Neutral Citation Number: [2022] EAT 33

Case No: EA-2020-SCO-000003-SH

Previously (UKEATS/0009/21/BA)

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 30 November 2021

Before :

THE HONOURABLE LORD FAIRLEY

- -

Between :

MS W HESKETH	**Appellant**
- and -	
GLASGOW CALEDONIAN UNIVERSITY	**Respondent**

- -
- -

Ms W Hesketh the **Appellant**
Ms A Stobart, Advocate (instructed by Anderson Strathern LLP) for the **Respondent**

Hearing date: 30 November 2021

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TRANSRIPT OF ORAL JUDGMENT

THE HONOURABLE LORD FAIRLEY:

1. This is the appeal of Wendy Hesketh in relation to claims brought by her against Glasgow Caledonian University. The appeal is from a Judgment issued following a preliminary hearing held on 20th of November 2019 before the Employment Tribunal at Glasgow (Employment Judge S. MacLean, sitting alone).

Background

2. The appellant formerly worked for the respondent as an academic lecturer. According to a note from a preliminary hearing held in October 2018, she first worked for the respondent in that capacity from September 2015 to the end of May 2016.

3. Between 1st June 2016 and 31st August 2016, she did not work for the respondent, but she was then engaged on a fixed term contract of nine months duration between 1st September 2016 and 31st May 2017. Following the end of that fixed term contract, the appellant did not work for the respondent in any capacity between 1st June 2017 and 8th October 2017. From 9th October 2017, however, she was again engaged by the respondent. There is a dispute between the parties about whether that was in the capacity of employee or worker. It is common ground, however, that from at least 21st February 2018 to 20th July 2018, the appellant was employed on a fixed term contract with the status of employee.

4. In her claim form (ET1) presented on 24th July 2018. The appellant stated that her employment with the respondent commenced on 14th September 2015 and ended on 20th July 2018. In its response form, the respondent does not dispute the termination date but states that the commencement of employment was on 21st February 2018.

5. The various statutory claims advanced by the appellant were discussed at a case management preliminary hearing on 11th October 2018. The Employment Judge's note of that hearing does not refer to any claim being made in respect of equal pay.

6. On 24th October, at 2018, the appellant sought to amend her claims to add claims in respect of alleged failure to make reasonable adjustments, indirect discrimination, and victimisation. That amendment was not opposed by the respondent.

7. In November 2018, and in response to an order made by the Employment Judge who presided over the preliminary hearing on 11th October 2018, the appellant produced a Scott Schedule, which bore to provide further and better particulars of her claims. A dispute then arose as to whether the Scott Schedule was no more than further and better particulars of existing claims or was, alternatively, an attempt by the appellant to introduce new heads of claim, including an equal pay claim, which had not previously been advanced by her.

8. A preliminary hearing was eventually fixed to consider that issue. The issue to be considered at that hearing was framed in the following terms:

> **"Whether the claim currently comprises a claim under the equal pay provisions, and if it doesn't, whether the claim is permitted to include such a claim."**

9. In the period between November 2018 and September 2019, the appellant's Scott Schedule underwent a process of revisal by her. The final version was dated September 2019.

10. Following a preliminary hearing held at Glasgow on 20th November 2019, the Employment Judge allowed an application by the appellant to amend her claims, but only to the extent that such amendment clarified existing claims already made by her. In other respects, the Employment Judge

refused to allow the appellant to introduce claims of equal pay discrimination arising from disability and harassment, all under the **Equality Act 2010**.

11. The Employment Judge stated, in particular, that she was not satisfied that the ET1, as it had been amended in October 2018, contained any claim in respect of equal pay. She concluded that whilst the ET1 form set out a claim of direct sex discrimination in which a Dr Bowness was named as a comparator, there was no basis on which an equal pay claim was foreshadowed.

12. The Employment Judge also noted, however, that in the November 2018 Scott schedule the appellant had listed equal pay as a claim that she made, and had named a Dr Buckle as a comparator (November Scott Schedule at pages 17 to 18). Doctor Buckle had not been mentioned in the ET1 as it had been amended by October 2018.

13. The Employment Judge concluded that the equal pay claim involving Dr Buckle as a comparator was a new claim and that it was first presented out of time as it related to a position held by the appellant between 2015 and 2016. On that hypothesis, and having regard to the other second factors, the employment judge refused to allow the claim to be amended.

Appeal

14. The appellant sought to appeal against that Judgement. In her application to this tribunal. She set out eight separate proposed grounds of appeal. Only two of these - numbered 3 and 5 – were allowed to proceed to a full hearing.

15. The issue identified by ground 3 is whether the Employment Judge erred in concluding that the claim form submitted by the appellant on 24th July 2018, and amended by her in October 2018, did not include any claim in respect of equal pay under and in terms of sections 64 and following of the **Equality Act, 2010**.

16. The issue identified in ground 5 is whether the Employment Judge erred in applying the **Selkent** principles in concluding that any equal pay claim had been brought out of time.

Ground 3

17. I have readily come to the view that the Employment Judge was entirely correct to conclude that it the ET1, as amended in October 2018 did not contain any claim in respect of equal pay. Whilst at section 8.1 of the ET 1, the appellant has ticked the box referable to sex discrimination and / or equal pay, it is clear from the substance of the claim as described in the paper apart to the ET1, that the only comparator founded upon at that stage was Dr Bowness.

18. On an objective reading, however, what is being described in relation to Dr Bowness is a claim which is based on his having succeeded the appellant to teach the same module that the appellant had previously taught, but on terms more favourable than those that the appellant had previously enjoyed. Whilst that may be recognisable as a claim of direct sex discrimination, it is not recognisable as a claim in respect of equal pay, not least because it is not competent to use as a successor employee as a comparator for the purposes of an equal pay (see **Walton Centre for Neurology and Neurosurgery v. Bewley** [2008] ICR 1047). The Employment Judge was, therefore, quite correct to conclude that what was said in the ET1 (as amended) did not amount to an equal pay claim.

19. The same observations may also be made about the way in which Dr Bowness is relied upon as a comparator in the November 2018 Scott schedule, in particular, at Pages 23 to 25 of that document (EAT electronic bundle reference pages 69 to 71).

Ground 5

20. The position in relation to the reference to Dr Buckle in the November 2018 Scott Schedule is, however, different from that in relation to Dr Bowness. On an objective reading, Dr. Buckle is

referred to as a potentially relevant equal pay comparator on the basis that he was the appellant's predecessor.

21. The Scott Schedule states, amongst other things, that the appellant "was denied the same pay and conditions as the person whose job she was covering (Jo Buckle)". Objectively, that is an equal pay claim. It was not, however, a claim that was made in the original ET1, as amended by October 2018. For the reasons already noted in relation to ground 3, as at November 2018, it was an entirely new basis of claim. As such, an application to amend was required in order to introduce it.

22. In considering the equal pay claim involving Dr Buckle as a comparator, the Employment Judge correctly noted that such a claim was first mentioned in the November 2018 Scott Schedule. Whilst no formal application to amend was made at that time, the inclusion of that claim in the November 2018 Scott Schedule can be taken, by implication, to be an application to amend to introduce the new claim.

23. Applying what seems to have been a "standard case" analysis of timebar under section 130 of the **Equality Act**, the Employment Judge concluded that the new equal pay claim involving Dr Buckle as a comparator was time barred.

24. Whilst that may have been an entirely understandable conclusion it is not clear what, if any, consideration was given by the employment judge to the possibility of the time bar in relation to that claim being that applicable to a "stable work case" in terms of section 129 of the **Equality Act**. Having regard to the history of the working relationship between the parties as set out in the note of the preliminary hearing Judge in October 2018, that was a matter of potential relevance and one which could possibly not have been determined only on the basis of submissions. It may have required either agreement of material facts or some factual evidence as to the nature and history of the underlying working relationship. It is at least possible that the answer to that question could have had a bearing

upon the application of the **Selkent** test to the Appellant's attempt to make such a claim for the first time in November 2018.

25. In these circumstances, I will sustain Ground 5 to the limited extent of setting aside the refusal of the Employment Judge to permit amendment of the claim to introduce the specific equal pay claim described at pages 17 to 18 of the November 2018 Scott schedule (that being the particular claim in which Dr Buckle is referred to as the proposed comparator). I will remit consideration of that proposed amendment to the same Employment Judge for reconsideration, such reconsideration to include (amongst the **Selkent** factors) consideration of the possible effect of the Section 129 **Equality Act** "stable work case" timebar.