claims for equality of terms in respect of those roles had therefore been brought out of time and could not be pursued. That, however, was not the case with the Claimant's subsequent move from OM to CSDM: on that occasion, her stable working relationship with the Respondent continued and, accordingly, her claims for equality of terms in respect of the OM role had been brought in time.

5. The Claimant successfully appealed against the decision of the Kolanko ET to the EAT (see the Judgment of HHJ Barklem of 12 October 2018 in UKEAT/0179/18) and this matter was remitted to a differently constituted ET, to determine whether the Claimant's stable working relationship with the Respondent had ended when she moved (i) from BSO to FSO, and, subsequently, (ii) from FSO to OM. The Respondent had not sought to challenge the decision of the Kolanko ET relating to the further move from OM to CSDM and that finding remains in place whatever the outcome of the present appeal.

6. On the remitted hearing, the Hargrove ET concluded that (i) in fact, there had been no end in the stable working relationship on the Claimant's move from BSO to FSO, but (ii) there was an ending of the stable working relationship on her subsequent move from FSO to OM. It is this latter finding that the Claimant now seeks to challenge; there is no appeal in respect of the finding relating to her move from BSO to FSO.

7. Subsequent to the promulgation of the Judgment now under appeal in UKEAT/0145/18, the Claimant applied for the Hargrove ET to reconsider its decision. That application was refused as having no reasonable prospect of success – see the further decision sent out to the parties on 28 January 2019. The Claimant has also appealed against the Hargrove ET's reconsideration decision (UKEAT/0146/18), although it is fair to say this raises no discrete points of challenge.

8. At all times, Mr Matovu, of counsel, has appeared for the Claimant, albeit on this appeal he is led by Ms Romney QC. Mr Dracass, of counsel has previously represented the Respondent, as he does today.

The Factual Background

9. The Claimant commenced her employment with the Respondent in 2009, then working as an Administrator. Throughout her employment with the Respondent, the Claimant has worked to Green Book local authority terms and conditions. There are other employees of the Respondent, described as "*uniformed*" or "*operational*" staff, who are employed on different, Grey Book, terms and conditions. Operational employees are predominantly male. In her equality of terms claims, the Claimant identifies a number of comparators in operational grades, working to Grey Book terms. The Respondent disputes that the Claimant was employed on like work to her comparators and also contends that, in any event, various material factors would serve to explain any differences in their terms. The substantive merits of the Claimant's claims and the Respondent's material factor defence remain undetermined.

10. Returning to the history, in November 2011, the Claimant successfully applied for the BSO role – a position within the Community Safety (Protection) Department. The Respondent's Community Safety Department is divided into two: Prevention deals with the safety of people at home, Protection concerns the regulation of the business environment. The BSO role was particularly aimed at the regulation of small businesses; it was a temporary, non-operational position, graded F under the Green Book and was to be for a fixed period of one year, ending 12 December 2012. The Claimant started this role on 12 December 2011 and was issued with a new contract on 11 January 2012; her move to the BSO role was described as a secondment, at the end of which she was to return to her substantive post as an administrator. In her equality of terms claim in relation to the work she was undertaking as a BSO, the Claimant compares herself to male Grey Book staff at Crew Manager level.

11. As recorded by Employment Judge Kolanko in his 1 June 2018 decision (see paragraph 4.5), the organisation structure within the Community Safety (Protection) Department was (from top to bottom) as follows:

> **"Area Manager**
>
> **Group Manager Delivery**
>
> **Office Manager**
>
> **Fire Safety Inspecting Officer**
>
> **Compliance Officer"**

12. In taking up the BSO role, the Claimant was going into this structure at Compliance Officer level. It was confirmed, however, by the Respondent's witness, Assistant Chief Fire Officer Adamson, that "*subject to competence and inclination ... staff would go up the [organisation] chart as a natural progression within Protection*." (again, see paragraph 4.5 Kolanko ET Judgment). We note that this is indeed what happened in the Claimant's case.

13. On 21 August 2012, while still seconded to the BSO role, the Claimant submitted an expression of interest for the more senior FSO position, also within the Community Fire Protection Team. She was again successful and was offered a contract to start as FSO on 15 October 2012. Subsequently, in June 2013, the Claimant was notified that she had successfully completed the development programme as FSO and her pay would be increased to grade G, backdated to 1 March 2013. As FSO, the Claimant seeks equality of terms with male Grey Book staff at Watch Manager level.

14. In May 2014, while FSO, the Claimant responded to an internal advertisement for an OM in the Respondent's Business Fire Safety Department. She was again successful and started this role on 16 June 2014. This was a temporary promotion, initially due to end on 8 May 2015. It

was subsequently continued for the period 23 April 2015 to 31 May 2016. The Claimant was not issued with a new contract on taking up the OM role and the notification of the extension of this promotion advised her as follows: "*1. The end date is subject to change. 2. The other conditions of service in your original contract of employment remain unchanged. … 3. This is a continuation of your current period of temporary promotion*." Initially the Claimant was paid at grade H, subject to later review to find the equivalent Grey Book Station Manager role. On 7 July 2015, the Claimant was informed that, thereafter, she would be paid at grade J. In relation to this role, the Claimant seeks equality of terms with male employees on Grey Book terms, who were promoted at around the same time to Station Manager positions.

15. During the course of 2015, the Respondent undertook a review of its Community Safety services, which resulted in the two separate departments – Prevention and Protection – being merged into one. This, in turn, led to the Claimant's OM role being changed to that of CSDM, at grade J. The position was duly re-advertised as such on 30 October 2015 and the Claimant successfully applied, taking up the CSDM role with effect from 1 January 2016. At this stage, the Claimant was issued with a new contract, which saw her confirmed into this role on a permanent basis – her earlier temporary status coming to an end; albeit, as the Kolanko ET had previously found, this did not end her stable working relationship with the Respondent in this position. Subsequently, on 13 October 2016, the Claimant's role as CSDM was re-evaluated under the Green Book job evaluation scheme at grade K.

16. On 9 June 2017 the Claimant left her employment with the Respondent, claiming she had been constructively dismissed. In particular, the Claimant complained that there had been a breakdown in trust and confidence in her relationship with the Respondent due to its failure to

afford her equal pay and to properly address her grievances about this issue. As already recorded, just over two months later, on 15 August 2017, the Claimant commenced these proceedings.

The Kolanko ET Judgment and the Claimant's First Appeal

17. The Kolanko ET found there had previously been breaks in the stable working relationship between the parties when the Claimant moved from BSO to FSO and then from FSO to OM. Finding that a stable working relationship only ran from the Claimant's assumption of the OM role, the Kolanko ET held that her claims in respect of the earlier roles had been presented out of time.

18. The Claimant sought to challenge that decision in the EAT and her appeal was permitted to proceed by Laing J who (considering this matter on the initial paper sift) 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. … the ET appears to have equated 'stable working relationship' with 'stable work', or 'doing' the same work, which may not be right."**

19. The Full Hearing in the Claimant's first appeal came before HHJ Barklem, sitting alone, on 1 and 12 October 2018 (our understanding is that submissions were heard on 1 October, with HHJ Barklem's Judgment being given orally on 12 October 2018). Having reviewed the case-law, HHJ Barklem observed that the nature and extent of the changes found by the Kolanko ET, and why these were regarded as "*significant*", was unexplained; he also considered it unsatisfactory that there was "*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"*." (see paragraph 46 of the HHJ Barklem's Judgment).

20. HHJ Barklem accepted:

> **"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."**

And noted:

> **"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."**

21. Against that background, HHJ Barklem observed:

> **"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. …"**

We can but agree.

22. Notwithstanding those observations, HHJ Barklem felt that it remained for the ET to determine whether a promotion or change in role within the same organisation amounted to *"a fundamental (or "radical" or "significant") change*" (see paragraph 54 of the EAT Judgment). He noted that the Kolanko ET had recorded Mr Matovu's "*apparent acceptance that a "radical change" could result in the ending of a stable working relationship*" (EAT at paragraph 44); "*significant*" was the term used by the Kolanko ET itself (albeit without explaining why it had done so, see the EAT's Judgment at paragraph 46); as for the term "*fundamental*", HHJ Barklem had taken that from the EAT's Judgment (Slade J presiding) in **Potter and Ors v North Cumbria Acute Hospitals NHS Trust and ors** [2009] IRLR 900. In **Potter**, the EAT was not concerned with the question whether there was a "*stable working relationship*"; at that stage, the claims were being pursued as a "*standard case*", and the EAT considered the relevant question to be whether there had been a "*fundamental change*" to the terms and conditions of certain of the

Claimants. The ET in that case had held that there had been such a change, and that this had brought about a rescission of the original contracts of employment, which were replaced by new contracts under the new terms. The EAT concluded that the ET's finding that there had been a fundamental change was perverse but did not hold that it had applied the wrong test. Acknowledging that the EAT in **Potter** was concerned with a different statutory provision, HHJ Barklem nevertheless considered that this was of some assistance "*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 [Kolanko] Tribunal without seeking to draw a distinction*." (see the EAT at paragraph 51).

23. Adopting that approach, however, HHJ Barklem considered that the Kolanko ET had reached a perverse conclusion in finding that the Claimant's move from BSO to FSO "*did not preserve a stable work case*", alternatively that that conclusion was, at least, inadequately explained ("*not Meek compliant*", see **Meek v City of Birmingham District Council** [1987] ILR 250)), failing "*to identify the test applied and to identify with any detail the factors in play"* (paragraph 55 EAT Judgment). In seeking to explain why the reasoning was inadequate, HHJ Barklem observed:

> **"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."**

24. In considering the Claimant's move from FSO to OM, HHJ Barklem noted that the Kolanko ET had, at least, defined the test it had applied by using the word "*significant*" but:

> **"57. … 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 in relation to the conclusion reached on the move from BSO to FSO] … 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 … I also conclude that the finding is not Meek compliant.**

25. HHJ Barklem therefore allowed the Claimant's appeal but, taking the view that the outcome to the case was not binary, remitted the question whether there had been a break in the parties' stable working relationship to a differently constituted ET for fresh determination.

The Hargrove ET's Decision and Reasoning

26. On the remitted hearing, the Hargrove ET found that there had in fact been no break in the stable working relationship when the Claimant moved from BSO to FSO. That finding is not challenged but is of limited assistance to the Claimant given that the ET went on to find that there was a break in the stable working relationship when the Claimant then moved from the FSO role to that of OM. It is therefore to the Hargrove ET's reasoning in that respect that we now turn.

27. The Hargrove ET found that the move to OM was a "*much more substantial promotion than that from BSO to FSO*", reasoning that this was demonstrated by the jump in Claimant's paygrade, from G to J (subsequently, as CSDM, to K), and by a comparison of the relevant job descriptions. Noting that the pay increase from G to J, was over 15%, the ET also considered that, whilst her BSO and FSO roles were essentially technical in nature, the Claimant's move to OM was to a strategic and managerial position. Although the Claimant continued under her FSO contract when she moved to the OM role, it had been expressly stated to be a temporary position, such that the continuation of the original contract could not be taken as demonstrating the continuation of the stable working relationship. The change in the Claimant's job title had been clearly identified and the Hargrove ET considered the changes in job content were of greater significance than the fact that no new contract had been issued. Although accepting that a promotion need not bring an end to a stable working relationship, in this case the Hargrove ET found that it had.

The Legal Framework and the Meaning of "Stable Working Relationship"

28. Although HHJ Barklem referred to a number of the relevant authorities in his Judgment on the first appeal in this matter, we make no apology for carrying out our own review of the case-law to explain our position on this appeal.

29. This case concerns the time limit applicable to bringing an equality of terms claim before the ET. The starting point can be expressed fairly simply: in a standard case, the claim can be brought at any time during the Claimant's employment but must be brought within a period of six months starting with the last day of that employment (the six months after the termination of the employment being described as "*the qualifying period*" under section 129(2) **EqA**). The Claimant's claim was brought well within the six months following the termination of her employment; if "*a standard case*", there would be no question that it had been brought in time.

30. A "*standard case"* is, however, expressly defined by section 130(2) of the **EqA** as *not* being (relevantly) "*a stable work case*". A "*stable work case*" is defined by section 130(3) **EqA**, as follows:

> **"A stable work case is a case where the proceedings relate to a period during which there was a stable working relationship between the worker and the responsible person (including any time after the terms of work had expired)"**

31. The reference to "*any time after the terms of work had expired*" is significant. The last day of employment will, in a standard case, normally be defined by the termination of the contract of employment (hence the contractual approach applied in **Potter**). The "*stable work"* case allows for the situation where the termination of a contract of employment (the expiration of "*the terms of work*") is not determinative; it recognises that separate provision needs to be made for cases involving more than one contract between the Claimant and the employer. In the present

A case, it is the fact that the Claimant's employment with the Respondent (the "*responsible person*") was governed by a number of different contracts that made this a "*stable work*" rather than a "*standard case*".

B

32. In a "*stable work"* case, the qualifying period is stated at sub-section 129(3) **EqA** to be:

> **"The period of 6 months beginning with the day on which the stable working relationship ended"**

C

33. Provided there has been no concealment and the Claimant suffers no incapacity (circumstances for which separate provision is made), any award for arrears of pay will, however, be limited to a period of six years prior to the institution of proceedings (section 132 **EqA**).

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34. The concept of a "*stable working relationship*" was introduced by regulation 4 of the **Equal Pay Act 1970 (Amendment) Regulations 2003** (SI 2003/1656), which inserted section 2ZA into the **Equal Pay Act 1970** ("the EqPA"), with effect from 19 July 2003, albeit the

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terminology then used was that of "*stable employment relationship*". Specifically, section 2ZA **EqPA** provided:

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

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35. The phrase "*stable employment relationship*" derived from the Judgment of the European

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Court of Justice ("ECJ") in the **Preston** litigation - the equal pay cases brought by some 60,000 part-time workers complaining of unlawful exclusion from membership of occupational pension schemes - see **Preston v Wolverhampton Healthcare NHS Trust and Secretary of State for Health; Fletcher v Midland Bank** [2000] ICR 961; [2000] IRLR 506 ("**Preston No.1**")). Many

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of the Claimants in that litigation had been employed under a succession of short-term (part-time)

contracts and the ECJ was asked (amongst other things) to rule whether the six-month time limit for bringing an equal pay claim – which then ran from the end of each such contract - was compatible with Community law. The ECJ concluded that it was not: Community law precluded a procedural rule that required a claim to be brought at the end of a short-term contract which was part of a series in a stable employment relationship; in such a case, it would not be compatible with Community law to require a claim to be made within six months of the end of a particular contract because that would make access to equal pay protection excessively difficult. As the ECJ reasoned:

> **"68. Whilst it is true that legal certainty also requires that it be possible to fix precisely the starting point of a limitation period, the fact nevertheless remains that, in the case of successive short-term contracts of the kind referred to in the third question, setting the starting point of the limitation period at the end of each contract renders the exercise of the right conferred by Article 119 of the Treaty excessively difficult.**
>
> **69. Where, however, there is a stable 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, it is possible to fix a precise starting point for the limitation period.**
>
> **70. There is no reason why that starting point should not be fixed as the date on which the sequence of such contracts has been interrupted through the absence of one or more of the features that characterise a stable employment relationship of that kind, either because the periodicity of such contracts has been broken or because the new contract does not relate to the same employment as that to which the same pension scheme applies.**
>
> **71. A requirement, in such circumstances, that a claim concerning membership of an occupational pension scheme be submitted within the six months following the end of each contract of employment to which the claim relates cannot therefore be justified on grounds of legal certainty.**
>
> **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 for membership of an occupational pension scheme (from which the right to pension benefits flows) to be brought within six months of the end of each contract of employment to which the claim relates where there has been a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applies."**

36. Upon the return of the **Preston** cases to the House of Lords, it was held that an employer could not rely on the six month limitation period (as then provided by section 2(4) of the **EqPA**) where there had been "*a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment; in such cases, the limitation period must run from the end of the last contract forming part of that relationship*."

(see per Lord Slynn of Hadley at paragraphs 33 and 35, **Preston v Wolverhampton Healthcare NHS Trust and ors** [2001] ICR 217 HL ("**Preston No.2**")).

37. The **Preston** cases were remitted to the ET, which then had to grapple – without statutory assistance at that stage – with what was meant by "*stable employment relationship*". On the subsequent appeal to the EAT, in **Preston No. 3** (**Preston and ors v Wolverhampton Healthcare NHS Trust and ors** [2004] ICR 993), HHJ McMullen QC (sitting alone) endorsed the approach taken by the ET Chairman (the title then given to Employment Judges), holding that the features that characterise a stable employment relationship were fourfold, as follows:

> **"115. …**
>
> **(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."**

38. In **Preston No. 3**, a specific issue arose in relation to teachers who had initially worked under a series of short-term contracts but then entered into a permanent contract with the same employer. Upholding the ET's rejection of these claims as having been presented out of time, HHJ McMullen concluded that a stable employment relationship arising from a succession of short-term contracts would be brought to an end by the employee's acceptance of a permanent contract; the relationship was no longer to be characterised by the first and second conditions identified as essential for a stable employment relationship (see above). More than that, however, HHJ McMullen considered that the ET had been correct to hold that:

> **"233. It is simply inconsistent with the nature of a stable employment relationship that the fundamentals of the succeeding contracts should vary. …**
>
> **235. 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."**

A See the citation at paragraph 119 of the EAT's Judgment in **Preston No. 3**.

B 39. Rejecting the Claimants' argument that the words used by the ET represented an impermissible gloss on the words "*stable employment relationship*", HHJ McMullen concluded that the ET had correctly identified the test for "*same employment*" (the third of the conditions he had identified as required for a stable employment relationship). In reaching this view, HHJ McMullen referred back to the report for the hearing before the ECJ in **Preston No. 1**, observing

C that this had described the stable employment relationship cases as follows:

> **"… 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)".**

D Again, see the EAT's Judgment at paragraph 119 (emphasis added by the EAT).

E 40. It was this that seems to have led HHJ McMullen to conclude that a requirement that the "*work must be for the same employer and be broadly the same throughout*" was not a gloss but was, rather, "*the exemplification of the issues placed before the European Court of Justice*".

F 41. We pause at this stage to note that the "*stable employment relationship*" issue before both the ET and the EAT in **Preston No. 3** related to the change from short-term to permanent contracts and we find it hard to see why there was any focus on the suggested requirement that

G "*the work … must be broadly the same throughout*". We certainly do not see how this could be said to arise from the Judgment of the ECJ in **Preston No.1**: even if the reference to contracts "*containing the same terms*" in the report for the hearing was significant, nothing was said about the actual work undertaken under those contracts.

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42. In any event, in **Thatcher v Middlesex University** UKEAT/0134/05, HHJ McMullen (again sitting alone) had the opportunity to re-visit the stable employment relationship question, this time in the case of a French language teacher who had entered into a fixed-term contract that was said to have brought an earlier stable employment relationship to an end. Returning to the ET's decision in **Preston No.3**, HHJ McMullen adopted the following passage as summarising the circumstances in which a stable employment relationship will be brought to an end:

> **"'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: eg a succession of short-term contracts is superseded by a permanent contract."**

See the citation at paragraph 6 of the EAT's Judgment in **Thatcher**.

43. Focusing on the last of these eventualities, HHJ McMullen opined:

> **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."**

44. Again, we are unable to see that there was any issue relating to "*the work done*" in **Preston No.3** and we are unable to see where the ET derived the requirement that this must not radically differ. Similarly, this was not in fact an issue before the ET or the EAT in **Thatcher**: Ms Thatcher remained a teacher of French throughout and, on her move to a fixed-term contract, the only change was in relation to her contractual terms.

45. As for the changes to Ms Thatcher's terms of employment, the ET found that the different contractual terms constituted a radical change but the EAT disagreed. Holding that the correct

approach required "*either an examination of the language of the contract or of the work done and …in this case, the correct analysis must have included both aspects*", HHJ McMullen found that the ET had failed to have regard to the parties' intention "*to be engaged with each other for the performance of similar contracts which went substantially unchanged as to the work done by the Claimant*". Having "*focused only upon the nature of the terms of the contract*", he considered that the ET had further erred in its analysis of those terms. In going on to determine that the ET's decision should be substituted by a finding that the Claimant's stable employment relationship with Middlesex University had continued, HHJ McMullen reasoned as follows:

> **"19. … I am in as good a position as the [ET] 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."**

46. At the risk of repetition, we again note that there was no suggestion that there had been any change (radical or not) in the duties undertaken by Ms Thatcher.

47. The approach adopted by HHJ McMullen was approved by Elias P (as he then was) in the subsequent case of **Jeffery and ors v Secretary of State for Education and anor** [2006] ICR 1062. The claims in that case related to membership of the employer's pension scheme, the Claimants contending that they were entitled to have their membership backdated to include periods of part-time employment undertaken before they moved on to permanent full-time contracts. The ET and EAT disagreed, holding that the move from a temporary to a permanent contract was a fundamental change in the nature of the relationship and this had brought about an end to any earlier stable employment relationship. As Elias P reasoned:

> **"18. I entirely agree with [HHJ McMullen's] analysis on this point. In my judgment, it cannot be said that there is a continuation of the stable employment relationship into a new permanent contract. To put it in my own words, the concept of a stable employment relationship has the effect of requiring a series of intermittent contracts or temporary contracts to be treated as if**

they were a single contract terminating at the conclusion of the last of those sequential contracts. But this only modifies the basic principle that time runs from the end of each contract in the very precise circumstances identified by the European Court of Justice. It does not permit an employee to treat a succession of contracts not falling within those criteria as amounting to a single stable employment relationship. If that were right, it would mean that, in practice, in almost all cases employees would be able to bring claims within six months of the termination of the employment relationship with a particular employer, however many separate contracts there may have been during the course of those relationships, and whether they were short term, long term or, indeed, whatever form they took. That would involve a fundamental change in the law which is plainly not the effect of the decision of the European Court."

48. Although the nature of the work undertaken had not been in issue in **Thatcher** or **Jeffery**, this was a question that did arise in two of the cases that subsequently came before the EAT (HHJ McMullen sitting alone) in **Secretary of State for Health and ors v Rance and ors** [2007] IRLR 665. These cases were also part of the **Preston** litigation; they had been the subject of agreed declarations by the ET after the Respondent conceded the question of stable employment relationship. As part of a later routine audit, the Respondent took the view that it had wrongly conceded this issue in certain cases and sought a review of the ET's earlier declarations. Specifically, before the EAT, the Respondent contended that it should be permitted to raise new arguments as to whether any stable employment relationship had been broken in the cases of two of the Claimants – Mrs Clark and Mrs Maddocks – when they had taken up what were said to have been fundamentally different posts. Mrs Clark had initially worked at different hospitals as a cook but had then taken up a position as Assistant Home Warden, a role in which the cooking duties "*were not significant*". Mrs Maddocks had started as a basic grade physiotherapist but had later accepted a new contract as a Senior 2 Physiotherapist. Having held that time limits could not be waived by agreement of the parties, it was thus for the EAT to determine whether the Respondent should be permitted to raise the new points it had identified.

49. In Mrs Maddocks' case, however, the Respondent applied to withdraw its appeal - an application the EAT allowed, noting that the ET had permissibly concluded that the Respondent had failed to put forward any cogent evidence to support its case. Indeed, in considering the

application for review, the ET had pointed out that the Respondent had adduced no evidence in support of its application other than a copy of the contract for the Senior 2 physiotherapist role and had gone on to observe that "*The fact that a new form of contract of employment has been issued is only one factor in establishing whether there was truly a change in the contract of employment. It would not normally be suggested that promotional changes would be such that the time limit starts running from those changes*."

50. In Mrs Clark's case, however, HHJ McMullen held that the Respondent should be permitted to take the new points contended and went on to determine himself that Mrs Clark had not remained within the "*same employment*", essentially holding that it was fatal to her case that "*Previously her job was cooking but thereafter her job description mentions nothing of cooking. Her terms and conditions were regulated by a completely different collective agreement made at a different bargaining table. Her hours were different as they changed from 14 to 20 a week*." (see paragraph 69).

51. In reaching his decisions in **Rance**, HHJ McMullen expressly adopted the same approach as he had previously laid down in **Preston (No. 3)** and **Thatcher** (see paragraph 52) and summarised what he considered to be the correct position as follows:

> **"53. The work done under the contract must be broadly the same throughout …. If there is a fundamental difference, time will begin to run. Work for a new employer, or a gap which is not straddled by the application of the stable employment relationship rules, will cause time to run. [The Secretary of State] relied upon the test case within Preston (No.3) of Mrs Bunyan, who accepted a newly created post at the end of a series of contracts, constituting a stable employment relationship. The contract was not varied because it was not in place at the relevant time – it had ceased (see Preston (No.3) at paragraph 107). On the other hand, a promotion by consent involves a variation of an existing contract (paragraph 109) …"**

52. The approach HHJ McMullen had taken - as laid down in **Preston No. 3** and as followed in **Thatcher**, **Jeffery** and **Rance** - was essentially accepted as orthodoxy until the case of **Slack and ors v Cumbria County Council** [2009] ICR 1217 was heard in the Court of Appeal.

Although not expressly addressing the decisions in **Thatcher**, **Jeffery** and **Rance** (it does not appear that **Thatcher** and **Rance** were referenced in argument; while **Jeffery** was referred to in the skeleton arguments for the hearing it is not cited in the Judgment itself), when considering the question whether there was a stable employment relationship, the Court in **Slack** can be seen to have adopted a very different focus. The Court of Appeal did not seek to suggest that the concept of a stable employment relationship must be limited to "*the very precise circumstances identified by the European Court of Justice*" (per Elias P in **Jeffery**) but agreed with the Claimants' submission that:

> **"98. … 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."**

53. Adopting that broader approach, the Court of Appeal made clear that a move from temporary to permanent status would not be fatal to the continued existence of a stable employment relationship. In addressing the particular facts of the three cases before the Court, it was noted that Mrs Slack and Mrs Elliott "*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*" and that the "*only variation made in the new contracts … was in the reduction of working hours*", albeit, we do not understand the Court of Appeal to have attached any significance to the reference to "*the work*" - certainly, the nature of the work undertaken was not in issue in those cases. As for the third Claimant, Mrs Athersmith, in remitting her case to the ET "*to find all the facts relevant to the stable employment relationship*", we again do not understand there to have been any issue relating to the nature of the work undertaken by Mrs Athersmith. From the information available, it appears that the issue in Mrs Athersmith's case related to the nature of her relationship with the employer prior to her permanent contract – whether her earlier periods of employment as a relief carer could be said to have given rise to a stable employment relationship.

54. When the case of **Potter and ors v North Cumbria Acute Hospitals NHS Trust and ors** [2009] IRLR 900 (referenced at paragraph 22 above) reached the Court of Appeal, under the name **North Cumbria University NHS Hospitals Trust v Fox and ors** [2010] IRLR 804, Carnwath LJ (as he then was) expressly adopted the broader approach to the characterisation of a "*stable employment relationship*" as laid down in **Slack**, noting that, although this concept had been adopted by the ECJ with reference to a case in which there was a succession of short-term contracts:

> **"28. … 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."**

55. Both Smith and Rimer LJJ agreed, with Smith LJ observing:

> **"34. … 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 … 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."**

56. The Claimants' argument in **Fox** was that the "*key question is whether the employment relationship is stable*" and, in determining that question, changes in contractual terms were "*relevant only to the extent that they throw light on this issue*" (see paragraph 23). The Court of Appeal expressly accepted those submissions (see paragraph 24), Carnwath LJ going on to observe:

> **"31. By adopting an entirely new expression, the [ECJ] was … signalling a wish to distance itself from all [the] various formulations [used by the parties]: 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."**

57. Rejecting an approach that was focused on the particular contractual terms, Carnwath LJ continued:

> **"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' …."**

58. In **Fox**, the Court of Appeal was still concerned with the former statutory language – "*stable employment relationship*" rather than the term used in the **EqA**, "*stable working relationship*". That said, although the language is different, the research undertaken by the parties in the present case suggests that Parliament did not intend that this should give rise to any change of approach. We have therefore proceeded on the basis that there is no material difference in the use of the term "*working*", rather than "*employment*", for these purposes.

The Parties Submissions

The Claimant's Case

59. In their arguments for this hearing, Ms Romney QC and Mr Matovu have identified the following three questions as central to this appeal:

(1) What is the proper construction of the term "*stable working relationship*" in sections 129(3) and 130(3) of the **EqA**?

(2) Why should a gloss be applied to the wording of section 130(3)?

(3) Does a test of a change of work make it too difficult for a Claimant to bring a claim under Article 157 of the **Treaty on the Functioning of the European Union** ("TFEU")?

60. On the first question thus identified, the Claimant observes that the legislative provisions in play refer neither to the similarity of the work done nor to the terms under which it is done. The term requires the ET to consider whether there was a stable working relationship between the Claimant and the Respondent during the period of the claim; the emphasis must be on the relationship between employer and employee, not the work. That relationship does not cease to

be stable where the employment has not only continued but has been affirmed by a series of promotions; the relationship was not diminished in these circumstances, the reverse was the case.

61. By her second question, the Claimant raises a point of statutory construction. In **Powerhouse Retail Ltd v Burroughs** [2006] ICR 606 HL, Lord Hope (with whose speech the other four Law Lords agreed) said that in construing the meaning and effect of section 2(4) **EqPA** – the statutory predecessor to sections 129 and 130 **EqA** – "*As with any other issue of statutory construction, the question begins and ends with the words of the statute*" (see paragraph 22). Similarly, where a statute does not specify a list of factors which a tribunal must consider, it would be wrong to put a gloss on the words of the provision or to interpret it as if it contained such a list (see per Leggatt LJ when considering the effect of another statutory time limit provision, under section 123(1) of the **EqA**, at paragraph 18 **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194 CA). And, in determining whether a stable employment relationship continued to exist, the Claimant notes that in **Fox**, Smith LJ indicated that this term was to be given a wide (not narrow) construction, to be derived from the ordinary and natural meaning of the words (Smith LJ at paragraph 34, **Fox**).

62. Turning to the third question, the Claimant observes that the effect of the ET's decision is that a complainant would be obliged to issue an equal pay claim after every promotion that might potentially cross the "*too substantial*" threshold, however seamless the change in role and even if only temporary. That was both arbitrary and unrealistic and it would frustrate a complainant's entitlement to arrears extending over a period of six years if an employer could issue new contracts of employment which triggered a new time limit in the case of each such contract. The principle of effectiveness means that national procedural rules must not make it excessively difficult or virtually impossible in practice for rights under Article 157 **TFEU** (or any

rights under EU law) to be exercised (see **Van Schijndel v Stichting Pensioenfonds voor Fysiotherpeuten** [1995] ECR I-4705 per Advocate General Jacobs at paragraph 17). The ECJ in **Preston No.1** found that the six-month limitation period breached the principle of effectiveness in those cases in which complainants could show that, although employed under a series of contracts, the context was one of a "*stable employment relationship*" resulting from a succession of short term contracts concluded at regular intervals in respect of the same employment and to which the same pension scheme applied. In **Slack**, the Court of Appeal accepted that the irresistible logic of the reasoning of the ECJ, and of the purpose of the amendment to the **EqPA** to introduce that concept, was that an uninterrupted succession of contracts was a fortiori case of a stable employment relationship. That test was reinforced in **Fox**, in particular see Smith LJ at paragraph 36.

63. As for the individual grounds of appeal, by Grounds 1, 4 and 8 the Claimant contends that the Hargrove ET erred in its approach to the question whether the parties' stable working relationship had ceased when she took up the OM role; the correct approach was as identified in the Claimant's submissions above and the Hargrove ET had failed to explain how an increase in pay or change in job content could be said to interrupt the stability of a working relationship. Ground 2 makes the same point, but specifically relates to the reconsideration decision. By Grounds 3-6, the Claimant essentially argues that, if the Hargrove ET had applied the correct test, it reached a perverse conclusion given (i) she worked under the same contract when moving from FSO to OM; (ii) there was no evidence to suggest that her mutually agreed promotion affected the stability of her working relationship with the Respondent; and (iii) the temporary promotion to OM was part of a natural progression to the next step-up within the same area of work, in the same section (Protection), in the same department (Community Safety). Ground 7 returns to the question of the applicable test, but raises the Claimant's argument that the approach adopted by

the Hargrove ET was incompatible with EU law; although an argument raised for the first time on this appeal, it requires no new findings of fact - the EAT is in possession of all the material necessary to dispose of the matter without further hearing (see paragraph 50 **Secretary of State for Health and ors v Rance and ors** [2007] IRLR 665).

The Respondent's Case

64. It is the Respondent's overarching submission that the Hargrove ET's decision could not be said to be wrong in law or in any sense perverse. The essential task for the Hargrove ET (as it had correctly identified) was to adopt a broad, non-technical test, looking at the character of the work and the employment relationship in practical terms (per Carnwath LJ in **Fox**). An important factor in that assessment was whether there had been a fundamental or radical change in the work done by the Claimant during the succession of contracts (whether they were temporary, fixed-term or permanent). The ET's conclusion that there was an ending of the stable working relationship when the Claimant moved from the role of FSO to take up the OM position was perfectly permissible, based on a proper application of the legal test. It considered that this new role represented a fundamental or radical difference in the type of work being undertaken, such that, whilst in other cases a promotion might not bring about an ending of a stable working relationship, the differences in the nature of the roles undertaken in this case were such that it did. The Claimant seemed to be arguing that the ET ought to have placed greater emphasis on the character of the Claimant's contract and the initially temporary nature of the OM role. That, however, would have been to shift the ET's focus away from the nature of the work or job undertaken in her employment and on to an examination of the legal contractual terms under which that employment was carried out, contrary to the Court of Appeal's guidance in **Fox**.

65. As for the new point of law raised by the third question identified by the Claimant, this had not been argued before the ET and should not be entertained on appeal. In any event, the Respondent does not accept that the approach adopted by the ET would render it "*excessively difficult or virtually impossible*" for a complainant to exercise her right to equal pay without discrimination, as conferred under Article 157 **TFEU**, and it neither breached EU law principles of effectiveness or legal certainty. In this regard, it was noteworthy that very similar arguments were considered and rejected by the Court of Appeal in **Slack** (see paragraphs 101-121). Moreover, an employee such as the Claimant would have first-hand knowledge of the work they were undertaking following a change in their job (whether brought about by a temporary promotion or not). If that change represented, in practice, a radical or fundamental difference in the nature or type of work being undertaken – such that it potentially gave rise to a break in the stable working relationship – the employee would be perfectly well-placed, and in possession of all the necessary facts, to consider their position and act to preserve limitation on any equal pay complaint relating to the job role they were previously undertaking before the break in the stable working relationship.

Discussion and Conclusions

The Approach – Our Analysis

66. Our starting point must be the test laid down by statute. That requires that a claim for equality of terms must be brought within six months of the day on which the "*stable working relationship*" between the parties ended (see sections 129(3) and 130(3) **EqA**). Unconstrained by authority, we would construe that term in an entirely straightforward way: the focus is on the relationship and the adjectives "*stable*" and "*working*" simply describe the nature of the required relationship. That, it seems to us, would be an approach that is entirely consistent with the introduction of this term by the ECJ in **Preston No.1**; it was (as HHJ Barklem observed in the

first appeal in this matter) a concept that was designed to assist complainants in being able to pursue equal pay claims, there was no suggestion that it was intended to create further obstacles. More particularly, adopting that approach, we cannot see how it could be said that an internal promotion, agreed by the parties and accepted as "*a natural progression within [the department]*" (see paragraph 4.6 Kolanko ET Judgment, referenced at paragraph 12 above) could be anything other than entirely consistent with the continuation of a stable working relationship for these purposes (indeed, the lay members of this tribunal consider this to be a common characteristic of a stable working relationship). Thus, drinking from the pure waters of the statute, we consider there could only be one answer to this case: the Claimant's claim was brought within six months of the ending of the stable working relationship she had previously enjoyed with the Respondent since 2009 (albeit any arrears of pay would be limited to the six year period prior to the bringing of the claim).

67. Our approach to the appeal is, however, subject to a number of constraints. First, as will be apparent from our review of the relevant jurisprudence, we do not come to the statutory waters free of authority. Second, we need to respect the view taken by HHJ Barklem in the first appeal in this case. Although we are not strictly bound by previous decisions of the EAT, we will only depart from earlier pronouncements at this level where decided *per incuriam* or where manifestly wrong, where there are inconsistent decisions of the EAT (or tribunal of co-ordinate jurisdiction) or where there are other exceptional circumstances (see **Lock v British Gas Trading (No. 2)** [2016] IRLR 316 EAT). Third, we note that the Claimant previously accepted that a "*radical change*" in the work done could bring about the ending of a stable working relationship (see paragraph 44 of HHJ Barklem's Judgment), a phrase HHJ Barklem considered to be interchangeable with "*significant*" (the description used by the Kolanko ET, albeit without explanation, see paragraph 46 of the EAT Judgment on the first appeal) and "*fundamental*" (the

term introduced by HHJ Barklem, referencing the contractual analysis adopted in a different context in **Potter**, see paragraph 22 above).

68. Addressing first the approach we take from the case-law, it seems to us to be clear that the earlier orthodoxy, as laid down in **Preston No.3**, **Thatcher**, **Jeffrey** and **Rance**, was founded upon an unduly restrictive view of the introduction of the concept of a stable employment relationship by the ECJ in **Preston No.1**. The early misstep (as we see it) taken by the ET and the EAT in **Preston No. 3** led to a number of highly technical analyses of differences in contractual terms, with little apparent attention to the stability of the continuing relationship between the parties. This was all the more questionable as the entirely novel concept of a stable employment relationship was plainly never intended to depend on a traditional contractual analysis (nor, for completeness, is it akin to the statutory concept of continuity of employment under the **Employment Rights Act 1996**, see **Dass v College of Haringey Enfield & North East London** UKEAT/0108/12). More than that, the tests laid down in **Preston No. 3** went further than required for the determination of that litigation, incorporating a requirement that the nature of the work undertaken must be "*broadly the same*" (a term used by both the ET and EAT in **Preston No. 3**), or, at least, must not "*radically"* alter or differ (see the ET in **Preston No. 3** and the EAT in **Thatcher**), although (i) this was not a requirement that could be taken from anything said by the ECJ in **Preston No.1**, and (ii) this was simply not an issue in the test cases under consideration in **Preston No.3**.

69. The principal misstep taken in **Preston No. 3** has, however, been corrected by the Court of Appeal in **Slack** and **Fox**. It is now clear that the concept of a stable working relationship is not to be restricted to the particular facts before the ECJ in **Preston No. 1** and, more generally, a broad and non-technical approach is to be adopted to determining whether a stable working

relationship continued in the circumstances in issue in any particular case. That said, the Court of Appeal in **Fox** still apparently considered that the determination of this issue will require the ET to look "*at the character of the work and the employment relationship in practical terms*", seeing the word "*employment*" (now "*working*") as "*intended to refer to the nature of the work*", "*the type of work, or job*" (see per Carnwath LJ at paragraphs 31 and 32 **Fox**). That is a characterisation of the test that has troubled us, as the statutory definition (and the original use of the term by the ECJ) would suggest to us that the word "*employment*" is intended to describe the nature of the relationship rather than the work undertaken (so, for example, an employment relationship rather than one for professional services), but the language used in **Fox** suggests otherwise. Although the "*nature of the work*" undertaken was not in issue in **Fox** itself (the cessation of the stable employment relationship was said to arise due to the introduction of new contractual terms and conditions), we consider that we are, in any event, bound to follow the approach thus laid down by the Court of Appeal in that case.

70. We also need to pay regard to the approach adopted by HHJ Barklem on the first appeal in these proceedings. Although he expressed surprise that a concept designed to assist complainants should have the opposite effect in this case, HHJ Barklem still allowed that there might be more than one answer to the question whether the parties' stable working relationship had ceased given a significant, fundamental or radical difference in the nature of the work undertaken by the Claimant. We have questioned whether the statutory definition requires such an approach, but accept that this can be seen (i) to be the consequence of the guidance laid down in **Fox**, and (ii) to follow from the concession made by the Claimant that a "*radical*" difference in the character of the work could be relevant.

71. We find greater difficulty, however, in the practical guidance offered by the EAT on the first appeal, suggesting that regard should be given to "*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*'". It seems to us that such a focus might lead to the same overly technical approach decried by the Court of Appeal in **Fox**. We suspect that is not what HHJ Barklem intended but, to the extent that these factors would require a focus on the legal terms under which the work is carried out, we consider this would be manifestly wrong, given the guidance laid down in **Fox**.

Decision on the Appeal

72. Against that background, we turn to the decision of the Hargrove ET and the Claimant's grounds of challenge on the current appeal, which we have considered as grouped into three broad categories: (1) a challenge to the approach adopted by the Hargrove ET; (2) a perversity challenge; (3) a new argument as to effectiveness of the enforcement of the EU right to claim equal pay.

73. In finding that the parties' stable working relationship came to an end when the Claimant moved from the position of FSO to that of OM, it is apparent that the Hargrove ET had regard to the "*jump in pay-grade*" and to the percentage increase in pay then enjoyed by the Claimant. It also considered it relevant that the job description identified the purpose of the new role to be managerial in nature whereas that of FSO was "*essentially technical*". Although the Claimant remained on the same contract when she moved from FSO to OM, the Hargrove ET took the view that this did not demonstrate the continuation of a stable working relationship, concluding that the changes in job content were more significant.

74. Although a stable working relationship is not subject to a contractual test and may continue notwithstanding breaks in the employment, it is notable that the Hargrove ET's conclusion in this case leads to surprising consequences. First, as a stable working relationship can continue notwithstanding the expiration of the contract ("*the terms of work*"), the Claimant would have been in a better position for these purposes if there had been a break in her employment rather than an onward progression towards a higher role, although it is hard to see why the former should be indicative of a more stable working relationship than the latter. Secondly, the change that the Hargrove ET saw as fatal to the continuation of the stable working relationship would not have had the same consequence if this had been a standard case: the Claimant's contract was not brought to an end by her move from FSO to OM and so would not have triggered the commencement of the qualifying period in a standard case. Third, this was a stable work case only by virtue of the Respondent's introduction of new contracts in respect of earlier promotions and on the Claimant's subsequent move to CSDM. Had those changes been brought about by agreed variation to the Claimant's contract (a course the Respondent might have chosen to adopt), there would have been no difficulty in the Claimant pursuing her claims in respect of her different roles as a standard case (albeit any pay arrears would be limited to a six year period). There is, however, no suggestion that Parliament (or the ECJ) meant those pursuing stable work cases to have more limited rights in such circumstances.

75. More generally, we consider that sections 129 and 130 **EqA** set out the different gateways for an equality of terms claim. Given that the introduction of the concept of a stable employment relationship created a new gateway and was expressly intended to remove a barrier to the enforcement of an EU right to equal pay, the outcome in this case inevitably raises the question whether the Hargrove ET has erred, either in its approach or in the conclusion it has reached.

76. In our judgement, the error is primarily one of approach. Even allowing (as we consider we are bound to do; see the discussion above) that it was right to look at the type of work or job undertaken by the Claimant (per **Fox**), that still had to be in the context of determining whether there was any break in the stable working relationship; a significant difference in the type of work undertaken need not necessarily mean that this relationship had been brought to an end. Adopting a broad, non-technical approach - looking at the character of the work and the employment relationship in practical terms - such a change would always need to be seen in context. Although the Hargrove ET acknowledged that a promotion need not bring an end to the stable working relationship, in practical terms it elevated a difference in job content (achieved through a promotion within an internal structure) into a determining factor. By adopting that approach, we cannot see that the Hargrove ET gave any weight to the stability of the relationship between employer and employee in this case.

77. More specifically, the nature of that relationship was – as the Respondent had confirmed at the original hearing before the Kolanko ET – such that (subject to competence and inclination) "*staff would go up the chart as a natural progression within Protection*". The Hargrove ET failed to take account of the fact that, in a case such as this, a change in job content - as part of the building of skills, leading to an internal promotion within the relevant department - was entirely indicative of the stability of the working relationship. Moreover, by discounting the fact that the Claimant's move from FSO to OM was initially a temporary promotion, under the same contract, the ET again failed to give weight to a relevant feature of the employment relationship in this case; that is, as one in which the Claimant could build on her skills and experience and thereby enjoy an incremental progression into higher positions, without disruption to the stable working relationship she enjoyed with the Respondent.

78. If we are wrong in our analysis of the error in this case as being one of approach, we consider that the conclusion reached is properly to be characterised as perverse. In coming to this judgement, we recognise the high threshold required (see **Yeboah v Crofton** [2002] IRLR 634) but are satisfied that the Claimant has made good an overwhelming case that the Hargrove ET reached a decision which no reasonable ET, on a proper appreciation of the evidence and application of the law, would have reached. Returning to our earlier observations, we are unable to see how a promotion into a role that was part of the "*natural progression*" within the department in which the Claimant worked could be seen as anything other than a continuation of a stable working relationship. The features that the ET identified – the increase in pay, the move to the higher pay-grade, the change in job content – were, in practical terms, entirely consistent with the stable working relationship that existed in this case.

79. Given the view we have reached on the Claimant's appeal on the basis of the approach adopted by the Hargrove ET and on her perversity challenge, we do not consider it necessary to address the additional point she seeks to take on effectiveness (Ground 7 of the appeal). Although we do not consider it fatal that this point has been taken for the first time on this appeal (it would require no additional findings of fact and could be resolved without the need for a further hearing), we cannot see that it takes the Claimant's argument any further given our conclusion on the other bases of challenge.

80. As for the appeal against the Hargrove ET's reconsideration decision, we cannot see that this raises any separate point for determination. In truth the application for reconsideration raised matters that were for the EAT rather than the ET and we do not consider that the Hargrove ET erred in refusing the Claimant's application in this regard.

Disposal

81. For the reasons we have provided, we therefore allow the appeal in UKEAT/0145/19/JOJ but dismiss that in UKEAT/0146/19/JOJ. On the appeal against the Hargrove ET's substantive decision, given our conclusion on the perversity challenge, we are satisfied that there is only one answer: the stable working relationship between the parties was not broken by the Claimant's promotion from FSO to OM. In the circumstances, it is unnecessary for us to remit this matter to the ET on this question (see **Jafri v Lincoln College** [2014] IRLR 544 CA); the Hargrove ET's decision will thus be set aside and a finding substituted that there was no end in the stable working relationship on the Claimant's move to the position of Office Manager in June 2014. This case should now return to the ET for determination of the claims on their merits.