EMPLOYMENT TRIBUNALS

Claimant: Mrs M McWilliams

Respondent: Bury Metropolitan Borough Council

HELD AT: Manchester **ON:** 22 November 2019 and 12 December 2019 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: Mr McWilliams, claimant's husband
Respondent: Miss L Quigley, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant did not fail to comply with the unless orders so the claim is not struck out on that basis.

2. The claimant's application to amend the claim to pursue an equal pay claim as a cook is refused.

3. The existing claim (based on being a driver) is struck out as having no reasonable prospect of success.

REASONS

Issues

1. This was a preliminary hearing listed to consider the following issues:

1.1. Whether the claimant's application to amend her claim should be allowed as set out in the case management minutes of 9 November 2018 and further as particularised on 24 November 2018.

1.2. Whether, on the respondent's application, the claimant's existing claim should be struck out.

2. The claimant wanted to amend her claim to pursue an equal pay claim based on having been a cook. The equal pay claim as it had been presented in 2008 described the claimant as a driver. We discussed, at the outset of the hearing, that it was not necessary for me to decide at this hearing whether the claimant was, as a matter of fact, a cook during the relevant period. If the claimant's application to amend was successful, this would be a live issue to determine at the final hearing. At this preliminary hearing, Miss Quigley would cross examine the claimant and Mr McWilliams on matters relevant to the amendment and strike out application, but not on parts of witness statements which related to the factual issue of whether the claimant was a cook. I did not need to hear from Mrs Deegan and Mr Stoddard, who had come along to give evidence for the claimant, because they could only help with the issue of whether the claimant was a cook; a matter I was not going to be deciding at this hearing.

3. The respondent's application was made on two grounds: because of non-compliance with an unless order; or because the claim has no reasonable prospect of success. In relation to the first ground, I needed to consider whether the claimant had complied with the unless order, in which case it was struck out in accordance with that order, and, if it had been struck out, whether the unless order should be set aside on the basis that it was in the interests of justice to do so. The second ground for the application to strike out required me to consider whether the claim had no reasonable prospect of success.

4. The parties agreed that I should hear evidence and arguments relating to both applications and then make a decision on both applications together.

5. There was also an outstanding matter relating to costs arising from hearings in August and November 2018 before Employment Judge Feeney. At the end of the preliminary hearing, I made case management orders orally, which were later confirmed in writing to the parties, in relation to the live issue as to costs. The costs matter will be referred back to Employment Judge Feeney after the date for compliance with the orders.

Evidence and submissions

6. I heard evidence from the claimant and her husband, Mr McWilliams, and I was referred to a number of documents. The respondent produced two bundles: one entitled "Chronological Index to Correspondence and Case Management Order Bundle" which we described as bundle A and another entitled "Index to document bundle" which we described as bundle B. The claimant provided me additionally with copies of a food hygiene certificate, Mr McWilliams' disabled person's parking permit, a GP's letter about medication prescribed to Mr McWilliams in March and April 2019 and a bank statement for Mr McWilliams showing payments of disability

living allowance. Mr McWilliams also gave me a copy of the EAT decision in **Bury Metropolitan Borough Council v Hamilton and others UKEAT/0413-5/09**.

7. Miss Quigley, for the respondent, produced a written skeleton argument and made further oral submissions. Mr McWilliams made oral submissions. I deal with the principal submissions in the sections on each issue.

Facts

8. The claimant worked for the respondent from 1987 until she retired in September 2008.

9. The claimant was one of a large number of claimants represented by Thompsons, solicitors, who presented an equal pay claim against the respondent on 30 January 2008. The claimant's job was listed as being "Driver 1 Grade 3" on the claim form.

10. The response form stated the claimant's post to be that of "Driver" grade 3.

11. It is common ground that the respondent continued to have the claimant's job title recorded as that of a driver until her retirement, whether or not, as a matter of fact, the claimant ceased being a driver in 1995 and became a cook for 99% of the time, apart from 1% of the time when she says she did driving to help out, as now asserted by the claimant.

12. Thompsons ceased to act for the claimant at some point. The claimant and Mr McWilliams thought this was before the claimant retired in September 2008.

13. No application was made to the tribunal to amend the claimant's claim to change her job title until this was raised at a preliminary hearing in August 2018 and a written application dated 24 November 2018 was made.

14. The first time it was asserted to the Tribunal on behalf of the claimant that the claimant was employed as a cook, rather than a driver, was in the hearing on 3 August 2018.

15. The claimant, when asked why she did not tell Thompsons that they had got her job wrong on the claim form, said she did not remember. When asked why she said in the claim she was a driver, she replied that her husband did quite a lot. When I asked her why she did not correct this for 10 years, she said she was not sure. She could provide no explanation as to why she did not try to amend the claim until 2018.

16. An employment tribunal found against the respondent in the multiple equal pay claim in 2009 when the issue of the genuine material factor defence in respect of bonus was heard in respect of a number of lead cases, including claims brought by Thompsons but for the respondent in relation to pay protection. The lead claimants included caterers. An appeal by the respondent was dismissed (except for an appeal in relation to some groups including the group of drivers) by the EAT in January 2011, who also allowed the claimants' appeal in relation to pay protection. The case of the claimant, who was identified as a driver, was included in the cases remitted by the EAT to the Tribunal to consider the gender proportions in those groups and whether there was any gender discrimination operating. The respondent said that,

although the lead claimants in those groups were women, the groups to which they belonged were either predominantly male or too small for any statistically significant conclusions to be drawn about them.

17. In 2011, many of the equal pay claims brought against the respondent were settled.

18. Mr McWilliams was aware around this time that cooks had been paid compensation by the respondent.

19. On 11 December 2012, the claimant sent a letter to the respondent in which she stated that she had retired as a cook grade 3 and that there had arisen a confusion which required clarification.

20. On 16 December 2015 the Tribunal wrote to the claimant asking her to indicate whether she was pursuing her equal pay claim against the respondent. The claimant did not reply.

21. The Tribunal wrote again on 23 August 2016, asking the claimant to confirm by no later than 13 September 2016 whether she was withdrawing or pursuing her claim and warning her that, if she did not reply, her claim might be struck out without further notice on the ground that it was not being actively pursued.

22. The claimant replied on 4 September 2016 to say that she was actively pursuing her claim. She wrote that equivalent female colleagues had received large awards but "for some inexplicable reason I have not received a penny". The claimant did not identify her job role in this letter.

23. A case management preliminary hearing was held in the case of the claimant and other non-legally represented claimants on 8 November 2017. Mr McWilliams represented his wife at this hearing. The claimant also attended the hearing. Prior to the hearing, the respondent wrote to the claimant on 20 October 2017 in relation to that hearing, writing:

> "The Council's position regarding your claim is that you were employed in a male dominated role as a driver and that you have to date failed to identify a valid comparator, a provision criterion or practice or a disparate impact between two groups. As a driver for the Central Production Unit, this service consisted of 3 drivers in total. Two of these drivers were male and one female and none received a bonus."

24. The respondent wrote that they proposed to ask the Tribunal to strike out the claim for reasons which they set out in the letter.

25. Employment Judge Horne ordered, in relation to the claimant's case, at the preliminary hearing on 8 November 2017, that the tribunal would determine the claimant's claim on the basis set out in Annex A to the written orders. Annex A records:

> "Mrs McWilliams was employed as a driver. She was paid at Grade 3. She did like work with the following men: [the names of 6 male comparators were listed].
>
> "It is Mrs McWilliams' case that at least some of the men, including [name], were paid at Grade 5."

26. In the reasons for a judgment given on 8 January 2018, Employment Judge Horne included, at paragraph 10, the following:

> "On 8 November 2017, Mrs McWilliams and her husband appeared at a preliminary hearing for the purpose of case management. At that hearing, Mr McWilliams explained to the tribunal the basis on which Mrs McWilliams was pursuing her claim. That explanation was noted and recorded in Annex A to a written case management order."

27. I find that the claimant was being identified by Mr McWilliams, on her behalf, at the preliminary hearing on 8 November 2017 as a driver and no mention was made of her having been, in fact, a cook.

28. Following an application from the respondent, a preliminary hearing was held on 8 January 2018 to consider striking out the claim on the grounds that it had no reasonable prospect of success or, alternatively, to consider ordering the payment of the deposit as a condition of continuing with the claim.

29. At the hearing on 8 January 2018, Mr McWilliams again represented the claimant. The claimant did not attend. The claims as set out in Annex A to the notes of the preliminary hearing on 8 January 2018 were struck out. The only part of the claimant's claim to proceed was to be that set out in Annex D which stated:

> "Mrs McWilliams alleges that, whilst employed in the role of driver/vending supervisor she was employed on work rated as equivalent with male employees in the role of driver. They were paid at manual grade 5 and the claimant was paid at manual grade 3."

30. Employment Judge Horne decided that the claimant was not required to amend her claim in order to pursue it on the basis set out in Annex D. The respondent conceded that, notwithstanding Annex A, it was already part of the claimant's claim that she was employed on work rated as equivalent with roles in the schedule of comparators. No amendment was therefore needed to enable Mrs McWilliams to allege that driver/vending supervisor was rated as equivalent with the role of manual grade 5 driver. Employment Judge Horne noted, at paragraph 37, that that was the only role in the list which the claimant wished to nominate as a comparator.

31. Mr McWilliams made an application to adjourn the preliminary hearing on 8 January 2018. Employment Judge Horne recorded in some detail in the reasons to his judgment the basis of the application as explained by Mr McWilliams. This included that he wished to obtain disclosure of the JESs so far as they related to the role of "supervisor". Employment Judge Horne recorded, in paragraph 18.2:

> "The relevance of the JESs, Mr McWilliams said, was to establish whether any supervisors were graded at manual grade 3. If they were, Mrs McWilliams would withdraw her claim. Mr McWilliams believed, however, that the JES is had rated all supervisor roles at at least grade 5 and that disclosure of documents would reveal this fact."

32. In paragraph 19, Employment Judge Horne recorded:

> "I asked Mr McWilliams if he was now arguing, despite the contents of Annex A, that Mrs McWilliams did work that was rated as equivalent to that of male employees. He said that he was. He was not, however, in a position to identify any such employees, because he wanted to see the JESs first."

33. In support of its application to strike out the claim, the respondent had produced a copy of a letter dated 19 June 1991 offering the claimant the role of "Driver/Vending Supervisor" at Grade 3.

34. At paragraph 42 of the reasons, Employment Judge Horne wrote:

> "Mr McWilliams confirmed that, of the comparator roles identified in the Schedule of Comparators, Mrs McWilliams only compares her role to the role of driver. She is not actively pursuing any other allegation as set out in the originally pleaded claim. Indeed it is Mr McWilliams's position that the claim form, as drafted on his wife's behalf, "went off in a different direction" from the true nature of her claim"

35. It is clear from Employment Judge Horne's reasons in general, and this part in particular, that he had a detailed discussion with Mr McWilliams about the basis of the claimant's claim. I find that, if Mr McWilliams had said that his wife was a cook and not a driver/vending supervisor, this would have been recorded. If it had been mentioned, this would have given rise to a potential application to amend which would then have been addressed by the judge, in the way that Employment Judge Horne identified and dealt with the need to amend the claim if the claimant was to compare herself with anyone other than male employees whose role appeared under the heading of "Manual Grade 5". This would have been an even more fundamental change to the basis of the claimant's claim than the amendment which Employment Judge Horne refused.

36. It appears that Mr McWilliams was explaining the basis of the claimant's case to be that she was employed in the role of Driver/Vending Supervisor. Employment Judge Horne recorded at paragraph 18.1 of his reasons that another basis of Mr McWilliams's application to adjourn the preliminary hearing was to trace a witness who had initially interviewed the claimant for the role of Driver/Vending supervisor. Employment Judge Horne recorded that it was Mr McWilliams's belief that this witness would confirm that that role had initially been advertised as a manual grade 5 role and that the respondent only decided to pay a manual grade 3 wage for it because the person appointed to the role was a woman.

37. Employment Judge Horne's reasons for refusing the adjournment included the following, at paragraph 36.2, in relation to the purpose for which it appeared Mrs McWilliams wanted the JESs:

> "Rather, she wants to look through all the "supervisor" roles to see if Driver/Vending Supervisor is there and whether it was rated at manual grade 5. If it was, she wants to compare herself to men doing any "supervisor" roles that were also rated at manual grade 5. To put it another way, she wants the JESs in order to change her case, rather than to support her existing case. For the reasons given in relation to the amendment dispute, it would not be fair to allow the claimant to reformulate her claim."

38. Employment Judge Horne decided that the claimant would be required to amend her claim in order to compare herself to any male employee whose role did not appear under the heading "manual grade 5" in the Schedule of Comparators. He refused permission to amend in that respect. He wrote, giving reasons for this, at paragraphs 39 and 40:

> "39. In my view the overriding objective points strongly towards refusing the amendment. This is a case where the statutory time limits and the manner and timing of the amendment application take on particular prominence. Mrs McWilliams's solicitors have known about the JESs since January 2008 at the latest, yet Mrs McWilliams has only just asked to see them. Mrs McWilliams has not identified the roles which she says were rated as equivalent to Driver/Vending Supervisor. It is as yet unclear precisely what new areas of factual enquiry would be raised by allowing the claimant to introduce new comparators. Potentially there could be a great many, as the JESs are likely to include many roles that have some element of supervision.
>
> "40. Each time a new comparator is alleged, or the basis of comparison changes (for example, "rated as equivalent" instead of "like work"), new avenues of factual enquiry are opened up. New factual issues are likely to be difficult for the respondent to deal with effectively because of the extreme delay. The respondent would be put at a real disadvantage in marshalling the evidence. It would have to explain differences in pay going back 6 years from 2008, possibly by reference to the events in 1991 when the grade 3 role was first offered to Mrs McWilliams. Any factual issue relating to the 1987 JES will involve looking back over 30 years."

39. I find that Mr McWilliams did not, at the hearing on 8 January 2018, say that the claimant had been employed as a cook. Rather, he explained the claim that his wife now wished to pursue as being on the basis that she was employed as a Driver/Vending Supervisor.

40. By notice dated 26 April 2018, Employment Judge Horne directed that there would be a preliminary hearing to determine whether the claimant should be struck out or alternatively whether the claimant should be ordered to pay a deposit as a condition of proceeding with her claim. This preliminary hearing was originally listed for 18 May 2018. It was postponed because Mr McWilliams said he was too unwell to attend the hearing. The hearing was relisted for 3 August 2018.

41. The preliminary hearing on 3 August 2018 was conducted by Employment Judge Feeney. For the first time in the proceedings, at this hearing, Mr McWilliams stated that the claimant's claim was not that she was a driver but that, from 2001 to 2008

when she retired, she was a cook and that this had not been recorded by the HR department and, therefore, the claim had proceeded as a driver. Mr McWilliams agreed that he had not made any application for amendment, although he said he recalled raising the issue with Thompsons when they were representing the claimant and Thompsons had advised that it was now too late to amend. He said he would seek a copy of that correspondence.

42. Employment Judge Feeney advised Mr Williams that he would have to seek an amendment to change his wife's case from being (1) that she was a driver rated as equivalent to other drivers under a JES but not receiving equal pay; (2) that she was a cook and then she would have to name her comparators and specify what type of equal pay claim was pursued. Employment Judge Feeney recorded at paragraph 12 of her notes:

> "Mr McWilliams stated that he had not amended before because he did not know he could, and that also he had not paid much attention to what his wife told him about her job as he was annoyed she had obtained the job in the first place, albeit it was initially a different job. He had no explanation for why he had advanced the case positively on the grounds she was a driver when he has known for some time that she was not a driver, on his case. Further, that in the last hearing he also advanced a case that she had been a vending supervisor and that was treated as an amendment, which was refused, and therefore he had knowledge of the process when seeking to change a position at tribunal."

43. Employment Judge Feeney advised the parties that the tribunal would have to consider an application to amend from the claimant to describe her role as a cook. She made orders that the claimant provide particulars to the respondent and the tribunal relating to her claim and to set out full grounds of the amendment to be considered at the next preliminary hearing. This preliminary hearing was listed to take place on 9 November 2018.

44. On 6 August 2018, the claimant signed a letter addressed to the respondent, stating "I work as a Driver at the Central Production Unit in Willow Street" and asking them to send her a copy of her Job Description and Contract of Employment. The claimant, when asked about this in cross examination, said she thought it had been typed by her husband but agreed that she had read it and agreed with it and signed it.

45. In a letter dated 15 August 2018 to the Tribunal, Mr McWilliams wrote:

> "Margaret requested an amendment to cook but was told by Thompson that it was too late."

46. At this hearing, Mr McWilliams was asked when this was. Mr McWilliams was unable to say when the claimant had been told this but thought it was a long time ago.

47. In the letter of 15 August 2018, Mr McWilliams wrote that they were looking for this document, amongst other things, but if they could not find them they would apply

to Thompsons solicitors for urgent copies. I have not been shown a copy of any letter from Thompsons about this matter.

48. At the hearing on 9 November 2018, Employment Judge Feeney discovered that the claimant had not provided the details she had been ordered to provide to the respondent. The judge decided to postpone the hearing and made orders, including the unless orders which are relied on as one of the bases for the respondent's application at this preliminary hearing for the claim to be struck out. The orders to provide further particulars were to be complied with by 30 November 2018, failing which the claim was to be struck out without further order.

49. In a letter dated 24 November 2018, received by the tribunal on 26 November 2018, the claimant set out details of the application she was making to amend her claim by changing her job title from driver/vending supervisor to cook grade 3. The respondent says this does not provide all the information required by the unless order.

50. By a letter dated 16 February 2019, the respondent requested that the claim be struck out for failure to comply with the orders made on 9 November 2018. The parties were notified that the question of whether the claimant was in breach of the unless order would be considered at the hearing which was postponed from 15 March 2019, on the application of the claimant, and re-listed for hearing on 22 November 2019.

My decisions

51. I will set out, under the heading of each of the issues, the law relevant to that issue, the principal arguments made by the parties and the conclusions I reach in relation to that issue. I deal first with the matter of whether the unless order has been complied with since, if it has not, and if I do not set it aside, the whole claim has already been struck out in accordance with the unless order.

Whether the claim is struck out for non-compliance with the unless order

<u>The orders</u>

52. The unless orders made on 9 November 2018 and confirmed in writing and sent to the parties on 27 November 2018 were as follows:

> "1. The claimant within 21 days, is to provide the respondents and the tribunal with full details of the claim she wishes to make by way of amendment setting out the post it is contended for she had, the comparator she relies on and the type of equal pay claim or claims she is asserting.
>
> "2. The difference in pay she contends for between herself and her comparators. Identifying whether this is bonus or some other type of payment and if so, the amount of difference at the time that the claimant contends for."

53. A further order stated that these orders must be complied with by 30 November, failing which the claim would be struck out without further order or correspondence in

accordance with rule 38 (1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

The Law

54. Rule 38 of the Employment Tribunals Rules of Procedure 2013 provide:

> "An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If the claim or response, or part of it, is dismissed on this basis the tribunal shall give written notice to the parties confirming what has occurred.
>
> "A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the tribunal in writing, within 14 days the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the tribunal may determine it on the basis of written representations."

55. I was referred to the cases of **Marcan Shipping (London) Ltd v Kefalas [2007] EWCA Civ 463** and **Johnson v Oldham Metropolitan Borough Council UKEAT/0095/13** in relation to compliance with unless orders. In **Marcan**, Moore-Brick LJ wrote, at paragraph 34:

> "In my view it should now be clearly recognised that the sanction embodied in an "unless" order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect."

56. In **Johnson**, Langstaff P held that:

> "The phrase used by Pill LJ in **Marcan** was "… any material respect": I would emphasise the word "material". It follows that compliance with an order need not be precise and exact."

57. He also wrote, in relation to a case in which what is in issue is better particularisation of a claim or response, that:

> "What is relevant, i.e. material, in such a case is whether the particulars given, if any are, enable the other party to know the case it has to meet or, it may be, enable the employment tribunal to understand what is being asserted."

Submissions

58. The respondent submitted that the claimant had failed to comply with orders 1 and 2, namely the requirement to fully particularise the "rated as equivalent claim" or to provide full grounds of the proposed amendment in respect of being "cook". In particular, the respondent argued that the claimant had not identified:

58.1. Whether the claimant is relying on rated as equivalent or equal value;

58.2. The identity of the comparator relied upon;

58.3. The difference in pay.

59. The respondent argued that the claimant has failed to provide vital details as to the claim she wishes to advance and there has not been material compliance with the orders.

60. Miss Quigley submitted that Mr McWilliams' health concerns are a recent factor which does not explain non-compliance. The GP evidence is post compliance.

61. Mr McWilliams gave evidence that his wife had given him the "bare bones" and he had then typed out the letter of 24 November 2018 and given it to his wife to read before sending it off. He said he was trying to comply with the orders by that letter and that he believed he had done everything he was required to do by the orders. He said he did not give the names of the comparators because he did not know them. The claimant was relying on the original class action and the article he had read about it did not identify the comparators. Mr McWilliams then referred to being a disabled person, referring to various conditions.

62. In his submissions, Mr McWilliams referred to his ill health and that he was trying to be a "white knight" for his wife. He said that, if legal mistakes were made, it was his fault and related to his ill health.

63. Mr McWilliams referred to a Supreme Court decision which he said related to the bedroom tax, without giving me a copy of the case or the name of the case or quoting any parts of the judgment. The relevance of this was not clear to me from Mr McWilliams' explanation, but he appeared to be arguing that it had some implications for what could be expected of him as a disabled person. He told me that the Supreme Court had said that no one was allowed to punish or discriminate against a disabled person where the root is disability.

64. Mr McWilliams said he tried his best to conform and did not purposely disobey any order of the tribunal. He said he was ill, on two courses of antibiotics, although the GP letter he gave me referred to being prescribed these courses of antibiotics in March and April 2019 i.e. some months after compliance with the unless order was required, and after his letter of 24 November 2018 had been sent in purported compliance with the order.

Conclusions

65. I have considered what was required by the orders and the contents of the letter dated 24 November 2018.

66. The letter was received within the required time frame, by 30 November 2018.

67. Order one required full details of the claim the claimant wished to make by way of amendment setting out the post it is contended for she had, the comparators she relied on and the type of equal pay claim she was asserting.

68. The letter identifies the claimant's post as that of cook so it complies with the requirement to set out the post it is contended that she had.

69. The letter identifies the claim as being one of "work rated as being of equal value". This does not, in isolation, identify whether the claim is one of "work rated as equivalent" or "work of equal value", conflating the two. However, read in context, with the references to the claims brought by other cooks, and the Employment Tribunal and Employment Appeal Tribunal cases, I consider it is clear that the claimant wishes to pursue her claim on the basis that the cook claimants in those cases were bringing their claims. It appears to me from the EAT judgment that this was on the basis that jobs had been rated as equivalent. Even if I am not correct in this, the basis of the claims brought by other cooks would be well known to the respondent. Although it does not identify the type of equal pay claim as clearly as would be desirable, I note from the case law that compliance does not have to be precise and exact. I conclude that this information does not fail to comply with what was required to identify the type of equal pay claim asserted in any material respect. The purpose is achieved of enabling the other party to know the case it has to meet and enabling the employment tribunal, albeit by reference back to previous claims by other cooks, if necessary, to understand what is being asserted.

70. The claimant does not identify by name any comparators. However, I consider that it is clear from the letter that the claimant is seeking to compare herself with the comparators relied on by cooks in the cases heard by the Employment Tribunal and EAT, by the reference to those cases and the reference to "gardeners etc". I conclude that this does not fail to comply with what was required in any material respect and it served the purpose of enabling the respondent and the tribunal to understand what was being asserted.

71. I conclude, therefore, that the unless order was complied with in relation to order one.

72. The second order required the claimant to provide the following:

> "The difference in pay she contends for between herself and her comparators. Identifying whether this is bonus or some other type of payment and if so, the amount of difference at the time that the claimant contends for."

73. The claimant appears to have understood this to relate to the amended claim which she seeks to bring. If this was not the intention of the order (i.e. if it was intended to apply also to the claim brought on the basis of being a driver), I conclude that the claimant placed a reasonable interpretation on the order, resolving any ambiguity in the claimant's favour. The claimant gave the information that the comparators had a bonus scheme which was 33% to 50% of their wage. I conclude that this does not fail to comply with the order in any material respect.

74. I conclude that the claimant complied with the unless orders so the claim was not struck out for failure to comply with those orders.

The application to amend the claim

The law

75. The test established in the case of ***Cocking v Sandhurst (Stationers) Limited*** [1974] ICR 650 and revisited in ***Selkent Bus Company Limited v Moore*** [1996] ICR 836 is that the Employment Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The relevant circumstances were said to include: the nature of the amendment, for example, whether it is a relabelling of facts already pleaded or the making of new factual allegations changing the basis of the existing claim; whether it is a minor matter or a substantial alteration pleading a new course of action. Another relevant factor is the applicability of time limits. If it is a new complaint, is that complaint out of time and, if so, should the time limit be extended under the applicable statutory provisions? A further relevant factor is the timing and manner of the application.

76. Miss Quigley referred me to the EAT decision of **Sisters Food Group Ltd v Abraityte UKEAT/0295/15.** In this case, the claimants sought to amend their equal value claims by changing and/or adding to the roles they carried out themselves. The EAT held that, where a claimant in an existing equal value claim sought to rely on different work she had undertaken during her employment, that gave rise to a different claim from that originally pursued.

Submissions

77. Miss Quigley submitted that the proposed amendment to alter the basis of claim from a driver to a cook is an entirely new claim. The basic and fundamental fact of the role undertaken by the claimant was clearly known to the claimant from the outset. She knowingly advanced a positive case based on the fact she was a driver. Miss Quigley referred to the chronology of these proceedings, commenting that history smacks of Mr McWilliams not being an innocent lay litigant. She commented that, when the claim was about to be struck out, he shifted the goalposts. When it was about to be struck out again, he sought to amend the claim.

78. Miss Quigley submitted that the claim would be 9.5 years out of time. There is no jurisdiction to extend time for an equal pay claim. There was inordinate delay.

79. Miss Quigley submitted that the respondent has litigated in good faith. If the amendment is allowed, they will be extremely prejudiced in dealing with the case. There is a triable issue as to whether the claimant was a cook or not. The material period for the claim is 2002-2008 but witnesses would need to deal with the transition the claimant says took place to becoming a cook. Witnesses have left the respondent and access to records is limited, post GDPR. The claimant is unable to recall key details. The prejudice is caused directly by the claimant's actions. The claimant has allowed the respondent to continue and spend money on defending an action which has, on the claimant's account, been knowingly pursued on a false basis. Miss Quigley submitted that there was a lack of good faith in the way the claimant's claim has been pursued; the case has been dishonest and vexatious. Mr McWilliams alluded to confusion but this was not a valid explanation for 11 years

litigation. The claimant must have known from the beginning that her solicitors had got it wrong. There is no explanation for her lack of action.

80. Miss Quigley submitted that it would be contrary to the overriding objective to allow the application to amend.

81. Mr McWilliams objected to the suggestion, put to him in cross examination, that they had switched track when they realised the claimant had no claim based on being a driver/vendor supervisor. He described this as a "cynical remark".

82. In his submissions on this point, Mr McWilliams said that the claimant was a cook and it was only justice for the legal system to reflect reality. He said that, if there was any mistake in the paperwork, it was not his wife's fault but his fault. He submitted that it was illegal, after what the Supreme Court had said, to punish him for being disabled.

83. In his reply to Miss Quigley's submissions, Mr McWilliams said he was confused, not making a false claim. He said HR's mistake was a "poisoned well"; if the claimant had had a contract of employment, they would not have had all this and would not have needed to put in Freedom of Information requests.

Conclusions

84. The claimant gave evidence that she became a driver/vending supervisor in 1991 but became a cook in 1995.

85. Mr McWilliams gave evidence that his wife was a cook 99% of the time, and helped out with driving 1% of the time. He agreed that his wife knew, from 1995, that at least 99% of the time she was a cook.

86. The claimant's correspondence with the respondent has been inconsistent as to whether she says she was a cook or a driver. On 11 December 2012, the claimant wrote to the respondent, stating that she was a cook at the time she retired. In a letter dated 6 August 2018 to the respondent, she wrote that she was a driver.

87. Whether she was a cook from 1995 will be a live issue if the amendment is allowed and, as I indicated at the start of the hearing would be the case, I make no finding as to whether or not she was a cook. The respondent accepts there is a triable issue as to whether the claimant was a cook. If she was a cook, her job role was incorrectly recorded by the respondent as still being that of a driver.

88. Whatever the factual reality of her position, the claimant allowed a claim to be put in on her behalf describing her as a cook in January 2008. She did not herself, or through her husband, inform the tribunal before August 2018 that she had not been a driver, but was a cook. Indeed, Mr McWilliams discussed the basis of the claimant's case with Employment Judge Horne in November 2017 and January 2018, putting her case on the basis that she was a driver (November 2018) then driver/vending supervisor (January 2018) and making no suggestion that this was an incorrect description of the claimant's role. The first mention in the tribunal proceedings that the claimant had been a cook and now wanted to pursue her claim on that basis came in a preliminary hearing before Employment Judge Feeney in August 2018.

89. If the claimant was a cook from 1995, she has knowingly pursued, or allowed her case to be pursued, on an incorrect basis from 2008 until 2018. Mr McWilliams, when it was put to him in cross examination that they had pursued the claim on a false premise, replied that this was a false premise created by HR. This does not provide an explanation as to why the claimant and he, on behalf of the claimant, pursued a claim for so long on a basis which they now say they knew to be incorrect from the start of proceedings. i.e. that she was a driver or driver/vendor supervisor.

90. There has been no satisfactory explanation from the claimant or Mr McWilliams as to why the claimant's claim has been pursued on the basis that she was a driver or driver/vending supervisor, for such a long time without being corrected, if the claimant was, in fact, a cook.

91. If the claimant was not a cook, then the basis of this application to amend is incorrect.

92. In the period that Mr McWilliams has been acting as her representative, he has been acting with the consent of the claimant. His actions must be attributed to the claimant.

93. I conclude that either the claimant knowingly pursued the case on a false basis from 2008 until 2018 or she is now making an application to amend the claim on a false basis. Whichever is the case, I conclude that the claimant has not been, or is not now, acting in good faith in pursuing her claim. This is a strong factor towards concluding that it would not be in accordance with the overriding objective to deal with cases fairly and justly to allow the amendment application and a strong factor against the claimant in the balancing exercise I have to carry out of balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. There can be little, if any, injustice and hardship to the claimant in allowing her either to amend her claim to pursue a claim on a false basis or to allow her to correct a claim which she has knowingly been pursuing on a false basis for more than 11 years.

94. I now consider the particular factors identified in **Selkent.**

95. I consider first the nature of the amendment. This is a very substantial change which is being sought. It changes the whole basis of the equal pay claim. Rather than identifying herself as a driver or driver/vending supervisor and comparing herself with a driver employed on work rated as equivalent, the claimant now wishes to identify herself as a cook and compare herself with men working in other roles, such as gardeners. This is a completely new claim.

96. I consider now the applicability of time limits. As noted above, this is a completely new claim. If it had been presented at a claim when the application was made (by the letter received by the tribunal on 26 November 2018 or, at the earliest, an oral application made at the preliminary hearing on 3 August 2018), it would have been more than 9 years out of time. The claimant retired in September 2008 and a claim would have had to be presented within 6 months of the end of her employment. There are no "just and equitable" or "not reasonably practicable" extensions available to time limits in equal pay cases.

97. I have referred already to matters which would come under the heading of the timing and manner of the application.

98. In terms of injustice and hardship to the respondent, I accept the submissions made by Miss Quigley about the likely prejudice to the respondent of having to deal with a completely new claim so long after the relevant events. In addition to the particular matters mentioned by Miss Quigley, I take into account that the respondent would not have had any reason to expect to deal with another equal value case brought by a cook, so long after the claims brought by those identified as cooks in the proceedings begun in 2008 had been concluded. After the Tribunal and EAT decisions in 2009 and 2011, these claims settled.

99. I conclude that the injustice and hardship to the respondent of allowing the amendment would be very serious. I conclude that there would be little, if any, injustice and hardship to the claimant in not allowing the amendment for the reasons given above.

100. I have, since the hearing, researched the case to which I believe Mr McWilliams was referring, which is **RR v Secretary of State for Work and Pensions [2019] UKSC 52.** I do not consider that the case is authority for the proposition he puts forward. However, regardless of that, in making this decision, I am not "punishing" Mr McWilliams for being disabled. I do not consider his disability has any relevance to the matters which have led me to refuse the application to amend the claim.

The application to strike out the existing claim on the basis it has no reasonable prospect of success

The Law

101. Rule 37 of the Employment Tribunals Rules of Procedure 2013 set out grounds on which a Tribunal may strike out a claim. These include that the claim has no reasonable prospect of success.

102. For an equal pay claim, a comparator of the opposite sex must be identified. For a claim pursued on the basis of work rated as equivalent, this must be someone employed on work rated as equivalent who was paid a higher rate of pay.

Submissions

103. Miss Quigley noted that the claimant had accepted that there was no valid claim based on a claim as a driver. She submitted that there was no comparator and no **Enderby** type discrimination.

104. In his submissions, Mr McWilliams, repeated what he had said in evidence, that the driver claim was "dead in the water" and confirmed that, whether or not the amendment was allowed, the claim based on being a driver had no prospect of success.

Conclusions

105. Mr McWilliams accepted in evidence that there was no arguable claim based on being a driver/vending supervisor. He said that, as soon as they realised other drivers were not successful in their claims, this claim was "dead in the water".

106. Mr McWilliams, on behalf of the claimant, has confirmed in his submissions that the claim based on being a driver had no prospect of success.

107. On the basis of the evidence and submissions, it is common ground that the existing claim has no reasonable prospect of success and I conclude that I can strike it out on these grounds on this basis alone.

108. Had I had to consider the merits of the existing complaint further, I would have struck it out as having no reasonable prospect of success. The claimant has not identified a male comparator employed on work rated as equivalent to that of driver/vending supervisor and paid at a higher rate despite a lengthy period to try to find such a comparator. I agree with Miss Quigley's submission that there is no reason to speculate that a comparator would be identified. Without such a comparator, the claim could not succeed.

109. I strike out the claim as having no reasonable prospect of success.

Employment Judge Slater

Date: 13 December 2019

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

16 December 2019
FOR THE TRIBUNAL OFFICE