Case number: 2501188/01
& others

EMPLOYMENT TRIBUNALS

Between:

Mrs C Carr & others	**and**	University of Durham
Claimant		**Respondent**

Case Management Discussion
by Telephone Conference Call

held at: Nottingham
on: 21 April 2005
the **Chairman**, Mr J K Macmillan
having identified the issues in the proceedings, made the following Order.

ORDER

1. The Claimant's application that claims against the Respondent be treated as test cases for determining when time ran for the purposes of Section 2(4) of the Equal Pay Act 1970, and that related cases across the country be stayed pending the outcome of those test cases, is refused.

.....
Chairman

Date:

IMPORTANT INFORMATION ABOUT ORDERS

(1) Any person who, without reasonable excuse, fails to comply with a requirement imposed under Rule 10(2)(c) [witness orders] or (d) [requirement to disclose documents or information] of the Employment Tribunals Rules of Procedure 2004 is liable on summary conviction to a fine of up to £1,000.00 under section 7(4) of the Employment Tribunals Act 1996.
(2) Failure to comply with an Order may result in the whole or part of a claim or response being struck out at or before the hearing or a costs or preparation time order.
(3) A party may apply to the tribunal to vary or set aside an Order but must do so before the period for compliance with the Order has expired.
(4) An Order granting the right to inspect documents may be complied with by supplying photocopies of the documents in question, provided the party in whose favour the Order was made agrees.

EMPLOYMENT TRIBUNALS

at: Nottingham

BETWEEN:

Mrs C Carr & others	**and**	University of Durham
Claimant		**Respondent**

Representations:

For the Claimant: Ms Helen Knott, Counsel for UNISON
Ms Jo White, Thompsons Solicitors

For the Respondent: Mr John Fisher, Pinsents Solicitors

REASONS

1. Of the 30 Claimants who have outstanding claims against the University of Durham, some 15 are represented by the trade unions UNISON, GMB and AUT.

2. The Respondents seek to strike out the claims on the basis that events during the Claimant's employment have caused time to run, for the purposes of Section 2(4) of the Equal Pay Act 1970, and the claims are therefore out of time.

3. The trade unions contend that issues arise in these cases which are suitable for determination as test cases, and that all cases nationally which give rise to the same or related issues should be stayed.

4. The specific test case issue is said to be "In what circumstances would time start to run against a Claimant who was continuously employed by the same employer where there have been changes to a) the nature of work carried out by the Claimant and/or b) the location of the work and/or c) the hours of work and/or d) the terms and conditions under which the work is carried out and/or e) the temporary or permanent status of the work, and the Claimant's claim was presented more than 6 months after the relevant change.

5. The time for bringing a claim under the Equal Pay Act, which is the legislation under which the part-time worker pension cases are brought, is (and I deliberately avoid the complications imported into the Act by the Equal Pay Act 1970 (Amendment) Regulations 2003 as they do not affect my reasoning) 6 months from the ending of the employment in question.

6. It is clearly established by the ***Preston*** cases (***Preston & Others -v- Wolverhampton Healthcare NHS Trust & Others***) that the employment in this context means the contract of employment in respect of which the dispute arises. The Equal Pay Act, by virtue of Section 1(1), creates the right to equal pay by inserting into the contract of employment of every woman an equality clause entitling her to equality of pay with men. It is the breach of that clause by the failure to pay equal pay which creates the cause of action and time runs, for the purposes of Section 2(4), from the end of the contract of employment into which the broken equality clause is implied.

7. The Claimants submit that it is necessary to draw a distinction between the variation, even a substantial and material variation of a contract, and its termination and replacement by a different contract. The circumstances in which the former may be said to amount to the latter and thus to trigger the running of time under Section 2(4) has not so far been addressed in the ***Preston*** litigation. That is a gap which I am invited to fill by acceding to this application.

8. The need for further test case guidance is said to arise because the Respondents in these proceedings are taking points which appear to be wrong, that other Respondents around the country are similarly taking bad points about when time begins to run, and that tribunals are reaching inconsistent decisions on them.

9. The trade union UNISON first raised the question of whether the University of Durham cases should be treated as test cases as long ago as the beginning of December 2004. Despite that they were not able to tell me today precisely how many factual scenarios were demonstrated by the University of Durham cases, nor were they able to tell me what other factual scenarios which might be said to be so common as to require test case determination could be described. Although it was said that this was a national problem, only one other case has thus far been identified as being a possible test case to be added to fill the gaps in the Durham cases.

10. I am unpersuaded of the need for a further test hearing. It would certainly not be in accordance with the overriding objective for all cases in which the broad general issue of the meaning of “the employment” arose to be stayed pending the outcome of these cases whether labelled test cases or not. The great majority of such cases are likely to be straight forward; many of them are now very old and no purpose whatever would be served by staying them.

11. My principal reasons for refusing the application can be summarised as follows:

i) Whether time runs in a particular case because of a change in the contractual arrangements between the Claimant and the Respondent is likely to be largely, if not entirely, dependant on the facts of that case. The best that could therefore be achieved by “test cases” would be to offer some guidance. To be of value, a wide range of factual circumstances would have to be investigated and their effect determined. At the most I appear to be being offered four such scenarios.

ii) The law, in my judgment, is established. The fact that Respondents may or may not be taking bad points, requiring the union to attend individual hearings to oppose strike-out applications, does not demonstrate that the law needs to be clarified.

iii) The two tribunal decisions which I have been shown do not appear to me to be inconsistent (in their outcome they are plainly consistent). There may be differences of emphasis and in the detailed guidance offered by the chairman as to where the borderline between variation and termination lies.

iv) If authoritative appellate guidance is needed on this issue it is far better obtained by appealing individual decisions which appear to be wrong rather than seeking guidance on a limited number of factual scenarios. A decision of an employment tribunal, whatever the identity of the chairman, which is not appealed is of only persuasive authority. If I were to find in favour of the Claimants in the test cases or to find against them on unarguably correct premises, the whole exercise would be rendered futile as the Respondents are clearly very nervous in becoming involved in the costs of appeals. The union's starting point must therefore be a claim which one of their members has lost which they feel that they ought to have won, not a claim which remains undetermined but in which the Respondents appear to be taking a bad point.

v) The part-time worker pension litigation has, since its inception, been managed on the premise that determination would occur at three levels. The first would be the preliminary issues which were of universal application. I made those decisions in 1995 and their appeal process was completed in 2001. The second level would be common points; points not of universal application but of wide enough general application to require resolution by test case. I made the determination in the common points test issues in 2002 and, apart from one outstanding issue, their appeal process is now complete. Preliminary and common points were largely questions of law. We are now in the third stage which is the determination of individual cases on the individual facts relating to those cases by the application to them of the law as determined at the preliminary and common points stages. If a Respondent takes what the unions regard as a bad point when applying to strike out a case, they must defend it on an individual basis, on its individual facts, if necessary at a full Pre-Hearing Review at which evidence and oral argument can be given. The majority of these cases, however, are being resolved on the basis of written submissions only. I have not been told why that cannot be done in these cases with the unions choosing to appeal any in which they feel that the outcome is wrong in law.

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Chairman

Date:

REASONS SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS