

Appeal Nos. UKEAT/0060/06/ZT UKEAT/0038/07/ZT
UKEAT/0402/06/ZT UKEAT/0700/05/ZT

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 14 March 2007
Further submissions 19 March 2007
Judgment handed down on 4 May 2007

Before
HIS HONOUR JUDGE McMULLEN QC
(SITTING ALONE)

UKEAT/0060/06/ZT

- 1) SECRETARY OF STATE FOR HEALTH APPELLANTS
- 2) NHS BUSINESS SERVICES AUTHORITY

MR P RANCE PR OF MRS P J RANCE (Dec'd) & OTHERS RESPONDENTS

UKEAT/0038/07/ZT

- 1) SECRETARY OF STATE FOR HEALTH APPELLANTS
- 2) NHS BUSINESS SERVICES AUTHORITY

- 1) MRS S R CLARK RESPONDENTS
- 2) NORTH BRISTOL NHS TRUST

UKEAT/0402/06/ZT

- 1) SECRETARY OF STATE FOR HEALTH APPELLANTS
- 2) NHS BUSINESS SERVICES AUTHORITY

- 1) MRS E MADDOCKS RESPONDENTS
- 2) LEICESTERSHIRE PARTNERSHIP NHS TRUST

UKEAT/0700/05/ZT

- 1) SECRETARY OF STATE FOR HEALTH APPELLANTS
- 2) NHS BUSINESS SERVICES AUTHORITY

MRS K WHEELER & OTHERS RESPONDENTS

Transcript of Proceedings

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SUMMARY

Equal Pay Act – Part time pensions

Practice and Procedure – Appellate jurisdiction/Reasons/Burns–Barke

The EAT exercised its discretion to allow a point conceded at the Employment Tribunal to be reopened on appeal. The exceptional circumstances included the fact that the issue went to

jurisdiction, these were four test cases representing 120 similar concessions in mass litigation affecting 11,000 NHS employees; the mistake was administrative not tactical, the Respondents applied in each case for a review to the Employment Tribunal, as well as appealing. There had been no first instance full hearing of the Claimants' cases, the matter being handled according to national protocols, and no further investigation into the facts was required in order to do justice. The concessions were withdrawn and the appeals were allowed.

The law on new points in the EAT is summarised. Guidance is given to Employment Tribunals in handling the stayed cases.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about re-opening claims for back-dated pension entitlement where it had been conceded that the Claimants were entitled to claim equal access to occupational pension schemes in the health service.

2. I will refer to the parties as the Claimants, or by name, and to the Respondents, who are the Secretary of State for Health, The NHS Pensions Agency, and its successor body, the NHS Business Services Authority. The other Respondents are the employing authorities of the Claimants. They play no role in the appeal and are content to adopt the submissions of the Secretary of the State and abide by the judgment, the Claimants taking no point that judgments have been made against the employing authorities, which are not the subject of a direct appeal.

Introduction

3. These are four test cases selected from 120 appeals. The way in which these cases are managed in the Employment Tribunals is set out in my judgment in *Thacker and Larthwell v Secretary of State for Education and Skills* (UKEAT/0039/05) at paragraphs 14 and 15:

"14. These cases are part of the *Preston v Wolverhampton Healthcare NHS Trust* No 3 [2004] ICR 993 (EAT) litigation, and are being handled throughout the UK according to that ruling. The first Originating Applications were lodged in 1994, and continue to be received, albeit in very small numbers. Most notices of appearance from the main employers were stayed. In the vast majority, these old cases are covered by the earlier Employment Tribunal Regulations, and the components of a notice of appearance then were less rigorous than those for a response now in the 2004 Regulations. Employers have been directed to submit schedules, listing those cases which they claim must fail, following the various *Preston* judgments. We at the EAT will recognise this, and also give effect to the proportionate decision in case management, taken in the employment tribunals, not to call on all Respondents to submit a response unless now sought.

15. As I understand it, there are three stages to the process in public sector cases (the problem may also arise in large private sector cases as well but that depends on whether the nominated chairman in the Region responsible for managing cases follows the public sector model):

15.1 The Respondent submits a schedule to the tribunal office listing the claims which are said to fail and giving brief but sufficient reasons why the claims should be struck out. In the great majority of non-NHS cases, this has been done and the schedules processed. There remains a small number of schedules to process and an even smaller number yet to be received. For most public sector Respondents, this involves at least tens and more frequently hundreds of cases. For the NHS, which is being handled centrally by the NHS Pensions Agency, it is thought the number is well over 8,000. The NHS schedules have been received and are being processed.

15.2 A letter is sent inviting the Claimant to show cause ie give reasons why the claim should not be struck out, for it appears to fall outside the rulings in Preston.

15.3 The Claimant replies and if the reply is deemed inadequate the claim is ultimately struck out by a Chairman without a hearing. In our experience at the EAT, it is usually a Claimant who has replied to the show cause letter who appeals against the strike out judgment, but that does not necessarily follow. The Claimant's reply to the show cause letter should be copied to the Respondent whose further views will be sought. Its reply in letter form can be taken as an amendment to the response in the schedule.

15.4 This process applies only to the old claims. A Respondent to claims which have been received after it has filed a schedule should be directed to enter a response in the conventional way under the 2004 Regulations, and so the problem will not arise in the newer cases."

4. The precise route taken by each case to the EAT differs, but they show certain common themes. Following Preston (No 3) (above), calculations were done to enable Claimants to understand what their entitlement was to access to the NHS pension scheme and at what cost to themselves. The Respondent acknowledged that certain periods of service would not be disputed, while others would. Tribunals around the country made rulings giving declarations in favour of the Claimants in respect of the undisputed periods and either dismissing or striking out their claims in respect of the disputed periods, in each case having offered them the opportunity to give reasons why such actions should not be taken.

5. Within weeks of the respective judgments, the Respondent, on doing routine auditing, found that periods should have been disputed and reviews were sought. In some cases, on a preliminary consideration of the application for a review, the relevant chairman refused the application. In others, a review was conducted and the earlier declaration either maintained or varied. Meanwhile, appeals were presented to the EAT and were collected together, resulting in four test cases.

6. The practical effect of reversing the judgment is that in each case the Claimant is out of time to present a valid claim. This is because of the application of the relevant time limits in the legislation. As is clear from paragraph 16 of Preston (No. 3), section 2(4) of the Equal Pay Act 1970 (EPA) originally provided that:

"No claim in respect of the operation of an equal pay clause relating to a woman's employment shall be referred to an [Employment Tribunal]× if she has not been employed in the employment within the six months preceding the date of the reference".

7. The six month EPA time limit was applied to claims for equal access to occupational pension schemes by virtue of the Occupational Pension Schemes (Equal Access to Membership) Regulations 1976 (SI 1976/142).

8. Section 2(4) EPA was later amended, for pensions purposes, with effect from 1 January 1996 by section 63(4)(c) of the Pensions Act 1995, as follows:

"No claim in respect of the operation of an equal treatment rule in respect of an occupational pension scheme shall be referred to an [Employment Tribunal] ... unless the woman has been employed in a description or category of employment to which the scheme relates within the six months preceding the date of the reference"

9. With effect from 19 July 2003, section 2(4) EPA was amended in all equal pay cases other than pensions cases to read:

"No determination may be made by an employment tribunal in the following proceedings–

(a) on a complaint under subsection (1) above,

×

unless the proceedings are instituted on or before the qualifying date (determined in accordance with section 2ZA below)."

Section 2ZA(3) EPA then went on to provide that

"In a standard case, the qualifying date is the date falling six months after the last day on which the woman was employed in the employment".

10. The above time limits have since been applied from 10 August 2005 to pensions cases by the Occupational Pensions Schemes (Equal Treatment) (Amendment) Regulations 2005 (SI 2005/1923).

11. In Preston (No 3) I held at paragraphs 81–120 that the above time limits should be interpreted so that time ran from the end of each particular contract of employment with a specific employer, unless the "stable employment relationship" exception to the operation of section 2(4) EPA applied because the Claimant had a series of contracts with the same employer containing the same or substantially similar terms.

The facts in the test cases

Mrs Wheeler

12. Mrs Wheeler started work with North West Hertfordshire Area Health Authority as a twilight district nurse on 1 January 1980 and had unbroken service with that and other Health Authorities until 30 November 1992. Two years later, on 16 November 1994, she took up employment with a general practitioner's practice but that is not the subject of any claim. She should have lodged her claim on or before 30 May 1993 but did so on 11 January 2005, some 11 years out of time.

13. Following the issue to Mrs Wheeler, and her completion, of a questionnaire, the Respondent agreed to her entitlement between 1 January 1980 and 5 April 1988. That is the disputed period in these proceedings. Adopting Mr Hill's express terminology in his skeleton argument, the Respondent "conceded" the Claimant's right to retrospective access to the pension scheme during the disputed period. The vehicle for this concession was the response to a direction issued centrally by Mr J K Macmillan, Regional Chairman, who has overall charge of these cases in the Employment Tribunals. The Respondent complied with the direction by submitting that parts of the Claimant's period of employment should be the subject of resistance and other periods were "accepted". On 31 August 2005 the Claimant and the Respondent received a direction in these terms:

"For the part of the claim that succeeds, a declaration by consent will be issued unless objections are received from either party or if the dates remain in dispute."

So it was that on 28 September 2005 the Tribunal gave the following judgment:.

"1. The Tribunal Chairman Mr Postle declares that the claimant is entitled to retrospective membership of the Respondent's occupational pension scheme as from 1st January 1980 to 5th April 1988.

2. Any other complaints by the Claimant that she has been excluded from membership of her employer's pension scheme are struck out.
3. By not later than 28 days from the date of this judgment the Respondent will write to the pension fund trustees (with a copy to the claimant) requiring the trustees to state the terms on which they will admit the Claimant to membership of the scheme between those dates.

Reasons

1. This is a complaint under Section 1(1) of the Equal Pay Act 1970 and Article 141 of the Treaty of Amsterdam alleging that the Claimant was unlawfully excluded from membership of her employer's pension scheme because she worked part-time and that such exclusion was indirectly discriminatory against women.
2. The Respondent concedes that the claim succeeds in respect of the period between 5th January 1980 and 5th April 1988 and consents to the tribunal making a declaration that the Claimant is entitled to be admitted to membership of the scheme for that period."

14. An application for a review was sought by the Respondent. In this application it was contended that the Claimant's period of claim ended on 30 November 1992. It is now common ground that the time during which a claim could be made ended on 30 November 1992 relating as it did to a period of claim up to 5 April 1988. The reason for the discrepancy in these dates is that, from 5 April 1988, measures were taken which meant that membership of the pension scheme was optional for both full and part-time employees. The consequence is that if Mrs Wheeler remained in employment after that date she would not be able to seek entitlement to access to the pension scheme but her entitlement to claim for the period before that date remained live during the course of her employment with the same employer and for up to six months thereafter.

15. The Employment Tribunal refused the application on the ground that it was made out of time (the time limit under rule 35(1) is 14 days from the date of the judgment, although there is a discretionary extension), and that "the Respondent admitted part of the claim". That refusal was made pursuant to rule 35(3) which provides for a preliminary consideration by the relevant chairman of the application for a review. If the chairman on such consideration holds that there is no reasonable prospect of the judgment being varied or revoked, the application must be refused.

16. This is essentially a unilateral consideration on the papers submitted by the applicant for a review. It requires no input from the other party. If a chairman considers that such input is required, he cannot logically within rule 35(3) consider that there are no grounds for the judgment to be reviewed. The application has, at the very least, provoked an issue in the chairman's mind which has to be examined following further material from the other party. In any other case, pursuant to rule 36(1) the judgment "shall be reviewed". Rule 36(1) is mandatory. If the preliminary consideration on the papers submitted by the Applicant shows there is no reasonable prospect of success, the application must be rejected, but otherwise it must be referred to a review hearing. The confusion, I think, lies in the understandable reference to a review being refused.

17. Rule 34(3) gives power to a Tribunal to review on certain grounds which are the following:

"34(3) Subject to paragraph (4), decisions may be reviewed on the following grounds only—

- (a) the decision was wrongly made as a result of an administrative error;
- (b) a party did not receive notice of the proceedings leading to the decision;
- (c) the decision was made in the absence of a party;

(d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time; or

(d) the interests of justice require such a review."

Mrs Rance

18. Mrs Rance started working for North Essex Health Authority on 1 September 1971 and ended her career in the NHS on 31 December 1988. The disputed period of employment is from 1 January 1977 to 5 April 1988, i.e. for 11 years' retrospective entitlement. She submitted her claim on 29 June 2000. Sadly Mrs Rance died on 13 May 2005 and conduct of her proceedings is in the hands of her widower. Following the same questionnaire procedure as in Mrs Wheeler's case, judgment was entered for the Claimant in respect of the disputed period for reasons which included the following:

"The Respondent concedes that the claim succeeds in respect of the period between 1 January 1977 and 5 April 1988 and consents to the tribunal making a declaration that the Claimant is entitled to be admitted to membership of the scheme for that period."

19. Her other periods of entitlement were disputed and were struck out on 8 August 2005. An application for review was made by the Respondent on 12 September 2005; that is some three weeks beyond the two week limit. The application said this:

"We have, unfortunately, been made aware of an error in the analysis of entitlement in this part time worker pension claim, in that, Mrs Rance's claim would appear to be out of time, not being lodged within six months of termination of the relevant contract of employment.

Mrs Rance's claim for access to the Scheme spans the period 1 January 1977 to 31 March 1989, during which time she was employed by the National Health Service. She left the National Health Service in 1989 to take up employment with a partnership of General Practitioners. Mrs Rance's Originating Application was not lodged until June 2000, well after six months of termination of her employment with the National Health Service.

In the circumstances, we would respectfully request that the Tribunal exercise its discretion under rule 35(1) to extend the time limit for carrying out a review of the Judgment under rule 34(3) (a) and (e). We apologise both for the error in the analysis of the claim, and for our lateness in seeking this Review, this being due to the sheer volume of part time worker pension cases with which this Office is concerned."

20. The chairman, at a preliminary consideration under rule 35 set out the background to these and other cases by saying this:

"1 The claimant, along with many thousands of other female employees presented a complaint to the Tribunal on 29 June 2000 maintaining that she had been unlawfully excluded from access to the respondent's Pension Scheme for the period when she was a part-time worker.

2 That complaint remained stayed along with the other part-time worker pension cases awaiting the result of test cases, which were dealt with by the Employment Tribunal and the subject of an appeal to the Employment Appeal Tribunal in the case of Preston –v– Wolverhampton Health Care (No 3 [2004] IRLR 96. The Judgment on the Appeal was given in December 2003 and when it became clear that the majority of the findings in that case were not to be the subject of further appeal to the Court of Appeal, the Tribunal sent to the parties an information bulletin No 9 requiring the NHS Pension Agency by 11 June 2004 to provide a schedule of cases which they submitted should fail either in whole or in part.

3 Because of the substantial amount of claims, the NHS Pension Agency was unable to comply with that timetable, and it was not until the spring of 2005 that individual response to the claimants was made available to be notified to the claimants. By that time well over a year had expired since the law on claims such as this had been clarified, clarification which had for a variety of reasons extended over a period of some ten years.

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9 ×The respondents maintain that the Application for Review was late because of the sheer volume of cases.

10 It is well understood that the NHS Pension Agency has been struggling with a huge number of cases. That however was reflected in the lengthy period of time allowed to the NHS in preparing its response. The respondents therefore had ample time prior to the submission of their response to consider all potential defences and in many cases they have taken the time limit point.

11 Whereas dealing with the response to many thousands of claims may well have required a generous approach to extensions of time, in my judgment the same does not apply in relation to an actual judgment served at the conclusion to a case. The number of actual judgments being received on any one day by the NHS Pension Agency is not known but common sense would suggest that it would be a very small number compared with the totality of the caseload being handled. I am therefore not persuaded that it is appropriate to extend the time limit in this case.

12 I also have regard to the need for finality in litigation. In this case the claim has taken five years for a Judgment to be given. During that time the claimant died. The respondents made a considered concession and now seek very belatedly to withdraw it. These do not, in my judgment, amount in the round to sufficient reasons for it to be just and equitable to extend the time limit for seeking a review and accordingly, the Application to Review is refused upon a preliminary consideration under rule 35."

21. The essence of that judgment is the refusal of the chairman to exercise discretion in respect of the Respondent's out-of-time application for a review. The essence of the substantive defence is that the Claimant changed employers and changed jobs, so time began to run against her. There does not seem to be any dispute about the correctness of that defence, if it were to be admitted.

Mrs Clark

22. On 27 October 1980 Mrs Clark started employment with Avon Area Health Authority at Glenside Hospital as a cook. She was subsequently appointed as a cook at Southmead Hospital and then back again at Glenside Hospital, until she took up a new post on 15 June 1992 as assistant home warden at Frenchay Hospital. All three hospitals are within the same employer. It was conceded by the Claimant that "the cooking duties in her new role were not significant". On the Respondent's case, time for presenting a claim in respect of the disputed period from 27 October 1980 to 31 August 1987 began to run on 15 June 1992 when she started work at Frenchay Hospital. She waited until 31 October 2001 and thus was nine years out of time.

23. Following the questionnaire procedure, the Employment Tribunal wrote to the Claimant saying that the Respondents:

"×do not appear to dispute× that the Claimant is entitled to succeed in respect of the period from 27 October 1980 to 31 August 1987".

Other aspects of her claim were struck out in a judgment dated 6 January 2006. On 25 January 2006, an application was made by the Respondent for a review. This was one week out of time. The grounds were as follow:

"1×. We believe that such an extension is just and equitable in the circumstances, as the grounds of the review, if allowed, go to the merits of the entire claim period. If our clients are correct in their assessment of this claim, then the claimant has suffered no detriment, whereas our clients will, if denied the opportunity to be heard on review, be unable to protect the Scheme against a considerable financial detriment which will need to [be] met largely at public expense.

2. For a review of the Judgment entered 6 January 2006 under rule 34(3) (a) and (e) – we note in particular that rule 34(3) (a) allows for review on the basis that a decision has been wrongly made as a result of an administrative error which is clearly applicable here, as the process leading to the Judgment has been almost entirely administrative in nature. Our clients contend that, for reasons similar to those set out at paragraph 1 above, the interests of justice require a review and for both parties to be heard again on the merits of the claim, the Tribunal making such findings of fact as are supported by the evidence before entering Judgment."

24. The Claimant objected to the review. Submissions were made on behalf of the Respondents. The submissions fell into two parts: first, it was contended that the administrative pressure on the Respondent had caused the error, and secondly, there were submissions about the change in the nature of the Claimant's duties. As to the former, the Respondent submitted this:

"In support of our application, we would ask that the Tribunal consider sympathetically the circumstances in which this review is being pursued, and which have, in large part, contributed to the delay in seeking it. The circumstances involve employment tribunal litigation, in the guise of the part time worker pension claims exercise, of a scale hitherto unknown, and which has placed considerable demands on all parties to these actions leading to certain unavoidable delays, such as that in the present case.

This Office has a small team of approximately two full time equivalent lawyers involved in part time worker pension litigation, whose job is to scrutinise the case load in order to identify any important points of legal principle with which the NHS Business Services Authority might need assistance. It is not possible for this Office to deal closely with all aspects of a claim's lifecycle, nor, given that the health sector has by far the largest number of such claims, with some 11 000 registered cases, would it be in the interests of the tax payer for it to do so. And so, on occasion, it can be difficult for us to meet the formal timescales set by the Rules of Procedure.

With respect, we would suggest that these difficulties have been recognised, and are reflected in the form of the nationally applicable directions for the processing of these claims in the health sector which, as you know, dispense with certain of the formality associated with other tribunal claims. All parties, including the tribunal itself, benefit from this dispensation, which helps accelerate the processing of cases, many of which are now over ten years old. We believe that it would be inequitable, against this background, for a tribunal to refuse to exercise the discretions open to it under the Rules of Procedure when an occasion for it to do so, as in the instant case, presents itself."

25. At the hearing conducted on the telephone on 9 May 2006, where the Claimant and the employing Respondent were legally represented, and the Secretary of State had also made written representations, the following judgment was given:

"The application by the second respondent to review and revoke the judgment is refused. The judgment is confirmed save as varied below.

By consent of the claimant and first respondent paragraph 2 of the judgment is varied so that within 28 days of the date of this judgment the second respondent will write to the pension fund trustees (with a copy to the claimant) requiring the trustees to state the terms upon which they will admit the claimant to membership of the scheme."

26. With respect to the Tribunal, I do not consider that this was a refusal to review. There were written submissions by the three parties and oral submissions by two of them at what can only be described as a hearing. Since the chairman had not refused the application in her preliminary consideration, she was bound under rule 36(1) to conduct a review. Indeed, the variation to the original order set out above arose as part of the review.

27. At the review hearing consideration was given to the parties' contentions as to the nature of the Claimant's work when she moved to Frenchay Hospital. It is agreed for the purposes of the appeal that documents produced to, or available to, the Employment Tribunal at a hearing or a review hearing may be used on the appeal. When Mrs Clark was employed as a cook, her terms and conditions were regulated by the Whitley Council agreement for ancillary staff. She applied for one of two vacancies as assistant home warden at Frenchay Hospital, for which she was interviewed. On 16 June 1992 she was appointed by letter, giving a commencement date of the previous day. She was invited to accept the following terms:

"Under the redeployment procedure you are entitled to a four week trial period. This will run from 15th June 1992 to 12th July 1992. This will give you an opportunity to settle in to this post and to receive any appropriate training you will need. If at any point before the end of your trial period you feel uneasy or unhappy about any aspect of this post, please discuss this immediately with either Mrs Richards or myself× May I take this opportunity of wishing you happiness in your new post and look forward to meeting you."

28. She became subject to collective agreements negotiated through the Whitley Council administrative and clerical council for which she was grade 2. A job description issued at about this time shows the nature of this work as an assistant home warden, but it says nothing about cooking. In further submissions by the Respondent on the appeal it is suggested without contradiction by the Claimant that the ancillary staff council handbook deals extensively with the role of a cook in the activities of, and relating to, the preparation and cooking of meals. These give a general increase in levels of responsibility through the scales.

Mrs Maddocks

29. On 23 August 1977 Mrs Maddocks started work for Leicestershire Health Authority as a basic grade physiotherapist working for seven hours a week. On 9 December 1985 she was employed under a new contract as a Senior 2 physiotherapist by the same employer. On 4 July 2002, the Claimant submitted her claim for retrospective access to the pension scheme for the period when she was engaged as a basic grade physiotherapist (eight years, from 1977 to 1985) and when engaged as a Senior 2 physiotherapist (three years, from 1985 to 1988). Following the questionnaire procedure, an Employment Tribunal on 2 June 2006 made a declaration "by consent" and gave reasons, essentially focusing on the reasons for striking out

the Claimant's claim for the period following 1985. This was because although she became entitled to join the pension scheme she did not do so and thus suffered no detriment.

30. On 20 June 2006 an application was made for a review, about one week out of time. The grounds were administrative error and interests of justice. At a hearing on 12 September 2006, in a judgment and reasons given on 20 September 2006, a chairman decided to extend the time limit for the review but rejected the application itself. The chairman's ground for extending time was that the application was only just outside the time limit and "bearing in mind the volume of cases, I consider this just and equitable."

31. The chairman then considered the submissions and the evidence and came to these conclusions, having looked at the two grounds on which a review was sought:

"10. The principal difficulty that I face on the respondent's application is that despite pointing out that I would require some evidence, no evidence has been put before me, other than the copy of the contract of employment for the Senior 2 physiotherapist role. In particular, nothing has been said as to how the error arose or how the error was discovered. I do not know why it came to light in June 2006 nor what the respondent was doing between November 2005 and June 2006.

11. Other than the production of a contract of employment, neither of the respondents has put forward any cogent evidence on the merits of their suggestion that there was a change in the claimant's contract of employment. On the face of it the change from a basic grade physiotherapist to a senior 2 physiotherapist at the same hospital does not look like a change of contract, but a promotionary position. The onus in a Review Application is upon the respondent. It has been recognised by the appeal courts that issues around whether a change in job amounts to a new contract of employment are complicated. The fact that a new form of contract of employment has been issued is only one factor in establishing whether there was truly a change in the contract of employment. It would not normally be suggested that promotional changes would be such that the time limit starts running from those changes. The onus in a Review Application is upon the party applying for the Review and the information put forward by the respondents is wholly inadequate to persuade me that, in this case, there is a real issue that the change from basic grade physiotherapist to senior 2 physiotherapist would have started the time limit for an equal pay claim running and I therefore, reject the Review Application on its merits.

12. I would also reject the Review Application on the second ground that the respondent consented to the Judgment and in that situation it is not appropriate to agree to a review. I say no more on that point because I am aware that there are numerous cases on this point which are subject to appeal at the Employment Appeal Tribunal."

32. Again, as a matter of procedure, I hold that the chairman was there conducting a review and not simply giving a preliminary consideration to whether there should be a review. The chairman said this:

"4. By a letter of 12 July, the parties were notified that a hearing of the Review Application would be held which would deal with the application to review out of time and, if that was granted, to consider the Review Application itself. The respondent's attention was specifically drawn to CPR Rule 3.9 and I said that I would require evidence from the respondents on both issues.

5. The Review Hearing was initially listed for 10 August 2006, but was postponed at the request of the first respondent, as it would be difficult to attend on that day because of annual

leave commitments. The case was then relisted for 12 September 2006 to enable the first respondent to attend. The first respondent made no further submissions and put forward no evidence and despite asking for the adjournment decided not to attend the Hearing."

It appears from that that the Tribunal was listing a three-party hearing on the application for a review. The chairman went on to "reject the Review Application on its merits." Given the content of the reasons, it is plain that this was a full consideration on the merits of the Respondent's case. The application for a review was made out of time. It was considered, notwithstanding that delay. The chairman did not consider at once that it had no prospect of success. Thus, it went to a review. The result of the review was to confirm the earlier judgment. The proper terminology is that the application for a review was granted, but on review the judgment was affirmed.

Judgments and reviews

33. The notice of appeal in each of these four test cases is targeted upon the substantive judgment which it is sought to set aside. However, where an application has also been made for a review, the reasons for granting or refusing a review will also be relevant. In each of these test cases a notice of appeal and an application for review were made at about the same time. It is often useful, where a party seeks to introduce new evidence, for this matter to be put first to the Employment Tribunal. The questions which arise on appeal are questions of law. Those which arise on a review are much broader. They are the five grounds set out in rule 34(3). They may or may not lead to a question of law. The interest of justice is a very wide category. The grounds for adducing new evidence are less circumscribed than those for new evidence to be adduced in the EAT. This is regulated by paragraph 8 of the Practice Direction which additionally requires the evidence to be apparently credible and likely to have had an important influence on the hearing. Consideration of reasons given on a review becomes more important when the original judgment is a default judgment or one given without a hearing. It is usually convenient for judgments and reasons at both the substantive and the review level to be considered and it is for this reason that the standard form of the notice of appeal included in the schedule to the EAT Rules requires copies of materials adduced at the review to be sent with the notice of appeal.

34. As the Practice Direction makes clear, it is important for case management at the EAT for it to be known whether or not an application has been made for a review, for notices of appeal are often stayed pending the outcome of any such application. Thus, reasons given for or against reviewing a judgment ought to be considered with the substantive judgment whether or not a separate notice of appeal is lodged against the review judgment. Since different conditions apply to the admission of an application for a review, it follows that it is not illogical for a notice of appeal against a substantive judgment to succeed and an appeal against a review judgment to fail. After all, an error of law detected in a substantive judgment which is maintained through a review judgment remains an error of law but the method of attacking it, by way of a review, is inappropriate.

Time limits and jurisdiction

35. On behalf of the Secretary of State, Mr Hill contended that the time limit under the EPA for presenting a claim relates to jurisdiction of an Employment Tribunal to hear it. Unusually in Employment Tribunal procedures, there is no power to extend the period by way of discretion. On the other hand, this limitation period is unusual, for it extends not just for six months beyond the date on which the breach of contract occurred, but for six months after the date of the relevant employment ceasing, see Preston (No 3) at paragraph 135.

36. Mr Hill in his skeleton argument foreshadowed an argument to be made by Mr Pirani and Ms Findlay as to the treatment of issues of jurisdiction by the EAT. It seems to me that

both by Respondent's answer to the notice of appeal and their skeleton arguments, the Claimants recognised the distinction between points relating to jurisdiction on the one hand and other points which may be less freely accessible on appeal. All of the Claimants argued that the issue related to a concession of fact and to judgment by consent. The territory over which the arguments gave battle related to the designation of these as exceptional cases in which the EAT would be justified in intervening to overturn an Employment Tribunal judgment on a conceded point.

37. However it is put, it seems to me Mr Hill is correct in his argument that the time limit under the EPA is one of jurisdiction. A Tribunal is precluded from hearing a claim which is not presented within the relevant time. Wording not dissimilar was upheld as going to jurisdiction in respect of unfair dismissal in *Westwood Circuits Ltd v Reed* [1973] 2 All ER 1013, per Sir John Donaldson, President, NIRC. The consequence of such a holding is that the jurisdictional provisions cannot be waived by the parties: *Rogers v Bodfari* [1973] IRLR 172, Sir John Donaldson, President, NIRC. Lord Denning MR in *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53 approved both of those judgments and said the following:

"According to the decisions of the Industrial Court, the time limit is so strict that it goes to the jurisdiction of the tribunal to hear the complaint. By that I mean that, if the complaint is presented to the tribunal just one day late, the tribunal has no jurisdiction to consider it. Even if the employer is ready to waive it and says to the tribunal, 'I do not want to take advantage of this man. I will not take any point that he is a day late'; nevertheless the tribunal cannot hear the case. It has no power to extend the time × The complaint must actually reach the tribunal itself within the four weeks. It is not sufficient for the man to put it into the post-box. He must see that it is 'presented' and delivered into the hands of the clerks of the tribunal themselves within the four weeks. If it arrives a minute after midnight on the last day, the clerks must throw it out."

38. In respect of race discrimination claims, a jurisdiction point not taken and therefore found by an Employment Tribunal to have been "effectively abandoned" was allowed to be raised on appeal to the EAT; *Sanctuary Care Services Ltd v Johnson* (UKEAT/0115/05, HHJ Ansell and members).

Concessions

39. I do not accept the distinction drawn by the Claimants and categorised by Mr Hill as "semantic" between concessions of fact and concessions of jurisdiction when related to the time limit for equal pay claims. An employer and an employee cannot agree between themselves that the employee was employed for one year, when he was employed for 11 months, or that his claim submitted one month out of time was submitted one month within time. Nor can they agree to an Employment Tribunal hearing the employee's related industrial injury claim. This is because Tribunals have jurisdiction given to them by statute and they may not hear claims made by people who do not have the relevant continuous service, or who put their claims in late, or seek to expand their claims beyond the statutory list.

40. In simple terms, in each of these cases the Respondent did not challenge the assertion by the Claimant that she had worked for the same employer for long enough to make the presentation of her claim timely. The differences are stark. Mrs Wheeler had a gap in her employment history between 1992 and 1994 when she resumed employment not with the relevant Health Authority, but with a GP's practice. Mrs Rance said in her claim form she left her employment for a Health Authority in 1989 and continued to be employed by a GP's

practice until at least 2004, before her death in 2005. Mrs Clark took up what the Respondent contends is a fundamentally different post in 1992. Mrs Maddocks did the same in 1985. Their claims were presented between nine and 16 years out of time on this footing. Time limits in Employment Tribunals are short because the remedies are wasting. Neither the House of Lords nor the European Court of Justice in the Preston litigation condemned the short time limits under the EPA or the lack of a discretionary extension. No-one sought to argue that the time limits were not jurisdictional, so giving Tribunals a flexibility which they did not have.

41. For that reason I would also reject the argument advanced by Ms Findlay that the time limit can be waived. She relied upon *Lubovsky v Snelling* [1994] KB 44 and *Seechurn v Ace Insurance* [2002] EWCA Civ 67. The short answer to this point is that these relate to limitation defences in claims based on tort and these must be specifically put in a statement of case if they are to be relied upon. See CPR part 16 rule 13.1.

42. Ms Findlay, in her skeleton argument, argued for the application of the doctrine of estoppel so as to prevent the Respondent from seeking to re-open its acceptance of the disputed period of employment. However, she abandoned this argument at the hearing.

43. It follows from this analysis that parties cannot waive the time limit. Although in form the Respondent in these test cases accepted that the Claimants were entitled to equal access to the pension scheme while disqualified as part-timers, and that is a question of fact, the acceptance paved the way for admission of the claims as a matter of jurisdiction before the Employment Tribunal when otherwise they would have been between nine and 16 years out of time. This "concession" shifted attention from a relevant act which, on the footing I have set out above, would have caused the determination of the relevant contract of employment at a date far earlier than six months prior to the date when the claims were presented. In effect, the Respondents did not make the point that such relevant event broke continuity with the result that the (by then) only outstanding issue of the disputed period of employment was to be resolved in each Claimant's favour. Had they noted that there was a gap in the employment, or a change in her status, they would have advanced an argument based upon the relevant employment coming to an end at that time.

44. Since I have held that time limits are matters of jurisdiction, I do not have to decide what the nature of the "concession" was. The Claimants argue that these were consent orders which therefore could not be disturbed on appeal. The first thing to notice about this is that it is not correct. The first three test cases are not judgments "by consent", only Mrs Maddocks's is. In *Hennessey v Craigmile & Co Ltd* [1986] ICR 461 the Court of Appeal considered an argument that an underlying agreement should be set aside following "economic duress". In *Larkfield of Chester Ltd v Milne* [1988] ICR 1, the EAT appeared to confirm that an Employment Tribunal had power to review a consent order, although in *Eden v Humphries & Glasgow Ltd* [1981] ICR 183, the EAT doubted its power to do that in respect of its own orders. I have been shown no direct authority on the unpicking of a consent order in the Employment Tribunal and consider that the approach of the Court of Appeal to such a situation now under the CPR would be relevant. This was set out in *Siebe Gorman Ltd v Pneupac Ltd* [1982] 1 WLR 185 by Lord Denning MR who said this:

"We have had a discussion about 'consent orders.' It should be clearly understood by the profession that, when an order is expressed to be made 'by consent' it is ambiguous. There are two meanings to the words 'by consent.' That was observed by Lord Greene M.R. in *Chandless-Chandless v Nicholson* [1942] 2 K.B. 321, 324. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will

only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting.' In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without objection?"

45. In my judgment, the order made by each of the four Tribunals in the test cases fell into the category of "the parties hereto not objecting." There was no direct agreement between the Respondent and any given Claimant. It is true that they both knew, by respectively filling in the questionnaire and not objecting to the proposed order of the Tribunal, how much of the Claimant's employment would count towards her occupational pension. But there was no express bilateral agreement between the parties as to this or as to the abandonment of her other claims which subsequently were struck out. On this analysis therefore, even if it could be described as a consent order in the other three cases, as it is in the Maddocks case, it does not make it a no-go area on appeal. In any event, both *Times Newspapers v Fitt* [1981] ICR 637 and *Eden* (above) can be distinguished, for in those cases the consent orders were found following a compromise agreement made between the parties. So the EAT held that it would be necessary to set aside the underlying agreements before attacking the consent orders themselves. That does not apply here.

New points on appeal

46. Mr Hill cited a long stream of authorities based on what the Court of Appeal has described as the "EAT's own jurisprudence" relating to the admission of new points on appeal when they were not taken at the Employment Tribunal or were conceded there. All parties based their argument on the exceptional nature of the exercise of the EAT's discretion and in particular its use in dealing with jurisdiction points. All of the cases were based upon "the concession" but in fact all of them considered review applications for the Respondent to withdraw the concession. In other words, the point was sought to be made before the appropriate Employment Tribunal but a revocation of the order was refused in each case.

47. It was not argued before me that that therefore took these cases out of the "new point on appeal" category, for the Tribunal in each case had been asked to consider whether or not the Respondent should be released from its concession. Different considerations might well apply to the application of these authorities when a Tribunal has gone through this process. It might, for example, be considered that a Tribunal erred in law in failing to review its judgment if the application otherwise fell within one of the grounds in rule 34. The argument must wait for another case.

48. In his speech in *North Wales Training And Enterprise Council Ltd v Astley* [2006] UKHL 29 Lord Mance upheld the approach of the EAT to the admission of new points as set out by the Court of Appeal in *Leicestershire County Council v UNISON* [2006] IRLR 810 where Laws LJ (giving the judgment with which Scott Baker and Brooke LLJ agreed) upheld a review of the authorities which I had given in the EAT in that case as being "well-established jurisprudence" (at paragraph 15). Laws LJ regarded as the leading authority the passage in *Jones v Governing Body of Burdett Coutts School* [1988] IRLR 521 where Robert Walker LJ attached particular importance to the prospect of fresh factual issues having to be determined (*Leicestershire* at paragraph 20). The passage relied upon in *Jones* is paragraph 20, which provides the following:

"20 These authorities show that although the Employment Appeal Tribunal has a discretion to allow a new point of law to be raised (or a conceded point to be reopened) the discretion should be exercised only in exceptional circumstances, especially if the result would be to open up fresh issues of fact which (because the point was not in issue) were not sufficiently investigated before the industrial tribunal. In *Kumchyk*, the Employment Appeal Tribunal (presided over by Arnold J) expressed the clear view that lack of skill or experience on the part of the appellant or his advocate would not be a sufficient reason. In *Newcastle*, the Employment Appeal Tribunal (presided over by Talbot J) said that it was wrong in principle to allow new points to be raised, or conceded points to be reopened, if further factual matters would have to be investigated. In *Hellyer*, this court (in a judgment of the court delivered by Slade LJ which fully reviews the authorities) was inclined to the view that the test in the Employment Appeal Tribunal should not be more stringent than it is when a comparable point arises on an ordinary appeal to the Court of Appeal. In particular, it was inclined to the view of Widgery LJ in *Wilson v Liverpool Corporation* [1971] 1 WLR 302, 307, that is to follow:

'The well-known rule of practice that if a point is not taken in the court of trial, it cannot be taken in the appeal court unless that court is in possession of all the material necessary to enable it to dispose of the matter fairly, without injustice to the other party, and without recourse to a further hearing below.'

21 In this case the Employment Appeal Tribunal recognised that the consequence of allowing Mr Jones's appeal would be a new hearing with fresh evidence (so far as that can be an appropriate term for evidence given in 1998 of events of five years ago): [1997] ICR at pp.398–9. It was therefore a case in which the Employment Appeal Tribunal would have had to have exceptionally compelling reasons for taking such an unusual course. It is necessary to consider the course of the proceedings to see whether there were such compelling reasons."

49. This case was also relied upon by Laws LJ in *Glennie v Independent Magazines (UK) Ltd* [1999] IRLR 719 at para 17 where he said this:

"The Employment Appeal Tribunal possesses a discretion, which must be exercised in accordance with established principles, to allow a new point to be raised before it for the first time. It is a general principle of the law that it is a party's duty to bring forward the whole of his case at the proper time. The reasoning of Robert Walker LJ in *Jones v Governing Body of Burdett Coutts School* [1998] IRLR 521 is, with great deference, consonant with this. A new point ought only to be permitted to be raised in exceptional circumstances, as Robert Walker LJ held at p.44B. If the new issue goes to the jurisdiction of the Employment Appeal Tribunal below, that may be an exceptional circumstance, but only, in my judgment, if the issue raised is a discrete one of pure or hard edged law requiring no or no further factual inquiry. There is a public interest, beyond the interests of individual parties, that statutory tribunals exercise the whole of but exceed none of the jurisdiction which Parliament has given them upon such facts as are proved or admitted before them, I do not consider that this case falls within that category, even if the facts required to be ascertained in order to determine the date of the termination of the applicant's employment were now capable of agreement. On the facts agreed before the industrial tribunal, that tribunal was correct to hold that it lacked jurisdiction. It was therefore necessary to show exceptional circumstances if the Employment Appeal Tribunal was properly to decide to allow the new point to be taken. The Employment Appeal Tribunal identified no such exceptional circumstances. In my judgment, there are none."

50. I regard those two passages as key statements of the law, together with the interpretation by Brooke LJ of previous judgments of the EAT dealing with concessions. From the authorities reviewed in those cases, I draw the following principles of law:

(1) There is a discretion to allow a new point of law to be argued in the EAT. It is tightly regulated by authorities; Jones paragraph 20.

(2) The discretion covers new points and the re-opening of conceded points; *ibid*.

(3) The discretion is exercised only in exceptional circumstances; *ibid*.

(4) It would be even more exceptional to exercise the discretion where fresh issues of fact would have to be investigated; *ibid*.

(5) Where the new point relates to jurisdiction, this is not a trump card requiring the point to be taken; *Barber v Thames Television plc* [1991] IRLR 236 EAT Knox J and members at paragraph 38; approved in *Jones*. It remains discretionary.

(6) The discretion may be exercised in any of the following circumstances which are given as examples:

(a) It would be unjust to allow the other party to get away with some deception or unfair conduct which meant that the point was not taken below: *Kumchyk v Derby City Council* [1978] ICR 1116, EAT Arnold J and members at 1123

(b) The point can be taken if the EAT is in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing. *Wilson v Liverpool Corporation* [1971] 1 WLR 302, 307, per Widgery LJ.

(c) The new point enables the EAT plainly to say from existing material that the Employment Tribunal judgment was a nullity, for that is a consideration of overwhelming strength; *House v Emerson Electric Industrial Controls* [1980] ICR 795 at 800, EAT Talbot J and members, followed and applied in *Barber* at paragraph 38. In such a case it is the EAT's duty to put right the law on the facts available to the EAT; *Glennie* paragraph 12 citing *House*.

(d) The EAT can see a glaring injustice in refusing to allow an unrepresented party to rely on evidence which could have been adduced at the Employment Tribunal; *Glennie* paragraph 15.

(e) The EAT can see an obvious knock-out point; *Glennie*, paragraph 16.

(f) The issue is a discrete one of pure law requiring no further factual enquiry; *Glennie* para 17 per Laws LJ.

(g) It is of particular public importance for a legal point to be decided provided no further factual investigation and no further evaluation by the specialist Tribunal is required; *Laws LJ* in *Leicestershire* para 21

(7) The discretion is not to be exercised where by way of example;

(a) What is relied upon is a chance of establishing lack of jurisdiction by calling fresh evidence; *Barber* para 20 as interpreted in *Glennie* para 15.

(b) The issue arises as a result of lack of skill by a represented party, for that is not a sufficient reason; Jones para 20.

(c) The point was not taken below as a result of a tactical decision by a representative or a party; Kumchyk at page 1123, approved in Glennie at para 15.

(d) All the material is before the EAT but what is required is an evaluation and an assessment of this material and application of the law to it by the specialist first instance Tribunal; Leicestershire para 21.

(e) A represented party has fought and lost a jurisdictional issue and now seeks a new hearing; Glennie para 15. That applies whether the jurisdictional issue is the same as that originally canvassed (normal retiring age as in Barber) or is a different way of establishing jurisdiction from that originally canvassed (associated employers and transfer of undertakings as in Russell v Elmdom Freight Terminal Ltd [1989] ICR 629 EAT Knox J and members). See the analysis in Glennie at paras 13 and 14 of these two cases.

(f) What is relied upon is the high value of the case; Leicestershire para 21.

51. When applying those principles to the four test cases, some new problems emerge which require new rules. In deciding whether to exercise discretion in favour of the Respondents it is relevant to ask what the period of time has been since the date of the judgment or possibly from the date of the "concession". A short period of time, or a short period of time in the context of very protracted litigation, would point in favour of the Respondents. It is also relevant to ask what the reason was for the change of position. An administrative mistake, or an oversight by a lawyer doing a routine audit of a very substantial number of files, is more venial than a tactical decision made by a representative in the proceedings. A mistake which arises in the course of handling 11,000 cases according to protocols directed by the Employment Tribunal from the centre should not readily be held against the Respondents, even if the number is upwards of 120 out of the 11,000. That genuine attempts were made to raise the matter on review before the Tribunals which were unsuccessful is also a relevant factor, as is the reason for the Tribunal's refusal. It would generally be unjust to allow the re-opening of a concession if the Claimant had made an agreement to forego any part of her claim in exchange for the conceded point, unless the matter could be put right entirely on a financial settlement. Attention should also be paid to the nature of the judgment-making in the Employment Tribunal: a judgment on the papers without an investigation of the evidence would not command the same protection as one after a contested hearing. There is less repugnance about a Respondent having a second bite of the cherry when the Claimant has not been put to proof and the Respondent has not suffered a contested defeat.

The substantive issue

52. The substantive issue in this case is whether there was a break in the continuity of employment of any of the test Claimants so as to start the six month time limit running. It is common ground that the law on this subject is set out in Preston (No 3) at paragraphs 107–120. Breaks in continuity of employment are rescued by the existence of a stable employment relationship. In a judgment I gave on behalf of the EAT in Thatcher v Middlesex University (EAT/0134/05) I described the proper approach for a chairman to undertake when looking at one of these issues, which came from Preston (No 3). We said this:

"5. The Chairman had considered the history because unchallenged evidence was given by the Claimant by way of a witness statement. In that, she described her duties and thus it

seems to me the task the Chairman was one of assessment, not only of contractual documents but also of the circumstances in which the Claimant worked. That is a perfectly proper approach because in Preston the issue was to determine whether or not there had been a radical change, as I said:

'115

It is therefore necessary to consider the 'features that characterise a stable employment relationship' (ECJ judgment paragraph 70) and these can be broken down as follows:

- (1) A succession of short-term contracts.
- (2) Concluded at regular intervals.
- (3) Relating to the same employment.
- (4) To which the same pension scheme applies.

As to (1), this devolves into two parts. The subject-matter must be short-term contracts. The House of Lords in its Order for Reference and in its consideration of the ECJ judgment when referred back to it has in mind as 'short-term' contracts which are termly, or for the academic or sessional year. It follows that those contracts and anything for a shorter period are 'short-term'. There must be a 'succession' or a 'sequence' (ECJ judgment paragraph 70). I interpret this to mean three or more, for the existence of two such contracts is not usually described as a sequence or a succession of such contracts. It would ordinarily be described as the repetition of a contract.

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As to (2), the intervals which must be regular, this is described as 'periodicity' which of course implies regularity. The periods are regular because they are clearly predictable and can be calculated precisely; and they are also regular where the intervals between work, and the length of the spells of work, are not to be predicted with accuracy; but nevertheless it is possible to say that the teacher, for example, is frequently, or even customarily, called upon whenever a need arises. This arises, by definition in the field of supply teaching, several times a term and thus may be described as regularly; but the precise dates cannot be calculated or predicted and so the work may accurately be described as intermittent.

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As to (3), 'same employment', no guidance is given. As to (4), the same pension scheme, it seems that the adoption of the expression 'over-arching' is encompassed within the same scheme.

118

In order to succeed in bringing the test cases within the above framework, Mr Cavanagh submits that the chairman was wrong to find that the stable employment relationship ceases when the terms of the contract, or the work done, alter radically: that is, when a succession of short-term contracts is superseded by permanent contract (Reasons paragraph 251(3)(e)). But in the context of the analysis of the ECJ's judgment as applied by the House of Lords, the submission fails because feature (1) is missing. The succession of short-term contracts ceases, or is interrupted, when a new permanent contract is negotiated. It is not apt to describe a succession of short-term contracts and a permanent contract as a succession of short-term contracts. The succession is broken, and the nature of the contract changes from short-term to permanent. The submission also fails because there is no periodicity about the contracts. There is no interval, let alone a regular interval, between the contracts since on the footing of the test cases each relationship is regulated by a single permanent contract.

Thirdly, the cases may also founder under feature (3) as not being in 'the same employment'. I will examine this matter in more detail below. I would further agree with the chairman that, in respect of Mrs Cockrill, her claim would fail because the pattern of her working was too spasmodic and could not be characterised as meeting each of the features set out above. She would fail principally on feature (2): the lack of periodicity of the employments.

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4. Similarity of terms and/or work

The chairman held (Reasons paragraph 233, 235) that:

'It is simply inconsistent with the nature of a stable employment relationship that the fundamentals of the succeeding contracts should vary×.

The work must be for the same employer and be broadly the same throughout; that is it will be supply teaching though not necessarily at the same schools, or the same subject at the same key stages; or home teaching, but not necessarily the same subjects, or to the same pupils × broadly the same throughout.'

It was contended that these words represent a gloss impermissibly put upon the words 'stable employment relationship'. Or alternatively that they 'imposed too strict a test of similarity'. In my view, that is an unfair criticism for one of the features of a stable employment relationship is 'same employment' which can be construed in different ways. It must be borne in mind that the report for the hearing in the ECJ described the stable employment relationship cases as follows (at p.510):

'× in other cases, the appellants worked regularly, but periodically or intermittently, for the same employer, with each period of work technically being under a separate contract of employment but with each contract containing the same terms and with the employment in total being relevant for pension purposes (but for it being part-time work' (emphasis added).

The applicants contended (at p. 520):

'To require the applicants who are employed under a series of identical, or substantially similar, contracts to bring applications within six months of the end of each such contract – some of which may be contracts for only one day's work – would plainly impose an unrealistic requirement which would make the enforcement of rights excessively difficult or impossible in practice and thus infringe the principle of effectiveness.'

It is for that reason that 'same employment' was given the characteristic cited above: it was not a gloss but the exemplification of the issues placed before the European Court of Justice.'

6. That was a reflection on the holding by the Chairman in Preston, Mr J K Macmillan, who had summarised the position as follows:

'3. A stable employment relationship ceases and time for commencing proceedings therefore begins to run when:

- a. A party indicates that further contracts will either not be offered or not accepted if offered;
- b. A party acts inconsistently with the continuation of the relationship;
- c. a further contract is not offered when the periodicity of the preceding cycle of contracts indicates that it should have been offered;
- d. a party ceases to intend to treat an intermittent relationship as stable;
- e. the terms of the contract or the work to be done under it alters radically: eg a succession of short-term contracts is superseded by a permanent contract.'

7. 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, and thus the Tribunal Chairman's approach was bound to be one of looking at all of the circumstances.

13. It must be recalled that the approach to looking at whether a radically different contract has been entered into involves either an examination of the language of the contract or of the work done and, as I have indicated in this case, the correct analysis must have included both aspects. The example given in the Preston case was a succession of short-term contracts superseded by a permanent contract. It is claimed that the new contract was not a permanent contract. It says it is temporary and, if assistance can be drawn from the later Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, it can be seen that a person who is a fixed-term employee is not a permanent employee. That is for the purposes of those Regulations, but they are illustrative of the correct distinction.

15. It is also correct to consider the intention of the parties because, as the Mr Macmillan in his Preston judgment indicated, intention is important – see paragraph 90 in Preston No. 3. If the intention of the parties is analysed in this case, it is clear that they intended to be engaged with each other for the performance of similar contracts which went substantially unchanged as to the work done by the Claimant."

53. The work done under the contract must be broadly the same throughout (para 119). If there is a fundamental difference, time will begin to run. Work for a new employer, or a gap which is not straddled by the application of the stable employment relationship rules, will cause time to run. Mr Hill relied upon the test case within Preston (No 3) of Mrs Bunyan, who accepted a newly-created post at the end of a series of contracts, constituting a stable employment relationship. The contract was not varied because it was not in place at the relevant time – it had ceased (see Preston (No 3) at para 107). On the other hand, a promotion by consent involves a variation of an existing contract (para 109) citing Lord Parker CJ in *Marriott v Oxford and District Co-operative Society* [1969] 1 WLR 254, reasoning not disturbed on this point in the Court of Appeal [1971] QB 186, see *City of Newcastle v Allan* UKEAT0845/04 at paras 40.1, 41 per Burton J (P).

Application to the test cases

Mrs Maddocks

54. Following a number of interventions by Mr Pirani, and a number of questions by myself, at the end of his opening submissions Mr Hill sought permission to withdraw the appeal in Mrs Maddocks's case. I will give my reasons for giving permission for this, because her case is illustrative of certain important points. Alert to the issue raised by the Respondent, the chairman conducted a review hearing. He came to a judgment on the merits, having evaluated the material produced for that hearing – see above. It is thus apparent that a simple observation of the documents is generally insufficient to determine whether a job has changed and what the intentions of the parties were. We held in *Thatcher v Middlesex* that concentration on similarities and differences between two written contracts would, in the circumstances of a contested hearing where live evidence was adduced, be insufficient.

55. The notice of appeal does not challenge the substance of the chairman's judgment, nor does it explain why the chairman erred when he found that the Respondents had not put forward any cogent evidence. This was a matter of fact and degree for the chairman and in the absence of clear grounds of appeal alleging perversity, the appeal could not be sustained. I would hold that the chairman acted correctly in acceding to the application and in conducting a review on the substantive merits. For the purposes of that executive part of his judgment, the fact that the Respondent had made a concession was irrelevant. On the evidence which his reasons disclose, it appears to me to be the correct judgment.

56. However, I would add my view about his auxiliary finding which was that it was not appropriate to conduct a review because the Respondent had consented to the judgment. This is the only test case in which it is formally a review of a consent judgment. Given the principles which I have set out from *Siebe Gorman Ltd* (above) it would have been wrong to decide the case on the basis solely that there was a consent order. This was not in the form of an underlying agreement, but of the parties not objecting to the order the Tribunal made. I cannot make a formal determination because I have given permission for the case to be withdrawn, but it will be sufficient guidance to Employment Tribunals for me to indicate that in any case based upon these test cases which is itself the outcome of the administrative protocols I have described, the "acceptance" or the "concession" of a period of employment later said to be disputed is not of itself a reason for refusing a review. Likewise, it would not be a reason in itself for refusing to admit the point on appeal.

57. I heard Mr Hill's argument in full and I had of course read Mr Pirani's skeleton argument in reply. Had the appeal been pursued to judgment, I would have refused the application to admit the Respondent's new point. The chairman's reasoning displays precisely the kind of further fact-finding and evaluation which it is necessary to conduct in certain of these disputed cases. It also illustrates the appropriateness of the chairman undertaking this role, even on a review, and not the EAT on appeal. The appeal is properly withdrawn and is dismissed.

Mrs Wheeler, Mrs Rance and Mrs Clark

58. These three cases are exceptional, and I allow the Respondent to argue that it should be released from the concessions. The context of these cases is important. Over 60,000 Claimants were involved in the Preston (No 3) litigation, including 11,000 from the NHS. Almost all of them have been resolved without further recourse to the Tribunals. The vehicle for this resolution has been the administrative protocol set up by Mr Macmillan in co-operation with the Tribunal staff the NHS and other employers. The sheer volume of these cases no doubt required complex administrative machinery to be put in place by the Secretary of State, the NHS Pensions Agency, and its successor body the NHS Business Services Authority. These cases demonstrate that these measures have commanded a very high degree of satisfaction. Understandably, the Claimants may not always have a complete record of their employment over the last 35 years. Many are retired; some have died. Few have worked all their working lives for the same employer and in the same position – many have been promoted, moved sideways, moved to different employers in the NHS and moved to places where the NHS pension scheme does not apply.

59. The Secretary of State was dependent for information on the employing Respondents. There have been many reorganisations of employment in the Health Service over this period. The Secretary of State has demonstrated through these test cases that she has in place a system of audit, so that where an error has been made in granting recognition of pensionable employment, it has come to light fairly quickly. The period of time following the judgment in the test cases and an attempt to resile from the concession was very short – between one and three weeks beyond the 14 days allowed for a review. There is no evidence that any Claimant expressly gave up a claim to a period of pensionable employment in exchange for recognition of her employment during the disputed period. The mistake made first time around was not a forensic or tactical decision, but an administrative error. With about 120 of these cases live, out of 11,000, the scale of the error is small. The timeframe in which it has been discovered is short in comparison with the overall length of this litigation.

60. As to the merits, without the burden of the concession, if the Respondents made good their case the degree of non-compliance by the Claimants is massive. They are out of time for presenting claims for unequal access to pension schemes by between nine and 16 years. These test cases, in practical terms, involve the acknowledgement of between seven and nine years' entitlement to access to the pension scheme which of course represents a substantial sum of money to the Respondents, to the taxpayer, and to the Claimants, who of course will have to make contributions for that period. The substantial value of the exposure is not in itself a reason for allowing the concession to be unpicked; see Leicestershire (above). But a sense of proportionality must be invoked when it is accepted that these are simple administrative errors capable of causing the increase in the pension entitlement of about 120 people of an additional, say, nine years, which will affect their pensions until death.

61. The cases are also exceptional because they will not involve the "further" examination of facts by the Employment Tribunals. Apart from Mrs Maddocks's case, there has been no examination of the merits of any one of them. I do take the view that a distinction is to be drawn between those cases where there has been a full examination before an Employment

Tribunal and those, as in these NHS cases, where multiple claims are handled according to administrative measures directed by a Chairman.

62. Since I have allowed the new point to be taken and it succeeds, it is open to me to refer the matter to an employment tribunal or to decide it myself. The same result is achieved by my finding that each of the three chairmen in these cases should have allowed the Respondent's application for a review. In any event, I do not regard the three remaining test cases as ones which would involve an examination by the Tribunal.

63. It is open to me, on the material which I have, to find in Mrs Wheeler's case that there was a gap in all her employment between 1992 and 1994. Thereafter she took up practice not with a Health Authority subject to the NHS pension scheme but with a GP's practice. These two undisputed facts are sufficient to require that she put in her claim for equal pay by 30 May 1993 when instead she waited more than 11 years. That is the only conclusion which could be reached by an Employment Tribunal and there is no need for it to be remitted. I will allow the concession to be unpicked and strike out the Claimant's claim for a declaration that she was entitled to access to the pension scheme between 1 January 1980 and 5 April 1988; the remainder of the Tribunal's judgment of 5 August 2005 remains in place.

64. In those circumstances, it is not necessary for me to deal with the judgment on the review application dated 4 November 2005. The application was rejected because it was received out of time. I would hold that this is not in itself a substantial reason for rejecting a review. A simple overview of the five grounds in rule 34 (3) upon which a review can be granted shows that these are not time limited. New evidence can become available more than 14 days after the hearing. A flexible approach to the extension of time should be considered. The Tribunal chairman gave no reason for refusing to consider exercising his discretion under rule 34 to extend time. The second reason he gave was that the Respondent had admitted the claim. I have already held that, in all these cases, this is an insufficient ground and what should have been considered were the reasons why the Respondent made the concession and now sought to resile from it.

65. Similarly, Mrs Rance's case requires no investigation. The disputed period is 1 January 1977 to 5 April 1988 and her employment with the relevant Health Authority ceased on 31 December 1988. Her claim form was submitted in 2000. She gave her dates of employment as "from 1971 to 1981". On that basis alone the claim was out of time, but she further accepted that she went to work for a GP's practice and thus had a new employer for 11 years. The Respondent made a grave mistake in failing to recognise this, but it would not be right to give her widower entitlement for nine years' access to the pension scheme when she had left it for 11 years before making a claim.

66. Again, it is not necessary for me to deal with the judgment on review, but since I have cited it extensively, it is appropriate for me to give a judgment. The chairman's judgment on review focuses upon his refusal to extend time and the reasons for that decision. It is plain that the chairman was fully aware of the substance of the concession and there is no dispute that the Claimant left NHS employment 11 years before she brought a claim. The chairman rejected the Respondent's contention based upon the large number of claims which it was dealing with. He held this was no excuse for getting this case wrong. It follows from my approach to allowing the Respondent to unpick this concession on appeal, that I would hold that the chairman erred in taking a procedural rather than a substantive approach to the issue before him. Given his finding that the Claimant ceased relevant employment 11 years before the claim, he simply had no jurisdiction to hear the claim and thus he should have exercised his discretion to allow an extension of time and should have found for the Respondent. Mrs

Rance's claim for entitlement to retrospective membership of the pension scheme from 1 January 1977 to 5 April 1988 is struck out and the appeal is allowed.

67. Mrs Clark's case presents rather more complicated circumstances but yields the same result. The judgment under appeal is the substantive judgment which was issued without reasons. I will take it that the reason was that the questionnaire procedure was gone through, so that the Claimant was accepted to be entitled to access to the pension scheme from 27 October 1980 to 31 October 1987 but the period after that was disallowed and was thus struck out. At the Respondent's request, the chairman indicated that she was proposing to review her judgment and to vary it and, following further submissions, did so at what I hold to be a review hearing. The Respondent did not comply with the EAT Rules or Practice Direction for the notice of appeal and did not include the chairman's reasons for her substantive or review judgments. Nevertheless, I can understand the reasons for the substantive judgment – it was simply to follow the documentation submitted by the parties.

68. Strictly, there is no appeal against the variation of the order on the review and so reasons are not necessary. But I will take the material which was available to the chairman at the review hearing in order to decide whether the Respondent should be permitted to unpick the concession. At first sight this does indicate that a remission to the Tribunal might be necessary, for it is contended that as a matter of fact the Claimant's job changed. Initially, it was contended by the Claimant that the new position of assistant home warden contained a significant amount of cooking duties but it was conceded that that was an error and that "the cooking duties in her new employment role were not significant". It was also contended that the change of title was linked to a reorganisation "rather than an application for a new post"; but this too was confounded by the production by the Respondent of the Claimant's application for the new post and evidence of her being interviewed for it, successfully.

69. The procedural arguments advanced by the Claimant were that the Respondent should not be permitted to change its stance. In my judgment, this was a case on the lines of that of Mrs Bunyan in the Preston No 3 cases. The Claimant was employed as a cook at Glenside Hospital and then applied for, was interviewed for, and was given the job of an assistant home warden. She concedes it was "new employment". Previously her job was cooking but thereafter her job description mentions nothing of cooking. Her terms and conditions were regulated by a completely different collective agreement made at a different bargaining table, Her hours were different as they changed from 14 to 20 a week. The date of the change in contract is 15 June 1992 and thus, with the claim submitted on 31 October 2001, she is nine years out of time on this argument. The two principal grounds advanced by the Claimant in writing to the Employment Tribunal on review have both been conceded, or found, to be incorrect, i.e. cooking duties and applying for a new post. In my judgment, she was not in the same employment. I would therefore admit the new point, allow the appeal and set aside the declaration.

70. It was contended by Mr Pirani in his skeleton argument but not in his Respondent's answer that if discretion were exercised to allow the point to be raised in Mrs Clark's case "it would be open to the Claimant to argue in accordance with the judgment of Lord Hope in *Powerhouse Retail Ltd v Burroughs* [2006] UKHL 13 that since it is alleged she took up a new post with the same employer in 1992 s2(4) of the EPA does not prevent the Employment Tribunal having jurisdiction."

71. With respect, I do not see how this tentative argument can get off the ground. Mrs Clark did not dispute the primary findings of fact put forward by the Respondent. The judgment he refers to is the appeal by some of the (electricity supply) employees from the

Court of Appeal's judgment which reversed my judgment in the Claimant's favour in Preston (No 3) on one point. The point was the application of the EPA when there has been a relevant transfer under the Transfer of Undertaking (Protection of Employment) Regulations 1981. The House of Lords was not called upon to deal with issues relating to when a fundamentally different contract is in place, which were issues up to and including the EAT but not thereafter, there being no appeal on these points. Thus, the answer to Mrs Clark's case is found in Preston (No 3) and no assistance is gained from the treatment of Mrs Burroughs's case by the House of Lords.

72. I should deal with one final argument, which is that the Respondent failed to give correct grounds for applying for a review, arguing that there has been an administrative error. However, in *Sodexo v Gibbons* [2005] ICR 1647 at paragraphs 33–40, it was accepted that such an administrative error could include errors by the parties. In any event, none of the Tribunals which handled applications by the Respondents for a review took the point.

Disposal of the cases

73. Clearly the only place for determining disputes of fact such as whether a stable employment relationship existed or came to an end and whether or not there was a gap in employment or a change in the job is the Employment Tribunal. The best vehicle for achieving this now is a review. In each of the test cases I have held that if it were necessary for me to decide the issue on review the Tribunal either did hold, or should have held, a review on the basis that the Respondent had made the mistake there set out. It follows that in those cases which have been stayed following a judgment but pending a review, there should now be a review if the parties cannot agree a way forward following this judgment.

74. In those cases where a review has been conducted and the order remains unchanged by reason either of a judgment by the Tribunal that it was inappropriate to unpick a consent order or a concession, or that the application was made out of time, it would be most likely that any appeal currently pending before the EAT would succeed and the matter be remitted to an Employment Tribunal or alternatively be decided by the EAT on the lines above. The parties are to notify the EAT of their positions and if appropriate draft a consent order in accordance with Practice Direction para 15.

75. In any case like Mrs Maddocks's, where a review has been conducted into the merits, shorn of any fetter imposed by the Respondent's concession, any appeal therefrom must be considered on the merits by the EAT and the Secretary of State must now say which of those cases she intends to pursue.

76. I would very much like to thank all Counsel and solicitors in this case for the help they have given.