



1996, unfair (constructive) dismissal, wrongful dismissal and equal pay (equal value). At paragraph 54 the Claimant asserted that she and her comparator(s) were employed by associated employers and that the comparators were employed by Carmarthenshire County Council (hereinafter 'CCC').

### The Issue

2. This is a decision on a preliminary issue following a direction given by EJ Davies on 22<sup>nd</sup> November 2019 that there be a preliminary hearing to determine the following issue:
  - 1) Was CCC an associated employer of the Respondent in accordance with s.79(4) of the Equality Act 2010 including whether:
    - a. One is a company of which the other (directly and indirectly) has control pursuant to s.79(9)(a) and/or
    - b. Both are companies of which a third person (directly or indirectly) has control, pursuant to s.79(9)(b)?
  - 2) Were there common terms at CCC and the Respondent, in accordance with s.79(4)(c) of the Equality Act 2010?
  - 3) Were the Claimant's and her intended comparator's terms and conditions attributable to a single source, pursuant to Article 157 of the TFEU, that was responsible and could remedy the pay disparity?

### The Hearing

3. For the hearing I had a joint bundle of documents running to 369 pages; a witness statement for the Claimant; a witness statement for Michael Theodoulou of the Respondent and a witness statement for Paul Thomas of CCC. I had skeleton arguments from both Counsel. I was provided with the following authorities for which I am grateful: **Scullard v Knowles [1996] ICR 399 EAT**; **Gardiner v London Borough of Merton [1980] IRLR 472**; **Lawrence and Others v Regent Office Care Ltd and Others [2003] ICR 1092** and **Fox Cross Claimants v Glasgow City Council [2013] ICR 954**.
4. I heard oral evidence from the Claimant, Mr Theodoulou and Paul Thomas. I heard oral closing submissions from both Counsel and I reserved my decision.

### Respondent's Submissions

5. Mr Bunting submitted that in order for s.79(4) to 'bite' the Claimant would need to satisfy all three subsections as they are conjunctive. That would mean that in order for the 'common terms' subsection to apply, the comparator must be employed by the Claimant's employer or by an associate of the Claimant's employer. Having regard to **Gardiner** the doctrine of associated employers can only apply where one of the employers is a company. While in **Glasgow CC v Unison [2014] IRLR 532 CS** the definition of company was expanded to include limited liability partnerships, there was no authority for the proposition that the definition could now include public bodies, local government bodies

and/or statutory bodies corporate. If the extension is limited by economic purpose, the organisations in this case exist for entirely different reasons. CCC cannot in law be an associated employer of the Respondent in accordance with s.79(4)(a) of the Equality Act 2010. CCC does not have direct or indirect control over the Respondent. CCC provided advice and the Respondent made the decisions. It largely followed Carmarthen's advice. The situation can be compared to a barrister advising clients: the barrister advises the clients but it is ultimately their decision as to whether to take the advice or not. The Claimant's and her intended comparator's terms and conditions are not attributable to a single source, pursuant to Article 157 of TFEU, that was responsible for and could remedy the pay disparity. The claimant's claim of equal pay should therefore be struck out. In ***Hesly v Fair Employment Agency [1989] IRLR 106 NIAC*** it was held that a statutory body corporate did not fall within the definition. There was a lack of evidence of common terms. Even if there were common terms, the Respondent was not a company. It was the policy of the Respondent to adopt the CCC process of job evaluation. This was effectively outsourced. Matters would be discussed at the Civic Governance and Personnel Committee. Carmarthenshire did not have any veto over the powers of the Respondent. The Respondent also obtained advice from Ellis Whittam and One Voice Wales. The Respondent was given a handbook but there was no suggestion that it would be binding. The SPC Greater London was not a collective agreement; it was just a scheme that was a means for the Respondent not to have to invent its own pay scales. The Respondent used a third party pay structure because it was convenient. CCC have no power to make any decisions as to the Claimant's employment. All decisions had to be made by the Respondent. It had no power to restore equal treatment in a single source context.

### **Claimant's Submissions**

6. On behalf of the Claimant it was submitted that 'company' should be interpreted to include the Respondent and CCC and that CCC had indirect control of the Respondent in respect of decisions relating to the evaluation of pay. In ***Fox Cross v Glasgow City Council*** a 'company' does not have to meet the definition of 'company' in the Companies Act. The expression is capable of including a body and association of persons formed together for some common purpose. The relevant statutory provision is an anti-discrimination measure and so should be construed purposively. There did not necessarily have to be a common economic purpose: it was enough for the Respondent and CCC to have been formed for some economic purpose. In ***Scullard v Knowles*** the EAT rejected the Tribunal's finding that a regional council could not amount to a company just because it did not take a particular form. The reality of the situation was that CCC told the Respondent what to pay their staff. The correspondence does not indicate that the Respondent was outsourcing the evaluation process. There were no 'terms of engagement' as such. Mr Thomas and his staff were telling the Respondent what to pay, however there were insufficient records of this. The Claimant had been asking for documents and evaluation papers but none were forthcoming. There was no written report even after three years. The evidence should therefore be treated with some circumspection. There was evidence of IT monitoring which indicated that there

was control by CCC. Monitoring must mean that they had some access and control over the Council. There were common terms in the form of NJC. There was no difference in terms. As for single source, if it were the case that CCC were telling the Respondent what to pay, they would also have the power to remedy any pay disparity. CCC had effectively stepped into the Respondent's shoes in terms of setting pay. There was no evidence of decisions being made by sub-committees.

## **The Law**

7. The relevant provision is at s.79 Equality Act 2010 which I set out in full as follows:

- (1) This section applies for the purposes of this Chapter.
- (2) If A is employed, B is a comparator if subsection (3) or (4) applies.
- (3) This subsection applies if—
  - (a) B is employed by A's employer or by an associate of A's employer, and
  - (b) A and B work at the same establishment.
- (4) This subsection applies if—
  - (a) B is employed by A's employer or an associate of A's employer,
  - (b) B works at an establishment other than the one at which A works, and
  - (c) common terms apply at the establishments (either generally or as between A and B).
- (5) If A holds a personal or public office, B is a comparator if—
  - (a) B holds a personal or public office, and
  - (b) the person responsible for paying A is also responsible for paying B.
- (6) If A is a relevant member of the House of Commons staff, B is a comparator if—
  - (a) B is employed by the person who is A's employer under subsection (6) of section 195 of the Employment Rights Act 1996, or
  - (b) if subsection (7) of that section applies in A's case, B is employed by the person who is A's employer under that subsection.
- (7) If A is a relevant member of the House of Lords staff, B is a comparator if B is also a relevant member of the House of Lords staff.
- (8) Section 42 does not apply to this Chapter; accordingly, for the purposes of this Chapter only, holding the office of constable is to be treated as holding a personal office.
- (9) For the purposes of this section, employers are associated if—
  - (a) one is a company of which the other (directly or indirectly) has control, or

(b)both are companies of which a third person (directly or indirectly) has control.

## **Findings**

8. The Claimant's case is that the Respondent relied on CCC's policies for its own staff in relation to sickness, pay entitlement and holidays. CCC set the grades and resulting salaries for employees. The upshot was that in effect the Town Council's staff were under control of CCC. In her evidence the Claimant stated that there have been members of staff and Councillors, such as Pat Jones, who have been simultaneously employed by the Respondent and CCC, such is the relationship between the two authorities. The Respondent's case is that it sourced advice from CCC on matters such as HR and job evaluations but that ultimately it had full power over the decisions that it made over staff and matters such as pay, which were made at committee level. It then raised the money for salaries through its precept. The CCC's case is that it had no control over the Respondent which was an entirely separate body corporate set up under different legislation and with a different political constitution.
9. The Respondent is a town council and therefore a statutory body corporate. The statutory sources for the Respondent's powers are found at page 243 of the bundle. Mr Theodophoulous stated under cross-examination that this was not exhaustive. The Town Council is controlled by Plaid. Only one of the eighteen councillors is a member of Plaid. At least four of the eighteen Councillors are also County Councillors. The Respondent carries out its functions by electing standing committees at its annual meeting and delegates power to them to deal with specific matters. Decisions on matters such as staff and pay and conditions are taken by resolution voted on by a majority of Town Councillors. The Respondent has no centralised HR function. Any revenue is raised by precept and by the hiring out of owned buildings. The Finance, Governance and Personnel Committee manages the Council's financial policies and procedures and makes recommendations to the Council in terms of the annual budget and the setting of precepts. It is responsible for staff policies and procedures. Any salaries are factored into when the Town Council prepares its budget for the year. This is a means of autonomous self-governance which is independent from that of CCC.
10. In 2014 the Claimant looked into staff's roles and noticed that there were anomalies. She brought this to a meeting of the Respondent's Civic Governance and Personnel Committee on 12<sup>th</sup> February 2015. The Claimant was instructed by Pat Jones, Councillor, to speak to Mr Paul Thomas in his capacity of Head of HR for CCC and to liaise with him about the need for job evaluations for the Respondent's staff. The Claimant requested that her evaluation be carried out in accordance with the NALC/SLCC National Agreement of Salaries and Conditions of Service of Local Council Clerks in England and Wales 2004. The Respondent determined to adopt the CCC job evaluation process under the Greater London Provincial Council job evaluation scheme.

11. The history behind the use of CCC to carry out job evaluations is as follows. In April 2018 a service level agreement came into existence between the Respondent and CCC to provide HR advice. The background to this was that CCC had been in the business of giving ad hoc advice to a number of town councils over a period of time and Mr Smith formed the view that it was not reasonable for them to continue to do this for free. Before this, there was an informal arrangement whereby the Respondent would approach CCC for advice on an ad hoc basis. The CCC have been carrying out job evaluations for the Respondent since 2006. The Respondent has always used the Greater London Provincial Council job evaluation scheme which had been agreed on a collective basis at CCC as part of the single status agreement. This scheme was used to evaluate the Claimant's role.
  
12. At page 277 of the bundle there is a letter to the Claimant from Councillor John James, Chair of the Respondent's Civic Governance and Personnel Committee dated 18<sup>th</sup> April 2017. In it Mr James states that it was the policy of the Respondent to adopt CCC's job evaluation process and that this had been in place since 2006. The letter goes on to say, *'Appointed by the Council a sub-committee of the Civic Governance and Personnel Committee has recently carried out a full review of the staff job descriptions deemed necessary for the efficient and smooth running of the Council's activities and in order to meet its responsibilities. This includes your job description which we attach for your information following due consultation with yourself. Where we deemed it appropriate we took into account the submissions you made and included such changes. The resulting job description defines the role that we, as a properly appointed committee of the Council, wish our Town Clerk to fulfil and is in accordance with our Committee structure and staffing organisation comprising Responsible Finance Officer, Technical Services Officer, Administration Officer and Administrative Officer. It has been evaluated in accordance with the CCC process.'*
  
13. The Claimant was banded within Grade I of the CCC salary scale points 34 to 38 on a band between £29, 854 and £33, 106. She was on Job Grade 36 with a salary of £31, 288 pro rata to be increased to £33, 106 pro rata Grade 38 from the date of the letter. The Claimant lodged an appeal on 23<sup>rd</sup> April 2017 (p.279). The Claimant took issue with the process as she had not been involved in it and had not been provided with any documentation. The Claimant requested documentation pertinent to the evaluation and also which had related to any comparisons under the NALC/SLCC National Agreement. She did not receive anything. The Claimant submits that the lack of transparency in effect underlines the association and/or control between the CCC and the Town Council.
  
14. Mr Paul Thomas, Assistant Chief Executive of of CCC, gave evidence as to the nature of CCC's involvement in the the provision of the job evaluations. I accept his evidence. He explained that as the unitary authority, CCC would often be approached by Town Councils to give ad hoc HR advice. If he were ever approached by the Respondent he would meet with members in his own time. As for job evaluations, he stated that it would be the responsibility of the Town Council to specify what the responsibilities were and to come up with a job

profile. The job profile is then assessed on the basis of an evaluation sheet which generates a score matched against the pay scale. The evaluation criteria are prescriptive. The CCC use the same process of job evaluation as they used for the Respondent. Mr Thomas stated that it is the choice of the Respondent as to what scheme they wished to use. The Respondent had no obligation to use the scheme that CCC used but did anyway. I accept that. It would be ultra vires for CCC to make any decision on behalf of the Respondent or for the Respondent to delegate its decision-making power to the CCC. There is no evidence that CCC would have any sort of veto on the decision that the Respondent made. I have considered the lack of any paper trail and this is unsatisfactory. However it is clear that the decision as to the Claimant's salary at p.277 was made by the sub-committee of the Civic Governance and Personnel Committee of the Respondent. Mr Theodopholous's evidence, which I accept, was that as far as he knew the Respondent always accepted the recommendations but that there were also a number of occasions when recommendations were amended by the Respondent.

15. In my finding, even if recommendations by the CCC were always accepted by the Respondent it does not follow that the CCC were exercising indirect or direct control over the Respondent. The job evaluations were the outsourcing of a function by the Respondent which was carried out by the CCC in a prescriptive way. The CCC were not making HR decisions for the Respondent or exercising any delegated powers on their behalf. The lack of paperwork is not satisfactory but it does not lead to any necessary inference that CCC were the decision makers as concerns the job evaluation. In addition, it would be fanciful to suggest that just because the Respondent was using CCC as a resource to carry out IT monitoring and payroll, there was somehow some sort of executive influence over the Respondent, whether indirect or otherwise.
16. The reality was that the Respondent is a small organisation which was looking to the CCC, an organisation with larger resources, for assistance in the discharge of some of its functions whether that was HR advice or IT. There had been a gentleman's agreement for many years which was recently formalised into a service level agreement. I do not consider that it is relevant that the Respondent also engaged Ellis Whittam and One Voice Wales. The Respondent was free to access different advice separate from the CCC and the lack of exclusivity in the service arrangement underlines the lack of control between CCC and the Respondent. I did not consider that the fact that there were Councillors who acted for both authorities to be a persuasive factor. Their obligations would be to the respective electorates. Pat Jones had instructed the Claimant to contact CCC for the job evaluation because this is the way it job evaluations had always been carried out.
17. Applying the law to the facts I find as follows. Firstly I take into account the Court of Appeal authority of **Gardiner v London Borough of Merton**. This holds that local authorities are not associated employers for the purposes of the associated employers provision (in that case it was s.153(4) of the Employment Protection (Consolidation) Act 1978 but it applies to the same provision in the Equality Act 2010). In **Fox Cross Claimants v Glasgow City**

**Council** the Scottish EAT adopted a broader construction of the word 'company' and the following principles can be derived:

- 1) It cannot be assumed that 'company' in s.1(6) of the Equal Pay Act 1970 means limited company;
  - 2) The associated employer provision in s.1(6)(c) was an anti-avoidance measure aimed at an employer setting up a body distinct from itself to which it could transfer employees and avoid its equal pay responsibilities
  - 3) The word 'company' in section 1(6) included an association of persons formed for an economic purpose, which might be recognised as a limited liability partnership.
18. While the Scottish EAT sought to expand the definition into limited liability partnerships, I find that the purpose of the provision is clear. It was enacted in order to prevent employers from setting up corporate mechanisms which would enable them to avoid their obligations. Neither CCC nor the Respondent are bodies which have been formed for an economic purpose. They are local authorities. **Gardiner** is on point: local authorities are not companies, even taking a broader construction of that word. Limited liability partnerships and companies are similar vehicles with economic purposes. Local authorities are not in the same category. **Scullard v Knowles** is distinguishable on the basis that there was no control by a third party on the facts of this case.
19. Therefore, CCC cannot be an associated employer of the Respondent under s.79(4) Equality Act 2010. In any event, as I have found above, CCC does not have any direct or indirect control over the Respondent for the purposes of s.79(9)(b) Equality Act 2010.
20. Section 79(4) cannot apply since all the subsections are conjunctive. If the Claimant is relying on a comparator who works for CCC then there needs to be an associative relationship in accordance with s.79(4)(a) and I have found that there is not.
21. There has not been any evidence of a third party having control of CCC or the Respondent further to s.79(9)(b) Equality Act 2010 and therefore there is no association under this subsection.
22. I come next to Article 157 TFEU. The Claimant did not have a written contract with the Respondent. However, it was only the Respondent who would be able to remedy any pay disparity. There was no evidence of any single source that was responsible for and could remedy any pay disparity as between the Claimant and a comparator at CCC.
23. In conclusion therefore all three preliminary questions as set out under 'The Issue' above must be answered in the negative.



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Employment Judge A Frazer  
Dated: 5<sup>th</sup> February 2020

SENT TO THE PARTIES ON 6 February 2020

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FOR THE SECRETARY OF EMPLOYMENT  
TRIBUNALS