Case Numbers: 3400194/2014
3400407/2014, 3400427/2014
3400429/2014, 3400793-799/2014

EMPLOYMENT TRIBUNALS

Claimant: Ms S Abraityte & Others

Respondent: 2 Sisters Food Group Limited

HEARD AT: EAST LONDON **ON:** 13th & 14th March 2017

BEFORE: **Employment Judge Laidler**

REPRESENTATION

For the Claimant: Ms D Romney, QC
Mr P Engelman, Counsel

For the Respondent: Mr D Reade, QC
Mr D Martin, Counsel

JUDGMENT

1. **On the issues remitted by the EAT:**

   1.1 **Leave to amend is granted to add Oven Operatives, Ground Services, Despatch Controller and Despatch Supervisors as new comparator roles,**

   1.2 **Leave is refused to add older job roles performed by the Claimants**

2. **On the Respondents strike out application – the application is refused.**

3. **On the Claimants application to amend:**

3.1 On the Claimants only proceeding with the roles they undertook immediately before the closure of the factory no order is required on the addition of older job roles.

3.2 Leave to amend is granted to change the description of the Claimants last job role as particularised in the application to amend of September 2016.

3.3 Leave to amend is granted to include in the claim for back pay a differential of 9.21% in respect of shift allowance at the relevant rate of pay of the male comparators.

REASONS

1. This was the adjourned Hearing of the Claimant's application to amend to add new Claimant roles and new comparators following the decision given by the Employment Appeal Tribunal on 13th November 2015 overturning the Tribunal's decision to grant the amendments and remitting the matter to this Tribunal.

2. As was recorded in the summary and orders sent to the parties on 22nd December 2016, following the last Hearing, towards the end of it the Respondent raised an issue regarding some of the claims being susceptible to strike out. The matter was adjourned with orders being made for the Respondent to produce to the Claimant copies of all the documents relied upon them in support of the dates they had provided of the relevant job roles and if it intended to pursue the strike out application to file and serve that by 20th December 2016. The Claimants were given until 14th February 2017 to respond. The matter was then listed for 13th and 14th March to continue with the applications.

3. As a result of the orders made and the correspondence that then passed between the parties, it became apparent for the first time in these proceedings that a Schedule (the 'Original Schedule') filed with the ET1 in the Abraityte multiple had not been received by the Respondent. When this matter arose in recent correspondence the Judge examined the Tribunal file and advised the parties that the original schedule had indeed been received. It can also be seen from the Tribunal file (and this was confirmed by the Respondent at this Hearing) that they did in fact get sent a Schedule of names of Claimants but that was not the Original Schedule that the Claimants' solicitor had filed but appears to have been an Employment Tribunal Service generated document. Further reference will be made to this correspondence below.

Background

4. It is necessary to set out the background to these applications before they can be considered.

The Abraityte Multiple

5. This was issued on 17th February 2014. In paragraph 1 of the Particulars of Claim it stated that "a Schedule of Claimants is attached all of whom worked at the 2 Sisters Haughley Park Site". The comparators were described as male workers in the roles of despatch operative, despatch controller and despatch supervisor.

6. As referred to above and as confirmed in a witness statement on behalf of the Respondent from Siobhan Baird for this Hearing that list of Claimants and their jobs was not received by her from the Employment Tribunal.

7. What had occurred, however, prior to the issue of proceedings was that on the 18th February 2014 the Claimants raised a grievance with the Respondent about these matters. The first line of that letter again refers to a "Schedule attached". It was clarified again by Miss Baird in paragraph 4 of her witness statement that a Schedule of Claimants was received by the Respondent before the 6th March 2015 as it was attached to the Equality Act Questionnaire dated 21st February 2014 which she received at the Wakefield Office on 24th February 2014 and which she again scanned and sent to her colleague Oliver Gant by email on the same day at 12.01.

8. Miss Baird gave evidence that the content of the original schedule appearing in the bundle at p190 but also the one that was attached to the ET1 was received from Michael Newman of the Claimant's solicitors and sent directly to Oliver Gant by email of 19th February at 16.48 (page 780 of the bundle for this Hearing) although not in precisely the same format. Oliver Gant was the Senior HR Business Partner of the Respondent.

The Respondent's answers to the Questionnaire

9. The Respondent's answers were served on 17th April 2014. They noted that

> "the female complainants were each employed in one of the following roles:
>
> a) Production Operative
> b) Hygiene Operative
> c) Team Controller"

10. They then went on to provide further information about those roles and then further information about the named comparator roles of Despatch Operative, Despatch Controller and Despatch Supervisor.

11. In a section headed "Section 5 Additional Questions" they gave pay details regarding a whole range of roles within the organisation. These included Oven Operative, Ground Services, Machine Minder, Despatch Controller and Despatch Supervisor that the Claimants seek to add as comparators. They then enclosed job descriptions for thirteen of the roles (although it transpired at an earlier Hearing that those were job descriptions prepared for these proceedings and not job descriptions currently held by the organisation). The tribunal accepts the submission made on behalf of the Respondent that it was this Response to the Questionnaire that contained substantial information regarding jobs other than the Despatch roles that had originally been selected by the female Claimants as comparators. (*Submissions for 29 November 2016 hearing)*

12. The Respondent also stated that the role of Assistant Manager and Supervisor did not exist at Haughley Park.

13. Further they made clear that Team Leader was an incorrect title and the correct title was Team Controller. Process Operative was also incorrect and the correct title was Production Operative.

14. The Respondents filed their response in the Abraityte multiple on 14th April 2014. There was no reference to a "Schedule of Claimants" but the Respondent asserted that the claim was poorly pleaded and incapable of substantive response in its current form. They requested that the Claimants be ordered to provide additional further information as set out in paragraphs 24 to 35 of the response.

Haidar and Others

15. These claims were issued on 17th March 2014 and did have attached to the Particulars of Claim a Schedule of the three named Claimants.

Order of 1st May 2014

16. This Judge made an order on the above date requiring the Claimants to provide the information requested by the Respondent at paragraph 26 to 35 of its Response by 19th May 2014.

Fulham Multiple

17. This claim was issued on 12th June 2014 and again the 7 Claimants were listed in a Schedule with their job titles.

Further Information 19th May 2014

18. The Claimants provided further information in response to the Tribunal's order of 1st May 2014. In view of the way the order had been drafted their response made specific references to numbered paragraphs in the ET3.

19. In response to the question posed in paragraph 26(b) of the ET3 which was "specific/accurate job title" the response was that these were contained in the attached schedule. No reference was made to the "original schedule" attached to the ET1 when it was filed. A new schedule was produced of Claimant's forename, surname, job title and the effective date of termination. This changed many of the job titles in the majority of cases to Production Operative.

20. The stage one Hearing had been listed to be heard at the Bury St Edmunds Employment Tribunal on 6th November 2014 which was subsequently postponed by agreement and transferred to be heard at the East London Employment Tribunal. In a detailed letter of 29th October 2014, the Respondent's solicitors stated there was still insufficient particularity in the claims. This was upon considering, they said, the various ET1s, riders and further information provided in response to the order of 1st May 2014. In relation to the equal values claims they requested: -

    "a) In any case where the task remains outstanding all jobs in respect of which the claims are being brought by each Claimant in the six-year period prior to the presentation of the claims. For the avoidance of doubt, this should be provided in respect of both male and female Claimants. We suggest that this should be done within four weeks following the Hearing by Thursday 4th December 2014.

    b) Specification of each and every comparator job role relied upon for each Claimant job role in respect of which each female Claimant advances a claim. The further information is seriously defective in this regard and a definitive and proportionate list of comparator roles must be provided if this litigation is going to be able to proceed in an orderly manner. We suggest that this should be carried out by not later than Thursday 8th January 2015.

    c) Specification of the female or females on which each job any male comparators complain is contingent."

21. In relation to sub paragraph b) above, if the Claimants' position was that further information was required from the Respondent in addition to that in their response to the Equality Act questionnaire their client would "respond to any reasonable and proportionate request within a sensible timeframe".

22. By letter of 4th December 2014, the parties were advised that the stage one hearing would take place at the East London Employment Tribunal on 6th March 2015.

23. By letter of 5th December 2014, the Claimants' solicitors replied to the Respondent's request for further particularity. Dealing with each in turn:

a) They felt that the request for all jobs in respect of which the claims are being brought would be better dealt with at the disclosure stage once all relevant personnel files had been disclosed. They also believed the Respondent was in a better position to provide the information accurately.

b) Disclosure was required before specific comparators could be itemised as requested. They stated that the Claimants had provided the details of three comparator job roles only, "and would be entitled to list more if it wishes". They specified that any male comparator's claim is contingent on all females which are successful in the equal value claim.

24. With that letter, the Claimants served a request for further information on the Respondent. This ran to some nineteen pages and upon receipt of further correspondence the Judge refused to make an order stating that submissions would need to be heard in respect of such a wide ranging request at 6th March Hearing. It was, however, made clear in the Tribunal's letter of 20th January 2015 that the Claimants did not need information from the Respondent to particularise the claim and that should be done as requested by the Respondent in its request of 29th October by 6th February.

25. By letter of 6th February 2015, the Claimants provided further information in two Appendices:

Appendix A

26. C*omparator Job Roles*

26.1 Area Controller H/C

26.2 Area Controller L/C

26.3 Bandsaw Operative

26.4 Boning Operative

26.5 Chiller Operative

26.6 Coldstore Operative

26.7 Despatch Controller

26.8 Despatch Operative

26.9 Despatch Supervisor

26.10 Machine Minder

26.11 Meat Supply

26.12 Ground Services

26.13 Oven Controller

26.14 Tumbler Operative

26.15 Oven Operative

Appendix B

27. This was a list of all jobs in respect of which the claims were being brought by each Claimant in the six-year period prior to the presentation of the claims. The Claimant's solicitors stated that they were taking instructions from their clients as to the start and end date of each job role they worked within that six-year period prior to the presentation of the claims and whether they worked any additional job roles during that period and would provide that information as soon as received.

28. They also agreed to liaise with the Respondent to confirm and improve the accuracy of the information given so that there would be a complete record of all jobs during the six-year period prior to the presentation of the claim.

29. By letter of 19th February 2015 the Claimant's solicitors served an updated Appendix B containing all jobs, to the best of the Claimant's knowledge, of the claims being brought by each Claimant in the six-year period prior to presentation of the claims. Where possible they had provided the start and end date of period of employment. They sought the Respondent's comments on the accuracy of the information and where the information was incorrect in particular confirmation of the correct job title. This now included in some cases roles undertaken by the Claimants in 2008 i.e. some 6 years prior to the issue of proceedings.

6th March 2015 Hearing

30. At this Hearing, it was noted that some information had been provided by the Claimant's solicitors as set out above. The Respondent's solicitors had set out in their letter of 29th October 2014 why they considered that clarification was still required. Further orders were made at the Hearing on 6th March 2015 as follows:

30.1 The Respondent to provide answers to the Claimant's request of 5th December 2014 by 7th April 2015.

30.2 By 28th April the Claimants to specify in relation to each Claimant:-

30.2.1 Each job title in respect of which a claim is being made,

30.2.2 In respect of which of the three current comparators the claim is made in relation to each job of each Claimant.

30.2.3 In respect of each claimant job role and comparator job combination the terms and conditions as to which it is asserted that they are less favourable and why.

30.2.4 By the same date the Claimants to file and serve an application to amend to add such comparators as they see fit.

31. As is recorded in paragraph 16 of the reasons sent to the parties after that Hearing, the last issue arose as the Tribunal had concluded the issue of additional comparators, and whether the Claimants needed leave to amend could be left in abeyance pending the provision of further information from the Respondent. The Claimants could then be required to make their position clear regarding the additional comparators. If they intended to rely on some or all of them and the Respondent still took the point, then the Claimants would need to submit an application for leave to amend which would be determined at the next Hearing.

32. By letter of 13th March 2015 the Claimants wrote to the Respondent requesting the following information:

32.1 All formal job titles for our clients within the six year period prior to the presentation to the claims.

32.2 Confirmation as to whether any job title included above was 'high' or 'low' care where relevant.

32.3 Start and end dates for each of the clients' jobs within the six year period prior to the presentation of the claims.

32.4 Shift patterns for all clients' job titles included at 1) above.

33. The Respondent disputed that this was what they had agreed to provide at the hearing on the 6 March and provided a schedule of what they argued had been agreed with their letter of 7th April 2015. The information provided in spreadsheet form was:

(a) job title as stated in the claim forms,

(b) actual job title at termination date and

(c) job titles in the six year period prior to the date of the claims and start and end dates of any such jobs in that period. They also served with that letter the additional information as ordered by the Tribunal.

34. It is of note that this spreadsheet contains a column of 'job title as stated' and it is made clear in the accompanying letter that is 'as stated in the Claim forms'. The Respondent does not state that it does not know which job roles the Claimants rely upon as they did not have the Original Schedule. The tribunal has considered carefully the information provided with this letter and notes the following, by way of example, as to how the Respondent described the job title of various Claimants in the Claim forms:

Santa Abraityte	Assistant Manager
Judy Andrews	Hygiene
Weronika Bilska	Normal Worker
Andrius Gabellis	Tumble Oven
Erika Kalinauskiene	Line work/team leader
Laima Kolesnikovica	Packing

35. The tribunal has concluded from the job titles used that at the time it prepared this information the Respondent was making reference to a schedule of job roles prepared by the Claimants. If this was not the Original Schedule served with the ET1 in the Abraityte multiple then it must have been working from the similar schedule served on it with the Claimants Equal Pay Questionnaire (which Ms Baird has acknowledged was received by the Respondent on or about the 24 February 2014).

36. This further information from the Respondent set out in another column the actual job title of the Claimants. It corrected a number by merely adding the word 'operative' to the title already used. In relation to the 5 roles which the Claimants now accept are different titles and where they ask that the tribunal exercise its discretion to grant the amendment and not strike out the claims, the information given by the Respondent as to the correct job title was:

James Chenary	Chiller Operative
Andrius Gabellis	Coldstore Operative
Keith Simmons	Slicer Operative
Aras Taladi	Slicer Operative
Henryk Jarocki	Hygiene Operative

Further information from Respondent 12 May 2015

37. By letter of the 12 May 2015 the Respondent corrected an error with regard to Tadas Abramavicius. As a result the information on Claimant job roles previously supplied on the 7 April 2015 had been double checked and an updated schedule provided with errors highlighted in yellow. This corrected the job roles and older roles for 7 Claimants as well as some of the dates of those roles.

Application to Amend

38. By letter of 28th April 2015 (before receipt of the Respondent's corrected information) the Claimants filed and served their application to amend each of the three multiples. In a Table A they set out: -

    38.1 Each job title in respect of which a claim is being made.

    38.2 In respect of which current comparator claim is made in relation to each job title for each Claimant.

    38.3 In respect of each Claimant job and comparator job combination the terms and conditions as to which it is asserted that they are less favourable and why.

    38.4 Additional comparators the Claimant seeks to rely upon.

Comparators

39. With regard to the female Production Operatives, they had relied upon the Despatch Operative but now wished to add Oven Operative and Ground Services.

40. The female Hygiene Operatives had compared themselves to the Despatch Operative but again wished to add Oven Operative and Ground Services.

41. The female Team Controllers had compared themselves to the Despatch Operative, Despatch Controller and Despatch Supervisor and wished to add Machine Minder. (Despatch Operative was no longer pursued at the Hearing)

Job Roles

42. The Claimants also wished to have leave to amend to rely on different job roles to those originally pleaded. What the Tribunal notes is that it appears when amending the "schedule of Claimants" that what the Claimants' solicitors were doing was amending the Original Schedule they had lodged with the Tribunal with the ET1. The Tribunal has come to that conclusion as that appears to be the only place where the lead Claimant Santa Abraityte was described originally as an Assistant Manager. In this

"schedule of Claimants" with the amendment application that has been deleted and her role put as female Production Operative. In the further information of 19th May she had already been described as a Production Operative. It is necessary to consider each of the claims that comprise the multiple in turn in describing the amendments being sought in relation to the female claimants:

42.1 Abraityte

Claimant name	**Original pleaded job title**	**Amendment sought**
Santa Abraityte	*Assistant Manager*	*Female Production Operative*
Judy Andrews	*Hygiene*	*Female Production Operative* *Female Hygiene Operative*
Ewelina Antczak	*Team Leader*	*Female Team Controller*
Weronika Bilska	*Normal*	*TBC*
Mirjana Doncic	*Production Operative*	*Female Production Operative*
Janina Gervinskiene	*Team Leader*	*Female Production Operative*
Laima Girdene	*Team Controller*	*Female Team Controller*
Anna Hudakova	*Hygiene*	*Female Production Operative* *Female Hygiene Operative*
Auguste Jurkonyte	*Production Operative*	*Female Production Operative*
Erika Kalinauskiene	*Team Leader*	*Female Team Controller*
Albina Kapociene	*Production Operative*	*Female Production Operative*
Inga Koldina	*Production Operative*	*Female Production Operative*
Laima Kolesnikovica	*Packing*	*Female Production Operative*
Elena Kuiziniene	*Production Operative*	*Female Production Operative*
Justina Kulisauskaite	*Team Controller*	*Female Team Controller*
Danule Miksiene	*Production Operative*	*Female Production Operative*
Sabina Mosceva	*Production Operative*	*Female Production Operative*
Ilona Muizyta	*Production Operative*	*Female Production Operative*
Rita Nasienalte	*Production Operative/team controller*	*Female Team Controller*
Agnie Pociute	*Team Controller*	*Female Team Controller*
Lina Smirnoviene	*Packing Leader*	*Female Team Controller*
Regina Stackukevic	*Line work*	*Female Production Operative*
Rita Stoniene	*Hygiene*	*Female Hygiene Operative*
Donna West	*Production Operative*	*Female Production Operative*
Maja Ziliene	*Roasting*	*TBC*
Rasa Ziliniskaite	*Production Operative*	*Female Production Operative*
Gintare Zilvyte	*Team Leader*	*Female Team Controller*

42.2 Haidar

All male claimants

42.3 Fullam

Heather Fullam	*Production Operative*	*Female Production Operative*
Hanna Jarocka	*Production Operative*	*Female Production Operative*

The Claimants were by this application utilising the information they had been provided with by the Respondent as to the correct job titles. Although they raised for the first time the addition of older roles they did not state the dates the Claimants had held those roles.

Hearing 14th May 2015

43. The Tribunal granted leave to amend to add the new Claimant job roles and the new comparators and it is that Judgment that was the subject of the appeal to the EAT. It is important for the present purposes to note that at that Hearing the Respondent raised what it submitted were errors in the Claimants' application. These were set out at Paragraph 3b of the skeleton argument for that Hearing. The Respondents asserted: -

> "b) Some Claimants elected to advance claims in respect of jobs that they did more than six years before the date of the claim i.e. quite apart from those jobs having ended more than six years before the date of the application to amend (e.g. Wojciech Tyszka as Production Operative, a role that ended on 30th September 2007). There would appear to be no arguable basis for the inclusion of such claims. This is quite apart from the added time point as to whether or not jobs done in between six years and six months prior to the date of the claims/application to amend would be out of time….
>
> c) Claimants still appear to choose some comparators which would give them claims of no value. It is not in the interests of the Tribunal or the parties, or of a future IE to allow this situation to continue any further. In fact, incorrect pay rates have been set out by Claimants in respect of three roles, Despatch Operative, Key Operative and Machine Minder. This effects a significant number of potential claims…
>
> e) So far as identification of terms and conditions relied upon and the requirement to set out why, the only material set out in the amendment application relates to basic pay hourly rates. It follows that if there is any claim other than basic pay (and Claimants refer to a claim for shift pay in their list of issues) this is entirely unarticulated, in breach of the order of at c) above. This is important, not least because the sex discrimination case, which related to the opportunity to carry out overtime or earn shift enhancements, has been dropped. It is of concern that the Claimants' list of issues list terms and conditions "at large," whereas had the order been complied with, we would now be clear as to which terms and conditions are relied upon and why.
>
> 4. It follows that the amendment application is defective and Claimants are probably going to want to reconsider their position…"

The Decision of the Employment Appeal Tribunal 13th November 2015

44. The Employment Appeal Tribunal concluded the Tribunal had been wrong to proceed on the basis that the amendments to change/add to the

Claimants' roles did not give rise to new claims potentially brought out of time. By analogy with the approach adopted by the EAT in *Prest & Others v Mouchel Business Services Ltd* [2011] ICR 1345, where the Claimant in an existing equal value claim sought to rely on different work she had undertaken during her employment that gave rise to a different claim from that originally pursued and the Tribunal should have seen it in context. Whilst not accepting the Respondent's objection that the Tribunal had failed to have regard to the time limit issues raised by the amendments in terms of the additional comparators, the reasoning did not disclose that it had done so in the cases of the amendments to individual Claimant's roles and it was unclear whether it had fully engaged with all the issues thus raised when considering whether to allow the amendment. Specifically the tribunal's reasons failed to disclose full engagement with the widened scope of comparisons required by the amendments (when both the comparator and Claimant role amendments were considered together). That was a matter relevant to the exercise of discretion in considering whether to allow the amendments and the apparent failure to have regard to it rendered the decision unsafe. The matter was remitted to this Tribunal.

The Period Between the EAT Decision and the Hearing on 29th November 2016.

45. A stay was granted to the orders that had been made at the May Hearing pending the appeal. The Employment Tribunal did not receive the Judgment from the EAT. When the file was referred to this Judge in December 2015 she instructed enquiries to be made of the EAT. As a result, the Judgment was received on 10th February 2016. It appears from the bundle that the EAT sent the decision to the parties on 7th January 2016 but it did not reach the Employment Tribunal. Neither party contacted the Tribunal on receipt of the EAT decision.

46. By letter of 2nd March 2016 this Judge directed the parties to provide an agreed list of issues for the remitted Hearing and dates to avoid so it could be listed.

47. By letter of 11th March 2016 the Respondent raised the issue of whether the Claimant was pursuing the application to amend of April 2015 or a new one. It repeated its point that it considered that there were errors in the original application and submitted the Claimant's representative had acknowledged that at the Hearing in May 2015. They requested any new application within fourteen days.

48. By letter of 16th March 2016 the Claimants' representative stated that due to annual leave and other commitments the Claimants' representatives had not had an opportunity to finalise the issues. They made no response at all as to whether there was a new application to amend. A request for a further fourteen days was granted.

49. As nothing was received by letter of 22nd April 2016 the Judge directed that an agreed list of issues and an agreed time estimate must be provided by 6th May 2016.

50. By letter of 5th May 2016 the Claimants' representative advised that they were requesting the Tribunal to list the application made previously for a Hearing. No new application was submitted. Regarding a list of issues, they provided a list of issues previously provided (unagreed). This was completely unhelpful as it did not identify the issues arising out of EAT decision.

51. At the same time the Claimants' representative wrote directly to the Respondent's representative confirming that they intended to pursue the application to amend. They stated that as accepted and recorded in paragraph 3.3 of the May Judgment of this Tribunal the amendment in respect of Team Controllers seeking to compare themselves to Despatch Operatives was no longer pursued but that the application would also include where relevant, the additional job titles the Respondent disclosed for the first time on 1st May 2015 having previously omitted them. They did not believe there was any need for a new application.

52. On 16th May 2016, the Respondent's solicitor sent a very detailed letter to the Tribunal copied to the Claimants. They stated that in the letter to them of 5th May, the Claimants seemed to suggest that a new application would be made. The Respondent's asked for an order that be filed and served no later than 28 days before the resumed Hearing. They set out the importance of hearing evidence on the job differences and submitted that the amendment application could not be properly evaluated without

    a) appreciating the sort of amendment that was being made i.e. whether a new cause of action was sought to be added or whether this was merely relabeling or some other minor form of amendment and

    b) if the amendment did indeed seek to add another cause of action or complaint, if the amendments were out of time, and if so, by how long.

53. They referred again to *Prest* and the fact that the test in that case would need to be considered in relation to any new Claimant job role and comparators in relation to that role and the comparators in relation to that role as compared to the comparators already relied upon in relation to the old role. Further the Tribunal would have to decide from when time would have run in relation to any new cause of action sought to be introduced by way of amendment in order to work out whether and, if so, how far out of time the claim was sought to be introduced. They emphasised that time must be dealt with at the point of considering the application to amend as this would impact on the application of *Selkent* and similar cases. Further they also relied upon the case of *Rowson v Doncaster NHS Primary Care Trust* 0022/08 which they stated made it clear that once an amendment

was granted the Respondent is prevented from taking an amendment point in relation to the claims brought in by way of amendment.

54. They made further submissions regarding the length of the Hearing if evidence had to be heard.

55. Nothing was heard from the Claimants in response to that letter. For reasons that are not now clear on the tribunal file, the file was not seen by the Judge until the 29 July and an order made of 1st August 2016 (which needed to be amended and sent again to the parties on 7th September 2016). By this the Judge ordered that by 23rd September 2016 the Claimants advise the Respondent and the Tribunal: -

    a. If they relied on the application to amend already made and if so, to identify each and every letter and document submitted in 2015 that will be relied upon.

    b. If not, to submit any further application to amend.

    c. Whether or not they accepted that all differently named comparator and Claimant roles in the case are different jobs for the purposes of *Prest*, i.e. there is (at least) a difference between each role and stable employment/working relationship.

    d. An order was also made for witness statements and the provision of listing dates to avoid.

56. The Hearing for the remission of the matter from the EAT together with a stage one equal value hearing) was listed on 7th September 2016 for 28th to 30th November 2016.

<u>The Claimant's Application to Amend Received 23rd September 2016</u>

57. With this application the Claimants provided the Background and Details of Claim originally filed with sections deleted and amendments added including the addition at paragraph 10A:

> *'Further or alternatively, where the claimants have done more than one job in the course of their employment with the respondent as shown in the amended schedule attached hereto, such claimants rely on there being a standard case.'*

It had already been pleaded at paragraph 10 that the claim related to any jobs the claimants have held in the past 6 years '*that form part of a stable working relationship'*.

58. The Claimants also produced a "Schedule of Claimants" (again this appears to have been based on the Original Schedule) with all the roles deleted and a new schedule produced. This contained each job relied upon and details of the comparators for both the female and male

Claimants. It appears to have been compiled from information provided by the Respondent on 12th May 2015. That date is acknowledged in the Claimants' letter sent with the application. They expressly stated:

> *"On 12th May 2015 the Respondents sent us further information in the form of a table which purported to correct information it had provided to us on 7th April 2015 about the Claimants' work history. These corrected job titles have also been added to the amended application, given that they result from the Respondent's error".*

This was first raised more than one year after those corrections were received by the Claimants on 12th May 2015. It was being raised for the first time on 23rd September 2016, the final day for compliance under the Orders made on 1st August (by an extension of time granted on the 5th September 2016). Part of that time period had been taken up by the Respondent's appeal to the EAT, the decision of which was given on 13th November 2015. What can be seen is that the principal difference between this application and that of April 2015 was the more detailed information both as to title and dates of the earlier job roles of the Claimants. That has become academic as they are no longer pursued by the Claimants at this hearing.

59. The Employment Tribunal had expressly asked whether the Claimants intended to pursue the intention there was a standard employment relationship and they confirmed that they did.

60. In relation to the female Claimants the Production Operatives and Hygiene Operatives had already sought to add Oven Operative and Ground Services to their original comparator of Despatch Operative in the original amendment application. The Team Controllers had already sought to add Machine Minder to Despatch Operative, Despatch Controller and Despatch Supervisor. What the female Claimants were doing by this application was adding earlier job roles they had carried out with the dates for those roles going back many years. The issue of comparators had not changed since the April 2015 application.

61. There was further correspondence culminating in the Claimants' letter of 21st October 2016 in which they stated that the Claimants would not pursue the argument that there were sufficient similarities between the Claimants' job roles to form part of a stable employment relationship. They acknowledged that may mean a number of the Claimants' job roles were potentially out of time. The Claimants would be inviting the Tribunal to exercise its discretion in accordance with the principles set out in *Selkent* considering the factors identified in the 23rd September letter.

62. As a result of that concession, the Respondent confirmed it would not be necessary to call evidence and the Tribunal listed the Hearing for only 1 day on 29th November 2016.

63. This amendment application also sought to add to the list of payments the Claimants argue they have been denied at paragraph 9:

> '*(4) a differential of 9.21% in respect of shift allowances at the relevant rate of pay of the male comparators'*

29th November 2016 Hearing

64. The Tribunal heard submissions on the amendment. Only at the end of those submissions did the Respondent raise the issue that it had raised with the Claimants for the first time on 28th November 2016 @16:09 (the day before) that it believed that some of the claims were in any event susceptible to strike out. As recorded in the Summary sent to the parties the Judge determined that the Respondent had to submit a proper application and the Claimants to have time to consider it. Orders were made and sent to the parties on 22nd December 2016.

The submissions made on 29th November Hearing.

65. The submissions made at the November hearing are relevant as they were in effect brought forward in the oral and written skeleton arguments for this Hearing. Written submissions were given and Counsel addressed the tribunal orally. The following is only a brief summary.

For the Claimants

66. Regarding the new comparators, the tribunal should 'apply its original reasoning in this remitted amendment' submitting that 'this part of the application to amend was remitted by the EAT only because of its impact on the additional jobs issue'.

67. In relation to the additional job roles paragraph 14 of the Particulars of Claim was relied on having pleaded that the Claimants were claiming equal pay in respect of all roles that they had carried out in the six years before lodging their claims. The Claimants had provided all job titles on 6th February 2015 but could not provide a definitive list until the Respondent provided a full list of job titles. The corrected information had only been received on 12th May 2015 and the further application to amend was made on 23rd September 2016.

68. Leave to amend should be given as the Respondent had always been on notice from the original pleading that the Claimant were relying on earlier jobs. The Respondent had the information on job roles.

69. There were no new (in the sense of different) job roles sought to be added for the female Claimants. There are a number of additional job roles sought to be added for some of the male Claimants only. However, those male Claimants 'piggybank' on the womens' claims and by agreement have been stayed pending the outcome of the womens' claims.

Permission was still sought to add the additional job roles, the need for evidence only arising if the female claims succeed.

70. At paragraph 19 of the written submissions were set out the seven new roles that would have to be considered but only on a 'piggyback' basis in the event that the women's claims succeed

71. Dealing with the time point it was submitted that even though the amendment gave rise to a new cause of action which is out of time that is not fatal to an application to amend, only a relevant consideration.

72. In relation to the amendment to add shift pay there was nothing in the written skeleton about this. Orally it was submitted that this matter arose out of discussion at the previous hearing. Originally there had been an allegation of indirect discrimination as there was a different shift pattern for different jobs. That is not pursued. However, for clarification it is now pleaded. If the Claimants are awarded a higher basic rate of pay per hour then the overtime they do must reflect that higher rate of pay. It is only a mathematical calculation, not a new claim.

For the Respondent

73. The Claimants are no longer proceeding on the application the subject of the hearing on the 14 May 2015 and subject to the appeal. Instead the Claimants pursue a new application which it was argued replicates a number of the errors in the earlier application. This was not submitted until the 23 September 2016 and will fall to be assessed as made on that date, with the impact on time limits that entails. Many of the jobs sought to be added are roles carried out well before termination; there is no available arrears period in some claims.

74. The apparently across the board application for 9.21% in respect of shift allowances is an entirely new claim, based on new facts in respect of all the different Claimant/comparator combinations, irrespective of whether those combinations are currently before the tribunal or are sought to be brought in by amendment.

75. The amendment applications are to be treated as new claims based on new facts. They are hugely out of time. There appears to be no good reason for the delay in making the application. The fact that some of the new Claimant jobs and new comparator roles are already included within the litigation as Claimant jobs is not relevant. It is the Claimant/comparator combination that falls for assessment and those are new.

76. In addition, the Ground Services role involves the addition of a role that has not previously been either a Claimant or comparator role.

77. The application should be refused.

78. It was at the end of submissions that the Respondent raised the issue of strike out that it had canvassed with the Claimants representatives the evening before.

Application to Strike Out 20th December 2016

79. The Respondents applied to strike out thirty roles. It was alleged that the Claimants had either brought a claim in respect of a job that ended at such a point that the claim was presented out of time, or it was clear that the job in respect of which the claim was brought was no longer being maintained.

The Claimants' Position 13th February 2017

80. Having considered the matter further, the Claimants notified the Tribunal and the Respondent they only intended to pursue the Claimants' most recent jobs prior to the factory closing in November 2013. All previous jobs prior to their most recent job title were no longer to be pursued.

81. It followed that four claims were not contested because the individual's most recent jobs prior to the factory's closure were paid at the same hourly rate as the highest paid comparator, the Despatch Supervisor, and therefore there was no pay differential. These four Claimants (Rytis Alejunas, Ahmed Isaki, Omed Rasul and Andrius Mazeika) have been dismissed on withdrawal in a judgment of 7th March 2017.

82. In relation to the twenty-six individuals remaining, the Claimants set out in an Appendix A, the name of the Claimant, the job title in the Claimant's schedule attached in the ET1, the most recent title in the schedule to the amendment application of 23rd September and a column stating the Claimant's reason for contesting the strike out. They stated that either the most recent job role now relied upon had been correctly described in the Original Schedule, there had been a 'minor mislabel/same role' or in five cases there was a different job role in relation to which the tribunal was asked to exercise its discretion to grant leave to amend and refuse strike out.

83. By letter of 23rd February 2017 the Respondents raised the point that this was the first mention of an "Original Schedule", that was alleged to have been with the ET1 in the Abraityte multiple. They attached the papers they had received which demonstrated they had not received the said Schedule. It was in response to that letter that the Judge considered the Tribunal file and had the letter sent to the parties of first day of March 2017, confirming that the original schedule had indeed been filed but it appeared that it had not been served.

Respondent's letter 8 March 2017

84. By letter of the 8 March 2017 the Respondent indicated that having reviewed its list included with the strike out application of the 20 December

it did not intend to pursue strike out in relation to Lucyna Wegiarczyk Panek and Caroline Wilson.

85. The Respondent's primary position remained that the amendment application be considered on the basis that claims were particularised in the Claimant's further information and not the Original Schedule. If however the tribunal accepted that the Original Schedule governed the Abrityte claims then they added further Claimants to the list that should be considered for strike out:

1. Santa Abraityte
2. James Chenary
3. Andrius Gabelis
4. Janina Gervinskiene
5. Keith Simmons
6. Lina Smimoviene
7. Aras Taladi
8. Maja Zilene
9. Henryk Jarocki

In fact only numbers 1,4,5 and 8 were new as the others were already included in the Respondent's 20 December application to strike out.

Hearing 13 & 14 March 2017

86. Witness statements were provided by both Siobhan Baird and Cathy Lafferty on behalf of the Respondents. That of Ms Lafferty was not challenged by the Claimants. Ms Baird's evidence has already been referred to.

87. Ms Lafferty's evidence dealt with each of the Claimants (male and female) setting out their job titles and payment rates taken from the Respondent's Ciphr HR system and payroll system.

Evidence of Cathy Lafferty

88. Ms Lafferty was not cross examined. Her evidence has not therefore been disputed and is accepted by the tribunal. In view of the strike out application it is necessary for the tribunal to consider and make findings in relation to each of the Claimants in turn. In doing so the tribunal has also taken into account the information provided by the Respondent with its letter of 7 April 2015, corrected by a letter of 12 May 2015. In view of the Claimants confirming they only proceed with regard to the latest role they held prior to the factory closure no findings are made with regard to earlier roles held by them. The following represents the tribunal's findings in relation to each Claimant role.

Tadas Abramavicius

89. This Claimant was described as a Team Controller in the Original Schedule ('OS') filed with the ET1, a Production Operative in the Further Information ('FI') of May 2014 and a Team Controller in the Application to Amend of September 2016. That is the role recorded as his final role on the Respondents Ciphr sheet and how he was described by the Respondent in its 7 April 2015 schedule.

Judy Andrews

90. Ms Andrews was described in the OS as 'hygiene', in the FI as Production Operative and in the September Application as Hygiene Operative. The Ciphr sheet identifies her final role as Hygiene Operative and that is how she was described by the Respondent in its 7 April 2015 schedule

Ewelina Antczak

91. Ms Antczak was described in the OS as a Team Leader. The Respondent had advised in its replies to the Equal Pay Questionnaire that that title was incorrect and should be Team Controller. In the FI she was described as Production Operative and in the September Application as Team Controller. The Ciphr sheet identifies her final role as Team Controller and that is how she was described by the Respondent in its 7 April 2015 schedule

Douglas Cardozo

92. Mr Cardozo was described in the OS as an Oven Operative, in the FI as Production Operative and in the September Application as Oven Operative. The Ciphr sheet identifies his final role as Oven Operative and that is how he was described by the Respondent in its 7 April 2015 schedule

James Chenary

93. Mr Chenary was described in the OS and the FI as Production Operative and in the September Application as Chiller Operative. The Ciphr sheet identifies his final role as Chiller Operative and that is how he was described by the Respondent in its amended schedule of the 12 May 2015.

Andrius Gabelis

94. Mr Gabelis was described in the OS as 'Tumble Oven', in the FI as Production Operative and in the September Application as Coldstore Operative. The Ciphr sheet identifies his final role as Coldstore Operative and that is how he was described by the Respondent in its 7 April 2015 schedule.

Yaser Haydari

95. Mr Haydari was described in the OS as 'Chiller', in the FI as Production Operative and in the September Application as Chiller Operative. The Ciphr sheet identifies that he was a Production Operative throughout his employment the Respondent accepts that is an error. Ms Lafferty gave evidence that he transferred to being a Chiller Operative on 18 April 2011 but continued to be paid the rate of a MRP Operator £6.65 per hour rather than £6.39 per hour. He appears to have been paid at the wrong rate. This is different information to the Respondent's schedule of 12 May 2015 in which it was stated that he had been a Production Operative from 12 February 2007 to 7 July 2009 and then Chiller being his final role.

Anna Hudalova

96. Ms Hudalova was described in the OS as 'Hygiene' and in the FI as Production Operative. In the September application, she was described as Hygiene Operative as her final role which the Ciphr sheet confirmed. This was also how she was described in the Respondent's information in April and May 2015.

Erika Kalinauskiene

97. Ms Kalinauskiene was described in the OS as Line Work/Team Leader and in the FI as Production Operative. In the September application, she was described as Team Controller as her final role which the Ciphr sheet confirmed. She was described as a Team Leader in the Respondent's information in April and May 2015 (a title the Respondent had said was incorrect and should be Team Controller)

Colin King

98. Mr King was described in the OS as Team Leader - Hygiene and in the FI as Production Operative. In the September application, he was described as Team Controller as his final role which the Ciphr sheet confirmed. This was also how he was described in the Respondent's information in April and May 2015

Justina Kulisauskaite

99. Ms Kulisauskaite was described in the OS as Team Controller and in the FI as Production Operative. In the September application, she was described as Team Controller which was also how she was described in the Respondent's information in April and May 2015. Ms Lafferty however now states that the Ciphr sheet continued to show her as a Production Operative throughout but that that is an error and she was paid as a Team Controller from 4 July 2011 (the date given in the Respondents May 2015 information)

Diamantino Maduereira

100. Mr Maduereira was described in the OS as 'Chiller' and in the FI as Production Operative. In the September application, he was described as Chiller Operative as his final role which the Ciphr sheet confirmed. This was also how he was described in the Respondent's information in April and May 2015

Dashty Mohammad

101. Mr Mohammad was described in the OS as Team Leader and in the FI as Production Operative. In the September application, he was described as Team Controller as his final role which the Ciphr sheet confirmed. This was also how she was described in the Respondent's information in April and May 2015

Rita Naslenaite

102. Ms Naslenaite was described in the OS as Production Operative – Team Controller and in the FI as Production Operative. In the September application, she was described as Team Controller as her final role which the Ciphr sheet confirmed. This was also how she was described in the Respondent's information in April and May 2015

Agnie Pociute

103. Ms Pociute was described in the OS as Team Controller and in the FI as Production Operative. In the September application, she was described as Team Controller as her final role which the Ciphr sheet confirmed. This was also how she was described in the Respondent's information in April and May 2015.

Paulius Rakauskas

104. Mr Rakauskas was described in the OS as Oven Operative and in the FI as Production Operative. In the September application, he was described as Oven Operative as his final role which was also how he was described in the Respondent's information in April and May 2015. The Respondent's Ciphr sheet wrongly gave his final role as Production Operative but he was paid the rate of an Oven Operative.

Keith Simmons

105. Mr Simmons was described in the OS and in the FI as Production Operative. In the September application, his final role was described as Slicer Operative. The Ciphr sheet gave his role as Production Operative throughout employment but the tribunal accepts the evidence of Ms Lafferty that was wrong and that he transferred to being a Slicer Operative on the 7 October 2012. This was also how he was described in the Respondent's information in April and May 2015.

Lina Smirnoviene

106. Ms Smirnoviene was described in the OS as Packing Leader and in the FI as Production Operative. In the September application, she was described as Team Controller as her final role. This was also how she was described in the Respondent's information in April and May 2015. On the Ciphr sheet her role was given as Packing Team Leader from 1 May 2013 to 30 May 2014 (one of the few employees to remain employed when the factory closed). Ms Lafferty however gave evidence that was a role at Theford and not at Haughley Park. A letter dated 20 April 2011 confirmed her role as Team Controller which was her final role at Haughley Park.

Rita Stoniene

107. Ms Stoniene was described in the OS as Hygiene and in the FI as Production Operative. In the September application, her final role was described as Hygiene Operative confirmed on the Ciphr sheet. This was also how she was described in the Respondent's information in April and May 2015.

Aras Taladi

108. Mr Taladi was described in the OS as Packer and in the FI as Production Operative. In the September application, his final role was described as Slicer Operative. The Ciphr sheet gave his final role as Production Operative but the tribunal accepts the evidence of Ms Lafferty that was wrong as a letter of 7 August 2012 confirmed his Slicer Operative role from 1 August 2012. This was also how he was described in the Respondent's information in April and May 2015.

Matthew Wright

109. Mr Rakauskas was described in the OS as Oven Operative and in the FI as Production Operative. In the September application, he was described as Oven Operative as his final role which was also how he was described in the Respondent's information in April and May 2015. The Respondent's Ciphr sheet wrongly gave his final role as Production Operative but he was paid the rate of an Oven Operative. This is the same as Mr Rakavskas.

Diar Haidar

110. Mr Haidar was described in the claim as Team Leader and in the FI as Production Operative. In the September application, he was described as Team Controller as his final role which was also how he was described in the Respondent's information in April and May 2015 and how he is recorded on the Respondent's Ciphr sheet.

Kamal Massih

111. Mr Massih was described in the claim as Team Leader/Area Controller and in the FI as Team Controller. In the September application, he was described as Team Controller in his final role. In the Respondent's information in April and May 2015 he was described as Area Controller. The Respondent's Ciphr sheet indicates he was a Team Controller it is Ms Lafferty's evidence he was an Area Manager in his final role.

Henryk Jarocki

112. Mr Jarocki was described in the claim as Production Operative In the September application, he was described as Hygiene Operative as his final role which was also how he was described in the Respondent's information in April and May 2015 and how he is recorded on the Respondent's Ciphr sheet.

Santa Abraityte

113. Ms Abraityte was described in the OS as Assistant Manager and in the FI as Production Operative and that is how her final role was described in the September application. This was also how he was described in the Respondent's information in April and May 2015 and how she is recorded on the Respondent's Ciphr sheet. Ms Lafferty's evidence is she has not been an Assistant Manager.

Janina Gervinskiene

114. Ms Gervinskiene was described in the OS as Team Leader and in the FI as Production Operative and that is how her final role was described in the September application. This was also how he was described in the Respondent's information in April and May 2015 and how she is recorded on the Respondent's Ciphr sheet. Ms Lafferty's evidence is she has not been a Team Leader.

Maja Zilene

115. Ms Zilene was described in the OS as Roasting and in the FI as Production Operative and that is how her final role was described in the September application. This was also how he was described in the Respondent's information in April and May 2015 and how she is recorded on the Respondent's Ciphr sheet. Ms Lafferty's evidence is there is no roasting involved in being a Production Operative.

<u>Submissions for Hearing 13 March 2017</u>

For the Respondent

116. Counsel handed up a 'Note on Respondent's position' in addition to his skeleton argument. In the Note the Respondent stated that it did not

assert that Claimants where there is an apparent mislabeling of the job fall to be struck out but that there are nine claimants where, even with that concession, the claims fall to be struck out. These fall into the following categories:

a. Claimants where it is acknowledged that the claim brought on the basis of a job which the claimant did not carry out or the claimant no longer seeks to maintain:

	Original Schedule	Proposed Amendment
James Chenary	Production Operative	Chiller Operative
Andrius Gabelis	Tumble Oven	Coldstore Operative
Keith Simmons	Production Operative	Slicing Operative
Aras Taladi	Packing	Slicing Operative

b. Two claims that still fall to be struck out from the original application:

Lina Smimoviene	Packing Leader	Team Leader
Henryk Jarocki	Production Operative	Hygiene Operative

c. Three claims which did not form part of the original application to strike out which now fall to be struck out on the basis of claims standing on the Original Schedule:

Santa Abraityte	Assistant Manager	Production Operative
Janina Gervinskiene	Team Leader	Production Operative
Maja Zilene	Roasting	Production Operative

For the Claimants

117. The Claimants opposed the application to strike out as in their letter of the 13 February. They confirmed they pursue claims only in respect of the most recent jobs they held prior to the factory closing in November 2013.

118. With regard to the date of the amendment application it was submitted that the 23 September 2016 application 'was only made to remedy errors made by the Respondent when providing Claimant job titles and it would be disproportionate for the Claimants to lose arrears periods as a result'. In oral submissions the point was made that this was not a new amendment application at all. What does not change is the description of the job last held by each Claimant. There is no need to look at the September 2016 application at all. The Claimants should not be penalised by the September 2016 application which is to all intents and purposes the same as the 2015 application but in a fresh document when considering the remitted amendment application from the EAT.

119. The Claimants submitted that the arrears period should be backdated from the date on which the claims were initially presented to the Tribunal.

120. Dealing with the claims that the Respondent sought to strike out these could be categorised as follows:

a. Job titles where that has been no change:

Tadas Abramaivicius
Justina Kulisauskaite
Rita Naslenaite
Agnie Pociute
Paulius Rakavskas
Matthew Wright

These claims were lodged in time and there are no grounds to strike them out

b. Mislabelling

It was submitted that there were 11 individuals whose jobs had been subject of a minor error in labelling in the Original Schedule. However the mislabeling did not affect the contents of the jobs and should not lead to their claims being struck out. Whatever job description had been used it was clear that the jobs were exactly the same ie Hygiene was in fact Hygiene Operative.

c. The remaining five Claimants where they ask the Tribunal to exercise its discretion to allow these claims to continue.

121. Counsel made submissions in relation to each of the 9 Claimants now dealt with in the Respondent's opening note for this hearing.

122. James Chenary had been a Chiller Operative since July 2010.

123. Andrius Gabelis had been a Coldstore Operative from 21 October 2012 and had 13 months worth of claim until the factory closed. His latest role had been shown as Tumble Oven. The Claimant accepts there is no such job and so this was an error. Counsel did not have an explanation as to why he had been shown as performing that role. It could not be said that the Respondent had been misled and Counsel was struggling to see what the hardship would be in allowing the amendment.

124. Keith Simmons was a Slicer Operative from 7 October 2012. Aras Taladi was a slicer operative from 1 August 2012. It turns out they were not performing the roles they had stated. The same point is made as above. In Ms Lafferty's witness statement at paragraph 19 she herself says there has been confusion as they are shown as in one role but actually doing another.

125. Lina Smirnoviene had been a Team Controller since April 2011. It is clear from Ms Lafferty's witness statement paragraph 19 that she has only ever had one job. She is described as Packing Team Leader. The

Respondent has not been misled; there is no difference in her job. It is not a wholly new job just a mis-description.

126. In the Fullam multiple Henryk Jarocki had been a Hygiene Operative since July 2011. It is accepted that there was an error in the way he was originally described.

127. Santa Abraityte, Janina Gervinskiene and Maja Zilene had only ever held one role as what is now correctly described as Production Operative

128. There are only 3 female jobs. All will have to be evaluated. It is not as if the changes sought will make a difference.

129. Dealing with the shift allowance the Claimants are not seeking the same percentage as the men but simply asking for an adjustment to back pay for the appropriate percentage to be applied to the higher hourly rate. From the ET3 at paragraph 47 it is clear that on the Respondent's own case it appreciated there was an issue with regard to the shift allowance. This is not a new head of claim but the Claimants seeking to recover back pay they are owed with the shift allowance premium for working certain hours. If the original pleading is considered at paragraph 6 and 7 there is reference to the shift allowance. Paragraph 10 claims back pay so it is not a new head of claim but a clearer way to plead it to show that shift pay is very much contemplated as part of the claim.

Relevant Law

The Equality Act 2010

130. Time limits are laid down in section 129 which provides as follows:

129 Time limits

(1) This section applies to—

(a) a complaint relating to a breach of an equality clause or rule;

(b) an application for a declaration referred to in section 127(3) or (4).

(2) Proceedings on the complaint or application may not be brought in an employment tribunal after the end of the qualifying period.

(3) If the complaint or application relates to terms of work other than terms of service in the armed forces, the qualifying period is, in a case mentioned in the first column of the table, the period mentioned in the second column:

Case	Qualifying period
A standard case	The period of 6 months beginning with the last day of the employment or appointment.
A stable work case (but not if it is also a concealment or incapacity case (or both))	The period of 6 months beginning with the day on which the stable working relationship ended.
A concealment case (but not if it is also an incapacity case)	The period of 6 months beginning with the day on which the worker discovered (or could with reasonable diligence have discovered) the qualifying fact.
An incapacity case (but not if it is also a concealment case)	The period of 6 months beginning with the day on which the worker ceased to have the incapacity.
A case which is a concealment case and an incapacity case.	The period of 6 months beginning with the later of the days on which the period would begin if the case were merely a concealment or incapac.

131. Arrears that can be awarded are dealt with in section 132:

132 Remedies in non-pensions cases

(1) This section applies to proceedings before a court or employment tribunal on a complaint relating to a breach of an equality clause, other than a breach with respect to membership of or rights under an occupational pension scheme.

(2) If the court or tribunal finds that there has been a breach of the equality clause, it may—

(a) make a declaration as to the rights of the parties in relation to the matters to which the proceedings relate;

(b) order an award by way of arrears of pay or damages in relation to the complainant.

(3) The court or tribunal may not order a payment under subsection (2)(b) in respect of a time before the arrears day.

(4) In relation to proceedings in England and Wales, the arrears day is, in a case mentioned in the first column of the table, the day mentioned in the second column.

Case	Arrears day
A standard case	The day falling 6 years before the day on which the proceedings were instituted.
A concealment case or an incapacity case (or a case which is both).	The day on which the breach first occurred.

132. The law on amendments is still as stated in *Selkent Bus Com Ltd v Moore* [1996] IRLR 661:

In deciding whether to exercise its discretion to grant leave for amendment of an originating application, a tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant circumstances include:

(a) The nature of the amendment, ie whether the amendment sought is a minor matter such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded to, or, on the other hand, whether it is a substantial alteration making entirely new factual allegations which change the basis of the existing claim.

(b) The applicability of statutory time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.

(c) The timing and manner of the application. Although the tribunal rules do not lay down any time limit for the making of amendments, and an application should not be refused solely because there has been a delay in making it, it is relevant to consider why the application was not made earlier. An application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then and not earlier, particularly where the new facts alleged must have been within the knowledge of the applicant at the time the originating application was presented.

133. In *Prest v Mouchel Business Services Ltd* [2011] ICR 1345 the EAT considered what can constitute a new cause of action or new claim in the equal pay context. Underhill J (as he then was) stated:

12 The starting point in choosing between those alternatives is that in my judgment Parliament in enacting section 2ZB(3) must have been concerned with when the substantive claim which attracts the liability for arrears was first formally brought before the tribunal. In the case of a claim introduced by way of amendment to existing proceedings, the date at which those proceedings were first instituted is logically an accident, and it does not make sense to determine the relevant time limits by reference to it. If the claim is new in substance then it is artificial and unreal to regard it as having been instituted at some earlier date simply because an earlier claim with which it has become procedurally entwined was instituted at that date: cf the reasoning, albeit that the specific statutory provisions are different, of Brandon LJ in disapproving the "relation back" theory in Liff v Peasley [1980] 1 WLR 781, 799–803, subsequently approved by the House of Lords in Ketteman v Hansel Properties Ltd [1987] AC 189. My view on this point is in accordance with the decision of Slade J in Potter v North Cumbria Acute Hospitals NHS Trust (No 2) [2009] IRLR 900: see paras 114–116 (at p 913).

…

18 It is clear from that review of the authorities that Elias J has been understood to have held in Bainbridge (No 2) (a) that each and every comparison between a claimant and a comparator gives rise to a distinct cause of action; (b) that the Court of Appeal in Bainbridge has been understood to have endorsed that conclusion; and (c) that the proposition in question has been treated as of application not only to the issue of res judicata but also more generally in other contexts where it is necessary to decide whether a claim by reference to a different comparator should be treated as the same claim.

…

22 On the basis set out at para 12 above, the essential question with which I am concerned is whether the two claims—the one originally pleaded and the one introduced by way of amendment—are in substance the same. In my view that does not depend as such on the identity of the individual comparator named. Take a case where a hundred men are doing an identical job. As a matter of procedure, it has, at least in domestic law, been conventionally regarded as necessary for a claimant to identify one of those men—let us say A—as her comparator. But in fact which individual she chooses is a matter of indifference4. What matters is whether the work that they (all) do is comparable5 to hers: it is the receipt of unequal pay for equal work which is the foundation of an equal pay claim. If the claimant subsequently decides for reasons of convenience6 to substitute a fresh comparator—B—doing the same work as A (or as A was thought to have been doing) that does not mean that the nature of the

claim has changed: whichever is taken as the individual comparator, the work is the same.

23 In my view, therefore, what matters is whether the work said to be being done by the new comparator is different from that said to be being done by the comparators originally named. It is only if it is indeed different that a substantially new claim is being advanced for the purpose of section 2ZB(3) (as explained at para 12 above); and the same applies to cognate questions such as that which arose in Brett .

134. HH Judge Eady QC held in the appeal in this case (UKEAT/0209/15) that if the Claimant relies on different work that she also carried out that was also a new claim as it is changing the basis of the claim being made.

135. In her decision, she also noted that it was common ground before her that it is not fatal that a proposed amendment gives rise to a new cause of action that is out of time. It is a relevant consideration but not determinative. Even if the amendment adds a new basis of claim that goes beyond a mere re-labelling of the facts, an ET retains discretion as to whether or not it should be permitted. She made specific reference to *Walsall Metropolitan Borough Council v Birch* 'UKEAT/0376/10 in which the EAT specifically considered the position of amendments to add new claims in equal pay cases where there is no discretion to extend time and an arrears period of six years. HHJ Richardson stated:

[37] While I accept that it is always an important consideration that the relevant limitation period has expired before the joinder of a new party, I do not accept that equal pay claims are in a special category because they are subject to immutable time limits, whether as to the commencement of the claim or as to the period over which arrears may be claimed. I can see no reason in principle why this should be so. In practical terms, many other cases (those where claims must be brought within three months if it is reasonably practicable to do so) are also subject to strict time limits. Nor do I accept that it is a special consideration that the limitation period arises by virtue of the decision of the Court of Appeal in Sodexo. In my judgment that is, in itself, a neutral consideration.

136. In *Evershed v New Star Asset Management* UKEAT/0249/0, there was analysis of the relevance of the amendment being a new cause of action and the court stated:

[15] It is clear that the amendment does indeed raise a new basis of claim, since there is nothing in the original pleading to indicate that the Claimant intended to rely on s 103A of the 1996 Act. (It might be possible to quibble with the phrase "cause of action", since s 103A is a form of unfair dismissal; but that is not a point of any significance.) However, the weight to be attached to that fact depends on the extent of the difference between the original and the new bases of claim. It is well-established that a "mere re-labelling" is much more likely to be permitted than an amendment which introduces very substantial new areas of legal and factual inquiry: see, eg,

para 13 of my judgment in Transport and General Workers Union v Safeway Stores Ltd (UKEAT/0092/07). The Judge does not attempt any explicit analysis of this; but that does not matter if and to the extent that his views, and the basis for them, appear from the remainder of his reasoning.

137. The Respondent had argued before the HHJ Eady in this case that the requirement to consider the question of time limits in equal pay cases is rendered all the more important given the absence of any discretion to extend time. She was 'not persuaded on that last point' (para 44) stating:

'…As the guidance laid down in Moore makes clear, the issue of any relevant time limit will be a material consideration to which an ET should have regard. That is so where there is a discretion to extend time whether on the basis of reasonable practicability or more broadly because it would be just and equitable to do so or not. Identifying the point from which time runs, whether the new claim added by amendment would be out of time or whether there is such a discretion time should be extended can involve complex, fact specific issues. My reading of Moore is that it allows that this relevant factor should be considered as part of the mix in all cases but it is for the ET to decide what weight to give to it. Inevitably, that will include considering the nature of the claim in question, but there is no rule that a different approach is dictated by a particular statutory basis of claim'

Relevant tribunal Rules

138. The Respondent applies to strike out some of the claims. Rule 37 provides as follows; -

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

139. Counsel for the Claimants relies on *H M Prison Service v Dolby* [2003] IRLR 694, a case heard under the 1998 Rules in submitting that the Tribunal retains a discretion even where a case has no reasonable prospects if it can be cured by amendment. Mr Recorder Bowers observed:

140. The same point it is submitted was made in *Hasan v Tesco Stores Ltd* UKEAT/0098/16. At paragraph 17 Lady Wise stated:

14. We thus think that the position is that the employment tribunal has a range of options after the rule amendments made in 2001 where a case is regarded as one which has no reasonable prospect of success. Essentially, there are four. The first and most draconian is to strike the application out under rule 15 (described by Mr Swift as 'the red card'); but tribunals need to be convinced that that is the proper remedy in the particular case. Secondly, the tribunal may order an amendment to be made to the pleadings under rule 15. Thirdly, they may order a deposit to be made under rule 7 (as Mr Swift put it, 'the yellow card'). Fourthly, they may decide at the end of the case that the application was misconceived and that the applicant should pay costs.

15. Clearly, the approach to be taken in a particular case depends on the stage at which the matter is raised and the proper material to take into account. We think that the tribunal must adopt a two-stage approach: firstly, to decide whether the application is misconceived and, secondly, if the answer to that question is yes, to decide whether as a matter of discretion to order the application be struck out, amended or, if there is an application for one, that a pre-hearing deposit be given. The tribunal must give reasons for the decision in each case, although of course they only need go as far as to say why one side won and one side lost on this point.

The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of Dolby the test for striking out under the Employment Appeal Tribunal Rules 1993 was interpreted as requiring a two stage approach.

Conclusions

The issue remitted by the EAT

141. When the EAT gave its judgment on the 13 November 2015 it was remitting the decision on the Claimants application to amend of the 28 April 2015. All the other issues before this tribunal which have arisen

since were not before the EAT. The direction in paragraph 56 of the EAT judgment was that the ET must consider the comparator and Claimant role amendments in the round in the exercise of its discretion. That must be considered in the context of the EAT's comments in its judgment that if a Claimant relies on different work that she also carried out that is 'changing the basis of the claim being made' (paragraph 52). The EAT did also however conclude that 'if it was solely relating to the comparator amendments, I think the Respondent protests too much' (paragraph 47). It did not however find that this tribunal had adopted the same approach in respect of the amendment to add or change the job roles.

142. As before and recorded at paragraph 13 of the original decision of the 14th May 2015 the tribunal is only dealing with the female Claimants.

New job roles

143. Dealing then firstly with the application as it then was the tribunal concludes that leave to amend to add new Claimant job roles should not be granted. The roles in the female Claimants case go back to in some cases 2006 to 2012. A claim in respect of those roles would have been significantly out of time in February 2014 when these claims were issued and even more so at the date of the application to amend in April 2015.

144. It is now clear from the decision of HHJ Eady in this case that the addition of new job roles is a new cause of action. Although a limitation point is only one of the factors to be taken into account it is a significant one when the job roles the Claimants seek to rely on go back as far as 2006. Such a claim in February 2014 (the date of the ET1) would have been approximately 8 years out of time.

145. Of relevance, also is the arrears period. The relevant date would be the date of the amendment application of April 2015. 6 years would go back to 2009, meaning that some of these claims in relation to the older jobs would have little if no value.

146. The tribunal also finds that a distinction can be drawn between what the Claimants might know about comparator roles as opposed to their own roles. Whilst comparator roles may be a more complex issue for Claimants the roles they actually undertook should not be.

147. In an equal pay case it is not just the addition of new job roles but the relation to comparator roles. To allow the amendment would lead to further work for the Respondent in the comparison exercise and evidence required. The Claimants have valid claims for their latest roles before the factory closed. The tribunal is satisfied greater prejudice would be caused to the Respondent by allowing the amendment to job roles than to the Claimants. For all of these reasons leave is refused.

The Claimants subsequent position

148. The Claimants eventually submitted a new application to amend after the EAT decision. As set out in the chronology this was only received after orders made by this tribunal and came 10 months after the EAT decision was given in November 2015. It provided the dates of all of the Claimants roles which information had been provided by the Respondent in its information of April and May 2015. It also made clear the comparators sought to be relied upon which were the same as in the earlier application to amend of April 2015. It also applied for leave to amend to add in relation to the payments claimed 'a difference of 9.21% in respect of shift allowances at the relevant rate of pay of the male comparators.

149. It was following this application that the Respondent made its application to strike out some of the claims at the hearing on 29 November 2016 which was adjourned to this hearing. This now includes male Claimants as well as female Claimants.

150. The Respondent relies on the fact it was never served with the Original Schedule in the Abraityte multiple. That does appear to be the case due to an administrative error. However it is clear that the Respondent did have a schedule of Claimants and roles with the Grievance in February 2015. Even before that it had the schedule with the Equal Pay Questionnaire of 21 February 2014. The details in that are mirrored in the original schedule so they had it around time of date of service on these proceedings. The Respondent had full knowledge of all individual Claimants and the job roles then relied upon. It was able to provide detailed responses to the Questionnaire and file its Response to this claim. The tribunal is satisfied that when it provided its information in April and May 2015 it was referring to schedules it had received from the Claimants.

151. The Respondent provided its definitive information by a schedule on 12 May 2015. This ties in with the witness statement of Cathy Lafferty for this hearing. This is information the Respondent has been able to obtain from its records.

152. The Claimants did not however act on this information until their application of the 22 September 2016. Part of the period since the information was provided by the Respondent was taken up with the Respondent's appeal to the EAT the decision of which was given on the 13 November 2015. Neither party appears to have taken any action to then progress these proceedings until this Judge had a letter sent to the parties on 2 March 2016 requesting a list of issues for the remitted hearing. The chronology thereafter has been set out above. Although the tribunal is critical of the Claimants delay in submitting its September application it has concluded from its examination of it against the April 2015 application that, as submitted on behalf of the Claimants, it changed very little in the nature of the amendment application. The date of the application to amend should therefore be 28 April 2015.

153. The position however with these older job roles has become academic as a result of the Claimants position since the EAT decision and remission. By letter of the 13 February 2017 the Claimants stated they only intended to pursue the Claimant job roles held immediately before the factory closure in 2013. That therefore removed all the older job roles.

154. The issue that remains in relation to Claimant job roles is where there has been not the addition of older roles but a change in role certain Claimants performed.

155. With regard to the following Claimants the tribunal accepts that the individual job titles are the same in the Original Schedule as they are in the amendment applications:

Tadas Abramavicius	Team Controller
Justina Kulisauskaite	Team Controller
Rita Naslenaite	Team Controller
Agnie Pociute	Team Controller
Paulius Rakavskas	Oven Operative

156. The Original Schedule was filed. It was an administrative error that it was not served. The Respondent had however with the Questionnaire a similar schedule. It was not disadvantaged. It never raised the point. It was able to deal with its Response to these proceedings.

157. In relation to these Claimants there are no grounds for striking out the claim and the application to do so is dismissed. Leave to amend is granted to amend to the correct title.

158. In relation to the following Claimants it is accepted that there has been minor mislabeling of their job titles, that leave to amend should be given and the claims not struck out:

Judy Andrews
Ewelina Antczak
Douglas Cardozo
Yaser Haydari
Anna Hudakova
Erika Kalinauskiene
Colin King
Diamantino Madureira
Dashty Mohammed
Lina Smirnoviene
Rita Stoniene

159. Haidar Multiple

Diar Hadar
Kamal Massih

160. Fullam Multiple

Lucyna Panek and Caroline Wilson – these were not pursued by the Respondent (letter 8 March 2017)

161. The 'errors' in these cases (if they can even be described as such) cannot have disadvantaged the Respondent. They vary from a title of Hygiene which should be Hygiene Operative to Team Leader which should be Team Controller. It was the Respondent that pleaded there was no such role as Team Leader so it was always aware that the correct title for those Claimants was Team Controller. The Respondent had no difficulty in identifying the roles these Claimants carried out by their Further Information in April and May 2015.

162. That leaves 5 Claimants in relation to which the Claimants accept they require the tribunal to exercise its discretion and grant leave to amend:

James Chenary
Andrius Gabelis
Keith Simmons
Aras Taladi
Henryk Jarocki

163. What can be seen from the chronology is that the way in which these Claimants describe their last role is the same in the September 2016 amendment application as it was in the April 2015 application. It is clear therefore that the Claimants representative is correct in stating that the September application was 'tidying up' the April 2015 application. The main change was the dates of the earlier job roles but those are not now pursued.

164. In all but James Chenary the Respondents gave the Claimants this information about the correct job role with their further information of 7 April 2015. The Claimants then included it in their application to amend of 28 April 2015.

165. In relation to Mr Gabells the Claimants had provided his job title as Coldstore Operative with their schedule on 19 February 2015.

166. In exercising its discretion to allow the amendments, the tribunal has taken account of the fact that in the majority of cases the change has come out of further information given by the Respondents. In their replies to the Questionnaire they clarified that some roles were incorrectly described or did not exist, eg Team leader was incorrect and should be team controller, Assistant Manager did not exist.

167. The Respondent is in no way disadvantaged by the change of job role when it has had the information in its possession as to the correct role. It has been able to provide information at various stages of these

proceedings about the roles the Claimants performed. For the last hearing, Cathy Lafferty was able to prepare a detailed statement about the role of every (including the male) Claimants. This is information that has always been in the Respondents possession, custody or control.

168. The Respondent has argued that there was delay by the Claimants in making the application. The tribunal is satisfied from its detailed chronology that from the time the Respondent answered the Questionnaire to the date of the amendment application both parties were requesting and providing information. Indeed the Respondent provided a corrected schedule of Claimant jobs on the 12 May 2015. The time taken therefore to make the application was not entirely of the Claimants making and is only one factor to be taken into account.

169. It is of course the case that if the Claimants had sought to issue in April 2015 relying on these roles they would have been significantly out of time as the factory closed in 2013. However, the case law establishes that notwithstanding s129 the fact the claim would now be out of time is only one of the factors to be taken into account. As we was said in the *Walsall* decision '*I do not accept that equal pay claims are in a special category because they are subject to immutable time limits, whether as to the commencement of the claim or as to the period over which arrears may be claimed…'* This was also accepted by HHJ Eady in the appeal in this case when she said '*there is no rule that a different approach is dictated by a particular statutory basis of claim'.*

170. The tribunal has also taken into account that these are all male Claimants whose claims are contingent on the success of the females claims. As stated by Counsel for the Claimants in the written Skeleton Argument for the November 2016 hearing there are no new (in the sense of different) job roles sought to be added for the female Claimants. The male Claimants 'piggyback' on the women's claims and by agreement, they will be stayed pending the outcome of the women's claims. The need for evidence on these roles will only arise if the female claims succeed (paragraph 18).

171. Paragraph 14 of each Particulars of Claim pleaded that the Claimants were claiming equal pay in respect of 'any jobs that the claimants have held in the past 6 years…' Although it has now been determined that the change of job role is a new cause of action all of the jobs were carried out at the same site with the same objective namely the production of chicken pieces.

Comparator roles

172. The tribunal has concluded that leave should be given to amend to include the new comparator roles in the original amendment application. The

Claimants wish to add Oven Operatives, Ground Services, Despatch Controller and Despatch Supervisors.

173. It was accepted that this change amounted to a new cause of action that on the face of it was out of time. That is just one factor to be taken into consideration.

174. As submitted on behalf of the Claimants (submissions May 2015) no new evidence will be required for the Oven Operative and Machine Minder because they are also male Claimants. The only new evidence required will be for the Ground Service comparator.

175. As submitted on behalf of the Claimants (submissions May 2015) no new evidence will be required for the Oven Operative and Machine Minder because they are also male Claimants. The only new evidence required will be for the Ground Service comparator.

176. The fact the factory closed in 2013 is another factor but one the Respondent has always had to deal with it since the issue of proceedings. The Respondent is still in operation elsewhere and has been able to obtain information as to the roles.

177. The fact the factory closed in 2013 is another factor but one the Respondent has always had to deal with it since the issue of proceedings. The Respondent is still in operation elsewhere and has been able to obtain information as to the roles.

178. Balancing prejudice the tribunal is satisfied that greater prejudice would be caused to the Claimants in not being permitted to rely on their chosen comparators than to the Respondent. Two of the proposed new comparators are male Claimants in any event so their work is already in evidence.

179. Language is a difficulty in this case for the Claimants and until all the relevant information was received from the Respondents it was not necessarily apparent to the Claimants or those instructed by them the significance of the other comparator roles.

Shift premium

180. It is in relation to this matter only that the only application to amend that can be considered is that of September 2016 as this was not included in the April 2015 application. The tribunal accepts the Claimants submissions that the addition of this into the payments that the Claimants state they been denied is for clarity and not a new head of claim. The Response dealt with Shift Allowance at paragraph 46-47. The original Particulars of Claim referred to the shift allowance paid to the

comparators. This is all part of the claim for back pay as originally pleaded. Leave to amend is granted.

Case Management

181. The parties agreed Stage 1 Directions at the hearing. It is now hoped that the parties will work within the spirit of the overriding objective to progress these proceedings.

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Employment Judge Laidler, East London
Date: 21 July 2017

ORDER SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS