Case Number: 2504691/2013

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimants		*Respondent*
Mrs B Pearson	**AND**	**Cumbria County Council**

PRELIMINARY HEARING

Held at:	**Carlisle**	**On:**	**18 & 19 April 2017**
Before:	**Employment Judge Hargrove**	**Members:**	**Mr T D Wilson** **Dr S Kay**

Appearances

For the Claimant Mrs Pearson: **In person**
For the Respondent: **Mr S Sweeney of Counsel, instructed by Mr P Brodie, Solicitor**

JUDGMENT

The claimant's equal pay claim in respect of the comparator Simon Airey, a planning technician, is struck out as having no reasonable prospects of success.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

If the respondent wishes to pursue any application to strike out any of the other cohort of teaching assistants including teaching assistants without professional educational needs, teaching assistants with special educational needs, senior teaching assistants without special educational needs, senior teaching assistants with special educational needs and higher level teaching assistants, it must, having served notice upon each such claimant in compliance with rule 37(2), and attaching a copy of schedule 1 to the further amended grounds of resistance to be found at pages 33-36 of the joint bundle for the Pearson hearing, and a copy of this judgment and reasons, send the application

to the Tribunal within 28 days of the date upon which this judgment is sent to the parties.

REASONS

1 This hearing was listed to consider an application to strike out Mrs Pearson's equal pay claim in respect of the comparator Mr Airey, a planning technician, as having no reasonable prospects of success, or alternatively for a deposit order upon the ground that it had little reasonable prospects of success. It is a test case which is likely to apply to other employees who are teaching assistants who are also unrepresented.

2 In simple terms a claimant for equal pay has to prove the following:-

2.1 **A claim made within time**

That is within 6 months of the date upon which the employment in respect of which the claim is made has ended. That is satisfied in the claimant's case because, although for unexplained reasons, her claim and that of the other teaching assistants was not presented to the Employment Tribunal by Thompsons until 25 July 2013, when other claims had been presented from 2004 onwards, Mrs Pearson's employment with the respondent as a senior teaching assistant with special educational needs is still continuing.

2.2 The claimant must identify the job of a comparator or comparators of the opposite sex who is or was in common employment with the claimant, ie with the same employer. Problems have arisen in this connection with which we will deal in paragraph 4 below.

2.3 That comparator's job must either be like work with the claimant's job (ie substantially the same job); or rated as equivalent under a job evaluation study rated as equivalent; or if not, at least of equal value with the comparator's job as found by an Independent Expert following an examination of detailed job descriptions in terms of the demands made on the claimant "by reference to factors such as effort, skill and decision making" (see section 65(6) of the Equality Act 2010 and equivalent provisions in the Equal Pay Act 1070). For more details of this see paragraph 5 below but broadly speaking, this claimant's job has at least from 2011 been treated as an equal value claim on the basis that her job was entirely different from Airey's job and had not been treated as having been rated as equal under a job evaluation study, this despite the respondent's now claim that both jobs had been so rated, prior to the single status agreement which came into force in this local authority on 1 October 2011, under a **Hay** evaluation scheme.

For the purposes of this hearing we assumed that the claimant will prove each of the above requirements.

2.4 **Pay**

The claimant has to establish that her pay was, during the comparison period, lower than the comparator's pay. The most common type of pay is basic pay, namely that element of pay, payable weekly or monthly on the basis of an hourly rate, or an annual salary, for turning up and doing the job. However there are commonly other additional sources of pay than basic pay, dealt with in a separate term in the contract. In the claimant's case, from 2002 to 2011, she has, without a break, been paid on an annual basis payable monthly an SEN allowance to reflect her expertise in dealing with children with SEN. She was entitled to receive it; and did receive it because it is accepted that she worked with such a child or children for over 50% of her contract hours which were from 2002 to 2011, 32.5 hours per week; and from 1 October 2011, under the single status agreement, 35 hours per week, although from that date her entitlement to an SEN allowance ceased. The employer is not entitled to set off against the basic pay of a claimant if it be lower than her comparator, the higher pay which she may receive for any enhancement ie any other element of pay which is not basic pay which she receives, but the comparator does not. This may result in a claimant, if successful in her equal pay claim, ending up with a total pay package higher than the comparator.

The source of this principle of a comparison of separate pay terms is **Hayward v Cammell Laird Shipbuilders Limited [1988] IRLR paragraph 257 (Supreme Court)**:-

> "If a contract contains provisions relating to –
>
> (1) basic pay,
>
> (2) benefits in kind such as the use of a car,
>
> (3) cash bonuses, and
>
> (4) sickness benefits
>
> it would never occur to me to lump all of these together as one term of the contract simply because they can altogether be considered as providing for the total remuneration for the services to be performed under the contract. In truth, these would include a number of different terms; and in my opinion it does unacceptable violence to the words of the statute to construe the word term in subparagraph (2) as embracing collectively all these different terms … We look at the two contracts, you ask yourself the commonsense question – is there is each contract a term of a similar kind ie a term making a comparable provision for the same subject matter; if there is, then you compare the two, and if on that comparison, the terms of the woman's contract proves to be less favourable than the terms of the man's contract, then the term in the woman's contract is to be treated as modified so as to make it not less favourable".

In the circumstances in **Hayward** the claimant and comparators had different rates of basic pay and different overtime rates. The employer was not entitled to rely upon other terms of the contract dealing with paid meal breaks, holidays and sickness benefits which favoured the claimant in order to make up the difference in the basic pay and overtime rates.

By contrast, in **Degnan v Redcar & Cleveland Borough Council [2005] IRLR** the EAT in the Court of Appeal overturned an Employment Tribunal decision that the attendance allowance paid to one comparator (and not to the claimant) formed part of the same subject matter as the basic pay and 40% bonus paid to another comparator so that the claimant was entitled to both, ending up with substantially more pay than either comparator.

We have unanimously decided that the claimant's entitlement to her SEN allowance is a term dealing with a separate subject matter than basic pay. It rewarded the claimant for her greater expertise and responsibility in dealing with SEN children; it was not payable according to the number of hours worked with such children and although this did not occur it was not payable if she was not working with such children. Accordingly the comparison is to be made between the basic pay of the claimant and Mr Airey. In fact however the difference does not make any material difference to the outcome of this application.

We further find that Mr Airey was not paid any enhancements during the relevant comparison period. His only source of pay was his basic salary payable monthly. Although the claimant has cast doubt upon that claim, we are satisfied from the documents at pages 128-132, the payroll information for the comparator for the period 2001 to 31 March 2005 (when he TUPE'd out to Amey), that the comparator's only source of income was his basic salary; and also that the was not paid anything than his salary at the time when he TUPE'd back in on 1 April 2012 (see page 171).

We will set out further findings on the topic of pay in paragraph 5 below. The respondent claims that throughout the comparison period the claimant earned marginally more than the comparator when compared on an hourly rate basis. The claimant contends that that is not the proper method of comparison.

2.5 If the claimant establishes all of the preceding matters; claim in time, comparator in common employment with the claimant, equality of work; inequality of pay (lower than the comparator), the burden of proof shifts to the respondent to prove that the reason for the difference in pay had nothing to do with sex or sex discrimination, either direct or indirect. An example of direct sex discrimination occurs where an employer chooses to pay a bonus based on basic pay to male dominated work groups but not to female dominated work groups whose jobs could be the subject of a similar bonus, without any reason, or for a reason which ceases to exist. This form of justification cannot be justified. Indirect discrimination occurs where the employer has a pay policy which in practice can be shown to

advantage male groups compared to female dominated groups but is not direct discrimination. It is often detected statistically (tainting by numbers). This form of discrimination can in certain circumstances be justified by an employer.

That completes an outline of what must be established for a claimant to succeed in an equal pay claim.

3 At this stage of the proceedings the respondent has raised a preliminary point that the claimant has no reasonable prospects of succeeding in her equal pay claim:-

3.1 Because she cannot show that she was paid less than Airey during the comparison period.

3.2 Even if the hourly rate comparison of their pay is not appropriate, and pay inequality can be shown, it has nothing to do with the difference of sex either direct or indirect.

4 **The choice of comparator**

It is up to the claimant (or more properly in the case of these claimants the claimant's former trade union solicitors) to identify the job of the comparator to be relied upon. As was recognised in **Prest v Mouchel Business Services Limited [2011] ICR page 1345**, it is not required that the name of an actual comparator is identified but the job must be identified. In orders sent out in March 2016 I sent out an explanatory note about this process. It appears from information dating from 2011 provided by the Independent Expert to the Tribunal in 2016 that, as of 2011, the job of a planning technician (Airey's job) had been selected by Thompsons for the teaching assistants and at that time the process was in place for preparing the job description. It came to a halt when the parties' representatives agreed a process to settle outstanding claims. Section 132 of the Equality Act provides that the period of comparison for the purposes of the Equal Pay Claim commences six years prior to the commencement of the proceedings themselves or the date of the first identification of the comparator job if it is not identified in the original claim. This period is known as the arrears period. However for reasons that have not been explained by Thompsons, who came off record as acting for these claimants in 2014, despite numerous requests for information by these claimants, nor has it been explained by the respondent, it has never been positively identified when the planning technician's job was identified for the purposes of these proceedings. It is however noteworthy that in further amended grounds of resistance settled by counsel and dated 28 November 2010 the respondent acknowledged that a planning technician was in the cohort of comparators' jobs for this group of claimants along with seven other jobs which are included in the Armistead schedule. A further complication is that, again for wholly unexplained reasons, Thompsons did not issue proceedings in respect of the teaching assistant claims until 25 July 2013, under that lead name of Sheila Armistead. It may be that the fact that no proceedings has actually been commenced in 2010 or 2011 in respect of these claimants had been overlooked by Thompsons, but that is mere speculation. A

further unexplained aspect of this case is that the Armistead claim had attached to it a schedule identifying no less than 19 jobs for comparators, from, for example, cemetery and crematorium operatives to red book craft workers, but did not identify a planning technician (in the Highways Department).

Mr Sweeney has thus asserted that the planning technician comparator has never been identified by these claimants, although he concedes that the Tribunal would be entitled to find that an application was made to identify the planning technician as a comparator, for example as at the case management hearing on 7 June 2016. If that be the case, the arrears period can only go back to 2010. If the identification date is to be interpreted as being 25 July 2013, the arrears date is 25 July 2007.

Two questions remain in this connection:-

4.1 How did the planning technician come to be selected in 2011? It is not possible for the Tribunal to answer this question on the information available at this stage. It may be appropriate for the Tribunal to order Thompsons to provide the information. What we can do however is to assess the pay differences and the prospects of success for the full possible period of the claim.

4.2 The second question is: if the panning technician was not identified, can the claimants rely upon any of the 19 comparators' jobs identified in the schedule to the Armistead claim form? It may be the case however that none of those comparators received higher "pay" than the claimants in the relevant period. That may be a matter for further investigation.

5 We now deal with the central issue as to the appropriate pay comparison between the claimant's pay and that of the comparator. Mrs Pearson's employment commenced on 15 October 2001. Her job was a former purple book job. We know that at least from 2002 she was paid an SEN allowance. In 1997 the pay scales for local authority purple book (APT and C jobs) and white book (manual jobs) were amalgamated under the green book. The planning technician's job was also a purple book job. His job had commenced on 1 September 1999 when he was on SCP25 (see pages 97-98). (It is said that both the claimant's job and his job were in fact at one stage rated under a **Hay** evaluation scheme but we ignore that for the purposes of this hearing). Mr Airey's job in the Highways Department of the respondent was TUPE'd out to Amey Construction on 1 April 2005. As from that date his pay award with the council would have been £21,654 on SCP28 but as of 31 March 2005 it was at £21,033. That remains the appropriate figure for the purposes of the comparison with the claimant's pay after that date, although Airey received pay increases from Amey after that date. It is well established that a comparison cannot continue to be made if the comparator has moved out of common employment with the claimant (or if he moves into a different job with the common employer, unless it also remains of equal value to the claimant's job). The reason for this is that the original employer is no longer responsible for the pay received by the comparator. The authority for this proposition is **Sorbie v Trusthouses Forte**

Hotels Limited [1977] ICR page 55. To put it another way the claimant is not entitled to track Airey's pay after 31 March 2005.

A complicating factor is that Mr Airey transferred back into the employment of the respondent from 1 April 2012. In theory that would permit the claimant to compare her pay with his pay after that date, but the respondent's case is that by that time he had been promoted to a senior planning technician's post on a yet higher scale, which is a job most unlikely to be of equal value to the claimant's. Although the claimant is sceptical about the circumstances of the promotion, no evidence of the circumstances having been disclosed by Amey, the respondent has produced its first payslip for Airey for the months to 30 April 2012, which corroborates the promotion.

A further relevant change occurred in the claimant's pay in terms on the establishment of the single status agreement in her case with effect from 1 October 2011. The claimant's job was evaluated at SCP16-17 so that her pay grade did not change. However prior to that date she had only worked 32.5 hours per week for 39 weeks of the year to earn the full time salary. After that date, the requirement was to work 37 hours per week for 44.543 weeks work per year (taking into account school opening times and holidays) in order to obtain full pay whereas she was only offered an increase in hours to 37 hours per week. In consequence of a reduction in pay the claimant was however entitled to pay protection for one year to 30 September 2012. In addition, the claimant lost her SEN allowance.

It is also to be noted that the planning technician's job did not exist in the respondent at that time and was not evaluated under single status, however it may be that there is another comparator available in that post a Mr Davis although it has not been made clear how the job was evaluated or indeed whether it was evaluated under single status.

Sheena Benson, a senior advisor in the respondent's HR Department, has provided a detailed witness statement setting out the methodology for comparing the hourly rates of pay of the claimant between 2007/08 to 2013/14 with that of Airey with his pay frozen at the annual salary as at 31 March 2005 (as explained above). The initial calculation took into account the claimant's basic pay at SCP17 and then, from 1 October 2012, after a review of her teaching assistant post to SCP23 (when her weekly hours also increased to 35 – see page 127.

The respondent submits that in order to reach an hourly rate comparison the following calculation has to be done (see paragraph 20 of the skeleton argument):-

> "(1) Ascertain the number of weekly working hours for the claimant and comparator.
>
> (2) Ascertain what monetary payments are made for working those normal working hours.
>
> (3) Aggregate the payments.

(4) Divide the total by the number of hours in the working week to give the hourly rate.

(5) Compare the outcomes.

Based on that method, Mrs Benson performed a comparison between Ms Benson's pay and Airey's pay as set out in the schedule attached to her statement. We are satisfied that it is mathematically correct. In addition, we received during the hearing a revised schedule which also calculated the hourly rate excluding Mrs Pearson's SEN allowance paid from 2007/08 to 30 September 2011 (when it was abolished). The revised schedule is attached to this judgment marked SB1. In summary, throughout the entire period from 2008 to 2014 Airey's pay, for the purposes of the comparison, remains frozen as form his pay on the last day he worked for the respondent on 31 March 2005 at an hourly rate of £12.76. Whether Mrs Pearson's SEN allowance has taken into account or excluded, her hourly rate exceeds that of Airey save that in 2012/13 the hourly rate is the same, and in 2013/14 the hourly rate of the claimant is 32 pence per hour less. Mrs Pearson's argument is that the hourly rate comparison is inappropriate. They were not paid at an hourly rate but at an annual salary and another schedule showing pay awards from 1/4/05 onwards for SCP28 (Airey's pay was however frozen at the SCP28 rate from 1 April 2004 to 31 March 2005) and for the claimant at SCP17 initially and then SCP23, shows a significant difference. This is of course explained in part by the fact that Airey worked longer hours per week on more weeks a year.

In this connection Mr Sweeney referred us to the decision of the then House of Lords (now the Supreme Court) in **Leverton v Clwyd County Council [1998] ICR page 33**. There are significant factual similarities between that case and the present case. The applicant was a nursery nurse employed by the County Council who worked similar school hours to the claimant. She based her claim upon the disparity between her salary and that of eleven male clerical officers employed by the County Council. The applicant enjoyed shorter working hours and longer holidays than the comparators. The Employment Tribunal had held that the local authority had established a defence under section 1(3) (the material factor defence now found in section 69 of the Equality Act 2010) in that the variation in pay between that received by the claimant and that received by the comparators under their respective contracts was due to the difference in working hours and length of holidays which constituted a material factor other than the difference of sex. They dismissed the appeal on another ground relevant to the present case. The applicant appealed. The Court of Appeal affirmed the decision on the other issue but held by the majority that the local authority had established the material factor defence. The claimant then appealed to the House of Lords which upheld the finding that the employers had established the material factor defence on the basis that the difference in pay between the claimant and the comparators was genuine due to a material factor which was not the difference of sex. We have been referred to various passages in the judgments of Lord Justice May in the Court of Appeal, and of Lord Bridge in the House of Lords. The following propositions can be derived in summary:-

(1) As to the hourly rate comparison the Court of Appeal upheld the Employment Tribunal's decision that such a comparison was unrealistic and not appropriate (see page 16, paragraph 4).

(2) In the Court of Appeal and in the House of Lords, however, both unanimously held that the EAT had been wrong to overturn the Employment Tribunal's finding that the hourly rate comparison was capable of constituting a material factor defence – see in particular the judgment of Lord Bridge at page 23:-

> "I must now turn to examine in more detail the facts on which the material factor defence depends. I have already referred to the notional calculation put forward by the respondents to compare the appellant's salary with that of the comparator's on an hourly rate basis. It is not wholly clear whether the respondents were advancing this in support of a defence that the terms of the appellant's contract were not less favourable than those of the comparator's. If so the Industrial Tribunal rightly rejected it as misconceived anticipating the decision of your Lordship's House in **Hayward v Cammell Laird Shipbuilders No 2**. But the decision records that, if the method of approach involved in this comparison were proper, the Industrial Tribunal would regard the respondent's point as well made. It adds later that the comparison was viewed by the majority as casting light on the broader merits of the case.
>
> The majority must have had this comparison in mind, as they were entitled to, when considering the material factor defence".

See also at pages 24-25:-

> "A (Employment Tribunal) set out their conclusion in the following terms:-
>
> > 'The majority of the tribunal is satisfied at this stage on the evidence that we have heard that the different contractual terms on hours and holidays are a genuine material factor which make it reasonably necessary for the respondents to impose pay differentials between the applicant and the relevant comparators. We at this stage would dismiss the application upon the basis that the respondents have fully established that material factor defence'.
>
> Looking no further, I should conclude that this was a finding of fact which was amply justified by the evidence as a whole, but perhaps particularly by the comparison putting the rates of pay and hours worked. Where a woman's and a man's regular annual working hours, unaffected by any significant additional hours of work, can be translated into a notional hourly rate which yields no significant difference, it is surely a legitimate if not a necessary inference that the difference in their annual salaries is both due to and justified by

> the difference in the hours they work in the course of a year and has nothing to do with the difference in sex".

In the present case, we have had regard to the fact that the basic salary was the only source of Airey's pay – he had no enhancements such as a sham bonus or attendance allowance. Some of the white book comparators had. Furthermore his job was unique. It was not a job in which there were a significant number of employees who were predominantly male. We are satisfied in these circumstances that both in terms of the calculation and in terms of the reason for the difference in the annual salary the claimant has no reasonable prospects of success in respect of this comparator.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
5 May 2017

JUDGMENT SENT TO THE PARTIES ON

5 May 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL