Appeal No. UKEAT/0253/19/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 November 2020

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

IRINA BIKTASHEVA APPELLANT

UNIVERSITY OF LIVERPOOL RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING – APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellant	IRINA BIKTASHEVA (The Appellant in Person) With assistance from MR VADIM BIKTASHEV (The Appellant's husband)
For the Respondent	MR TIM KENWARD (of Counsel) Instructed by: University of Liverpool Legal Department Foundation Building 765 Brownlow Hill Liverpool L69 7ZX

SUMMARY

EQUAL PAY AND PRACTICE AND PROCEDURE

The Claimant brought a "like work" claim in 2015. The 2015 claim was withdrawn without the Claimant, who was legally advised at the time, stating that she wished to reserve the right to bring a further claim that was the same, or substantially the same, in the future. In 2018 the Claimant brought a further like work claim in relation to the same work, naming different comparators, but not contending there was any change in the work being done by her, or her comparators, compared to the 2015 claim. The only proper conclusion was that the 2018 claim, as pleaded by the Claimant, should be struck out because it was precluded by cause of action estoppel and/or operation of Rule 52 of the ET Rules.

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HIS HONOUR JUDGE JAMES TAYLER

1. I shall refer to the parties as the Claimant and the Respondent as they were before the Employment Tribunal.

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2. The Claimant represented herself with some assistance from her husband, when needed. The Respondent did not object to him providing such assistance. The Respondent was represented by Mr Kenward, of Counsel.

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3. This is an appeal and cross-appeal in relation to an Equal Pay claim brought in 2018 in which the Claimant contended that she was undertaking "like work" to four named comparators but receiving less pay ("the 2018 claim"). After a Preliminary Hearing held on 11 December 2018 in Manchester before Employment Judge Shotter, with a day in chambers on 13 December 2018, a judgment was sent to the parties on 3 January 2019 holding that there was no jurisdiction to hear the Equal Pay claim based on three of the comparators relied on by the Claimant; Prof. Savani, Prof. Krysta and Dr.Vasiev. The allegations based on these comparators were struck on the basis that the complaints could have been brought relying on them as comparators in earlier proceedings brought by the Claimant in 2015 ("the 2015 claim"), which had also included a complaint of Equal Pay by way of "like work"; and so the complaints were precluded by the principle in **Henderson v Henderson** (1843) 3 Hare 100. The Respondent's contention that the entirety of the claim should be struck out by reason of cause of action estoppel was rejected. In respect of the fourth comparator, Dr Kurlin, a Deposit Order was ordered, on the basis that the claim had little reasonable prospect of success.

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4. The Appeal is limited in scope as a result of an Order made by His Honour Judge Auerbach, with seal date 17 October 2019, as a result of which only part of the fourth ground of appeal was permitted to proceed. That ground of appeal allowed the Claimant to challenge the dismissal of the claim relying on Dr Vasiev as a comparator by the application of the principle in **Henderson v Henderson**, having regard to: "(a) the date when Dr Vasiev was promoted to Senior Lecturer, (b) the fact that he worked in a different department from the Appellant and the other comparators; and (c) such information as the Tribunal had before it as to whether the Appellant knew of his promotion at the time she withdrew the 2015 claim".

5. The Cross-Appeal was permitted to proceed in full. The Respondent contended that the claims relying on all of the comparators should have been struck out on the basis that they were precluded by cause of action estoppel. Alternatively, the Respondent argued that the claim reliant on Dr Kurlin as a comparator should have been struck out because of the principle in **Henderson v Henderson**. Finally, the Respondent contends that the claim naming Dr Kurlin as a comparator should have been struck out because it had no reasonable prospect of success.

The outline facts

6. The Claimant commenced employment with the Respondent on 1 December 2002. From 2007 she was a grade 8 lecturer. On 20 June 2015, the Claimant brought a claim in the Employment Tribunal alleging a number of forms of discrimination, including an Equal Pay claim, contending that she had been engaged in "like work" with Dr Potapov from 2009 and Dr Gairing from 2013, both of whom were paid as grade 9 lecturers.

7. The Claimant stated in the grounds attached to her claim form:

> **"Since 2007 I have been doing work equal with that of my male comparators, who were timely promoted and therefore had both better career opportunities and paid more."**

8. It is worth noting that the Claimant contended that she had been underpaid from 2007. A central feature of the Claimant's contention was that she should have been promoted to be a grade 9 lecturer no later than 2007. From then onwards she contended that she has been doing "like work" to that done by all of her comparators in both the 2015 and 2018 claims.

9. The Claimant acted in person for part of the time the 2015 claim was being litigated. A Preliminary Hearing for Case Management was held by Employment Judge Robinson on 4 September 2015. He raised the question of whether the Claimant would be able to establish "like work" between herself, as a grade 8 lecturer, and her comparators, at grade 9.

10. After the Case Management Hearing the Claimant instructed solicitors. They advised on a number of matters in respect of which the Claimant waived privilege, with the consequence that some of the documentation setting out the advice the Claimant received was before the Employment Tribunal. The solicitors acting for the Claimant went on record on 29 January 2016. On 5 February 2016 they sent an email withdrawing "the entire claim in this matter". A judgment was promulgated on 22nd February 2016 dismissing the proceedings following the withdrawal of the claim by the Claimant. The Claimant's solicitors wrote to her on 23 February 2016, enclosing the Judgment, stating:

> **"This now brings a conclusion to your claims against the University of Liverpool. As previously explained, you will not be able to reopen the claim again based on the same set of facts."**

Withdrawal

11. Rule 52 of the **The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides that:

> **"Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—**
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> **(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or**
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> **(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice."**

12. Rule 52 was introduced to deal with a problem that had been raised by Lord Justice Mummery in **Ako v Rothschild Asset Management Limited and Another** 2002 [ICR 899]. Lord Justice Mummery noted the distinction between the tribunal rules, then in force, and the approach in the civil courts. Withdrawal of a claim in the Employment Tribunal could result in an order dismissing the proceedings which would give rise to a cause of action estoppel, whereas a party is entitled under CPR to discontinue proceedings, which would not give rise to cause of action estoppel because no final order is made determining the complaint.

13. One of the effects of the new rule, Rule 52, is that where a claimant withdraws a claim, and does not reserve the right to bring a new claim raising the same, or substantially the same, complaint, and the judge does not decide that a judgement dismissing the claim is not in the interests of justice, the judgment on withdrawal under Rule 52 has effect as a judgment determining the claim, with the consequence that cause of action estoppel can apply.

14. I raised with the Respondent's Counsel whether it is the application of Rule 52 that would preclude a further complaint being brought or the common law rules of cause of action estoppel. The distinction is possibly of some significance because the wording of Rule 52 is

arguably rather wider than the concept of cause of action estoppel that requires that the cause of action be identical to that previously raised. He relied, principally, upon cause of action estoppel, without explicitly rejecting the possibility that it is rule 52 that prevents the bringing of a new claim that is the same, or substantially the same, as the claim that has been dismissed.

15. I consider, upon a proper reading of Rule 52, that the words in parenthesis are designed to be explanatory, explaining to parties the gist of the common law, that where a judgment on withdrawal has been issued they will be prevented from raising a further similar claim. The law that underlines the determination of whether further proceedings can be brought is that of *res judicata*, including cause of action estoppel. However, I have also considered the other possibility that it is Rule 52 itself that may prevent further claims being brought after a claim has been dismissed in withdrawal.

16. *Res judicata* and the related principles was considered by Lord Sumption in **Virgin Atlantic Airways Ltd v Zodiac Seats Limited** [2014] AC 160, in which he concluded that the more liberal regime that applies in considering whether the principle in **Henderson v Henderson** prevents new proceedings does not apply to cause of action estoppel. Lord Sumption held at para. 26:

> **"Where the existence or nonexistence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."**

17. The Claimant argued that the Judgment on withdrawal was not one to which Rule 52 applied with the effect that cause of action estoppel could not apply. The Claimant has also sought to rely on what she contends are new facts; the actual knowledge, rather than assumption, that her contract was the same as that of her comparators, and her discovery that the Respondent did not use the Higher Education Role Analysis ("HERA") to grade roles.

A Notwithstanding the suggestion that there has been a relevant change of circumstances, the Claimant contended that she withdrew the 2015 claim with the specific intention of bringing a new claim. Under Rule 52 the Claimant had the opportunity to reserve her position and could have done so. If she failed to do so because of poor advice that, unfortunately, is a matter between her and her advisors.

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18. The Claimant's argument that Rule 52 did not apply was rejected by Employment Judge Shotter who held, at para. 51:

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> **"The Tribunal took the view Irina Biktasheve was unwilling to put her 2015 Claim to the test; she did not want to take the risk of losing a case which prima facie appeared weak, and was concerned that she could be facing the possibility of a cost order. Her subsequent withdrawal of the 2015 Claim was taken following legal advice, and it amounted to the Claimant, either expressly or by implication, conced[ing] the issue by choosing not to have the matter formally determined. This analysis is also relevant to the Henderson v Henderson principle explored below. In conclusion, taking into account case law the Tribunal found the Judgment of Employment Judge Feeney which dismissed the 2015 Claim following its withdrawal by the Claimant constitutes a "decision" for the purposes of the *res judicata* doctrine."**

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19. The Claimant sought to challenge that decision, but her Ground of Appeal in that respect was rejected at the Rule 3 (10) Hearing by HHJ Auerbach, who held at paras. 24 and 25:

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> **"24. Ground three is that the Tribunal misapplied the guidance in Rothschild v Ako, in particular in distinguishing the facts of her case from the facts of that case. However, I do not agree that that is arguable. In particular, the Tribunal was entitled to have regard to the fact that the Claimant had the benefit of access to legal advice when she withdrew her claim, that it was actually withdrawn by lawyers on her behalf, and the relevant regime applying at the time when she withdrew her claim was the regime of Rule 52 of the 2013 Rules.**
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> **25. The Claimant says, in so many words, that she was not properly or sufficiently advised by her then lawyers, as to the full implications of withdrawing her claim, and the Rule 52 dismissal that would follow, if she did not seek to reserve her position when doing so. However, what the EAT has to consider is whether there are arguable grounds for appealing the Decision of the Judge, based on the evidence presented to the Judge, including, following the waiver of privilege, the evidence of the letter the lawyers wrote to the Claimant referring to confirmation of advice given prior to the withdrawal. Any issues the Claimant may have with her former lawyers are a different matter and do not provide a basis for arguing that the Employment Judge erred in law."**

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20. A large part of the Claimant's submissions were to the effect that the Judgment of HHJ Auerbach was based on "misconceptions" about the case. It is not open to me to rehear matters

that have already been determined in the Rule 3(10) Judgment. The Claimant has sought to appeal the judgment of HHJ Auerbach to the Court of Appeal. It was not clear whether that appeal is extant.

21. Accordingly, the current position is that the judgement on withdrawal of the 2015 claim had the consequences provided for by Rule 52. The Claimant had not reserved the right to bring a new claim raising the same, or substantially the same, complaint; and the Employment Judge did not consider that issuing a judgement dismissing the 2015 claim was against the interests of justice.

22. On 6 June 2018, the Claimant submitted a new claim form to the Employment Tribunal. She contended that she had been engaged in "like work" to Prof. Savani from 2013 to 2015, Prof. Krysta from 2009 to 2012, Dr Vasiev since 2014 and Dr Kurlin since 2016. I consider it is important to focus on the Claim as pleaded by the Claimant. She stated in the Grounds attached to her Claim Form:

> **"It is with the greatest regret that I write this statement and that I find myself making an Equal Pay claim against my employer, University of Liverpool.**
>
> **Since 2007, I have been doing a work equal with that of my male comparators, who were timely promoted and therefore had both better career opportunities and paid more."**

She went on to state:

> **"I am doing same or broadly similar with my male comparators' work, namely Dr Vasiev, appointed Senior Lecturer since 2014, Dr Kurlin, appointed Senior Lecturer since 2016, Prof. Savani, who was appointed Senior Lecturer 2013-15, and Prof. Krysta who was appointed Senior Lecturer in 2009-12, and such differences as there are between their work and my work are not of practical importance in relation to the terms of the work, by way of example."**

23. The Claimant then set out a number of schedules comparing her work to that of her comparators: Schedule 1 set out publications including peer-reviewed journals; Schedule 2 gave examples of acting as principal investigator and project leader; Schedule 3 gave details of

PhD student supervision; there was no Schedule 4 in my bundle; Schedule 5 gave examples of contribution to the management of quality audit and further external assessment; Schedule 6 dealt with committee membership.

24. After the schedules, which set out the duties and achievements of the Claimant and her comparators, the Claimant pleaded:

> **"there are differences, but such differences as there are between my and the comparators' work are not of practical importance in relation to the terms of the work, with regard to the nature and extent of the differences and the frequency with which these differences occur in practice."**

25. It is to be noted that there was a significant overlap for the periods of comparison for some of the comparators relied on in the 2015 and 2018 claims. The Claimant contended that she and her relevant comparators in grade 9 lecturer roles from time-to-time were doing "like work" throughout the period of comparison in both claims, being the type of work that she had been doing since 2007.

26. The Respondent submitted its response to the Claim on 17 July 2018. The Hearing to consider applications to strike out or for deposit orders took place on 11 December 2018. The Judgment and Reasons were sent to the parties on 3 January 2019. The Notice of Appeal submitted on 12 February 2019.

27. On 24 June 2019 Her Honour Judge Eady QC (as she then was) concluded that there were no reasonable grounds for bringing the Appeal and directed that no further action be taken upon it.

28. The Claimant challenged that determination, resulting in the Hearing on 17 October 2019 before HHJ Auerbach, at which the Appeal was permitted to proceed on limited grounds, set out above.

29. On 14 November 2019 the Respondent submitted their Answer and Cross-Appeal. The Cross-Appeal was permitted to proceed in full. On 8 January 2020 the Claimant submitted a reply to the Respondent's Cross-Appeal.

30. In the lead-up to this Hearing the Claimant, on a number of occasions, sought permission to rely on new evidence, seeking an order that an affidavit be produced to establish that HERA grading was not applied to her and her comparators. The applications were refused. A great deal of the Claimant's written submissions were focussed on her contention that HERA grading was not applied to her and her comparators, and her contention that this was something that she had only recently discovered.

31. At the outset of the Hearing the Claimant produced a lengthy "brief" for the Appeal and Cross-Appeal. She stated that it differed, to an extent, from what she had set out in her Skeleton Argument. The lengthy and detailed documents focussed very much on her contention that she had recently discovered that she and her comparators had identical contracts of employment and that HERA job grading had not been applied by the Respondent. There was also a detailed critique of the reasoning of HHJ Auerbach in respect of the Grounds of Appeal that he had dismissed which, as explained above, is not a matter that can be reopened in the Employment Appeal Tribunal.

32. At the outset of the Hearing, I explained that it seemed to me to be logical to deal with the matters in the following order: first, to consider the Cross-Appeal in respect of cause of action estoppel because, if the Respondent's contention that cause of action estoppel applied to

all comparators was correct, that would provide an answer to all of the claims. Furthermore, before considering whether the principal in **Henderson v Henderson** applied, it was rational to consider whether cause of action estoppel applied, as the rule in **Henderson v Henderson** deals with situation where there is a new cause of action that could and should have been brought in previous proceedings, rather than one that already has been brought in the previous proceedings. Thereafter, I would, if appropriate, go on to consider whether the Employment Tribunal had been wrong to find that Dr Vasiev was covered by the **Henderson v Henderson** principle and/or whether the Tribunal was wrong to find that the **Henderson v Henderson** principle did not apply to Dr Kurlin; and, finally, if necessary, whether the claim based on Dr Kurlin as a comparator should have been struck out on the basis that it had no reasonable prospect of success. The parties agreed that this was the order in which I should consider the matter.

33. I start by considering cause of action estoppel. Cause of action estoppel prevents a person from bringing a claim that raises a cause of action that is identical to that which has been previously determined. It does not, however, require that the evidence relied on to advance the claims are identical. New evidence may have come to light, or there may be a material change of circumstances, notwithstanding which the party cannot re-litigate the same cause of action. That is clear from para. 26 of **Virgin Atlantic**.

34. It is important to consider what constitutes the cause of action in a "like work" Equal Pay claim. Section 65 (2) of the **Equality Act 2010** provides:

> **"A's work is like B's work if—**
>
> **(a) A's work and B's work are the same or broadly similar, and**
>
> **(b) such differences as there are between their work are not of practical importance in relation to the terms of their work."**

35. The first question for the Tribunal is whether the work done by the Claimant and the comparator is the same or broadly similar. This turns on an analysis of the work that is actually done as opposed to contractual terms. The question is to be determined in general terms without a minute examination of the work that is being done. Next, consideration has to be given to whether such differences as there are, are of practical importance in relation to the terms of their work.

36. The questions of what amounts to a claim of "like work", and the circumstances in which a new claim may be brought under that head, were considered by Underhill P (as he then was) in **Prest v Mouchel Business Services Limited** [2011] ICR 1345. After considering the previous authorities he stated:

> **"21. In these circumstances I have thought it right to start with a clean slate, putting the authorities to one side for the present. I also put to one side the phrase "cause of action", not because I think that the cases which employ it are irrelevant but because it comes with a certain amount of baggage which may get in the way.**
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> **22. On the basis set out at para. 12 above, the essential question with which I am concerned is whether the two claims – the one originally pleaded and the one introduced by way of amendment – are in substance the same. In my view that does not depend as such on the identity of the individual comparator named. Take a case where a hundred men are doing an identical job. As a matter of procedure, it has, at least in domestic law, been conventionally regarded as necessary for a claimant to identify one of those men – let us say A – as her comparator. But in fact which individual she chooses is a matter of indifference. What matters is whether the work that they (all) do is comparable to hers: it is the receipt of unequal pay for equal work which is the foundation of an equal pay claim. If the claimant subsequently decides for reasons of convenience to substitute a fresh comparator – B – doing the same work as A (or as A was thought to have been doing) that does not mean that the nature of the claim has changed: whichever is taken as the individual comparator, the work is the same.**
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> **23. In my view, therefore, what matters is whether the work said to be being done by the new comparator is different from that said to be being done by the comparators originally named. It is only if it is indeed different that a substantially new claim is being advanced..."**

37. The same approach was adopted in an unreported decision of the Employment Appeal Tribunal given by Her Honour Judge Eady QC (as she then was), in **2 Sisters Food Group Ltd**

v Ms S Abraityte & Others (UKEAT/0209/15/AC) in which consideration was given to a change in the type of work being done by a claimant and whether that gave rise to a new cause of action. At para. 52 Her Honour Judge Eady stated:

> **"The Claim is thus that a Claimant's work is of equal value to that of her comparator, just as if she seeks to rely on the different work undertaken by a different comparator, if the Claimant relies on different work that she also carried out why is that not a new claim? It seems to me that the correct answer is that contrary to the approach adopted by the ET that is changing the basis of the claim being made. To that extent, therefore, I consider the ET's reasoning flawed."**

38. Accordingly, in determining whether a new claim, or a new cause of action, is being advanced, one has to consider whether there has been a change in the work being done so that there is a different type of work for the purposes of the comparison with the new comparators.

39. It is common in Equal Pay claims for a number of comparators to be named. There are a number of reasons for this. Sometimes, the claimant contends that she is undertaking the same work as all those who are named as comparators. More than one comparator is relied upon in case it should turn out that one of the comparators is atypical or because it may be necessary at some stage to cease to rely a comparator who has, for example, changed job or retired. The comparators are not named because it is contended that there is a different cause of action that arises in respect each of them, it is simply as a matter of convenience. Alternatively, a claimant may contend she is doing a type of work for which she has one comparator or, alternatively, a different type of work, with a different comparator. If one were to assume that there are staff at grades 8, 9, and 10, the Claimant might bring a claim as a grade 8 lecturer alleging that she is doing "like work" to a man at grade 10 or, in the alternative, a man at grade 9. These would be different claims raising different causes of action.

40. The Respondent contends in the Cross-Appeal that the Employment Tribunal misapplied the law in failing to properly analyse the work that the Claimant was relying on for

A the purposes of the 2018 claim and whether that was "like work" to that done by the comparators named in the 2015 claim.

B 41. The Claimant now contends that her work has varied over time; that it is now at a higher level than it was in the period when her comparison commenced. However, she was equally adamant at this hearing that the work has been at least at grade 9 since 2007. In her pleaded case she did not contend that there had been any material change in the work she or her

C comparators were doing throughout the period of comparison. Her pleaded case was that it was the same throughout the periods of comparisons in both cases.

D 42. The Employment Judge concluded that the work of the 2015 comparators was not the same as that of the 2018 comparators:

> **"59. Mr Kenward submitted the class of grade 9 lecturers were akin to road/street sweepers and naming a different individual comparator within the same class of comparators as an individual comparator previously named will not amount to a new cause of action unless "the work said to be being done by the new comparator is different from that said to be being done by the comparators originally named". He points out that nowhere in her 2018 Claim (which cites four Senior Lecturers) or the 2015 Claim (which cites two Senior Lecturers) does the Claimant suggest that there are material or practical differences between the individual comparators in terms of work done so that (for equal pay purposes) the work said to be being done by one comparator is different from that said to be being done by another comparator. Indeed, in her 2018 Claim, the Claimant refers to the four Senior Lecturers collectively, and states that "such differences as there are between their work and my work are not of practical importance". The Tribunal accepts Mr Kenward's submission that no factual basis has been put forward by the claimant to suggest that the work said to be being done by the 2018 comparators is different from that said to have been done by the 2015 comparators, however, it appears to the Tribunal as a matter of logic the work senior lecturers carry out cannot be described as identical, unlike the work of road sweepers. This much is clear from the comparison tables attached to the 2015 and 2018 Claims that reflect the differences in published material, monies being brought into the department, research output, teaching PhD students and so on. Not one lecturer is identical and this is the nub of the claimant's case, and indeed, the difficulties she will face proving she was doing the same or broadly similar work.**
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> **60. In conclusion, the Tribunal took the view that Mr Kenward's arguments appeared to have leverage on the basis that the senior lecturer comparators are all paid at grade 9 and on the face of it, are the same class of comparator. On closer examination of the facts it cannot be said Professor Rahul Savani, Professor Piotr Krysta, Dr Bakhti Vasiev and Dr Vitaliy Kurlin are identical to each other, or to the 2015 comparators. They have in common the fact they**

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> **were successful in their applications for senior lecturer at grade 9 when the claimant was not; aside from this they are individuals and have achieved academic success in different ways, for example, publishing different articles in journals and so on. The claimant is correct in her submission that the comparator(s) will require a different evidential and factual analysis in comparison of her own work, and it is theoretically conceivable she could succeed against one individual comparator but not another. The Tribunal refuses to strike out the claims for the entire pay period claimed by the claimant on the basis that Professor Rahul Savani, Professor Piotr Krysta, Dr Bakhti Vasiev and Dr Vitaliy Kurlin did not fall into the same category of workers as the two 2015 comparators and thus whilst it was the same head of claim, the claim was not substantially the same. Had the claimant's comparators been road sweepers or refuse drivers the Tribunal's decision would have been different. In arriving at it, the Tribunal was concerned with the prospect of the claimant litigating into the future and picking out different individual comparators in order to do so with the respondent facing the spectra of claim after claim without end. This concern has been resolved by applying the rule of Henderson v Henderson."**

43. The Employment Judge also concluded that a comparator who started working after the previous claim could not be doing the same type of work, holding at paragraph 56:

> **"The Tribunal preferred the claimant's argument and it did not accept that as the claims for the period both before and after 2015 depend upon establishing the same breach of the same implied equality clause, the judicial decision dismissing the claims in relation to the breach alleged in the 2015 Claim had the effect of determining the Claimant's contractual rights post-2015 in so far as those rights depend upon establishing that breach. It is theoretically conceivable that post-2015 the respondent could have breached the implied equality clause in respect of Dr Kurlin and the work he carried out, and it would make a nonsense of the equality legislation to prevent the claimant from raising a claim in 2018 due to an earlier claim not involving Dr Kurlin being dismissed.**

44. The approach that the Employment Tribunal adopted was that for the work being done by the comparators to be the same "like work", it must be identical. At para. 59, having stated that the Tribunal accepted that no factual basis had been put forward by the Claimant to suggest that the work said to be being done by the 2018 comparators was different from that said to have been done by the 2015 comparators, the Tribunal went on to conclude as a matter of logic that the work senior lecturers could not be described as "identical", unlike the situation of road sweepers who do identical work.

45. At para. 60 the Employment Judge stated:

> **"On closer examination of the facts it cannot be said Professor Rahul Savani, Professor Piotr Krysta, Dr Bakhti Vasiev and Dr Vitaliy Kurlin are identical to each other, or to the 2015 comparators."**

46. It is possible that the Employment Judge, in referring to the work being identical, was taking the example given by Underhill P in **Prest** in which he referred to, at para. 22, a situation in which "a hundred men are doing an identical job." I consider that Underhill P was giving an example, but not the only example, of where there would be the same "like work" claims. For a claimant to establish "like work", it is not necessary for the claimant to establish that the work is identical to that of a comparator, far from it; the claimant need only show that the work is the same or broadly similar. That is to be determined in general terms without a minute examination. What is required for there to be the same cause of action in respect of an Equal Pay claim is that the work is the same in the sense of being the same or broadly similar, so that it is the same "like work" claim. It is not necessary for "like work" claims to be advancing an identical cause of action for the work to be identical, it only need be sufficiently similar such that it gives rise to the same "like work" comparison. In the case of road sweepers there are likely to be some differences in the work done by different individuals, but it is unlikely to be such as to prevent the work being alike. The Claimant's case rested on the contention that although there are necessarily differences between the work being done by all lectures that does not prevent it from being "like work". The analysis adopted by the Employment Judge effectively precluded the possibility that two lectures could ever be doing "like work" because their work is not identical. That would have been fatal to the claims from the outset. I do not consider that is the correct approach to be adopted in analysing "like work" claims.

47. It also does not follow that just because a comparator started work after the conclusion of the Claimant's previous case they cannot be doing the same "like work" as in the previous

claim. If that were the case, after any "like work" complaint is determined, a new claim can be brought the moment a new comparator is appointed, even if there is no discernible difference between the work the new comparator has been appointed to do and that done by the previous comparators.

48. In this case, one can analyse the situation in terms of grading. The Claimant contended that there is grade 8-type work and grade 9-type work. For any 2 lecturers there are bound to be differences in the work they do, because they will work in different fields; publish different articles; receive different grants; and teach different students. That does not preclude the possibility that they are engaged in "like work", in the sense that they are both doing grade 8 work or grade 9 work. Otherwise, the Claimant's claims would all have had no reasonable prospects of success because it would be impossible for her to establish "like work" with any of her comparators. Her contention is that she has been doing grade 9 work since 2007 and she alleges that work has been alike to that of all of her comparators in both claims, all of whom have also been doing grade 9 work, but unlike her have been paid at the grade 9 rate. It is the Claimants pleaded case that in comparison with all of her comparators:

> **"such differences as there are between my and the comparators' work are not of practical importance in relation to the terms of the work, with regard to the nature and extent of the differences and the frequency with which these differences occur in practice".**

49. This wording was specifically taken by the Claimant from the **Equality Act 2010** Section 65 (2) to demonstrate that she is rely on the same "like work" comparison throughout.

50. For there to be a new cause of action there has to have been a change in the type of work being compared between the claimant and the comparators.

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51. I consider that the Employment Judge misdirected herself in law in her analysis of what was required to establish cause of action estoppel by considering that it required that the work done by the old and new comparators had to be identical rather that the cause of action be identical because it relies on the same allegation of difference in pay for the same "like work".

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52. Alternatively, if it is rule 52 that precludes further proceedings in this type of situation, rather than the common law doctrine of cause of action estoppel, the 2018 claim is precluded because it is the same, or substantially the same, complaint as the 2015 claim.

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53. The issue that then arises is what step I should take. Should I then remit the matter to the Employment Judge to re-determine the question of whether cause of action estoppel applies, or should I determine the matter myself?

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54. In **Jafri v Lincoln College** [2014] EWCA Civ 449 Lord Justice Underhill considered this question and, despite some misgivings, having held that for the EAT to determine a matter itself, in the absence of the agreement of the parties, the test was that there must only be one answer that is reasonably possible. He went on to state that:

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> **"47. The disadvantages of this ruling can be mitigated to some extent if the EAT always considers carefully whether the case is indeed one where more than one answer is reasonably possible: there are plenty of examples in the authorities of a robust view on that question being taken. Further, even where more than one outcome is indeed possible, there is in my view no reason why the EAT cannot still decide the issue if the parties agree; and in an appropriate case they should be strongly encouraged to do so. It is important to appreciate that the requirement to remit enunciated by the authorities referred to by Laws LJ is not based on a formal problem about jurisdiction. Section 35(1) of the Employment Tribunals Act 1996 reads:**
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> > **"For the purpose of disposing of an appeal, the Appeal Tribunal may –**
> > **(a) exercise any of the powers of the body or officer from whom the appeal was brought, or**
> > **(b) remit the case to that body or officer."**
>
> **A determination by the EAT of an issue in respect of which the ET had erred in law would plainly be made "for the purpose of disposing of the appeal". Rather, the issue concerns, as Sedley LJ expressed it in *Bennett* (see para. 30, at p. 892E), the correct use of that power. The point made in the authorities is that it is wrong in principle for the EAT as a reviewing tribunal to make a decision**

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which falls within the scope of the fact-finding (and that includes fact-assessing and discretion-exercising) tribunal. But there can be no such objection where the parties consent."

55. I sought the parties' submissions as to whether the matter should be remitted to the Tribunal or whether I should determine it. Both parties asked that I should determine the matter if I considered it appropriate.

56. I consider that on the material that was before the Employment Tribunal there was only one outcome that was reasonably possible; namely, that the cause of action that the Claimant was raising in the 2018 claim was the same as the cause of action that that had been raised in the 2015 claim. The claim that the Claimant advanced was that the work that she had been doing from 2007 throughout the period to the conclusion of the 2018 claim was grade 9 work and that it was the same or broadly similar to all her comparators so that they had all been doing the same "like work".

57. The Claimant did not allege in the 2018 claim that there had been a change in the nature of the work that she was doing or in the work that her comparators were doing. The Claimant contended that in respect of all of the comparators the work was the same or broadly similar and specifically pleaded that, while there were differences, such differences were not of practical importance in relation to the terms of work. That wording was taken directly from Section 65 of the **Equality Act** and was designed to assert that throughout the period of the work done by the Claimant and her comparators they had been engaged in the same type of work so as to make it "like work". There was a substantial overlap in time in which the 2015 and the 2018 comparators were alleged to be doing "like work" compared with the Claimant and each other. In those circumstances, the only reasonable outcome is that cause of action estoppel precluded the Claimant from raising her claim against all comparators in the 2018

claim. Alternatively, for the purposes of Rule 52, the 2018 Claim is precluded because it is the same, or substantially the same, complaint as the 2015 claim.

58. That is sufficient to determine the matter as it necessarily results in a decision striking out the 2018 claim relying on all comparators.

59. In respect of the limited points that HHJ Auerbach permitted to be pursued in the appeal, it is clear that, and it was accepted at the commencement of the Claimant's submissions, although she later contended that she was not certain, that Dr Vasiev was appointed as a senior lecturer in 2014, not 2015. That is clear from the letter informing him of his promotion and was how the matter was pleaded in the claim form. It was an error in the Reasons of the Employment Tribunal to give the date as 20l5. The fact that he worked in a different department from the Claimant and her comparators and/or the fact that the Appellant contends that she did not know of his promotion at the time she withdrew her 2015 claim, were matters that could have been raised, but were not raised, before the Employment Tribunal. There is no proper basis for those matters being raised now.

60. Accordingly, had I not found in favour of the Respondent on the Cross-Appeal, meaning that the entirety of the claim stood to be struck out under the cause of action estoppel, I would have dismissed the appeal.

61. The remainder of the Cross-Appeal effectively turned on issues of **Henderson v Henderson** and reasonable prospects of success in respect of Dr Kurlin. Having determined the cause of action estoppel precluded the bringing of the complaints against all of the comparators, **Henderson v Henderson** is not in play because these are not different causes of

A action, but the same cause of action. In the circumstances, it is not necessary to go on to consider prospects of success.

B 62. Therefore, the Order that I make is to allow the Cross-Appeal and to substitute a decision that all claims are struck out in respect of all comparators by reason of cause of action estoppel. I dismiss the Appeal.

C 63. At the conclusion of the Hearing, the Claimant sought permission to appeal to the Court of Appeal. Permission will only be given where the appeal would have real prospects of success or there is some other compelling reason why the appeal should be heard. I do not D consider that there are real prospects of this appeal succeeding.

64. I appreciate that the Claimant feels extremely strongly about her situation. She E considers that it is unfair that, as a result of a decision taken to withdraw the 2015 proceedings, she is thereafter prevented from bringing any challenge in respect of her pay. In her application for permission to appeal the Claimant repeated her contention was that she has been working at grade 9 level throughout from 2007. New proceedings could only be brought if there was a F change in the cause of action because of a change in the type of work that the Claimant relies upon for the like work comparison. In the Claim Form and evidence before the Employment Tribunal it was not the Claimant's case there had been any change in the work over the period G that she sought to make a comparison. That was clear from the Judgment of the Employment Tribunal, where it was accepted that the Claimant had put forward no factual basis to suggest that the work being done by the 2018 comparators was different to that being done by the 2015 comparators. Accordingly, I refuse permission to appeal. H