Employment Lawyers Association (UK)

Barnard v Hampshire Fire & Rescue: stable working relationships

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Topics: Discrimination and equal pay

Recognising a stable working relationship is important. It is a mistake to think that it is analogous to that of continuous employment. It is not. It is an issue which goes to jurisdiction and so, ultimately, to compensation. Getting it wrong can be costly for clients and practitioners alike; a novel feature of the equal pay jurisdiction is that the tribunal does not have the power to extend time.

There are four possible qualifying periods in an equal pay case, dealing with the first two: in a standard case, a claim must be presented within six months of the last day of employment; and in a stable working relationship case, a claim must be presented within six months from the day on which the stable working relationship ends.

Barnard: the facts

The claimant, Mrs Barnard, began her employment with the respondent on 6 July 2009. From 12 December 2011, she took the role of a business support officer (BSO) within the Community Safety (Protection) department. The promotion route started with the role of BSO, to fire safety officer (FSO) to office manager (OM) and then to community safety delivery manager (CDSM).

The claimant's progress was as follows:

- 12.12.11 to 14.10.12 BSO (role 1);
- 15.10.12 to 16.06.14 FSO (role 2);
- 16.06.14 to 31.12.15 OM (role 3); and

- 01.01.16 to 09.06.17 CSDM (role 4);

Upon each promotion, the claimant was issued with a new contract, save for when she first moved into role of OM in June 2014, thereafter remaining under her existing contract.

Following the termination of her employment in June 2017, she submitted an equal pay claim in August 2017 dating back to her first promotion in 2011. She argued that all roles formed part of a stable working relationship. The respondent disagreed, saying that stability was broken by her promotions and as such, she was only entitled to bring an equal pay claim in respect of role 4, as she was out of time in respect of roles 1-3.

Back to the beginning

The concept of a stable working relationship was conceived by the European Court of Justice in Preston to assist women pursue their Treaty rights.

Preston saw some 60,000 part-time workers complaining of unlawful exclusion from occupational pension schemes under the Equal Pay Act 1970. Many of the claimants had been employed under a succession of part-time, term-time contracts.

The ECJ was asked whether the six-month time limit for bringing equal pay claims was compatible with EU law in the circumstances. The ECJ concluded that it was a matter for the domestic legal systems to determine procedural conditions, provided those conditions were not a bar to accessing those rights. On the facts of Preston, it held that the six-month qualifying period could start to run from the end of the last contract forming part of the stable employment relationship. The concept was box-fresh; it had no precedent in any legislation or case law in any member state.

The features of a stable working relationship were:

- successive short-term contracts; which
- conclude at regular intervals; and
- are in respect of the same employment; and
- to which the same pension scheme applies.

In 2003, the EPA was amended to capture the new concept and phrased as 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 a contract of employment when no further contract of employment is in force’.

In Thatcher, HH Judge McMullen focused on when a stable working relationship would come to an end. He said that start times would run from when:

- a party indicates that further contracts will either not be offered or not accepted if offered;
- a party acts inconsistently with the continuation of the relationship;

- a further contract is not offered when the periodicity of the proceeding cycle of contract indicates that it should have been offered;
- a party ceases to intend to treat an intermittent relationship as stable; and
- the terms of the contract or the work to be done under it alters radically; for example, a succession of short-term contracts is superseded by a permanent contract.

HH Judge McMullen then focused on the fifth point, saying that 'thus a stable employment relationship ceases where the terms of the new contract or (and I emphasise the word "or") the work done under it radically differs'.

It was HH Judge McMullen's fifth circumstance that turned the EU's gift into a barrier.

A concept evolving …

The Thatcher gloss was the accepted orthodoxy until Slack was heard in the Court of Appeal, where, when considering the question of whether there was a stable employment relationship, the court adopted a different position. It suggested that the concept was not limited to the precise four circumstances identified by the ECJ; rather, an uninterrupted succession of contracts is an a fortiori case of a stable employment relationship.

The broader Slack approach was then adopted by the Court of Appeal in Fox, where Carnwath LJ (as he then was) expressly adopted the wider approach to the characterisation of a stable employment relationship, noting that although the concept had been adopted by the ECJ with reference to a case in which there was a succession of short-term contracts, the language of the ECJ does not confine it to that factual situation. On the contrary, said the Court of Appeal, 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.

The key question, argued the claimants, is whether the employment relationship is stable, and in determining that question, changes in contractual terms were 'relevant only to the extent that they throw light on this issue'. The Court of Appeal expressly accepted their submissions.

Carnwath LJ further observed that the ECJ had adopted an entirely new expression and one which distanced itself from all the various technical ones suggested, choosing instead to adopt a broad non-technical test, looking at the character of the work and the employment relationship in practical terms.

Smith LJ, rather optimistically, said: 'I hope that, in future, tribunals will be able to dispose of these limitation issues without difficulty.'

That was not the case for Mrs Barnard, who required two trips to the tribunal and the EAT to settle the issue.

The present day …

The first tribunal dealt with the concept as defined in s.130(3) EqA – a stable working relationship, as opposed as stable employment relationship found under the EPA. There is no material difference between the terms.

The first tribunal held that roles 1-3 all involved different work, so that a stable working relationship ran only from Mrs Barnard's assumption of role 3 onwards.

Mrs Barnard appealed. The EAT allowed her appeal;
HH Judge Barklem remitting the case and summarising the issue as: 'How should a tribunal approach the task of applying a non-technical broad-brush test examining the character or nature or type of the work and the employment relationship in practical terms such as to determine whether an unbroken stable working relationship subsisted?'

HH Judge Barklem also observed: 'It is surprising, therefore, that a concept which was originally devised to assist women in being able to pursue equal pay claims has had the opposite effect in this case and it is difficult to see from the case law what the justification for this can be.'

Contrary to the findings of the first tribunal, the second tribunal held that the stable working relationship had not been broken when Mrs Barnard moved from role 1 to 2, but that there was a break when she moved from role 2 to 3. Mrs Barnard appealed (again).

The second trip to the EAT

The main issues before for HH Judge Eady were: what is the proper construction of the phrase 'stable working relationship'; and should a gloss be applied to the wording of s.130(3) EqA?

HH Judge Eady started with the statute, stating: 'Drinking from the pure waters of the statute, we consider there could only be one answer to this case; the claimant's claim was brought within six months of the ending of the stable working relationship she had enjoyed with the respondent since 2009 … More particularly … we cannot see how an … internal promotion, … accepted as "a natural progression" could be anything other than entirely consistent with the continuation of a stable working relationship.'

Recognising that the EAT did not come to the statutory waters free of authority, HH Judge Eady found that the earlier orthodoxy was unduly restrictive, and that it led to a number of highly technical analyses of differences in contractual terms, with little attention placed on the stability of the relationship. The EAT said this was all the more questionable as the entirely novel concept was plainly never intended to depend on a traditional contractual analysis. Moreover, the tests laid down went further than required, incorporating a requirement that the nature of the work must be broadly the same, or must not radically alter or differ.

It said Slack and Fox had corrected matters – a broad, non-technical approach is to be adopted and the concept is not to be confined to the particular facts of Preston; thereby, giving it room to grow.

The EAT though was still troubled by Fox's binding judgment rendering relevant the character/nature of the work, whereas the statutory wording suggests it is the nature of the relationship rather than work undertaken that is important. It was also reluctantly required to pay regard to the decision of HH Judge Barklem, where he accepted an earlier concession that a radical change in the nature of the work could break the stability of the working relationship; although it questioned whether the statutory definition requires such an approach; they accepted that it might be seen as a consequence of the guidance laid down in Fox.

However, it was able to depart from HH Judge Barklem's suggestion that relevant to the radical change question were matters such as the percentage pay increase – this was overly technical and thankfully wrong in light of Fox.

The EAT reminded itself that the concept was a gateway to claiming equal pay, designed to remove barriers, not create them. It found the tribunal made the error of elevating a difference in job content due to a promotion into a determining factor and in doing so, ignored the stability of the relationship. In the alternative, it held that the tribunal's decision was perverse; none of the factors it took into account suggested anything other than a stable working relationship continuing.

Conclusion

Any decision in the equal pay arena that underlines a broad-brush approach is welcome. Respondents are notorious for seizing on technicalities to keep claimants in the foothills of the litigation and this case is no different– two trips to the tribunal and EAT and they are still nowhere near the substantive issues.

Equal pay litigation is not for the faint of heart, claimant and practitioner alike, but this decision makes it that little bit easier

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KEY:

Barnard Barnard v Hampshire Fire & Rescue UKEAT/00179/18/LA

EPA Equal Pay Act 1970

ECJ European Court of Justice

Preston Preston v Wolverhampton Healthcare NHS Trust [2001] ICR 217

Thatcher Thatcher v Middlesex University UKEAT/0134/05

Slack Slack v Cumbria CC [2009] ICR 1217

Fox North Cumbria University Hospitals Trust v Fox [2010] IRLR 804

EqA Equality Act 2010