Case number: 2403947/2017

EMPLOYMENT TRIBUNALS

Claimant: **Ms Vicki Barnard**

Respondent: **Hampshire Fire and Rescue Authority (operating a Service)**

Heard at: **Southampton** **On: 8-9 May 2018**

Before: **Employment Judge Kolanko**

Representation
Claimant: Mr D Matovu of counsel
Respondent: Mr T Dracass of counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

Pursuant to sections 129 and 130 of the Equality Act 2010:-

1. The Claimant's stable working relationship ended when the claimant transferred from being a Business Support Officer to Fire Safety Officer, and when the claimant transferred from being a Fire Safety Officer to Office Manager. Accordingly the complaints in respect of equality of terms relating to the above roles have been brought out of time, and are therefore dismissed.

2. The claimant's stable working relationship continued when she moved from being an Office Manager to Community Safety Delivery Manager. Accordingly complaints in respect of equality of terms in relation to the role of Office Manager were brought in time.

NOTICE OF PRELIMINARY HEARING CASE MANAGEMENT BY TELEPHONE

Employment Judge Kolanko will conduct a preliminary hearing to identify the issues and to make case management orders including orders relating to the conduct of the final hearing.

The hearing will be conducted **by telephone** on **Tuesday 5th of June 2018** at **2.00 PM**. It has been given a time allocation of **I HOUR**.

To take part you should telephone 033 300 1440 on time and enter the access code 391381# when prompted.

Unless there are exceptional circumstances, no application for a postponement will be granted. Any such application must be in writing.

ORDERS
Made pursuant to the Employment Tribunal Rules 2013

Further Information

By 30 May 2018 the claimant shall respond to the request for further information recited in its case management agenda referred to in paragraph 1 of the order made on 10 November 2017.

REASONS

The Nature of Claims and Issues

1. This matter came to the tribunal by way of a preliminary hearing to determine whether the equal pay complaints pursued by the claimant relating to her role as a business support officer 3 January 2012 to 14 October 2012, and the role of inspecting officer from 15 October 2012 to 15 June 2014 have been brought in time. In the course of hearing it was suggested by the respondent that limitation also arises in relation to the claimant's role as an office manager on 16 June 2014 until 1 January 2016.

Evidence and Basic Facts found by the Tribunal

2. The tribunal heard evidence from:

    - the claimant Ms Barnard
    - Mr S Adamson Assistant Chief Officer and Director of Operations at Hampshire Fire and Rescue Authority.

3. The tribunal was assisted by having a substantial bundle of documents containing 202 pages. Although the tribunal's attention was drawn to a substantial number of documents in the bundle some documents were not drawn to the tribunal's attention

4. Having read the evidence of the witnesses and having looked at documents introduced into evidence, the tribunal finds the following basic outline facts in relation to the period of the claimant's employment which is the subject of these proceedings.:-

4.1. The claimant commenced employment with the respondent as a station administrator on 6 July 2009.

4.2. On 9 November 2011 Assistant Chief Fire Officer Adamson put in a request for approval of a variation of establishment, to pilot a new post of Code Compliance Inspector-Protection "CCO (later known as Business Support Officer "BSO"), in the Community Safety Protection Department "CSPD" addressing the issue of protection within the community, as opposed to prevention which was a separate department within CSPD. Mr Adamson in evidence indicated the rationale for this new post, was that most of the legal enforcement had been taken up against small businesses and the introduction of a BSO was to prevent this, and support Fire Security Officers who could then deal with high-risk buildings hospitals et cetera, enabling BSOs to deal with the small businesses, thus freeing up the FSOs for the other work. During the piloting period the prospective BSOs were to be provided with warrant cards as was the case with FSOs

4.3. The claimant expressed interest in the new role and was successfully interviewed by Mr Adamson, and commenced her new role on 12 December 2011. The claimant signed a contract on 18 January 2012 (bundle page 53-74) which indicated that the employment was a temporary contract ending on 11 December 2012, on grade F. It stated:-

> On completion of your secondment you will return to your current substantive post of service delivery administrator. However, if you decide not to return to your substantive post need to inform line manager in writing as soon as possible and by 12 November 2012 at the latest. This notification will be processed as a resignation from your substantive post. Give your contractual notice with the termination date coinciding the end of the agreed secondment stop

4.4. Under the job description of the Compliance Officer-Protection (bundle page 176) the purpose of the new role was described as:-

> To provide high quality fire safety advice service, ensuring that designated premises are visited and possible operational risks are identified, enabling the service to meet its statutory obligations, work within the scope of the better regulation agenda, achieve the aims of the publish Hampshire Fire and Rescue Service Plan and raise standards of fire safety awareness in the community.

4.5. The organisation chart within protection which was attached to the job description (bundle page 186) within community service has a progression within protection of:

> Area Manager
>
> Group Manager Delivery
>
> Office Manager
>
> Fire Safety Inspecting Officer

Compliance Officer.

Mr Adamson in evidence confirmed that subject to competence and inclination officers staff would go up the chart as a natural progression within Protection. The claimant commenced on a salary scale .26 within grade F.

4.6. On 11 September 2012 and whilst the claimant was undertaking her role as a BSO she expressed interest in 2 posts as a Fire Safety Officer, one at her current station at Redbridge and another in Basingstoke. She was shortlisted, and was successfully interviewed by Mr Adamson on 21 September 2012.

4.7. On 8 October 2012 the respondent sent a letter confirming her appointment with effect from 15 October as an FSO (bundle page 104). Attached to the letter was a contract of employment which indicated that the Grade she was appointed to was F-G and that the post was full-time and permanent base again at the Redbridge Fire Station. She was informed that she would move from pay grade F to G following her development programme. The job description recited as its purpose:-

> To undertake the role of CFP (community fire protection) Inspector dealing with daily activities which may include:
>
> - undertaking fire safety audits: preplanned and as a result of information received;
> - enforcing Fire safety order by collecting evidence and writing reports;
> - building regulations consultations;
> - working with other authorities and partners to reduce risk
>
> To protect life and property and to serve the community by providing fire safety solutions, identified through risk assessment and delivered in a professional and considerate manner in accordance with the Integrated Risk Management Plan.

4.8. The claimant in evidence indicated that she in her previous capacity undertook audits and preparation of reports. It is proper to record that the job descriptions for the previous role of BSO, and the role as FSO have similarities. It is noteworthy that the person specification for both roles (bundle page 183, 178) recite key accountabilities, experience and competency required, and the grading of importance whether essential or desirable. In large measure they are the same with exception of the first accountability regarding functional management is noted as desirable for the compliance role but essential for the fire safety role, and the 5th accountability relating to fire safety inspections which reference competency required of being physically capable of gaining access to areas of buildings and plant under construction this

was seen as desirable for a fire safety officer role but essential for a compliance officer role.

4.9. The claimant having achieved competency status as an FSO moved to G grade as envisaged in her contract on 1 March 2013.

4.10. On 16 June 2014 the claimant commenced her role as the office manager at the Redbridge fire station still in the Community Safety Protection Department, on a temporary role until 8 May 2015. It was acknowledged by both sides that this was a change of role to a more managerial function, although the claimant remained responsible for FSOs below her. The claimant remained on her FSO contract during this period.

4.11. On 23 April 2015 her role as office manager was extended to 31 March 2016.

4.12. Following reviews in 2015 it was determined that the 2 departments of prevention and protection within community safety would be merged into one department to be known as the Community Safety Department and that this would be managed by a community safety delivery manager "CSDM." The claimant successfully applied for this post which she commenced on 1 January 2016. Her contract (bundle page 157) noted that the post was permanent although there was a probation period of 6 months, the place of work again was at the Redbridge Fire Station , and the claimant increased her salary on to grade J. I was informed that the claimant retained original staff, from staff from the former Prevention Department. The claimant contends that in essence she was doing effectively the same job as she had been doing before.

4.13. The claimant's then line manager Mr Murray at the time of the appointment was anxious that she be appointed at the earliest opportunity and in his submission in support (bundle page 148) in his overall comment stated "*Vicky Barnard has been in the role for some time and has proved herself to be a competent office manager in fire safety . I have no hesitation in offering her the position."*

4.14. Mr Steve Ash took over from Mr Murray as the claimant's line manager on 15 April 2016, and on 28 November based upon his assessment that the claimant had been doing the work of the CSDM role from May 2014 (when she was the office manager), the claimant was given backdated pay to reflect this.

Submissions

5. Mr Dracass on behalf of the respondent provided written submissions, and elaborated upon them orally. He referred to the relevant statutory provisions,

and the relevant case law many of which were relied upon by Mr Matovu on behalf of the claimant. His primary submission was that the claimant undertook a number of different roles with different responsibilities which attracted different grades of pay, as well as different contractual terms. There were significant differences between the BSO role and the FSO role. Mr Dracass relied upon the fact that as a BSO the claimant did not have any enforcement powers. This distinction was somewhat reduced when it was acknowledged later in the hearing that the claimant and the colleague who were on the pilot scheme had been provided with warrant cards. He submitted that there was a marked difference between the role of FSO and the new role taken up as an office manager. He submitted that there was a distinction between the office manager role which were for fixed periods and the claimant's last role as a CSDM which was permanent. These matters he prayed in aid to submit that stable work ended at the conclusion of each contract. He submitted that the authorities advanced the proposition that a permanent contract replacing a temporary contract necessarily ended the stable relationship. Mr Dracass in response to a question put by me acknowledged that in all these cases there was no obligation on the part of the employer to retain the employee after the temporary contract had ended, unlike an employee had been working for several years with the same employer.

6. By way of a fallback, Mr Dracass submitted that there was certainly an ending of the stable work, when the claimant went to the role of office manager with two grade increases, undertaking a wider remit of work including staff development roles and management responsibilities for FSOs. Whilst perhaps intervening when staff under her were failing and undertaking FSO roles, she was essentially managerial from that moment.

7. Mr Matovu on behalf of the claimant also prepared written submissions, which he elaborated upon orally. As stated earlier he relied upon similar authorities to those advanced by Mr Dracass. In his written submissions he referred to the case of North Cumbria University Hospitals which referenced stable employment (referable to the Equality Act) as relating to the nature of the work rather than the legal terms. He referred to the authorities in particular Slack as supporting the case that uninterrupted succession of contracts is supportive of a stable working relationship irrespective of length between the contracts.

8. His primary case was that throughout the period of the claimant's working there was no fundamental change of work undertaken by the claimant, and asked rhetorically were there any differences that could be said to have interrupted the stability of the working relationship. He referred to the substantial overlap between BSO and FSO roles and that the further promotion to office manager was another progressive step within the same line of work. He reminded the tribunal that only competent inspecting officers were eligible for the role of office manager.

9. In paragraphs 26 to 29 of his submissions, Mr Matovu submitted that the clearest evidence of a stable working relationship was the fact that she had uninterrupted succession of contracts gaining promotion at various times. He

suggested that it would be absurd to suggest that had she remained as a BSO without being promoted then she would be considered to have stable work, but not if she excelled and gained promotions during the same period. Referring back to Dass (paragraph 14) he stated that "*it does not require a detailed analysis of the work carried out by C in each role to ascertain how far her day-to-day duties differed.* ***It is sufficient that she worked for the same employer under successive contracts with no gaps between them."*** In his oral submissions he submitted that it was irrelevant as to whether in a series of contracts there are fundamental changes or whether the work in practice undertaken by the employee is radically different. He then acknowledged however that where there is a radical change in the job there may be a case of a stable relationship coming to an end and another beginning

The Law

10. The starting point is section 129 Equality Act 2010 which states that in the context of a stable work case (which is not a concealment or incapacity case or both) a complaint must be brought within the qualifying period that is stated as "The period of 6 months beginning with the day on which the stable working relationship ended." Section 130(3) defines a stable work:-

> "A stable work case is a case where the proceedings relate to a period during which there was a stable working relationship between the worker and the responsible person (including any time after the term of work had expired)."

11. The above provision is a successor to the former provision in section 2ZA of the Equality Act 1970 which determined qualifying date from which the time limit would run, which stated:-

> "stable employment case" means a case where the proceedings relate to a period during which a stable employment relationship subsists between the woman and the employer, notwithstanding that the period includes any time after the ending of the contract of employment when no further contract of employment is in force."

12. This was an amendment to the Act introduced in consequence of the well-known litigation concerning Preston v Wolverhampton Healthcare NHS Trust which involved employees who were engaged on a succession of contracts with breaks between the contracts. Following a referral to the ECJ the court stated:-

> "Community law precludes a procedural rule which has the effect of requiring a claim for membership of an occupational pension scheme…. To be brought within 6 months of the end of each contract of employment where there has been **a stable employment relationship** resulting from a succession of short term contracts concluded at regular intervals in respect of the same employment same pension scheme applies."

13. In view of the similar authorities relied upon by both counsel, it appears not to be suggested that there is a difference between the term "stable employment

relationship" as recited in the ECJ judgment and in the amended Equality Act, and the reference to "stable work" in the 2010 Act. It is noteworthy both in relation to the Equality Act and the 2010 Act that no specific definition is given to either term nor does it appear that the term "stable employment relationship" had any lineage before the ECJ judgment.

14. I have been referred to numerous authorities touching upon the principles to be adopted when defining the above terms. The case of Slack and others v Cumbria County Council and others 2009 ICR 1217 Court of Appeal addressed the question as to whether there is a distinction between the Preston case where there were a succession of contracts with breaks which was held to constitute a stable employment relationship and present case where there were continuous contracts without any breaks. Lord Justice Mummery addressed the matter as follows:-

> ***"Stable Employment Point***
>
> 97. As explained above, the concept of "a stable employment relationship" in the context of time limits for equal pay claims emerged in the judgment of the Court of Justice in **Preston.** That was a case of a succession of contracts with breaks between the contracts. The Council emphasised that that was the context in which there was room for the concept and that it was not necessary for the Court of Justice to consider the operation of time limits in case like this of an unbroken succession of contracts. It was argued that the stable employment case does not cover these cases either by reason of the ruling of EC law or as a result of the 2003 Regulations implementing the ruling of the Court of Justice into the provisions of domestic law.
>
> 98. The claimants disagreed. They submitted that there is no logic in a distinction confining the concept of a stable employment to cases in which there are contract-free breaks in the succession of employment contracts. The irresistible logic of the reasoning of the Court of Justice and of the purpose of the 2003 Regulations is that an uninterrupted succession of contracts is an *a fortiori* case of a stable employment relationship.
>
> *Discussion*
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> 99. We agree with the claimants. In our judgment, on the facts found by the ET, the relationship between the Council and both Mrs Slack and Mrs Elliott was a case of stable employment. **They did the same work for the Council over very many years without any break in the work they did or in the succession of contracts. The only variation made in the new contracts in 2001 was in the reduction of working hours. "**

15. In the case of North Cumbria University NHS Hospitals Trust v Fox 2010 IRLR 804 CA the Court of Appeal adopted a similar approach, and considered that the ECJ ruling in Preston Number 1 referenced stable employment relationship in the context of the particular facts of the case, and was not suggesting that stability could only be applicable in a succession of short term contracts, but rather was of a more general application. Carnworth LJ gives helpful guidance in the context of interpretation:-l

> **Discussion**
> 24. At the end of the argument on this issue, we indicated that we agreed with the claimants' submissions on the new ground of appeal, and that it was unnecessary therefore to hear argument on the issue which divided the tribunals.
>
> 25 I would have been content simply to adopt the reasoning of Mummery LJ. On the facts found by the tribunal in this case, these were 'stable employment relationships'. As in

Slack, the nurses in the present case continued to do the same work for the trust, without any break in either the work itself or the succession of contracts. Although the tribunal found that there was a 'fundamental' change, that judgment was based entirely on the differences in the terms of employment, most notably the introduction of the KSF requirement. **There was no suggestion that the nature of their jobs as nurses changed materially, nor that there was any other practical break in the employment relationships.**

26 It would probably be enough to say that we are bound by the judgment in *Slack*, and that there is no reason to distinguish it. However, since the message of that case seems to have taken a little time to sink in with the profession, it may be helpful to add some supporting explanation.

27 In the first place, although the principle is now enshrined in a domestic statute, it is relevant to have in mind its European roots. That to my mind is the necessary consequence of the fact that the amendment was made, not by primary legislation, but by regulations (the Equal Pay Act 1970 (Amendment) Regulations 2003) under s.2(2) of the European Communities Act 1972. That section authorises regulations for the purpose of implementing the 'Community obligations of the United Kingdom'. In this case, according to the explanatory note accompanying the regulations, the changes were deemed necessary to reflect the equal pay provisions of the Rome Treaty (Article 141) 'as applied in a number of recent cases before the European Court of Justice and the domestic courts'. The footnote refers to *Preston* both in the ECJ and in the House of Lords. That it is appropriate therefore to have regard to the scope of the relevant European obligation, is apparent from those authorities. Indeed, if the new provision were found to differ significantly from the European obligation, its validity as an exercise of the 1972 Act power would be open to question.

28 Secondly, although the ECJ adopted the new concept with reference to a case in which there was a 'succession of short-term contracts' (reflecting the facts of the cases before it), their language does not confine it to that factual situation. On the contrary**, if stability of the relationship is the guiding principle, it would be perverse to hold that a succession of long-term contracts cannot achieve the same result.**

29 Thirdly, it is significant that the concept of a 'stable employment relationship', as adopted by the ECJ in *Preston*, appears to have been entirely new. We were not referred to any direct parallel in UK legislation or in that of any other member state. Nor was it prefigured in the submissions of the parties to the ECJ, or the opinion of the Advocate General (who reached the opposite conclusion to that of the court). The ECJ gave no further guidance as to the constituents of a stable employment relationship.

Then later:

31 **By adopting an entirely new expression, the court was, as I read the judgment, signalling a wish to distance itself from all these various formulations: on the one hand, to reject the Advocate General's proposal which depended on the concept of an 'umbrella contract', involving mutual obligations of renewal, and, on the other, to adopt a broad, non-technical test, looking at the character of the work and the employment relationship in practical terms.**

32 In particular, as I understand it, the word **'employment' in this phrase was intended to refer to the nature of the work, rather than the legal terms under which it is carried out**. Thus, in stipulating that a 'succession of contracts' must be in respect of 'the same employment', the court cannot have intended to use the word 'employment' in the legal sense of a *contract* of employment, since that would make nonsense of the sentence. The natural alternative is a reference to the type of work, or 'job'. (I note that the French text uses two different words, distinguishing between, on the one hand, the existence of one or more 'contrats du travail' and, on the other, the need for them to concern 'le même emploi'. Whether this is of more than linguistic interest I am not qualified to judge.)

33 I am satisfied, therefore, that on the facts of the present cases, the new terms imposed following Agenda for Change did not interrupt the stability of the employment

relationship. Accordingly, albeit on different grounds, the decision of the EAT should be upheld.

In the judgment of Smith LJ concurring with Carnworth LJ she stated:-

" The argument before this Court was whether the expression 'stable employment relationship' should be given a narrow meaning, applying only to cases factually similar to *Preston* as HH Judge McMullen QC had decided in *Thatcher* and *Rance* (see paragraph 18 above) or whether it should be given the wider construction to be derived from the ordinary and natural meaning of the words. In *Slack,* this court held that the wider construction was correct. We are bound by that decision and in any event I think it is right.

35 In the present case, the issue before the tribunal was whether the claimants' attempts to add a new cause of action were in time. Because it was not suggested that the situation was covered by the stable employment provision, the tribunal found it necessary to make a detailed examination of the contractual arrangements and the changes consequent upon Agenda for Change. It concluded that the changes had brought the existing contracts to an end that the claimants were now working under new contracts. On appeal, after an equally careful and painstaking examination of the contractual position, the EAT reached the opposite conclusion and held that the old contracts of employment had been varied.

36 In my view it is unfortunate that this exercise was undertaken. Much time and cost would have been saved if it had been realised that **there is now a far simpler route to the answer to the limitation question. Consideration of whether a stable employment relationship has continued to exist will be straightforward in most cases.** In the present cases, the answer to that question was obvious. I hope that, in future, tribunals will be able to dispose of these limitation issues without difficulty."

16. In the case of Dass v The College of Haringey Enfireld and North East London EAT 0108/12 Slade J that employment relationship did not equate with continuity of employment under the Employment Rights Act 1996 and stated at paragraph 54

54. The approach of the CJEU in **Preston** achieves the certainty which would not be secured by waiting for the end of the entirety of the Claimant's employment before putting in a claim in respect of the period of a stable employment relationship. **Such a claim may well have to be lodged before all employment of the Claimant with the Respondent has ceased. The parties will know when the periodicity of a stable employment relationship has come to an end and a claim in respect of such employment should be brought.** Whether there was a 'temporary cessation of work' or continuity of employment within the meaning of the **ERA** is, in my judgment, not material to the question under appeal: whether the EJ erred in deciding that there was nor stable employment relationship in the relevant period. The CJEU in **Preston** and the Court of Appeal in **Fox** made it clear that 'stable employment relationship' has an autonomous meaning. Accordingly the EJ erred if and insofar as he relied in deciding whether there was a stable employment relationship on the absence of a temporary cessation of work and therefore no continuity of employment within the meaning of the **ERA** during the summer of 1995. Nor, in my judgment, does it assist in deciding whether there was a stable employment relationship during that period to make a comparison with continuous employment within the meaning of the **ERA**.

The Tribunal's Deliberations and Conclusions

17. The body of case law presented to me is not factually on all fours with the present case. It is proper to observe that both counsel invited me to reach different conclusions, based upon the same principle for determination which

was whether or not the various roles the claimant undertook were essentially the same or materially different. I agree that that is the approach that should be considered, and find it reflected in the judgements recited earlier. The varying commentaries gleaned from the judgements referred to me, satisfies me that no one particular factor is necessarily conclusive. The authorities make clear that construction or over analysis of contractual terms is inappropriate and one should have regard to the nature of the work undertaken. Similarly I do not find that issues as to whether a contract is described as temporary/fixed term or not permanent, particularly compelling, absent other factors. It is clear from the comments made by Smith LJ that the exercise should be relatively simple and in most cases obvious.

18. It is proper to observe that HHJ McMullen in the Preston (number 3) case observed that stable employment should not be construed in layman's terms but in a strictly jurisprudential sense. Clear it is that a person who is employed over a lengthy period with the same employer achieving advancement by way of promotion to various different jobs, and who is highly regarded and valued by his or her employer could be said in lay terms to enjoy a stable work relationship, but I judge that that is not determinative of the matter. In the North Cumbria case the character of the work pre-and post agenda for change was essentially the same, the nurses were continuing to do nursing duties pre-and post change, and doubtless this was what prompted Smith LJ to make her concluding comments.

19. Applying the above considerations to the present case, I find that Mr Matovu's approach of suggesting that as the claimant was working throughout for the respondent in the same protection department, undertaking general fire protection roles, that this necessarily gave the claimant status of stable working relationship, to be too wide an approach. I agree with his analysis however that one should consider the nature of the work undertaken.

20. I am not satisfied that the move from BSO role to FSO preserved a stable work case. There was difference in pay, responsibilities especially in the context of enforcement (notwithstanding warrant cards were issued to the claimant during this pilot role). The claimant acknowledged in practical terms that she was advised that in her role as a BSO the enforcement side should be left to the FSO's.

21. If I were in any doubt in relation to the above I am wholly satisfied that the change from FSO to office manager was a significant change of role and responsibilities. The range of responsibilities and management duties including supervising FSO's, cannot in my judgment warrant any conclusion other than that stable work ended at that stage.

22. In respect of the change from office manager to CSDM, the evidence before me satisfies me that the claimant was doing the same work. Such view is not altered by the fact that the initial office manager role was not permanent in contrast to the CSDM role. The merging of the 2 departments in view of the personnel involved was a minor difference. My conclusion is fortified by the view plainly held of the claimant's then line manager's comments at the time,

and the backdating of pay to the commencement of the claimant working as an office manager.

23. In conclusion therefore the complaints based upon the claimant working as a business support officer and fire safety officer are dismissed for want of jurisdiction they being presented out of time. The claimant's complaint based upon the role as office manager was presented in time.

Employment Judge Kolanko

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Date 25 May 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS

Post held as a CSD