



EMPLOYMENT TRIBUNALS

Claimant: Ms S Conway

Respondent: Carnegie Theatre Trust

RECONSIDERATION JUDGMENT

Upon the claimant's application for reconsideration of the Tribunal's judgment with reasons sent to the parties on 5 July 2022, the application is refused, except as set out at paragraphs 36 and 44 of the Reasons below. The original judgment is confirmed, save to that extent.

REASONS

1. Following a hearing on 23-25 May 2022, and an oral decision on 25 May 2022, the Tribunal's judgment was sent to the parties on 31 May 2022. The claimant had requested written reasons for the decision at the hearing and written reasons were signed by the judge on 4 July 2022 and sent to the parties on 5 July 2022.
2. The decision of the Tribunal was: (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.
3. The claimant applied for reconsideration of the decision by email on 18 July 2022. The grounds of that application were set out in a document attached to that email and comprising 8 pages.

4. The application was referred to the judge on 29 July 2022. The judge considered the reconsideration application in chambers on 1 August 2022.

The rules of procedure

5. Rule 70 provides that a Tribunal may on the application of a party reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the original decision may be confirmed, varied, or revoked. If it is revoked it may be taken again.
6. The application complies with the procedural requirements of rule 71. It is usual for the application to be considered by the judge who took the original decision (rule 72(3)).
7. Rule 72(1) requires the judge to consider the application. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application shall be refused, and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the judge's provisional views on the application.
8. The application is in five parts: (1) Material factor defence; (2) Payment of allowances; (3) Comparator from previous employment (real comparator); (4) Grievance; and (5) Linked conduct.
9. The judge now turns to consider each part of the application in turn. He reminds himself that he may reconsider any judgment "where it is necessary in the interests of justice to do so." At this stage, the question is whether the judge "considers that there is no reasonable prospect of the original decision being varied or revoked."

(1) Material factor defence

10. To do justice to the claimant's application, the Tribunal begins by setting out the essential points that she seeks to make as follows.
11. (a) The Tribunal reached a decision made on factually incorrect information and has failed to consider the true facts of the case (paragraph 21 of the written reasons). (b) The Tribunal accepted the respondent's Material Factor Defence based on an incorrect statement that the claimant's role did not change on 1 June 2015, and by December 2015 it was fundamentally different from that of her pre-TUPE role, due to it now including extra duties carried out by higher graded roles pre-TUPE. (c) The Tribunal referenced a Job Description (Clerical Assistant) which did not reflect the actual role the claimant was required to undertake during her employment with the respondent. (d) The claimant provided substantial and sufficient evidence to show that her pre-TUPE role did not match that of the role the respondent required her to undertake, and that it was equal/broadly similar to that of Finance Team staff at Allerdale Borough Council. (e) This is especially relevant following the reduction in hours by the claimant where the respondent decided that her role was primarily to carry out

the finance work. (f) Evidence of this available to the Tribunal included various emails, work diaries, and a Job Description created by the claimant showing her true role (see the claimant's witness statement and both hearing bundles). (g) The respondent confirmed that the claimant's role had changed (see its grounds of resistance, the claimant's witness statement and written submissions, and the respondent's responses to the claimant's grievance. (h) This was work which was previously undertaken by former colleagues of the claimant within the Finance Team at Allerdale Borough Council. (i) The Tribunal has relied on documented evidence provided by the respondent on 24 May 2022 of which the claimant was not aware existed, and which should not have been used to reach the decision made by the Tribunal (and the claimant explains why she takes that view in her application). (j) The Tribunal has failed to address or take into account changes made to both the claimant and her comparators' roles for the duration of her employment with the respondent, of which there was a consistent failure to maintain the Material Factor Defence, both contractually and in accordance with case law, instead focusing on the circumstances of the claimant at transfer/shortly after transfer only – in particular, when her role was primarily focused on finance work following the reduction in her hours. (k) The Tribunal has decided that the claimant's basic pay was graded correctly as equal to that of her comparators using an out of date and incorrect Job Description. (l) The Tribunal has also failed to take into account the fact that the claimant's basic pay was actually less than her male comparators due to it including an enhancement under a collective agreement which her comparators were not subject to. (m) The Tribunal has further failed to take into account the recommendations of Underhill J in *Bury v Hamilton MDC* [2009] ICR 1426; or *Walker v The Co-op Group* (courts should decide if any changes in circumstances have affected the reliability of the Material Factor Defence and other points made therein). (n) At the time of the hearing, the "allowance" was no longer payable to the claimant's comparators for extra duties undertaken; it formed part of their Job Descriptions and basic pay, and had done since early 2017 following a staff restructure/realignment. (o) The claimant's case is that there were a number of requests that her rate of pay be re-evaluated due to extra duties, all of which were ignored or dismissed. (p) The respondent failed in its contractual obligation to conduct annual Equal Pay checks in accordance with a Collective Agreement forming part of the claimant's contract of employment.

12. In summary, the claimant contends that the Tribunal was mistaken in accepting the respondent's Material Factor Defence due to: (i) A decision being made without considering the full, presented facts of the case; making a decision on incorrect facts. (ii) Failure to consider a large number of changes in circumstances to the workforce/duties which could have affected the reliability of the Material Factor Defence. (iii) Relying on evidence which is out of date, and of which the respondent has failed to maintain accordingly. (iv) Failing to acknowledge the recommendations of Underhill J in regard to the maintaining of any Material Factor Defence. (v) Making a decision based on circumstances at the inception date of the Material Factor Defence (1 May 2015), and not the correct date as established in *Walker v The Co-op Group*, which would be 25 December 2020. (vi) The claimant requests that the Tribunal reconsider the decision and refer the issue to the full hearing scheduled for October 2022, where the full facts of the case be considered along with the relevant evidence presented.

13. Having set out the claimant's application for a reconsideration of the Tribunal's decision on the Material Factor Defence, the Tribunal can address that application with relatively more brevity and economy.
14. This was a 3 days hearing, in which the Tribunal had extensive witness and documentary evidence before it, provided by the claimant and by the respondent. The respondent's material factor defence was being tested against that evidential background. The Tribunal had a full understanding of and considered fully the claimant's case regarding the material factor defence. It understood and appreciated that the claimant's duties had evolved over time, not just when compared with her pre-TUPE employment with the Council, but also during her post-TUPE employment with the Trust. However, the essential question was whether the respondent had shown that there was a material factor, other than the difference of sex, that explained the difference in pay between the claimant and her male comparators. The Tribunal dealt with that matter in its findings of fact and in its discussion with conclusions. It does not accept that this is a case to which the strictures in *Hamilton* or *Walker* apply. The respondent established its material factor defence, in the Tribunal's judgement.
15. The question was unnecessarily complicated by the claimant seeking simultaneously to compare herself with past and/or present (unnamed) employees of the Council and past and/or present (named) employees of the Trust. The Tribunal explained in its written reasons how it approached those various comparisons. The matter was further complicated by the claimant impliedly arguing that she was not really engaged on like work or work of equal value with her male comparators and should in fact be regarded as engaged in work of higher value for which she should have been paid more than her male comparators. The basis upon which the claimant sought to establish her equal pay claim was simply misconceived at several different levels.
16. The Tribunal does not accept the criticism that the claimant has made of its decisions on the admission of evidence, the assessment of that evidence, its findings of fact, its identification of the relevant legal principles, its application of those principles to the facts or the assumed facts, and its conclusions. The reconsideration procedure is not an appropriate vehicle for such an objection. The judge does not consider that it is necessary in the interests of justice to reconsider his judgment on the material factor defence. He considers that there is no reasonable prospect of the original decision being varied or revoked.

(2) Payment of allowances

17. The claimant's application under this heading may be captured as follows.
18. The claimant objects to the Tribunal striking out complaint (c) (as identified by Judge Allen) as a general discrimination complaint on the ground that it is an equal pay claim, and such a claim cannot be brought via section 13 of the Equality Act 2010. The claimant says that the Tribunal is mistaken in that decision. The claimant describes this complaint as one brought under section 13 (direct discrimination). The complaint is said to be about a discriminatory decision made by the respondent to create, implement, or apply a policy,

procedure, practice or criterion (which can be a one off or recurring incident) to award an allowance to employees who undertake extra duties not forming part of their Job Description, which previously formed part of other roles regular tasks. This is said to be confirmed in the witness statement of Mandy Lawson-Jackson. In the case of the claimant's comparators, this is the extra task of Duty Management, of which they were required to do during their normal working hours. It did not constitute extra hours on top of their contracted hours, the claimant asserts.

19. The claimant's complaint is that the respondent has consistently failed to apply the same decision to her regarding the extra duties she was required to undertake – those of finance duties, which were previously undertaken by higher graded positions pre-TUPE and did not form part of the claimant's post-TUPE role. The claimant says that she provided substantial and sufficient evidence to demonstrate these extra duties. The claimant contends that the circumstances between herself and her male colleagues are identical in the fact that both were required to undertake extra responsibilities which did not form part of their normal regular duties, of which were previously undertaken by other higher graded staff pre-TUPE.
20. The claimant contends that by failing to apply the same decision, policy, procedure, practice or criterion to the claimant, the respondent has directly discriminated against her in accordance with section 13. The claimant further contends that this is not an Equal Pay claim due to the "allowance" potentially applicable to her which, had the respondent applied the decision fairly, would not necessarily be equal to the "allowance" payable to her comparators, and would be dependent on an independent assessment of the value of the tasks, both financially and to the successful administration of the business.
21. The claimant contends that the Tribunal was mistaken when striking this complaint out on the grounds given. The claimant requests that the Tribunal reconsider its decision, referring the complaint to the scheduled full hearing for a decision to be made in relation to time limits considering the full facts and evidence of the complaint, and the fact that this was an ongoing decision which discriminated against the claimant every payday until her redundancy.
22. Having set out the claimant's application for a reconsideration of the Tribunal's decision on the allowances, again the Tribunal can address that application with relatively more brevity and economy.
23. The Tribunal fully appreciated the way in which the claimant had put her case. This aspect of her case was not simply about the payment of allowances, but in reality it was about whether the respondent had consistently failed to address her contention that her job duties had evolved and/or she was not being paid properly for the work that she was doing. The Tribunal considered that to be an equal pay complaint, in the way that this was framed in complaint (c), and not one that could be properly described as an ordinary or general sex discrimination complaint. It explained why in its written reasons. The matter was further complicated by the question of time limitation. This complaint, as presented, was misconceived.

24. The judge does not consider that it is necessary in the interests of justice to reconsider his judgment on complaint (c). He considers that there is no reasonable prospect of the original decision being varied or revoked.

(3) Comparator from previous employment (real comparator)

25. The claimant contends that the Tribunal has made a mistake by striking out this part of claim on the grounds that a predecessor comparator must be in the same employment. The claimant says that she brought the claim in accordance with section 64(2) of the Equality Act 2010, enabling the claimant to compare herself to a comparator who previously carried out the work/role she was required to undertake. The claimant argues that the effect of TUPE on Equal Pay claims is that a claimant can use a comparator with whom she previously worked alongside pre-TUPE.

26. The claimant's submission is that the Tribunal has failed to acknowledge or consider that at the time the work was carried out by any comparator the claimant uses, the claimant worked alongside this comparator at Allerdale Borough Council. The Tribunal has also failed to apply or acknowledge the effect of TUPE in relation to Equal Pay claims and has instead seemingly applied section 64(2) to circumstances if the claimant had not been subject to TUPE.

27. The claimant requests that the Tribunal reconsider the decision to strike out on the grounds given by considering: (a) The claimant is able to use a comparator who previously carried out the duties/work/role (like or broadly similar) prior to her for the business. (b) TUPE has the effect on Equal Pay claims that a claimant can use a comparator that she previously worked alongside prior to TUPE. (c) The claimant did work alongside any comparator/comparators used in the same employment when said comparator/comparators carried out the work. (vii) The claimant contends that the Tribunal has made a mistake by striking this claim out by deciding that the claimant can only compare herself to a predecessor employed by the respondent; thus not considering the effects of TUPE in relation to Equal Pay Claims.

28. Having set out the claimant's application for a reconsideration of the Tribunal's decision on the question of comparators from a previous (pre-TUPE) employment, the Tribunal can once more address that application with relatively more brevity and economy.

29. The Tribunal took some care to address the relevant case law on the intersection between the TUPE regulations and the equal pay provisions of the Equality Act. It took pains to set out as clearly as it was able to the distinctions to be drawn between the use of contemporary and predecessor comparators in post-TUPE employment, and contemporary and predecessor comparators in pre-TUPE employment, and in particular the position of cross-employment comparisons sought to be made post-TUPE. The Tribunal does not accept that it is wrong in its interpretation and application of the relevant case law. The reconsideration procedure is not apposite as the claimant's means of challenge.

30. The judge does not consider that it is necessary in the interests of justice to reconsider his judgment on the comparator issue. He considers that there is no reasonable prospect of the original decision being varied or revoked.

(4) Grievance

31. The claimant's contention is that the Tribunal has made a mistake by striking out the 2018 grievance due to time limits. This formed part of complaint (g) on general discrimination within the claimant's original complaint to the Tribunal. The claimant refers to Judge Allen's record of the preliminary hearing held on 18 January 2022. She says that at paragraph (9) it is stated that strike out regarding time limits could not be decided in relation to this complaint at a preliminary hearing. She states that strike out on time limits could only be decided on complaints (c), (d), (e) and (f).

32. Complaint (g) is that the respondent failed to correctly deal with grievances on two separate occasions (in 2018 and 2020). The claimant contends that this is one claim in relation to the handling of grievances by the respondent. She says that Judge Allen decided any time limits regarding this complaint (g) should not be decided at a preliminary hearing due to it not being possible or appropriate to decide the question of whether they were part of a continuing act at a preliminary hearing. The only claims time limits could be applied to were those which might be determined as isolated events. The claimant submits that at paragraph 62 of the present Tribunal's written reasons for strike out it has incorrectly included (g) as a "possibility".

33. The claimant summarises her position as being that the Tribunal has made a mistake in striking out part of complaint (g) as being out of time, because this complaint had previously been decided would not be subject to decisions in relation to time limits. The claimant requests that the Tribunal reconsider striking out part of this allegation, and as directed at the preliminary hearing on 18 January 2022, the whole complaint of (g) be decided at the full hearing scheduled for October 2022.

34. The judge has considered this part of the application under rule 72(1). The judge considers that there is a reasonable prospect of this part of the original decision being varied or revoked, and that it may be in the interests of justice to do so, for the reasons given by the claimant and by reference to paragraphs (3)(vii), (3)(viii) and (9) of Judge Allen's record of the previous preliminary hearing. In addition, and on reflection, it might indeed be better if evidence as to both grievances were to be heard and any question of time limitation decided at the final hearing so far as affects those grievances.

35. The application in respect of the grievances (complaint (g)) is thus not refused at this stage and the Tribunal informs the parties accordingly.

36. The parties shall now treat this document as the sending of a rule 72 notice to the parties setting a time limit of 14 days from the date that this document is sent to the parties for any response to the application by the other party (the respondent Trust) and seeking the views of both parties on whether the application can be determined without a hearing. This notice sets out the judge's provisional view that this part of the

application should be granted and that complaint (g) should proceed in its entirety to be determined at the final hearing (including any issues of time limitation).

(5) Linked conduct

37. Finally, the claimant contends that the course of discriminatory conduct by the respondent is linked by common personality due to the legal structure of Trusts, and how the law applies to decision-making by Trusts. She refers to the claimant's written submissions. A Trust Board is legally a single personality, and any decisions made are seen to be made by a single personality.
38. The claimant submits that the Tribunal failed to address this at the hearing held on 23-25 May 2022. She says that the Tribunal has subsequently rejected this without giving any explanation for the rejection, without any sort of discussion or investigation into the legal entity of Trusts regarding decision-making. The Tribunal has also incorrectly stated that even if all the events were seen to be linked, the claims would be out of time as the deadline would be September 2020. This date is said to be incorrect due to the claimant submitting a grievance on 28 September 2020. It would not have been appropriate for the claimant to also apply to the Tribunal at the same time without giving the respondent the opportunity to deal with the issues first. This would not have been fair to the respondent. The claimant says that she received the written decision for the first stage of the grievance on 8 January 2021. It would be appropriate that the time limit would therefore be 8 April 2021, and not September 2020.
39. The claimant requests that the issue of any link due to common personality be referred to a full hearing where it can be fully discussed with relevant evidence in relation to business/corporate law regarding Trusts, along with submissions from both parties in order that it is fully explored and determined, and not just dismissed as it has been presently without any sort of discussions or submissions or reason given for the Tribunal rejecting the claimant's argument. The claimant contends that this should be done in the interests of justice.
40. The judge considers that it is not clear that the Tribunal has rejected any submissions as to "common personality". It is not in issue that the Trust is a single legal personality, so far as the judge is aware. The judge does not understand what the concern is regarding that matter. It is also not clear as to what part of the Tribunal's decision this concern is being addressed. It is possible that the claimant is objecting to paragraph 69 of the written reasons.
41. If so, nothing that the claimant says in her application for reconsideration affects the Tribunal's decision in respect of complaints (d), (e) and (f). Those complaints are out of time; they did not constitute a course of conduct between themselves and/or linked to complaint (g). There was no proper basis to extend time in relation to them on the just and equitable ground.
42. So far as the claimant's arguments relate to complaint (g) – linking the 2018 complaint and the 2020 complaint and establishing that time did not start to run until January 2021 – the judge considers that that is a matter best left to the final hearing as part of any reconsideration of complaint (g), as discussed above.

43. The application in respect of linked conduct is thus not refused and the Tribunal informs the parties accordingly.

44. In that respect, the parties shall treat this document as the sending of a rule 72 notice to the parties setting a time limit of 14 days from the date that this document is sent to the parties for any response to the application by the other party (the respondent Trust) and seeking the views of both parties on whether the application can be determined without a hearing. This notice sets out the judge's provisional view in the preceding paragraph.

Judge Brian Doyle

DATE: 1 August 2022

JUDGMENT SENT TO THE PARTIES ON

11 August 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.