

*Cannop v Highland Council*, 2008 S.L.T. 625

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The question of whether a claimant has submitted a grievance and then a form ET1 in terms such as to allow the employment tribunal jurisdiction to hear the claim has vexed many a claimant since the introduction of the Employment Act 2002. In this case the issue affects a huge number of claimants estimated at 50,000 who currently have equal pay claims pending before the employment tribunals throughout Scotland.

*Cannop v Highland Council*, 2008 S.L.T. 625 is an appeal from the EAT to the Inner House of the Court of Session on the question of the employment tribunal's jurisdiction in circumstances where an employee brings an equal pay claim having lodged a grievance which named comparators different to those subsequently named in the form ET1. Section 32 of the Employment Act 2002 states that an employment tribunal will only have jurisdiction to hear a claim if it concerns matters in relation to which a grievance has been set out in writing and sent to the employer.

In *Cannop* some claimants, notably those represented by Stefan Cross (the "SC claimants"), had, within their grievance, named comparators in terms of job types found within the Scottish Council of Local Authority Services (Manual Workers) Scheme of Pay & Conditions of Service ("the Green Book"). However, by the time they lodged their employment tribunal claims, they had discovered other job types in the same category of Green Book manual worker that they could compare themselves with and so included those also. In other cases before the employment tribunal, particularly where the employees were represented by a union, the union had lodged a collective grievance naming no actual comparators but indicating that their members in the manual worker category did not receive equal pay to their male colleagues ("union-backed claimants").

The respondent sought to establish before the tribunal that where a form ET1 specified different comparators to those in the grievance, then those parts of the claim relating to new comparators should be struck out.

The Stefan Cross claims came before the tribunal, where it was accepted by the respondents that step one of the standard grievance procedure contained at Part II of Sch.2 to the Employment Act 2002 had been complied with, i.e. that the SC claimants had "set out the grievance in writing and [sent] the statement or a copy of it to the employer". However, the respondent asked the tribunal to "take a red pen" to the claims, deleting the additional comparators named in the form ET1 which were not named in the grievance.

The issue of the collective grievance and the union-backed claimants was not dealt with specifically by the employment tribunal as it was agreed the matter should be dealt with at a separate hearing. However, representatives of this group of claimants were allowed to make representations before the tribunal and their argument included the proposition that, where the standard grievance procedure applied, it was sufficient that the written statement identified the grievance as being one in respect of an equal pay claim and it was not necessary to include reference to any comparator.

In respect of the SC claimants the tribunal concluded that “the grievance — the action the employer had taken in relation to the claimants (by paying them less than men doing the same or lower jobs) — was both recognisable as a claim for equal pay and consistent in both grievance and claim”. The employment judge found that where the claimant had identified comparators of a certain job type from a recognised source (i.e. the Green Book), and then included others of the same job type from the same source in the claim form, then “that difference should not be treated as the snake which forces her to return to Go”.

The respondent appealed to the EAT on the basis that the tribunal had erred in law in concluding that it was sufficient that the grievance “related” to the subsequent claim and by not addressing the question of whether the relationship between the claim and grievance was sufficiently close. The EAT, in common with the tribunal, was addressed by both the representatives of the SC claimants and of the union-backed claimants. As a result the issues in discussion were perhaps more wide-ranging than was strictly necessary to decide the issue.

The EAT reversed the decision of the employment tribunal and ordered that the matter be remitted to the same tribunal.

The EAT found that it was not sufficient to make a complaint of equal pay without specifying a comparator. The EAT further found that it was fundamental to a complaint of equal pay that there be some specification of comparator either by reference to job or job type in the grievance document. The EAT went on to find that the tribunal needed to check that comparators which were substantially the same or not materially different, were specified in both documents. In the event that they were not substantially the same, the effect of s.32 of the 2002 Act would be to exclude the jurisdiction of the employment tribunal in respect of that part of those claims. By implication, taking into account obiter comments made by Lady Smith in the EAT judgment, where no comparator was specified in the grievance, the conclusion could be drawn that the grievance and form ET1 could not meet the requirements of s.32 of the Employment Act 2002.

The effect of the EAT’s decision was to require the tribunal in each of the Stefan Cross claims, to compare the original grievance with the form ET1 and to consider whether each comparator specified in the grievance was “not materially different from” those comparators specified in the form ET1.

As a result of the EAT decision and the obiter comments made, some natural confusion ensued as to the status of the estimated 50,000 equal pay claims pending in the employment tribunal service across Scotland as many of them had not named comparators in either the grievance or the form ET1, or else, had named additional comparators in the form ET1. Respondents were asked whether they wanted to take the “Highland Council” point and I understand that in many cases where settlement was well advanced, negotiations ground to a halt.

The EAT decision was appealed by both the union-backed claimants and the SC claimants and it was agreed that the matter should be fast-tracked given the interest of so many parties in the outcome.

There was some discussion before the Inner House as to the standing of the union-backed claimants given that the claims that were decided before both the ET and the EAT related directly to the SC claimants and only indirectly to the union-backed claimants. It was argued, however,

that the obiter comments made by the EAT had an impact on the union-backed claimants and that, as such, they had an interest in the case.

The Inner House took the view that the question of whether s.32 of the Employment Act 2002 was satisfied where an employee stated in a grievance that they had an equal pay claim without naming comparators was a hypothetical one in the context of the *Cannop* proceedings and that this had been the case before the ET, the EAT and the Inner House itself. The Lord President delivering the opinion described the issue as having “bedevilled” proceedings. Therefore, the Inner House did not address the hypothetical issue head on as they felt it would be dangerous and potentially confusing for the court to address a hypothetical question without actual context.

Instead the Inner House approved the decisions in the EAT in the cases of *Shergold v Fieldway Medical Centre* [2006] I.R.L.R. 76 and *Canary Wharf Management Ltd v Edebi* [2006] I.R.L.R. 416 and specifically the observation by Elias J. in *Canary Wharf* at para. 16: “[the statement of the grievance] must of course be a statement of the same complaint as the employee is seeking to have determined by the tribunal” and then later at para. 21: “The only requirement, as section 32(2) makes plain, is that the complaint to the employer must be essentially the same complaint that is subsequently advanced before the tribunal”.

The Inner House also approved the observations that an unduly technical or over-sophisticated approach is inappropriate. The Inner House observed that the correlation to be looked for is whether “underlying the claim presented to the tribunal is essentially the same grievance as was earlier communicated”. Moreover they made the point that the grievance document need not be read in isolation and reference could be made to earlier communications with the employer to provide a context in which to understand the grievance. The Inner House also accepted that there may be circumstances in which an employee does not have access to the full facts and therefore a grievance based on a suspicion that certain facts exist would be sufficient.

The Inner House concluded that the EAT was entitled to conclude that the ET had erred in law in concluding that it would not have mattered if the comparators referred to in the grievance document were quite different from those relied on in the subsequent claim. The employment tribunal must compare the grievance and the form ET1 to check that essentially the same complaint was being made. To that extent the Inner House was in agreement with the EAT. However, the EAT went further in suggesting that in every case the statement of grievance must specify the comparator or comparators relied on, and that these must not be materially different from those relied on in the ET1. The Inner House took the view that as that issue did not arise for decision, the EAT should not include such a statement in its remit to the ET.

Instead, the remit to the tribunal should merely ask whether the grievance underlying the form ET1 submitted to the tribunal was essentially the same as the grievance earlier communicated.

In my view the tribunal is being asked to do what the original employment judge did in relation to the SC claimants, namely look at the schedule of claimants, compare the terms of the grievance with the terms of the form ET1 and see whether they are essentially the same. The difficulty in this case arose because both the tribunal and the EAT were sidetracked into commenting on the hypothetical position of a claimant who made a bald grievance “I have an equal pay claim” and then in her form ET1 repeated that sentence.

In essence, therefore, the claimant who has essentially the same comparators in both grievance and ET1 will pass the jurisdictional hurdle imposed by the Employment Act 2002. Where no comparator is mentioned in either the grievance or the form ET1 the tribunal will need to look at both, look at the context of the grievance and decide whether the claim is essentially the same. In my view therefore the claimant with no grievance is in no worse a position than before the matter was first raised before the ET as the test approved by the Inner House is that approved by the EAT in *Shergold* and *Canary Wharf*. The obiter comments made by Lady Smith and the employment judge have not been approved and as such each case will have to be decided on its own facts. The fact that no comparators are mentioned will not be determinative.