

TIME LIMITS: *PRESTON NO. 3*

**EQUAL PAY: REVIEWING THE CASE LAW
INSTITUTE OF EMPLOYMENT RIGHTS
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1. This paper is designed to provide a brief overview on recent case law and legislative developments in relation to time limits in equal pay cases.

***Preston*: bringing a claim within 6 months of termination of employment**

2. The mass litigation in *Preston v Wolverhampton Healthcare NHS Trust* has now been ongoing since 1996. The claims were brought by some 60,000 part-time workers in both public and private sectors who argued that the exclusion of workers from occupational pension schemes because they worked fewer than the minimum number of hours specified for membership indirectly discriminated against women.
3. The time point which arose in *Preston* turned on the meaning of the requirement to bring a claim “within 6 months of the end of the employment to which the claim related” as defined in the old s.2(4) Equal Pay Act 1970. The employers argued that a claim had to be brought within 6 months of the termination of each contract under which a worker had worked for the employer.
4. The House of Lords in *Preston (No.2)* [2001] IRLR 237, following a reference to the ECJ, held that a claim had to be brought within a period of 6 months from the end of each contract of service unless the worker worked under a stable employment relationship. A stable employment relationship was defined as a series of contracts concluded at regular intervals in respect of the same

employment. In that case, the period of 6 months would run from the end of the last contract in that relationship.

(1) Stable employment relationship

5. The latest instalment of the litigation in ***Preston No.3*** [2004] IRLR 96 considered the features of a stable employment relationship and how to determine when a worker has been working in such a relationship. The relevant test is that there should be:

(1) a succession of short-term contracts, meaning three or more contracts for an academic year or shorter;

(2) concluded at regular intervals, in that they are clearly predictable and can be calculated precisely, or where the employee is called upon frequently whenever a need arises;

(3) relating to the same employment; and

(4) to which the same pension scheme applies.

6. Further, a stable employment relationship ceases for this purpose when a succession of short-term contracts is superseded by a permanent contract.

7. Practical guidance on whether a particular worker is likely to be found to have worked in a stable employment relationship is to be found at www.employmenttribunals.gov.uk in Information Bulletin No 9 on Part Time Workers Pensions cases. A worker may be able to “create the relationship” for the purposes of showing that her equal pay claim is in time by relying on regular or intermittent contracts:

(1) If the worker worked under a succession of regular contracts, with the pattern of intervals dictated by the nature of the work or the requirements of the employer for workers to perform it, with on the same or broadly similar terms to perform essentially the same work, time will run from the date on which it became apparent that the sequence of contracts was broken e.g. a teacher not being offered a new contract for the forthcoming Autumn term.

(2) If the worker worked under intermittent contracts (with the same or broadly similar terms and the same work), the focus of the Tribunal will be on the parties' intention as to the inception and the cessation of the working relationship. The worker must be able to show that he/she was part of the employer's "first team" not just one person on a list of people upon whom the employer might call. Provided that this requirement is satisfied, time will run from the date on which it ceases to be the parties' intention that there should be a working arrangement between them.

(2) Series of jobs

8. Separate considerations apply where workers have been continuously employed by an employer but there have been changes in the work carried out by them during the period of their employment e.g. change of job location, change of job title, promotion. In the absence of intervals between contracts, a stable employment relationship cannot arise.
9. The issue in this type of case is identifying when a contract terminates, as time will run from the date of termination of the contract – *Young v National Power* [2001] ICR 328. This may be simple – the worker is not required to turn up to work and does not turn up to work after a particular date – or more complicated –

the worker is no longer a care assistant for the employer but is now a night care assistant. It is therefore necessary to distinguish between a new contract (time runs) and a variation in contract (time does not run).

10. The case of *Davitt v HQ Service Children's Education (MOD)* [1999] ICR 978 has been relied upon to suggest that any material variation in a contract will make time run (see the Middlesbrough Borough Council litigation below), but a better view is that the variation has to be so fundamental that the original contract is no longer in existence, see *Marriott v Oxford and District Co-operative Society* [1969] 1 WLR 254.

11. The argument that time should not run unless there has been a variation amounting to a rescission of contract succeeded in the Newcastle ET in the Middlesbrough Borough Council equal pay litigation (Case No: 2501390/03). The ET suggested that relevant considerations in determining whether there was a fundamental variation of contract would include looking at:
 - (1) the express or implied terms of the Claimant's original contract;

 - (2) the existence of terms in the contract permitting a change in working conditions such as pay, promotion or change of employment;

 - (3) whether such changes could be made to the contract of employment with or without the consent of a party to the contract;

 - (4) how such changes were recorded;

 - (5) the parties' perceptions of the importance of the changes.

***Preston*: TUPE and time limits**

12. The other important time point determined in *Preston* is when time begins to run in a case where the employment has transferred under a TUPE transfer. This issue concerned employees in the former nationalised electricity industry whose employment had been transferred to a private sector employer in 1992. Their claims were presented at a time when they were still employed by those employers, but more than 6 months had passed since the TUPE transfer.
13. The case, under the name *Powerhouse Retail Ltd v Burroughs* [2004] IRLR 979, went to the Court of Appeal on the issue of whether time runs from the date of transfer or from the date of termination of the transferred employment contract.
14. The Court of Appeal reversed the decision of the EAT and effectively drew a distinction between equal pay claims in respect of pension rights and other equal pay claims. The former type of claim must be brought against the transferor within 6 months of the date of transfer, because the effect of reg 7 TUPE is to exclude occupational pension schemes from the ambit of the contract which transfers – the specific contract of employment inclusive of pension rights has come to an end. However, a claim for equal pay in respect of some other type of pay can be brought within 6 months of the date of termination of employment against the transferee because of the continued existence of the transferred contract of employment – *Armstrong v Newcastle upon Tyne NHS Hospital Trust* EAT/0158/04.

Statutory changes to determining when time begins to run

15. The discussion so far has focused on bringing claims within 6 months of the date of termination of the employment relationship, whether that means the termination of a particular contract or the ending of a stable employment relationship.

16. The amendments to the Equal Pay Act which were introduced by the Equal Pay Act 1970 (Amendment) Regulations 2003 introduces the concept of the “qualifying date” into s.2(4). Proceedings must be instituted on or before the qualifying date, or the Tribunal has no jurisdiction to consider the complaint.

17. There are now four types of cases:

- (1) Standard case – claim must be brought within 6 months after the last date of employment
- (2) Stable employment relationship – claim must be brought within 6 months after the ending of that relationship, which can continue even where no contract is in force between the parties
- (3) Concealment case – claim must be brought within 6 months after the date of discovering the qualifying fact which has been concealed or the date when the fact could have been discovered with reasonable diligence
- (4) Disability case – claim must be brought within 6 months after the date on which the woman ceased to be under a disability, although if the case is also a concealment case, the qualifying date is the latter of either ceasing to be under a disability or discovering the qualifying fact.

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