EMPLOYMENT TRIBUNALS

Claimant: Mrs M McWilliams

Respondents: Bury Metropolitan Borough Council

HELD AT: Manchester **ON:** 8 January 2018

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: Mr R McWilliams, husband
Respondent: Miss R Wedderspoon, counsel

JUDGMENT

In this judgment:

(a) “the claim form” means the claim form presented on 30 January 2008;

(b) “the Schedule of Comparators” means the schedule of comparators attached to the claim form; and

(c) “Annex A” means Annex A to the case management order of 8 November 2017.

1. Those parts of Mrs McWilliams’ claim that are set out in Annex A are struck out on the ground that they have no reasonable prospect of success.
2. Except to the extent that it appears in Annex D below, Mrs McWilliams’ claim as it appears in the claim form is struck out on the basis that it is not actively pursued.
3. The claimant is not required to amend her claim in order to pursue it on the basis set out in Annex D.
4. The claimant is required to amend her claim in order to compare herself to any male employee whose role does not appear under the heading, “Manual Grade

5" in the Schedule of Comparators. Permission to amend in this respect is refused.

5. Accordingly, the only part of Mrs McWilliams' claim that will proceed is that contained in Annex D.

ANNEX D

Mrs McWilliams alleges that, whilst employed in the role of Driver/Vending Supervisor she was employed on work rated as equivalent with male employees in the role of Driver. They were paid at Manual Grade 5 and the claimant was paid at Manual Grade 3.

REASONS

The preliminary issue

1. By a notice sent to the parties on 22 November 2017, this preliminary hearing was convened in order to determine, amongst other things,

   > "…whether the claim should be struck out on the ground that it has no reasonable prospect of success".

2. As will be explained more fully below, I also had to consider a number of ancillary matters. One of these was Mrs McWilliams' application to adjourn the hearing. Another was the question of whether Mrs McWilliams needed to amend her claim and whether such an amendment should be granted.

Procedural history

3. The claimant was employed by the respondent from 13 October 1987 until 8 September 2008. From 1991 her role title was Driver/Vending Supervisor at Bury College. She was paid at Manual Grade 3.

4. On 30 January 2008, a large number of claimants including Mrs McWilliams presented a claim to the tribunal. At that time they were represented by Thompsons Solicitors. The claim alleged breach of the Equal Pay Act 1970 and Article 141 of the (then) Treaty of Rome.

5. Box 6, paragraph 3 of the claim form read as follows:

   > "The claimants[']s jobs … have … (a) been rated as equivalent under the NJC Manual Worker Job Evaluation Scheme (White Book Claimants) to the jobs undertaken by groups of male comparator employees (White Book Comparators)….

6. Paragraph 5 set out the alternative contention that the White Book Claimants did work of equal value to their comparators.

7. The claim form was accompanied by a Schedule of Comparators. In this document, various male-dominated roles were grouped together under headings corresponding to the grade at which they were paid. Under the heading, "Manual Grade 5" there were 10 different roles, of which one was "Driver".

8. On 28 February 2008 the respondent submitted its ET3 response form. In its grounds for resisting the claim, the respondent referred to two job evaluation studies (JESs) carried out by the respondent, respectively in 1987 and 2004.

9. Over the years that followed, the tribunal determined various preliminary issues and those decisions were challenged on appeal. The appeal judgment was handed down on 28 January 2011. Since that date, most of the claims have settled, but a few remain, including the claim brought by Mrs McWilliams. Thompsons no longer represent her.

10. On 8 November 2017, Mrs McWilliams and her husband appeared at a preliminary hearing for the purpose of case management. At that hearing, Mr McWilliams explained to the tribunal the basis on which Mrs McWilliams was pursuing her claim. That explanation was noted and recorded in Annex A to a written case management order.

11. At no point during the hearing did Mr or Mrs McWilliams mention any job evaluation study or allege that her work had been rated as equivalent to the work of any male employee.

12. Annex A read as follows:

    "

    1. Mrs McWilliams was employed as a driver. She was paid at Grade 3. She did like work with the following men:

        1.1 Graham Shaw

        1.2 Duncan Stoddard

        1.3 Mr Chris Hobin

        1.4 Mr Ashley Crumblehome

        1.5 Mr John Tuohy

        1.6 Mr Alan Chadwick

    2. It is Mrs McWilliams' case that at least some of the men, including Mr Shaw, were paid at Grade 5."

13. Mr Tuohy, one of the comparators named in Annex A, was one of the original claimants whose equal pay claim was presented in 2008. As between Mr Tuohy and the respondent, it is common ground that Mr Tuohy was employed as a Driver/Carer within the respondent's Adult Care Services Division. The respondent's amended response to Mr Tuohy's claim asserts that Mr Crumblehome also held that role.

14. In an effort to gather supporting evidence, Mrs McWilliams made two requests of the respondent under the Freedom of Information Act 2000 (FOIA). She sought a list of all persons who had been entitled to drive Council vehicles. She also sought a list of all those people who had held the role of Vending Supervisor prior to the claimant. Those requests were declined on various grounds. The claimant has since complained to the Information Commissioner.

15. On receipt of Annex A, the respondent submitted an amended response. In broad outline, the respondent relied on the following grounds for resisting the claim:

    15.1. Mr Shaw and the claimant were employed on like work. There was, however, no need for an equality clause because they were paid at virtually the same rate. There was a small difference of 1.5 pence per hour, explained by the fact that the claimant received a school meal and Mr Shaw did not.

    15.2. The remaining comparators were not employed on like work with the claimant.

    15.3. Those comparators employed on manual grades were assigned those grades pursuant to the 1987 JES.

16. The respondent sought a preliminary hearing to consider whether Mrs McWilliams' claim should be struck out. In support of its application, the respondent provided the following documents, amongst others:

    16.1. A letter dated 19 June 1991 offering the claimant the role of "Driver/Vending Supervisor for 30 hours at Grade 3".

    16.2. Pay slips showing the claimant's and Mr Shaw's hourly rate of pay;

    16.3. An extract from the National Joint Council Agreement, section 1 - paragraph 2 set out the rates and added, "these rates are reduced by 58.33p per week (1.5 per hour) in respect of meals provided to employees in school meals, staff canteens and day nurseries";

    16.4. A written job description for the role of Catering Manager – Central Production Unit – Mr Stoddard's name was handwritten on the job description;

    16.5. Mr C Hobin's statement of employment particulars, offer letter and job description for the role of Chef; and

    16.6. Screen shots from the personnel records of the remaining comparators, setting out each comparator's role title. According to the records, Mr Crumbleholme was employed as a "Driver/Carer", Mr Tuohy was also employed as a "Driver/Carer" and Mr Chadwick was a "Cleaner and Site Manager".

17. By letter dated 7 December 2017, Mrs McWilliams sought a postponement of the preliminary hearing on the ground that the information requested under FOIA was "critical" to her case. I refused the postponement, adding that, if Mrs McWilliams considered that she needed particular documents, she could seek an order for disclosure at the preliminary hearing.

18. Mrs McWilliams did not attend the preliminary hearing, but her husband attended on her behalf. At the outset, he made an application to adjourn. The basis of his application was twofold:

    18.1. To try and trace a witness, Mr Rogers, who had initially interviewed Mrs McWilliams for the role of Driver/Vending Supervisor. It was Mr McWilliams' belief that Mr Rogers would confirm that that role had initially been advertised as a Manual Grade 5 role and that the respondent only decided to pay a Manual Grade 3 wage for it because the person appointed to the role was a woman.

    18.2. To obtain disclosure of the JESs so far as they related to the role of "supervisor". It was not clear whether, by this, Mr McWilliams meant any role with the word, "supervisor" in the title, or any role which included some element of supervision. The relevance of the JESs, Mr McWilliams said, was to establish whether any supervisors were graded at Manual Grade 3. If they were, Mrs McWilliams would withdraw her claim. Mr McWilliams believed, however, that the JESs had rated all supervisor roles at at least Grade 5 and that disclosure of documents would reveal this fact.

19. I asked Mr McWilliams if he was now arguing, despite the contents of Annex A, that Mrs McWilliams did work that was rated as equivalent to that of male employees. He said that he was. He was not, however, in a position to identify any such employees, because he wanted to see the JESs first.

20. Once Mr McWilliams had made his submissions in support of an adjournment, I informed him that I would also be considering the question of whether Mrs McWilliams would need to amend her claim. I also said I would like to hear his arguments as to why the claim should not be struck out, so I could decide on all the contentious points at the same time. Mr McWilliams then made some further submissions which largely repeated the application for an adjournment. He did not suggest that Mrs McWilliams did the same or similar work as any of her comparators.

21. During the course of submissions I drew the parties' attention to the contents of the original claim form. Ms Wedderspoon, for the respondent, conceded that Mrs McWilliams would not need an amendment to her claim to pursue an allegation that was clearly set out in the claim form, even if it did not appear in the much later formulation of her claim in Annex A. I did ask Mr McWilliams whether his wife compared herself to any of the roles under the heading of "Manual Grade 5". The only such role identified by Mr McWilliams was "Driver".

Relevant law

<u>Overriding objective</u>

22. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective as follows:

    "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

    (a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

Whether amendment is required

23. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

24. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a

system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

25. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

26. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA*,* HHJ Serota distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

<u>Whether amendment should be granted</u>

27. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

27.1. A careful balancing exercise is required.

27.2. The tribunal should consider whether the amendment is merely a relabelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

27.3. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

27.4. The tribunal should have regard to the manner and timing of the amendment.

27.5. The paramount consideration remains that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

<u>Striking out</u>

28. Rule 37(1) gives a tribunal the power to strike out all or part of a claim on grounds including (a) that it "has no reasonable prospect of success"; and (d) "it has not been actively pursued".

29. It is well established that it is inappropriate to strike out claims – and discrimination claims in particular – where there are central disputes of fact: *Anyanwu & another v South Bank Students Union* [2001] ICR 391. It will only be in an exceptional case that such a claim will be struck out as having no reasonable prospect of success where the central facts are in dispute: *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126, CA.

<u>"Like work" and "work rated as equivalent"</u>

30. Section 1(2) of the Equal Pay Act 1970 sets out the circumstances, prior to the coming into force of the Equality Act 2010, in which an equality clause has effect in relation to the terms of a woman's contract. Those circumstances include (a) "where the woman is employed on like work with a man in the same employment…"; and (b) "where the woman is employed on work rated as equivalent with that of a man in the same employment".

31. By section 1(3), "An equality clause … shall not operate in relation to a varation between the woman's contract and the man's contract if the employer prove that the variation is genuinely due to a material factor which is not the difference of sex and that factor…in the case of an equality clause falling within subsection (2)(a) or (b) above, must be a material difference between the woman's case and the man's.

32. Section 1(4) provided as follows:

> "(4) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences."

33. The "like work" test involves a two-stage test:

    33.1. The first stage is for the tribunal to consider whether the nature of the work is the same or broadly similar? This requires merely a broad, general consideration, avoiding a pedantic approach;

    33.2. The second stage requires the tribunal to analyse the details of the work more closely and to determine:

        33.2.1. The differences, if any, in the tasks actually performed;

        33.2.2. The frequency or otherwise with which such differences occur in practice; and

        33.2.3. The nature and extent of any such differences.

    (See *Capper Pass v. Lawton* [1976] IRLR 366 and *Waddington v. Leicester Council for Voluntary Services* [1977] IRLR 32.

34. By section 1(5), "a woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value, in terms of the demand made on a worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to

evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value but for the evaluation being made on a system setting different values for men and women on the same demand under any heading."

Conclusions

Adjournment

35. In my view it would not serve the overriding objective to adjourn this preliminary hearing. Avoiding further delay is an important factor in this claim, which is about to reach its tenth anniversary.

36. I am not persuaded that the adjournment would help to deal with the case fairly. Dealing with the two pieces of evidence that the claimant wishes to obtain:

36.1. There is little basis for thinking that Mrs McWilliams would be able to track down Mr Rogers after so many years. She has no positive leads other than the fact that Mr Rogers was working for the respondent in 1991. It is still less likely that, if traced, Mr Rogers would admit to having changed the rate of pay for a Grade 5 job simply because the post-holder was a woman. And even if he did, Mrs McWilliams would still need to identify a flesh and blood comparator to bring her claim under the Equal Pay Act 1970.

36.2. It is still far from clear how the JESs could Mrs McWilliams to succeed in her claim as it is currently formulated. They are highly unlikely to show that she did like work with any of the comparators named in Annex A. That in any event does not appear to be the purpose for which Mrs McWilliams wants them. Rather, she wants to look through all the "supervisor" roles to see if Driver/Vending Supervisor is there and whether it was rated at Manual Grade 5. If it was, she wants to compare herself to men doing any "supervisor" roles that were also rated at Manual Grade 5. To put it another way, she wants the JESs in order to change her case, rather than to support her existing case. For the reasons given in relation to the amendment dispute, it would not be fair to allow the claimant to reformulate her claim.

Amendment

37. The respondent has conceded that, notwithstanding Annex A, it is already part of Mrs McWilliams' claim that she was employed on work rated as equivalent with roles in the Schedule of Comparators. No amendment is therefore needed to enable Mrs McWilliams to allege that Driver/Vending Supervisor was rated as equivalent with the role of Manual Grade 5 Driver. That is the only role in the list to which Mrs McWilliams wishes to nominate as a comparator.

38. If the claimant wishes to argue that her role was rated as equivalent with any "supervisor" role that does appear in the Schedule of Comparators, she will need to amend her claim.

39. In my view the overriding objective points strongly towards refusing the amendment. This is a case where the statutory time limits and the manner and timing of the amendment application take on particular prominence. Mrs McWilliams' solicitors have known about the JESs since January 2008 at the latest, yet Mrs McWilliams has only just asked to see them. Mrs McWilliams has

not identified the roles which she says were rated as equivalent to Driver/Vending Supervisor. It is as yet unclear precisely what new areas of factual enquiry would be raised by allowing the claimant to introduce new comparators. Potentially there could be a great many, as the JESs are likely to include many roles that have some element of supervision.

40. Each time a new comparator is alleged, or the basis of comparison changes (for example, "rated as equivalent" instead of "like work"), new avenues of factual enquiry are opened up. New factual issues are likely to be difficult for the respondent to deal with effectively because of the extreme delay. The respondent would be put at a real disadvantage in marshalling the evidence. It would have to explain differences in pay going back 6 years from 2008, possibly by reference to the events in 1991 when the Grade 3 role was first offered to Mrs McWilliams. Any factual issue relating to the 1987 JES will involve looking back over thirty years.

<u>Strike-out of the Annex A claim</u>

41. Turning to Annex A, I am persuaded that the claim as formulated there stands no reasonable prospect of success. I take the six comparators in turn:

    41.1. *Mr Shaw.* Whilst Mrs McWilliams and Mr Shaw were employed on like work, there was only a miniscule difference in pay. The difference of 1.5p per hour is transparently explained by the National Joint Council agreement in respect of employees who received school meals. It is, in my view, inconceivable that a tribunal would find that the 1.5p gap was due to the difference in sex.

    41.2. *Mr Stoddard.* There is no reasonable prospect of Mrs McWilliams showing that she and Mr Stoddard were employed on like work. Mr Stoddard managed the whole Central Production Unit. That work was not even broadly similar to that of a Driver/Vending Supervisor.

    41.3. *Mr Hobin.* Mr Hobin was a chef. There is no reasonable prospect of his being found to have been employed on like work with a Driver/Vending Supervisor. The nature of the work is not even broadly comparable.

    41.4. *Mr Tuohy and Mr Crumblehome.* Driver/Carers will not be found to have been employed on like work with Driver/Vending Supervisor. In comparing roles which partly consist of driving, Mr McWilliams urged me to focus in particular on the non-driving parts of the role. Adopting that approach, I have compared a Vending Supervisor at a college with that Carers working within Adult Social Care. Even on the very limited material available at this stage, it is obvious to me that the roles are not even broadly similar.

    41.5. *Mr Chadwick.* The role of Site Manager does not appear to be even arguably the same or broadly similar to the work of a Driver/Vending Supervisor. There is no reasonable prospect of Mrs McWilliams being found to have been employed on like work with Mr Chadwick.

<u>Strike-out of the originally-formulated claim</u>

42. Mr McWilliams confirmed that, of the comparator roles identified in the Schedule of Comparators, Mrs McWilliams only compares her role to the role of Driver. She is not actively pursuing any other allegation as set out in the originally-pleaded claim. Indeed it is Mr McWilliams' position that the claim form, as drafted on his wife's behalf, "went off in a different direction" from the true nature of her claim.

The surviving element of the claim

43. It follows from the above that the only surviving element of Mrs McWilliams' claim is her allegation that she was employed on work rated as equivalent with male Drivers. I have not examined the merits of that claim. It would be premature to do so without seeing the relevant part of the JESs. If the JESs support Mrs McWilliams' contention, the claim should be determined at a hearing. If, on the other hand, the JESs suggest that the roles were not rated as equivalent, there may need to be a further preliminary hearing to consider prospects of success.

Employment Judge Horne

9 January 2018

SENT TO THE PARTIES ON

11 January 2018

FOR THE TRIBUNAL OFFICE