



EMPLOYMENT TRIBUNALS

Claimant: Ms S Conway

Respondent: Carnegie Theatre Trust

Heard at: Manchester (preliminary hearing in public via CVP)

On: 23-25 May 2022

Before: Judge Brian Doyle

Representation:

Claimant: In person

Respondent: Ms J Linford, Counsel

JUDGMENT

1. The claimant's complaints in respect of equal pay were presented in time, but they are struck out because they have no reasonable prospect of success.
2. The claimant's complaints of sex discrimination (except for the complaints about her September 2020 grievance and her December 2020 redundancy) were not presented in time, and it is not just and equitable to extend time, so that those complaints are dismissed.
3. The complaints of sex discrimination about her September 2020 grievance and her December 2020 redundancy were presented in time and they may proceed to a final hearing on 24-26 October 2022, subject to case management orders issued separately.
4. The claimant's request for written reasons is granted and written reasons will be provided as soon as possible.

WRITTEN REASONS

Written reasons

1. These are the written reasons for the above judgment, originally signed on 25 May 2022, following an oral decision announced to the parties at the conclusion

of the third day of the preliminary hearing. The claimant made a timely application for written reasons, which are now supplied in accordance with rule 62 of the Employment Tribunals Rules of Procedure 2013 and *Partners of Haxby Practice v Collen* (2012) EAT.

Introduction

2. The claimant's claim arises from her employment by the respondent (Carnegie Theatre Trust) at the Carnegie Theatre and Arts Centre in Workington, Cumbria between 1 May 2015 and 25 December 2020. The respondent is a charitable trust and registered charity operated by a board of trustees.
3. The claimant was employed under various job titles and job descriptions as a Team Leader or Clerical Assistant or Administration Officer or Finance Officer at various times within that period. Prior to that period, she had been employed at the theatre by Allerdale Borough Council ("ABC") as a Clerical Assistant since 26 July 2010 [115-119], although seconded to the role of Front of House Team Leader under a temporary contract due to expire on 31 May 2015. Her employment had transferred to the respondent because of a TUPE transfer taking effect in May 2015 [121-126].
4. The claimant makes two broad complaints arising from her employment with the respondent in her claim. First, complaints in relation to equal pay based on like work or work of equal value in which she seeks to compare herself with yet unnamed employees of ABC's finance department or named employees of the respondent at various times between 2015 and 2020. Secondly, complaints of sex discrimination at various times arising from her employment with the respondent and the subsequent redundancy of her post in December 2020.
5. Acas early conciliation commenced on 18 March 2021 and ended on 29 April 2021 [9]. The claimant's ET1 claim form was presented on 23 May 2021 [10-18] with particulars of claim attached [19-23]. The respondent's ET3 response to the claim was presented on 24 June 2021 [28-32] with grounds of resistance attached [33-40].
6. At a preliminary hearing on 15 September 2021, Employment Judge Holmes commenced initial case management of the proceedings [41-48] and the judge made considerable progress in identifying and clarifying the complaints and issues [43-46].
7. As a result, the respondent presented amended grounds of resistance on 6 October 2021 [49-66]. This resulted in correspondence from the claimant on 15 November 2021 [67-70], which the Tribunal has noted. The matter was then listed for a further preliminary to be held on 18 January 2022.
8. At that further preliminary hearing before Employment Judge Allen on 18 January 2022 the judge identified preliminary issues that were to be determined at the present preliminary hearing on 23-25 May 2022. He also undertook further case management to clarify the complaints and issues and made case management orders [73-88]. The issues to be determined at the preliminary hearing are described at [74-75]; the complaints and issues are set out at [76-79]; and the list of issues resulting from that process is at [84-88].

9. That resulted in an undated request by the claimant to amend part of the claim [93] and further clarification by her of her equal pay claim [94-95]. On 12 April 2022 the respondent presented further amended grounds of resistance [96-115].

Materials before the Tribunal

10. The Tribunal had before it (1) a witness statement from the claimant of some 48 pages; (2) a shorter witness statement from Mandy Lawson-Jackson, a volunteer trustee of the respondent trust, of some 4 pages; (3) a main bundle of documents comprising 883 pages (inclusive of an index of 8 pages); (4) a supplementary bundle prepared by the claimant comprising 30 pages (inclusive of a title page and index of 2 pages); (5) the claimant's written submissions – pleadings and arguments running to 37 pages (inclusive of a title page and an index pages); and (6) a 27 pages document disclosed by the respondent on the second day of hearing as a result of a question asked by the judge – the respondent's *Events Front of House Staff Procedures* document (Version 4, August 2015).
11. The Tribunal heard evidence from the claimant and from Mandy Lawson-Jackson. Both witnesses were cross-examined. The Tribunal also asked questions of them.
12. The claimant relied upon her written submissions with a little amplification in reply to the respondent's submissions. The respondent's counsel made oral submissions.

The complaints

13. The latest expression of the claimant's complaints is her document dated 7 February 2022, which she describes as her amended claim, and may be found at electronic pages [11-13] of her supplementary bundle.

Equal pay

14. The equal pay claim is said to have two aspects. The Tribunal has extracted the essentials of the equal pay complaints from the claimant's narrative pleading in those pages.
15. First, a complaint of work of equal value where the comparators are male colleagues who worked in the positions of Box Office Manager (Daniel Marsden) and Hospitality Manager (Mike Nutter; previously Scott Roe). The claimant's position is that her job changed following the TUPE transfer from the council to the trust, and that it was of equal value when taking into account skills, knowledge, responsibility and environmental factors in line with the conditions of a collective agreement which formed part of her employment contract. The claimant complains that the respondent has failed to review her pay despite many requests, instead relying on a defence of material factor while ignoring all other responsibilities. She argues that these male colleagues were not TUPE-transferred from Allerdale Borough Council, but were recruited by the respondent trust post-TUPE, meaning that the terms and conditions relating

to pay and the evaluation of pay (for example, the requirement for a fully transparent pay structure set out in a collective agreement – which the respondent trust does not operate) are different from those of her male colleagues.

16. Secondly, a complaint of like work previously done by her former colleagues at Allerdale Borough Council, in conjunction with the TUPE Regulations 2006, due to her becoming responsible for work undertaken by both male and female colleagues who were not transferred. These colleagues had been responsible for the finance work she was required to undertake post-transfer. The claimant argues that the respondent trust has consistently failed to address this issue and that it has denied that a comparator can be “someone she used to work with in the same employment prior to the sale of the business, where the Transfer of Undertakings (Protection of Employment) Regulations 2006 apply”. The claimant relies upon a statement on the Equality and Human Rights Commission website. The claimant says that she will rely on both a hypothetical comparator and “real” comparator(s) from her pre-TUPE employment with Allerdale Borough Council who were responsible for the work prior to the TUPE transfer. At the date of the preliminary hearing no comparators had been named or identified.

General discrimination

17. The claimant expresses her “general discrimination” complaints as a belief that she has been subjected to less favourable treatment in comparison with her male colleagues in circumstances which she has only recently realised. She refers to an “undercurrent of discrimination” towards her. The incidents upon which she relies are as follows.
- (a) 1 June 2015 to 25 December 2020 – failure to re-evaluate her rate of pay in accordance with TUPE rules in conjunction with the Equality Act 2010, contrary to an instruction to do so by her trade union representative in 2016.
 - (b) 7 December 2015 to 25 December 2020 – failure to award her “allowances” for tasks undertaken which did not form part of her job description/contract, while offering male colleagues such “allowances”. This applies to both duty management and accountancy tasks.
 - (c) 7 December 2015 to 25 December 2020 – consistent failure to ensure that she was paid in line with male colleagues in accordance with the Equality Act 2010, even though her role had “majorly changed” to the point where it was a different job with a different job title, and instead keeping her on the same pay rate as female cleaning staff.
 - (d) December 2015 – an incident at the Allerdale Borough Council Christmas Party where her male colleague was taken to engage in a “meet and greet” with her former colleagues and she was placed in a room to look after her former colleagues’ coats. Her manager, Karen Thompson, looked for her and removed her from the room due to there being no need to “look after anyone’s coats” and it was very demeaning to have her carry out such a role.

- (e) 25 August 2016 – refusal of a flexible working request submitted on 10 June 2016 to reduce her hours from 37 to 22.5 on grounds of “burden of costs” for a request she did not make (thus breaching section 80G(1)(b) of the Employment Rights Act 1996), a fact of which she has only recently become aware. Instead the respondent offered her a “take it or leave it” reduction to 15 hours per week, only to increase the hours of a male colleague from zero hours to contracted hours of 37 hours per week almost immediately after she reluctantly accepted on mental health grounds. This also involved giving that male colleague work which was taken from her in order to reduce her hours to 15 per week, resulting in both financial and further mental detriment; removing her from the main office to give that male colleague her desk, and making her work in isolation at all times. This action had a long term and recurring consequence regarding her salary. She also believes it contravened section 47E(1)(a) of the Employment Rights Act 1996.
- (f) Restructure of March 2017 when two new positions were created – the Box Office Manager and the Hospitality Manager. These positions were given to two male colleagues, and she was denied the opportunity to apply for these positions even though she had proven experience for both positions. A claim of “you work part-time and these are full-time positions” was made on 25 September 2018 at a grievance meeting of which it is said that the respondent trust is refusing to supply copies of minutes/outcome despite a request via a Subject Access Request.
- (g) 24 July 2018 and 28 September 2020 – failure to deal with two grievances, in breach of company policy and the ACAS Code of Practice, in which issues of pay rate and other incidents were raised.
- (h) 25 December 2020 – redundancy dismissal.

The issues to be determined at the preliminary hearing

18. Judge Allen identified the issues to be determined at this preliminary hearing at paragraph (3) in Part One of his Case Management Summary as follows. He directed that issues (vi) and (vii) *may* be determined if the judge conducting the hearing feels it appropriate to do so.
- (i) For the claimant’s equal value claim in which she compares herself to Daniel Marsden and Mike Nutter (but not for the like work claim in which she compares herself to a hypothetical comparator employed by the Council prior to 1 May 2015), can the respondent show that the reason for the difference in pay was genuine, material, not a sham or pretence, and not due to the difference in sex?
 - (ii) For the claimant’s equal value claim in which she compares herself to Daniel Marsden and Mike Nutter (but not for the like work claim in which she compares herself to a hypothetical comparator employed by the Council prior to 1 May 2015), has the claimant established a prima facie case of indirect discrimination? If the claimant cannot establish a prima facie case, the

respondent is not required to justify the reasons for any difference in treatment relied upon in its material factor defence.

(iii) For the claimant's equal value claim in which she compares herself to Daniel Marsden and Mike Nutter (but not for the like work claim in which she compares herself to a hypothetical comparator employed by the Council prior to 1 May 2015), if the claimant has established a prima facie case of indirect discrimination, has the respondent proved that any difference in pay was objectively justified, in that it was a proportionate means of achieving a legitimate aim?

(iv) For the claimant's like work claim, is the claimant able to rely upon a hypothetical comparator (as she does in asserting her claim)?

(v) For the claimant's like work claim, is the claimant able to rely upon a (hypothetical) comparator who was a predecessor of hers undertaking the work which she has since undertaken for the respondent (including, where that predecessor comparator was employed by the Council pre-transfer and not by the respondent)?

(vi) For the claimant's like work claim, was the claim presented within the time limit set out in sections 129 and 130 of the Equality Act 2010? Dealing with this issue may include consideration of: (a) When did the treatment complained about occur; (b) Whether, if out of time, it was part of conduct extending over a period and, if so, when was the end of the period over which that conduct extended; and/or (c) Whether time should be extended on a just and equitable basis? The judge noted that these issues were as recorded and discussed at the preliminary hearing, based upon the respondent's list of issues, but in fact the time issues to be determined in an equal pay complaint differ from what was proposed/discussed and might not include (b) and (c) as they might not apply to an equal pay claim and the focus will be on the test in sections 129 and 130 of the Equality Act 2010 at the next preliminary hearing.

(vii) For the discrimination/harassment claims recorded in the grounds of claim under the heading general discrimination as allegations (c), (d), (e) and/or (f) (of direct and/or indirect discrimination and/or harassment), was the claim presented within the time limit set out in section 123(1)(a) and (b) of the Equality Act 2010? Dealing with this issue may include consideration of: (a) When did the treatment complained about occur; (b) Whether, if out of time, it was part of conduct extending over a period and, if so, when was the end of the period over which that conduct extended; and/or (c) Whether time should be extended on a just and equitable basis?

(viii) Whether the Tribunal should strike out all or any parts of the claimant's claims on the basis that it has no reasonable prospects of success? The respondent contends that this should be considered for all of the claims brought and may include consideration of the time issues as part of the determination.

(ix) Whether to order the claimant to pay a deposit as a condition of continuing to advance any allegation or argument if the Tribunal considers that the allegation or argument has little reasonable prospect of success? The

respondent contends that this should be considered for all of the claims brought and may include consideration of the time issues as part of the determination.

19. The Tribunal now turns to its findings of fact so far only as necessary for then determining each issue in turn.

Findings of fact

20. At the date of the TUPE transfer in 2015 the claimant was seconded to the role of Front of House Team Leader. Her substantive role was Clerical Assistant working 22.5 hours per week on a salary of £16,718 pro rata (with a 3% allowance for weekend working). Her original employment particulars are found at [116-119]. Her secondment to the Front of House Team Leader role is evidenced at [120] and [127-128].

21. From 1 June 2015 the claimant was employed by the respondent as Administrative Officer (Finance Lead). This represented a change of job title from Clerical Assistant to Administrative Officer, but the duties of the post remained as before. The job description for that role appears at [129-131]. Her principal responsibilities are there set out under the headings Administrative Support, Box Office, Accounts (see, in particular, paragraphs 14-18), Customer Focus, Venue Management, Marketing and Publicity, and other appropriate duties which may be reasonably required of the post. A person specification for the post appears at [132-133]. At this time there were two Administrative Officer posts – one leading on Finance and one leading on Marketing.

22. This had been discussed and agreed with the claimant. See the contract variation letter at [159] signed by the claimant on 22 September 2015. The result was that she stayed on a contract for 37 hours per week rather than returning to her temporary role that had involved 22.5 hours per week that had accommodated the claimant pre-transfer.

23. At this time, the other Administrative Officer (Marketing Lead) was also female – Andrea Fitzsimons. Her terms and conditions of employment, and her job description and person specification were the same as those applying to the claimant. Her salary was also £16,718 (with a 3% allowance). However, she was paid a Duty Manager allowance of £2,882. The claimant was not paid this allowance because she did not wish to carry out Duty Manager duties.

24. The Duty Manager duties are to be found in the respondent's *Events Front of House Staff Procedures* (Version 4, August 2015), which was entered into the evidence on the second day of the hearing without objection. The claimant expressed the view that this was an out-of-date document, but it is not suggested that this document has been superseded by any subsequent document. The Tribunal finds that this is the relevant document describing the Duty Manager duties. A Duty Manager is an employee or trustee or volunteer who takes on the duties that might otherwise be discharged by, for example, the Venue Manager or other senior manager, when they are not present in the theatre or rostered to be on duty. The Venue Manager's job description is at [139-147].

25. These duties apply only to specific performances, productions or events that are taking place in the theatre, and not to smaller and often regular activities that might be taking place on the theatre premises on any particular day. That is apparent from the duties that the Duty Manager is addressed to in the Policy under the headings Pre-Artist Arrival, On Artist Arrival, Show Duty and General. See pages 1-6 of the Policy. The Policy document also distinguishes the duties of a Duty Manager from those of Security Personnel, Stewards and other volunteers.
26. See further paragraph 4 of Mandy Lawson-Jackson's witness statement. The Duty Manager allowance is for carrying out the additional responsibilities of Duty Manager, which involves managing events and shows and the front of house staff in the theatre. These duties are carried out largely in the evenings and weekends which can involve working up to midnight due to the nature of the events. The expectations and responsibilities of this role had not changed from when the claimant had previously carried out these duties when the theatre had been managed by the Council. The claimant understood this, as is apparent from her email of 10 June 2016, and that she did not carry out the Duty Manager role.
27. Those employees who carried out the Duty Manager role are identified in these findings. They included a female employee who was a single parent.
28. When there was an event in the theatre in the evening on the days that the claimant worked (Monday & Tuesday) the rotas show, that on balance, her hours were changed from 1pm to 9pm to 9am to 5pm, as a Duty Manager would be in work that evening. The rotas illustrate that the Venue Manager and the Operations and Hospitality Manager worked as late as 1.00am or 2.00am when events were held in the theatre or the bar.
29. When the claimant was employed by the Council. the Clerical Assistant role job description stated that one of the responsibilities was "to assist with the operation and security of the Carnegie Theatre and Arts Centre and to be a keyholder for the premises. This will involve the proper supervision of the Carnegie Theatre and Arts Centre and any small-scale events or activities taking place therein in the absence of the Manager and Team Leader". The claimant was expected to be a keyholder to the building and to supervise the building during small-scale events or activities taking place in the absence of the Venue Manager.
30. The Duty Manager role is quite different from the inherent duties that any employee of the respondent trust (of which there were only 7 at the relevant time) would have if issues arise while they are on the theatre premises during their rostered shift or contractual hours. These are the ordinary and expected duties of a keyholder and of an employee representing the theatre to the public, as the claimant was. See paragraphs 12 and 13 of the Administrative Officer's job description.
31. In December 2015 one of the claimant's male comparators started work as an Administrative Assistant on a fixed term contract of 3 months on a salary of £15,155. He underwent training in the Duty Manager duties, which he was willing to undertake, and from February 2016 his salary increased to £16,718

plus an Acting Duty Manager allowance of £2,882. He succeeded Andrea Fitzsimons in the role that she had discharged. His fixed term contract was extended twice to 9 months in total.

32. The claimant also compares herself with Scott Roe. He was first employed by the respondent on a casual basis in August 2016 on £7.25 per hour. See [134-138]. In September 2016 he became an Administrative Assistant (Bar Lead) on a fixed term contract. He was paid the same basic salary as the claimant, Andrea Fitzsimons and David Marsden. He was also willing to discharge the Duty Manager duties and he also received the same Duty Manager allowance. His hours were full-time and he took on some of the claimant's duties when her hours were reduced following her flexible working request.
33. What is noticeable about the documentation recording the job descriptions of the Administrative Officers/Assistants is that the specific and generic duties are in a largely common form, apart from any particular focus that is needed for the Lead duties (Accounts or Marketing or Bar). This points strongly to these jobs being broadly similar or at least of being of equal value.
34. In February 2017 the Venue Manager proposed, and the respondent trust accepted, a reorganisation of the Administrative Officer (Marketing) and Administrative Officer (Bar) roles. The posts were realigned and offered on a permanent basis to the existing post-holders, David Marsden and Scott Roe. This resulted in a change of job titles to "Box Office and Administration Manager" and to "Operations and Hospitality Manager" in order to better reflect the responsibilities of the roles. The salaries attached to these posts remained the same, as did the essential duties. The respondent's position, which the Tribunal accepts, is that this was an exercise in changing job titles of existing post-holders. There would be no question of regarding these as new posts that should have been made open to competition from others including the claimant. There was no evidence that the claimant was interested in this exercise, having just accepted reduced hours as a result of her flexible working request.
35. Michael Nutter replaced Scott Roe as Operations and Hospitality Manager in November 2019 on the same salary terms.

Submissions

36. The Tribunal has considered the claimant's lengthy written submissions and it is not necessary to reproduce them here. The Tribunal has also considered the respondent's relatively shorter oral submissions. They are recorded in the judge's notes of proceedings and are not reproduced here.

Relevant legal principles

37. The Tribunal addresses the relevant legal principles in its discussion and conclusions below. In particular, it has considered the Equality Act 2010 sections 13, 19, 26, 27, 39(2), 64-71, 123 and 129-130. Regard has also been had to the Employment Tribunals Rules of Procedure 2013 (as amended) rules 37 and 39 (with the relevant judicial guidance recently reviewed in *Laing v Bury & Bolton Citizens Advice* (2022) EAT and *Bahad v HSBC Bank plc* (2022) EAT.

Discussion and conclusions

Issue (i)

38. Issue (i) requires the Tribunal to answer the question whether, for the claimant's equal value claim in which she compares herself to Daniel Marsden and Mike Nutter, can the respondent show that the reason for the difference in pay was genuine, material, not a sham or pretence, and not due to the difference in sex? This issue is not concerned with the claimant's like work claim in which she compares herself to an actual or hypothetical comparator employed by the Council prior to 1 May 2015.
39. The Tribunal considers that the respondent can show this. It accepts the evidence of Mandy Lawson-Jackson on this issue. The documentary evidence, and the Front of House Policy in particular, supports the respondent's position.
40. It is clear that the claimant was paid the same basic salary as her two male comparators. She was also paid on the same basis as a former female colleague in a similar post. Whether the job title is Clerical Assistant or Administration Officer or some variant thereof matters not. What matters is that the two male comparators were paid a supplement or allowance, not because they were men and the claimant was a woman, but because they carried out the Duty Manager role on top of their main duties when the theatre was presenting specific productions or performances or events covered by the Front of House Policy. The Duty Manager role and its duties were additional to and quite different from the duties that any employee or keyholder might have to carry out while on the theatre premises during their shift or contracted hours. In addition, the Duty Manager role carries extra responsibilities and involved unsociable hours, and this is why it attracted a supplement or an allowance.

Issue (ii)

41. Issue (ii) requires the Tribunal to answer the question for the claimant's equal value claim in which she compares herself to Daniel Marsden and Mike Nutter has the claimant established a prima facie case of indirect discrimination? If the claimant cannot establish a prima facie case, the respondent is not required to justify the reasons for any difference in treatment relied upon in its material factor defence.
42. The Tribunal concludes that the claimant has not established a *prima facie* case of indirect discrimination. The respondent has provided a lawful and non-discriminatory explanation for the difference in pay. In particular, the allowance or supplement paid to the comparator employees for the Duty Manager duties has been explained. The claimant did not wish to carry or discharge or work such duties. She would have been paid the supplement or allowance if she had been willing to carry out the Duty Manager duties. But she did not wish to do so and she did not in practice do so. Moreover, she agreed in evidence that her children were no longer of school age. There was no reason related to her sex, such as childcare responsibilities, that prevented her from being a Duty Manager in addition to her main role and thus earning the Duty Manager supplement or allowance.

Issue (iii)

43. Next, the Tribunal addresses issue (iii). For the claimant's equal value claim in which she compares herself to Daniel Marsden and Mike Nutter, if the claimant has established a *prima facie* case of indirect discrimination, has the respondent proved that any difference in pay was objectively justified, in that it was a proportionate means of achieving a legitimate aim?
44. The claimant has not established a *prima facie* case of indirect discrimination. This issue thus falls away. However, if the claimant had established a *prima facie* case of indirect discrimination, then the Tribunal is satisfied that the respondent has proved that any difference in pay was objectively justified, in that it was a proportionate means of achieving a legitimate aim.
45. The difference in pay is demonstrated by the need to remunerate employees who undertook the additional duties of a Duty Manager. The respondent needed to encourage sufficient employees to undertake these additional duties, which involved extra responsibilities and unsociable hours. It did so by paying a fixed supplement and allowance, which was paid to any male or female employee who was willing to undertake and did undertake the extra role of Duty Manager. The allowance does not appear to be disproportionate to the role or duties concerned. Nor does it appear to be connected to sex in any way. The respondent had a legitimate aim. It adopted proportionate means to achieve that aim. The difference in pay has been objectively justified.

Issue (iv)

46. For the claimant's like work claim, is the claimant able to rely upon a hypothetical comparator (as she does in asserting her claim)? In pursuing a like work claim the claimant appears to rely upon a hypothetical comparator (and possibly an as yet unnamed actual comparator) being an employee of the Council undertaking like work prior to 1 May 2015.
47. The orthodox position is that if the claimant is complaining of pay discrimination that arose during her pre-TUPE employment with the Council, then she must bring her claim within 6 months of the TUPE transfer. She also cannot bring a claim against the present respondent in respect of any improvements in the terms and conditions of the Council's employees that occur post-transfer. That would be a post-TUPE, cross-employment comparison. This is also not one of the exceptional cases where cross-employer comparisons are permitted where two employers share a single source responsible for setting pay. See *King v Tees Valley Leisure Ltd* (2005) ET and *Sodexo Ltd v Gutteridge* (2009) EAT and CA.
48. It is correct, as the claimant argues, that liability for the claimant's equality clause transferred from the Council to the respondent at the point of the TUPE transfer. That serves to make the respondent potentially liable for any discriminatory terms that existed as between the claimant and relevant Council employees as at the point of transfer. However, the Court of Appeal in *Sodexo* held that the time limit for such a claim was 6 months from the date of the TUPE transfer by the transferor and not 6 months from the effective date of termination of a claimant's employment with the transferee.

49. Nevertheless, the claimant relies upon *Kells v Pilkington plc* (2002) EAT. There the EAT held that there is no rule of law restricting how far back a claimant may look for a comparator. That is, that exercise is not limited to 6 years. However, in the Tribunal's judgment, this does not assist this claimant. She is complaining about alleged pay discrimination that is said to have occurred post-transfer. She is not complaining about pay discrimination that occurred pre-transfer. As a matter of law, she cannot seek to compare herself with an employee of another employer. That would be a cross-employer comparison. Such a comparison is only permitted in an exceptional case, as explained above, which this is not.
50. In summary, whether the claimant identifies an actual or a hypothetical comparator, who is or was an employee of the Council and employed in its finance department, her claim cannot succeed on that basis for the various reasons explained above.
51. In addition, equal pay law does not permit reliance upon a hypothetical comparator. See *Colroll Pension Trustees v Russell* (1995) ECJ; *Walton Neurological Centre v Bewley* (2008) EAT. Furthermore, and in any event, the claimant has thus far not named an actual comparator.
52. For all these reasons, even taking the claimant's case at its highest, the like work claim has no reasonable prospect of success. It is struck out.

Issue (v)

53. For the claimant's like work claim, is the claimant able to rely upon a (hypothetical) comparator who was a predecessor of hers undertaking the work which she has since undertaken for the respondent (including, where that predecessor comparator was employed by the Council pre-transfer and not by the respondent)?
54. The Tribunal's analysis for issue (iv) also applies to issue (v). The claimant has not identified an actual or hypothetical comparator who was her predecessor and where both the claimant and her comparator were employed by the respondent (as opposed to being employed by the Council).
55. The claimant is correct in arguing that the Equality Act 2010 section 64(2) provides for the possibility that the comparator may be a predecessor. However, that does not help the claimant here. The predecessor must be someone who was employed in the claimant's post by the respondent and, for the reasons already explained above, not simply someone who is or was employed by the Council.
56. Thus, the claimant's like work complaint on this basis also cannot succeed. This strengthens the reasons for making a strike out order, even taking the claimant's case at its highest.

Issue (vi)

57. For the claimant's like work claim, was the claim presented within the time limit set out in sections 129 and 130 of the Equality Act 2010? Dealing with this issue may include consideration of: (a) When did the treatment complained about occur; (b) Whether, if out of time, it was part of conduct extending over a period and, if so, when was the end of the period over which that conduct extended; and/or (c) Whether time should be extended on a just and equitable basis?
58. Judge Allen noted that these issues were as recorded and discussed at the preliminary hearing, based upon the respondent's list of issues, but in fact the time issues to be determined in an equal pay complaint differ from what was proposed/discussed and might not include (b) and (c) as they might not apply to an equal pay claim and the focus will be on the test in sections 129 and 130 of the Equality Act 2010 at this preliminary hearing.
59. If the like work claim is about pay discrimination arising during the claimant's employment with the Council, but liability for which has passed to the respondent under TUPE then, as already explained above, the time limit is 6 months from the date of the TUPE transfer.
60. However, if here the claimant is complaining about post-TUPE pay discrimination, then section 129 of the Equality Act 2010 applies. This is a so-called "standard case". It has not been suggested that it falls into any other category of case for the purpose of section 129 (although nothing hangs upon that in any event). The time limit is the period of 6 months beginning with the last day of the claimant's employment with the respondent. There is no provision for any extension of time and the Tribunal has no discretion in that regard.
61. The like work claim against the respondent arising from pay discrimination during employment with the respondent is thus in time, but it has no reasonable prospect of success, as already explained. However, if the like work claim is against the respondent, but in respect of pre-TUPE transfer pay discrimination by the Council, then it is out of time and there is no provision permitting an extension of time.

Issue (vii)

62. For the discrimination/harassment claims recorded in the grounds of claim under the heading general discrimination as allegations (c), (d), (e) and/or (f) (of direct and/or indirect discrimination and/or harassment), was the claim presented within the time limit set out in section 123(1)(a) and (b) of the Equality Act 2010? Dealing with this issue may include consideration of: (a) When did the treatment complained about occur; (b) Whether, if out of time, it was part of conduct extending over a period and, if so, when was the end of the period over which that conduct extended; and/or (c) Whether time should be extended on a just and equitable basis?
63. This issue concerns the non-equal pay complaints. That is, ordinary complaints of sex discrimination, including harassment and victimisation. These are allegations (c), (d), (e) and (f), and possibly (g).

64. The time limit here is that in section 123(1)(a) and (b) of the Equal Pay Act 2010. Such a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal considers just and equitable. Conduct extending over a period is to be treated as done at the end of that period: section 123(3).
65. Allegations (a), (b) and (c) are not ordinary sex discrimination complaints. They are equal pay complaints. They are subject to the time limit in section 129. The claimant is able to make a complaint of equal pay at any time up to 6 months from the last day of her employment. She may not present an equal pay complaint as if it were an ordinary sex discrimination complaint (Equality Act 2010 sections 70-71). Those complaints have been dealt with above.
66. Allegation (d) is the Christmas party allegation. It occurred in December 2015. Allegation (e) is the alleged refusal of the claimant's flexible work request, the reduction in her hours and the change in her internal work location. These acts occurred in August 2016. Allegation (f) concerns the restricting of posts (although this appears to be more to do with a change in job titles and job descriptions of existing post-holders. This occurred in March 2017. Allegation (g) concerns the handling of the claimant's grievances in July 2018 and September 2020.
67. The claimant's employment with the respondent ended on 25 December 2020. Subject to Acas early conciliation, the primary limitation period ended on 24 March 2021. Acas early conciliation started on 18 March 2021 and ended on 29 April 2021. The ET1 claim was presented on 23 May 2021. Therefore, so far as any of the sex discrimination complaints occurred on or after 19 December 2020, those complaints would be in time.
68. Is it just and equitable to extend time for those sex discrimination complaints arising before 19 December 2020? Allegation (h) concerns the claimant's dismissal by reason of redundancy and is in time.
69. The acts of discrimination complained of are all capable of being identified by reference to the date of the act complained of as set out by the claimant in her particulars of claim. In the Tribunal's judgment, these are simple acts of alleged discrimination. They are not conduct extending over a period of time. They are each separate and free-standing acts of different types alleged to amount to sex discrimination. They do not constitute a course of conduct. The Tribunal does not accept the claimant's arguments at pages 10-12 of her written submissions. Even if these acts were properly to be regarded as a course of conduct extending over a period of time, time would end in September 2020.
70. The Tribunal has a broad discretion to extend time under the just and equitable test. This is not a question of what was reasonably practicable or within what later time it would be reasonable to have presented the claim. See *Abertawe Bro Morgannwg University Local Health Board v Morgan* (2018) CA; *Chief Constable of Lincolnshire Police v Caston* (2010) CA.

71. There is no presumption that time should be or will be extended. See *Robertson v Bexley Community Centre* (2003) CA. The claimant must persuade or convince the Tribunal that it is just and equitable to extend time. Time limits are not to be ignored lightly and an extension of time is the exception rather than rule, although that does not mean that the claimant's circumstances (in seeking an extension) have to be exceptional.
72. There is no checklist or list of factors that must be applied, although see section 33 of the Limitation Act 1980 and *British Coal v Keeble* (1997) EAT. What might be relevant to be weighed in the analysis of what is just and equitable is the prejudice to each party; the length of any delay; the reasons for that delay; the effect on the cogency of the evidence; how promptly the claimant acted when she had knowledge of the relevant facts; and any steps she took to seek advice. However, this is not a list to be followed slavishly. The prejudice to the parties and the length and reasons for delay are often most relevant: *Southwark LBC v Afolabi* (2003) CA; *DCA v Jones* (2008) CA; *Adedeji v University Hospitals Birmingham* (2021) CA.
73. The claimant relies upon her unconcluded grievance as a factor. However, the respondent dealt with the informal grievance raised by the claimant in August 2018, as can be seen in the documents at [224-244], even if that was then left unresolved. The claimant could have taken up that complaint at any time thereafter.
74. She renewed her grievance in September 2020 [333-336], to which the respondent responded at [337]. The claimant appealed against that response/decision, which was sent to her after her employment ended. This is a complaint that is in time.
75. Otherwise, the claimant relies upon the points that she makes at pages 13-18 of her written submissions. She refers to her father's death in July 2018. She considered that there was little chance of her grievance being treated fairly. She experienced harassment by her landlord from September 2018, resulting in acute anxiety in December 2018 and contact with third parties for advice in 2019 – but this was matter that was resolved within a year. She refers to being afraid of the respondent and how issues were dealt with by it. She asserts a lack of knowledge of what was sex discrimination and how it could arise.
76. Nevertheless, the Tribunal is not satisfied that the claimant has adequately explained the reasons for the delay and the length of the delay concerning allegations (d), (e) and (f). There is insufficient here to support an argument that there were circumstances preventing her from acting timeously. She was continuing to work. She does not suggest that she was prevented from acting by ill health or by external circumstances. She was a trade union member and she had access to its advice and services. She was also someone who was very obviously able and capable of articulating her concerns to management. She was also someone of apparent intelligence, with some legal training, although not as a legal professional. It is difficult to accept that she did not recognise (and was incapable of recognising) that the respondent's actions in relation to her could potentially amount to sex discrimination, even in the general sense, if not in the legal sense, and to have taken advice as to her position.

77. As for the balance of prejudice, that weighs more heavily upon the respondent than against the claimant. The claimant's explanations for delay are inadequate. She had access to advice. It is difficult to accept that she was ignorant of her rights. The delay has compromised the cogency of the evidence, which disadvantages the respondent more than it does the claimant. The claimant is not left without a cause of action.
78. The Tribunal takes a different or more nuanced view of the grievances in July 2018 and September 2020. The complaint about the latter grievance is in time, but it would also be just and equitable to extend time, if it were necessary to do so. The July 2018 grievance was left unresolved, but then the claimant's housing dispute and ill health intervened, but these difficulties were overcome within the year. The claimant could have pursued a claim to the Tribunal about the July 2018 complaint at that point. The Tribunal is unpersuaded by the factors the claimant advances that might cover that grievance. For the same reasons as above, it is not just and equitable to extend time.
79. In summary, the non-equal pay sex discrimination complaints may proceed only to the extent that they concern the handling of the September 2020 grievance and so far as they concern the December 2020 redundancy dismissal.

Issue (viii)

80. Whether the Tribunal should strike out all or any parts of the claimant's claims on the basis that it has no reasonable prospects of success? The respondent contends that this should be considered for all of the claims brought and may include consideration of the time issues as part of the determination.
81. As can be seen above, The Tribunal concludes that the following complaints have no reasonable prospect of success and are struck out: (a) the equal pay complaints and (b) the sex discrimination complaints except those regarding the September 2020 grievance and the December 2020 redundancy dismissal.

Issue (ix)

82. (Whether to order the claimant to pay a deposit as a condition of continuing to advance any allegation or argument if the Tribunal considers that the allegation or argument has little reasonable prospect of success? The respondent contends that this should be considered for all of the claims brought and may include consideration of the time issues as part of the determination.
83. In the circumstances above, a deposit order is not appropriate.

Judge Brian Doyle
DATE: 4 July 2022

JUDGMENT WITH WRITTEN REASONS
SENT TO THE PARTIES ON
5 July 2022

FOR THE TRIBUNAL OFFICE

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