EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112743/2018

Held remotely by Cloud Video Platform on 5 April 2022

Employment Judge S MacLean

Ms W Hesketh	**Claimant** **In Person**
Glasgow Caledonian University	**Respondent** **Represented by:** **Ms A Stobart - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that following reconsideration of the proposed amendment of the claim to include the specific equal pay claim described at pages 17 and 18 of the November 2018 Scott Schedule the original decision dated 17 December 2019 and sent to the parties on 17 December 2019 is confirmed.

REASONS

Introduction

1. A preliminary hearing took place before me on 20 November 2019 to consider whether the ET1 claim form comprised a claim under the equal pay provisions and if it did not whether the claimant was permitted to include such a claim.

2. I issued the following judgment (the Judgment):

> "The judgment of the Employment Tribunal is that the claimant's application to amend as set out in the claimant's Scott Schedule and Further and Better

Particulars dated 26 September 2019 is allowed to the extent that it seeks to clarify the existing claims but is not allowed to the extent that it introduces claims of equal pay, discrimination arising from disability and harassment under the Equality Act 2010."

3. I was not satisfied that the ET1 claim form as amended in October 2018 (the Amended Claim Form) contained any claim in respect of equal pay. While it contained a claim of sex discrimination with Dr Bowness named as a comparator there was no basis upon which an equal pay claim was foreshadowed. I also noted that the November 2018 Scott Schedule listed an equal pay claim with Dr Buckle as a comparator. He had not been mentioned in the Amended Claim Form. I concluded that the equal pay claim involving Dr Buckle was a new claim that was presented out of time as it related to a position held by the claimant between 2015 and 2016.

4. The claimant appealed against the Judgment on eight grounds, two of which were allowed to proceed to a full hearing:

    a) Had I erred in concluding that the ET1 claim form did not include any claim in respect of equal pay under and in terms of section 64 of the Equality Act 2010 (EqA)?

    b) Had I erred in applying the *Selkent* principles in concluding that any equal pay claim had been brought out of time.

5. In the EAT Judgment dated 30 November 2021 Lord Fairley ordered the Appeal be allowed in part to the extent only of setting aside my refusal to permit the amendment of the claim to include the specific equal pay claim described at pages 17 and 18 of the November 2018 Scott Schedule and remitted consideration of the proposed amendment of the claim to me.

6. In his oral judgment Lord Fairley said that I was correct to conclude what was said in the ET1 claim form did not amount to an equal pay claim. He said that the November 2018 Scott Schedule stated amongst other things that the claimant was denied the same pay and conditions as the person whose job she was covering (Jo Buckle). Objectively that was an equal pay

claim which was not made in the ET1 claim form. As it was an entirely new basis of claim an application to amend was require to introduce it.

7. In considering the equal pay claim involving Dr Buckle as a comparator Lord Fairley said that I correctly noted that such a claim was first mentioned in the November 2018 Scott Schedule. Whilst no formal application to amend was made at the time the inclusion of the claim in the November 2018 Scott Schedule can be taken by implication to be an application to amend to include a new claim (the Buckle Amendment).

8. Lord Fairley said that applying a "standard case" analysis of time bar under section 129 of the EqA I had concluded that the equal pay claim involving Dr Buckle as a comparator was time barred. Whilst that might have been an entirely understandable conclusion it was not clear what if any consideration I had given to the possibility of time bar in relation to that claim being that applicable to a "stable work case" in terms of section 129 of the EqA. This was potentially relevant given the history of the working relationship set out in the note of the preliminary hearing Judge in October 2018 and was one which could possibly not be determined only on the basis of submissions. It may have required either an agreement of material facts or some factual evidence as to the nature and history of the underlying working relationship. It was at least possible that the answer to that question could have had a bearing upon the application for the *Selkent* test to the claimant's attempt to make such a claim for the first time in November 2018.

9. Following a preliminary hearing for case management on 5 April 2022 it was agreed with the parties that I would fix a reconsideration hearing to be conducted remotely by cloud video platform at which I would reconsider the proposed Buckle Amendment to include amongst other *Selkent* factors the possible effect of section 129 of the EqA. I confirmed to the parties that I had retained the joint set of productions provided for the preliminary hearing in November 2019.

Reconsideration Hearing

10. The respondent provided a supplementary set productions consisting of the letters of engagement, letters of employment, written terms and conditions for Lecturer in Criminology - Sociology and Social Policy, written terms and conditions for Researcher 1A and notice of termination of employment.

11. In response the claimant provided a supplementary set of productions consisting of work diaries, payslips,, casual worker payment forms, P60s for year ended 5 April 2016, 2016 and 2018.

12. As my reconsideration involved considering an application to amend to introduce a new claim and time bar was one of the *Selkent* factors being considered we discussed the conflicting EAT authorities of *Amey Services Limited and another v Aldridge and others* EATS 007/16 and *Galilee Commissioners of Police of the Metropolis* 2018 ICR 634 EAT and to what extent I would be determining the issue of time bar when deciding the application.

13. My understanding of the parties' position at this reconsideration hearing was that the claimant asserts that that she had a stable work relationship with the respondent which commenced in September 2015 and terminated on 24 July 2018. As the Buckle Amendment (which relates to the period 23 November 2015 to 5 May 2016) was included in the November 2018 Scott Schedule it was not time barred when the implied application to amend was made. The respondent accepted that the Buckle Amendment was not time barred if there was a stable work relationship which terminated on 24 July 2018. The respondent asserts that there was no stable work relationship. It was agreed that it was not the purpose of this reconsideration hearing for me to determine whether the was a stable work relationship. I would however consider that was the claimant's position and take this into account when reconsidering the application to amend.

14. It was agreed that Ms Stobart, Counsel for the respondent would address me first and the claimant would then respond. Ms Stobart would have the opportunity to reply if necessary.

The Respondent's Submissions

15. Ms Stobart said that from the Judgment and the EAT Judgment the Buckle Amendment was a new claim first foreshadowed in the November 2018 Scott Schedule. At the preliminary hearing in November 2019 when considering time limits the equal pay claim was looked as a standard case. The claimant's position is that the Buckle Amendment is a stable work case.

16. The Buckle Amendment relates to the period from 25 January 2016 to 25 May 2016 when Ms Stobart said the claimant was engaged as a casual worker. She referred me to a letter of engagement dated 14 September 2015, headed: Subject Group: Sociology and Social Policy (Criminology) 10282 Module Name ML2L423)32 AB Crime and Society. This was a contract for payment for hours worked following the submission and authorisation of a Casual Hours Form. Hours were to be approved be the appointing manager before they were worked.

17. Ms Stobart then referred me to the index of the claimant's supplementary productions and in particular document 7: Contract of Employment for covering Jo Buckle's Module 25/1/2016 – 20/5/2016. This typewritten document states:

> "Module leadership 68 hours = 4 hours per week for 17 weeks from 25/1/16 to 20/5/16. This lasts until the dates that marks are due.
>
> Preparation hours 38.5 hours (3.5 hours per week)
>
> Contact time 77 hours = 7 hours per week for 11 weeks
>
> Marking 62 hours
>
> Total hours = 245.5 x £21.60 = £5,351.9
>
> Plus holiday pay of 12.07%"

18. Next Ms Stobart referred to a fixed term employment contract dated 30 August 2016 effective from 1 September 2016 to 31 May 2017 to provide

maternity cover for Professor McMillan's teaching obligations (the McMillan Contract). The McMillan Contract provided a salary. Ms Stobart said that this was a contract of employment rather than an hourly rate casual assignment.

19. The next document dated 5 October 2017 was headed Casual worker letter of engagement; Subject group: Sociology and Social Policy (10282) Module Name: Business of Social Science. The engagement was five hours per week to carry out work as Occasional Lecturer from 9 October 2017 to the end of May 2018. This was a contract for payment for hours worked following the submission and authorisation of a Casual Hours Form. Hours were to be approved be the appointing manager before they were worked.

20. Ms Stobart then referred to a document dated 9 October 2017 headed Casual worker letter of engagement; Module: Skills for Legal Employment - 4 hours/week, Trim A; Introduction to Legal Systems and Study – 4 hours/week Trim A. This contract was for the Department of Law, Economics and Accountancy and Risk to cover the modules between October 2017 and January 2018 Sociology and Social Policy (10282): Business of Social Science. This was a contract for payment for hours worked following the submission and authorisation of a Casual Hours Form. Hours were to be approved be the appointing manager before they were worked.

21. The final document to which Ms Stobart referred was dated 19 February 2018, a fixed term employment contract as a professional academic (research) effective from 21 February 2018 to 20 July 2018 for 0.6 FTE. The contract provided a salary. The department was the Glasgow School for Business and Society. Ms Stobart said that this contract of employment (the Research Contract) was a different grade and scale from the McMillan Contract.

22. Ms Stobart said that the respondent's position was that the claimant was engaged on a series of different types and length of contacts; with breaks and for different departments and doing different work: lecturing and research.

23. Turning to the Buckle Amendment, Ms Stobart said that from the November 2019 Scott Schedule this related to the period from January 2016 when the claimant was asked to cover Dr Buckle's modules while he was hospitalised.

24. Ms Stobart then referred to the *Selkent* factors.

Nature of the amendment

25. Ms Stobart said that this was a new cause of action. It would cause substantial prejudice to the respondent because of the passage of time. The contract produced by the claimant was entered into in 2016. Dr Buckle is dead. There is no opportunity for him to explain what work he did and what work he expected the claimant to do while he was off sick.

26. By allowing the Buckle Amendment there will need to be a new evidential enquiry. This will involve not only enquiry about whether the claimant's work was the same of broadly similar to that of Dr Buckle and any difference must not be of practical importance but also consideration of whether it was a stable work case. This is all new enquiry with complex legal consideration involving time effort and expense including legal cost. This is a substantial prejudice to the respondent.

Applicability of time limits

27. Since the Appeal it is now suggested that this may be a stable work case. That was not suggested before.

28. To establish if there is a stable work case there will need to be consideration of all the contracts. Ms Stobart referred to her earlier summary. The claimant's position is that these demonstrate a stable work case. Ms Stobart said that while this argument could be made it had little prospect of success.

29. She referred to His Honour Judge MacMillan's endorsement of the Employment Judge's application of the ECJ ruling in *Preston v Wolverhampton Healthcare NHS Trust and other (No 1)* where a stable employment relationship arises when an employee is employed by the same employer; there are a succession of contracts punctuated by intervals

without a contract on the same or broadly similar terms to perform essentially the same work under.

30. Ms Stobart said that while there was the same employer and a succession of contracts with intervals they were fundamentally different terms and the not essentially the same work or broadly similar work. Some were hourly paid rather than salary. They involved different roles, different terms and conditions and different work and variation in salary.

31. The contract relating to the Buckle Amendment ended in May 2016. The claimant was then engaged on a contract covering Professor McMillan's lectures during her maternity leave. The contract as an academic lecture did not involve any lecturing duties. It was clearly a different role and type of contract.

32. Ms Stobart said that the claimant's schedule of loss underlines this point in which the claimant states:

> *"The claimant's net/gross weekly pay was variable each trimester, but the annual amounts received are given below.*
>
> *As aforementioned the claimant effectively worked in 3 roles before being dismissed (lecturer for the law department, lecturer for the sociology department and part-time researcher funded by a third party).*
>
> *The annual salary received by the claimant from the respondent is as follows:*
>
> *2015/16 -£3,790.84 2016/17 - £27,171.90 2017/18 - £7,074.30"*

33. The applicability of time limits weighs heavily in favour of the respondent. While the new claim is not necessarily out of time it is very likely and the respondent will be put to potential unnecessary expense determining the nature of the work done in 2016. The respondent would be prejudiced by allowing the application.

Timing and manner of the application

34. The Buckle Amendment relates to an equal pay claim that could have been brought in 2016. The claimant did not do so. She did not bring the claim in her ET1 claim form. She included it in the November 2018 Scott Schedule which was not the Scott Schedule that she relied upon at the preliminary hearing in November 2019. The respondent has no understanding why the claimant did not make the claim earlier. She has never provided an explanation for this.

35. It is an unfair criticism to say that the November 2018 Scott Schedule was not opposed. The purpose of the Scott Schedule was to provide additional details of the claims in the ET1 claim form which would not normally be opposed. This would not normally be the way a new claim would be brought. The claimant knew how to amend her claim form.

Balance of prejudice

36. Considering all the factors Ms Stobart said that there was substantial prejudice to the respondent. The claimant has many other cases. This equal pay claim is a red herring. To allow the Buckle Amendment will take more time and substantial delay. The respondent will need to consider whether the claimant and Dr Buckle were doing like work. Why were casual contracts use and what factor if any did gender play? How were others treated at that time and if there is a material factor defence. There will need to be a hearing on the stable work case and time bar.

37. Ms Stobart invited me to exercise my discretion and refuse the application.

The Claimant's Submissions

38. The claimant agreed that I was considering whether to allow the Buckle Amendment which at paragraph 21 of the EAT Judgment states,

> "The Scott Schedule states amongst other things that the appellant 'was denied the same pay and conditions as the person whose jog she was covering (Jo Buckle)'. Objectively this is an equal pay claim. It was not however a claim made in the ET1 as amended in October 2018. For reason already noted in relations to ground 3, as at November 2018, it was an

entirely new basis of claim. As such an application to amend was required to introduce it.

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 an the new claim."

Nature of the amendment

39. The claimant said that at the preliminary hearing in October 2018 she understood that she was to apply to amend the ET1 claim form to include acts of discrimination that had occurred after 24 July 2018 when she had sent the ET1 claim form to the Tribunal. She did this on 24 October 2018. The application was accepted on 20 November 2018.

40. At that stage she was directed to provide a schedule by 8 November 2019 setting out each and every act or omission that she intended to rely in any of her discriminations claims. The claimant said that as she thought that her ET1 claim form included an equal pay claim she included the details of her comparator Dr Buckle.

41. The claimant said that the respondent has always been well represented by a legal team. The respondent responded to the claimant's amendment on 10 December 2018. The respondent did not oppose the November 2018 Scott Schedule until July 2019. A revised schedule was emailed on 12 July 2019, "Please note that the application is not opposed to the extent that it seeks to clarify or otherwise the claimant's existing claim. However it is noted that the claimant's application goes much further than that. For instance it seeks to add a fifth potential disability of dyscalculia and seeks to add entirely new claims for equal pay and also for dismissal of a statutory right. The respondent has thus far not prepared for these claims which are wholly new and differ significantly from the legal claims pursued to date. It is also contended that these new claims are time barred and the claimant should

not simply be able to get round the issue of time bar by seeking to amend her claim some 12 months on."

Applicability of time limits

42. The claimant said that the respondent had produced documents in support of the "Timeline of Work", a document in the joint set of productions. The summary was not substitute for hearing evidence about the basis upon which the claimant worked for the respondent. Regardless of the headings in the letters and what the respondent called the working relationship, the nature of that working relationship was the crux of the dispute between the parties The claimant said that the Timeline of Work did not accurately reflect that.

43. The claimant said that she taught two modules in 2015/16. There were four full time staff in Criminology at the time. Dr Buckle's modules were popular. She was engaged in 2015 to help Dr Buckle deliver his module. She was described on the system as a casual worker. The claimant disputes this status and maintains that she was an employee because of the level of responsibility and integration. It suits the respondent to call her a worker but in the interests of justice there should be a final hearing.

44. The claimant referred to her work diary for the week commencing 23 November 2015 which she said demonstrated that in addition to delivering her modules she also covered modules of Dr Buckle as he was off sick. This continued the two following weeks. The Christmas break followed. The claimant referred to the document that she had produced described as "Contract of Employment for Covering Jo Buckle's Module – 25/1/2016-20/5/2016". She said that this was what she was given. It was the type of arrangement that was put in place at the discretion of the manager. Her casual worker payment forms show that she claimed for lecturing, preparation, module leadership and marking. The claimant said that she was doing Dr Buckle's work. She was paid less than £6,000 whereas he was paid over £40,000.

45. The claimant did not keep the document because she was going to make a claim. She kept her head down and got on with the work. While there were different department she was doing the essentially the same work. Although she was a "Researcher" latterly all academics do research. The claimant said that she had stable work case. The claimant referred to *Preston (No 1)* (above). There was a succession of contracts, doing an academic role, with the same pension scheme. The contracts were termly. She was not paid over Christmas and the summer holidays as there was no teaching.

46. The claimant said that the claim was presented in time. She disputed the respondent's position that the stable work argument was weak. While there war conflicting EAT authorities *Amey/Galilee* (above) I could allow the application to amend and for the issues of time bar to be determined at a later stage.

Timing and manner of the application

47. The claimant said that while she had knowledge of criminal law and criminology she was a litigant in person with no expertise in employment law. She is also disabled person whose is cognitively impaired. She thought that she had brought an equal pay claim when she ticked the box "sex (including equal pay)" on the ET1 claim form. She provided additional information about this claim in the November 2018 Scott Schedule. This was not opposed at the time.

Balance of prejudice

48. The claimant said that she would be seriously prejudiced if the Buckle Amendment was not allowed and her equal pay claim was not explored. The respondent needs to address the existing claims and in terms of scope and cost the equal pay claim is no more onerous than the other discrimination claims that are being pursued. The discrimination is a continuing act. The passage of time also prejudices the claimant as she says Dr Buckle encouraged her to bring the claim.

Consideration of the proposed Buckle Amendment to include amongst the *Selkent* factors the possible effect of section 129 of the EqA

49. This case was remitted to me to reconsider the Judgment and in particular to my decision not to allow the Buckle Amendment. As part of that reconsideration I was to include amongst the *Selkent* factors the possible effect of section 129 of the EqA.

50. When deciding whether to exercise my discretion to allow the Buckle Amendment I have to have regard to all the circumstances of the case. In particular I should consider any injustice or hardship which may be caused to any of the parties, if the Buckle Amendment was allowed or refused.

51. While any application to amend involves reference to *Selkent* I was mindful that the Selkent factors are a list of examples of factors which are likely to be relevant in striking the fundamental balance of injustice or hardship in allowing or refusing the amendment. It is not a checklist.

52. It is now accepted that the Buckle Amendment raised a new cause of action. I therefore asked the extent to which new pleading is likely to involve substantially different areas of inquiry than the original pleading.

53. The Amended Claim Form presents complaints of discrimination. The claimant relies on four potential grounds: disability, sex, the fact that she was a part-time worker; and the fact that she worked on a fixed term contract. The allegations start from August 2015 when the claimant asserts that she did not secure the appointment of a permanent position as result of indirect disability and sex discrimination. The claimant complains of ongoing indirect sex and disability discrimination in relation to further recruitment and promotion up to August/September 2018. She complains that she was treated less favourably than James Bowness on the grounds of sex in relation to covering the maternity leave of Professor McMillan. The claimant says that she was treated less favourably than other workers on the grounds of her part-time worker status and/or fixed term worker status. She makes a claim of failure to make reasonable adjustments in relation to the interview process in August/September 2018 and victimisation in relation to that

process as she had by that stage raised a grievance and presented these proceedings.

54. The Buckle Amendment seeks to introduce an equal pay claim. The comparator is Dr Buckle. It refers to the period 23 November 2015 until around 5 May 2016 when the claimant says that she was engaged under the letter of engagement dated 14 September 2015 but went from delivering seminars to stepping in as Module Leader on "Crime & Society" in the first trimester when Dr Buckle was hospitalised. The claimant says that she was denied the same terms and conditions as Dr Buckle whose job she was covering. The claimant has produced a typewritten document: Contract of Employment for covering Jo Buckle's Module 25/1/2016 – 20/5/2016. It refers to module leadership, preparation time, contact time and marking. The claimant appears to be asserting that during this period her work was the same or broadly similar to that of Dr Buckle.

55. There will need to be consideration about what was Dr Buckle's work in this period and whether it was the same or broadly similar to that of the claimant or if any differences were of practical importance. If so the respondent will also have to investigate whether it can establish that any difference in pay was genuinely due to a material factor which is not the difference in sex. This is a significant new line of enquiry both factually and legally. In addition there will need to be consideration of whether it is a stable work case. While the Amended Claim Form requires consideration of claimant's contractual terms the legal and factual issues are different.

56. The EAT Judgment states that whilst no formal application to amend was made at the time, the inclusion of the claim in the November 2018 Scott Schedule can be taken by implication to be an application to amend to include a new claim.

57. I appreciated that the claimant is a party litigant and although she lectures in law, employment law is not her area of expertise. She has presented several different types of claim relying on different grounds of discrimination and her position has evolved since presenting the ET1 claim from. The claimant

amended the ET1 claim form in October 2018. Separately she then provided the November 2018 Scott Schedule in response to an order to provide additional information about her existing claims.

58. The respondent has been legally represented throughout. The respondent responded to the Amended Claim Form on 10 December 2018. I note the claimant's comments on the respondent's delay in opposing the November 2018 Scott Schedule. The respondent raised the issue in an email sent on 12 July 2019 in response to the claimant producing a revised Scott Schedule: "Please note that the application is not opposed to the extent that it seeks to clarify or otherwise the claimant's existing claim. However it is noted that the claimant's application goes much further than that. For instance it seeks to add a fifth potential disability of dyscalculia and seeks to add entirely new claims for equal pay and also for dismissal of a statutory right. The respondent has thus far not prepared for these claims which are wholly new and differ significantly from the legal claims pursued to date. It is also contended that these new claims are time barred and the claimant should not simply be able to get round the issue of time bar by seeking to amend her claim some 12 months on."

59. Given the claimant's amendment in October 2018 and the subsequent focus on the issue of disability status which involved a pause in the proceedings I could understand why the respondent did not comment immediately on the November 2018 Scott Schedule. It was not an express application to amend but part of a document that was intended to give details of the existing different types of claims relating to events that spanned three years. Indeed the claimant's position at the preliminary hearing in November 2019 was that there was an equal pay claim in the Amended Claim Form and the November 2018 Scott Schedule and the other Scott Schedules that she produced were providing additional information.

60. In any event the November 2018 Scott Schedule is being treated as an implied application to amend in November 2018. The Buckle Amendment may therefore not be time barred if the claimant succeeds in establishing that it is a stable work case. However the respondent disputes that. There is

no agreed statement of material facts. While the contracts have been produced in my view there needs to be further factual evidence about the intention of the parties at the inception and cessation of the contracts before a decision can be reached on the classification of the case.

61. I turned to consider the practical consequences if the Buckle Amendment is refused. The claimant will not be able to proceed with her equal pay claim and will lose her right (if successful) to an award of arrears of pay. The claimant has however brought several other discrimination claims covering the period in which she was working for the respondent. While there are preliminary issues in relation to time bar in some of these claims, some if not all will proceed to a final hearing in early course.

62. If the Buckle Amendment is allowed, I anticipate that documents will be requested by the claimant to allow her to provide the factual basis of her equal pay claim. There will need to be clarification that the claim is only of "like work" and not any other route for enforcing equal pay. Once this is clarified the respondent will need an opportunity to respond. This is likely to take some time as the respondent has not prepared for the claim. It relates to a period in November 2015 to May 2016. There will need to be enquiry about the work undertaken by the comparator, Dr Buckle and what work he expected the claimant to do while he was on sick leave. Given that Dr Buckle is dead this is likely to be challenging exercise. The respondent will need to ascertain who is able to provide this evidence. The respondent will also need to consider whether is will be relying on the material factor defence and the basis for that. In particular why did the respondent use the contracts that it did and what factor if any did gender play in that decision. I also anticipate that there will be a preliminary hearing on whether the case is a stable work case. This will cause delay in fixing a final hearing in the other claims and additional expense. I do not accept the claimant's point that the cost of the equal pay claim is no more onerous that the other discrimination claims. As explained it involves consideration of different facts and legal issues.

63. In deciding whether to reconsider the Judgment the balance of justice is key. In my view for the reasons stated allowing the Buckle Amendment will cause substantial prejudice to the respondent. The claimant is able to advance other claims.

64. I therefore decided that having reconsidered the Buckle Amendment the original decision is confirmed.

Employment Judge: Shona MacLean
Date of Judgment: 03 May 2022
Entered in register: 04 May 2022
and copied to parties