Appeal No. UKEATS/0008/14/BI
UKEATS/0009/14/BI
UKEATS/0011/14/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 9th December 2014 and 12th May 2015

Before

THE HONOURABLE LADY STACEY

MS JUDITH GASKELL

MRS ANNE HIBBERD

MISS J MACDONALD AND OTHERS — CLAIMANTS

GLASGOW CITY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Claimants	Fox Cross claimants : Mr Robin Allen, QC with Mr Jonathan Mitchell QC, Fox and Co Unison /Unite claimants Mr Graeme Dalgleish, Advocate, UNISON Legal Services (formerlyThompsons Solicitors) GMB claimants : Mr Calum MacNeill, QC, Digby Brown LLP
For the Respondent	Mr John Bowers QC with Mr Stephen Miller,Solicitor, Glasgow City Council Legal Services (with Simpson & Marwick Solicitors)

SUMMARY

Equal Pay: the claimants challenged the respondent's Job Evaluation Study. They argued it was invalid because it produced two separate scores for each job; further, it was not shown to be objective. They argued that the ET had inverted the onus of proof and erred in its treatment of expert evidence. Held: the ET had made findings it was entitled to make. There was no error of law in the ET's decision.

Pay Protection: the claimants argued that the respondent had shown no justification for its pay protection policy, which protected pay of those in detriment prior to implementation. Held: the ET did not set out a legitimate aim and then consider whether the pay protection policy was a proportionate way of achieving that aim.

Appeal allowed in part.

THE HONOURABLE LADY STACEY

Introduction

1. This is an appeal against decisions taken at a Pre Hearing Review by an Employment Tribunal (ET) comprising Employment Judge Paul Cape, Mr W Stewart and Mr K Thomson. The decision was notified to parties on 9 December 2013. One matter was not completed and the ET convened again to hear it. The additional decision was notified on 7 May 2014.

2. There are three groups of claimants. The first were at one time represented by Fox Cross solicitors and have been referred to in the ET as the Fox Cross claimants. We continue to use that name. The second group are members of the unions Unison or Unite, who were represented by Thompsons, solicitors. They have been referred to in the ET as the Unison claimants or the Thompsons claimants. We shall refer to them as the Unison claimants. The third group are members of the GMB union, and are represented by Digby Brown, solicitors. They have been referred to as the GMB claimants or the Digby Brown claimants. We shall refer to them as the GMB claimants. The respondent is Glasgow City Council, to whom we shall refer as the respondent, the council or the local authority as the context demands. Mr Allen QC appeared before us for the Fox Cross claimants, Mr Galbraith-Marten QC having appeared before the ET. Mr Dalgleish, advocate, appeared for the Unison claimants, Mr MacNeill QC for the GMB claimants and Mr Bowers QC for the respondent, all before us and before the ET.

3. The litigation arises as a result of the respondent bringing in a Workforce Pay and Benefits Review (WPBR) which was designed to implement the move to single status for local authority employees and to deal with issues related to historic practices in pay. The case has been described by counsel as being on a massive scale. The ET heard evidence on

37 days. The first set of written reasons comprised 927 paragraphs over 189 pages; the second set 45 paragraphs over 9 pages. Matters ranged far and wide both before the ET and before us. The issues raised before the ET related to the validity of a Job Evaluation Study (JES) used by the local authority. The ET referred to the JES as a "study" and as a "scheme" and we use the terms interchangeably, as did the ET. It was said to be an unusual scheme because it produced two ratings for evaluation, referred to as "core or grade" and "work context and demand (WCD)". The design of the scheme was criticised. There was a challenge to the pay protection provisions used by the council. We were referred to a number of cases, which we refer to informally by name and which are listed with citations in an appendix annexed to these reasons.

4. There was controversy before us about the way in which claimant and comparators were to have been treated by the ET. There were differing views as to whether the claimants were sample claimants or test claimants; whether matters were to be dealt with generically or not. We were surprised that parties had not apparently agreed about the basis on which a long case had been argued. We found that parties could not agree and so we have dealt with the difficulty by proceeding on the basis in which the ET stated it was proceeding. We note from paragraph 42 of the second judgment that the ET states that it has heard about sample claimants. It accepted a submission made by counsel then appearing for the Fox Cross claimants that there may be particular individuals about whom it has not heard whose circumstances may fall to be considered on their own facts. The ET has determined the issues brought before it on the basis of sample claimants and comparators and not on hypothetical circumstances.

5. The case concerns claims under the Equal Pay Act 1970, which we will refer to as EQP, as it was referred to by the ET. The ET 1 forms referred to many matters but before us the parties were agreed that the controversy related to the provisions of section 1(5) and section 2A(2A) of EQP as amended, and to pay protection, including in that broad heading assimilation, pay protection and the Employee Development Commitment (EDC) procedure used by the council. We heard the case in two tranches, as counsel argued that the time initially sought and set aside was insufficient to hear all of it at one sitting. The first dealt with pay protection and was heard over three days; the second dealt with the JES and was heard over four days. The GMB claimants participated in the first tranche only. Mr Bowers submitted that we should not reach any decision until we had heard all of the case, as the issue of the proper categorisation of the JES and pay protection were inextricably linked. We agreed with that submission and this judgment and these reasons were made after we had heard all submissions. In these reasons we deal with the validity of the JES first, and then we deal with pay protection.

The issues before the ET

6. The issues to be decided by the ET were set out in their reasons, noting they had been decided by parties in a document dated 20 July 2012 as follows:

> 1. Which parts of the Workforce Pay and Benefits Review (WPBR) constitute the job evaluation scheme used/relied upon by the Council, in particular are the sections dealing with:
>
> the non-core hours and/or
>
> the working context and demands
>
> part of the [Job Evaluation Scheme] JES?

2. From what date does the relevant job evaluation scheme operate for the purposes of section 1 (5) of the Equal Pay Act 1970 (EQP)?

3. Is it a valid job evaluation as defined in section 1 (5) EQP?

4. If so, are the respondents entitled to rely upon it for the purposes of section 2A (2A) of the EQP. In particular:

    (i) are there reasonable grounds to suspect that it is based upon a system which discriminates on the grounds of sex?

    (ii) are there reasonable grounds to suspect that it is otherwise unsuitable to be relied on?

5. Are any of the measures taken to protect/maintain the level of pay of the comparators discriminatory and not objectively justified, in that equivalent measures were not put in place for the claimants. This will involve consideration of:

    (i) the allocation to job families and role profiles;

    (ii) the design and evaluation/schooling of such profiles;

    (iii) assimilation;

    (iv) the three year protection arrangements commencing 1 April 2006; and

    (v) the Employee Development Commitment

6. What is the consequence of the finding that there are reasonable grounds to suspect that the WPBR is discriminatory or is otherwise unsuitable to be relied on, in particular:

    (i) are employees rated as equivalent under the Green Book entitled to continue to compare themselves with those Green Book comparators?

    (ii) are all employees entitled to bring equal value claims?

7. Do any of the matters contended by the claimants constitute direct or indirect part-time discrimination?

8. If so can the Council show objective justification?

The following four issues were not determined by the ET in the first judgment. A further hearing was held to determine the first issue.

1. In a case in which two factor plans are employed to determine the value of jobs, when are two jobs properly to be regarded as rated as equivalent; (this matter was held over and determined at the second hearing, and was part of the appeal before us.)

2. Whether the respondent has a defence pursuant to section 1(3) in respect of some or all of the payments made under the rubric Non-standard Working Patterns;

3. Whether, if such a claim was before the tribunal, the decision of the respondent not to treat as eligible for the benefits of the Employee Development Commitment, an employee who would have been in detriment had the earnings been raised to the level of the comparators prior to assimilation amounts to sex discrimination;

4. Whether there was unlawful discrimination against part-time workers.

The ET judgments

7. The first judgment of the tribunal is as follows:

1. The parts of the Workforce Pay and Benefits Review (WPBR) constituting the job evaluation used/relied on by the respondent are those methodologies leading to the determination of an employee's pay grade and Working Context and Demands (WCD) payment

2. The job evaluation took effect on 1 April 2006 and with effect from that date could be relied upon by employees for the purposes of sections 1(2)(b) and the respondent for the purposes of section 2A(2A) EQP.

3. The respondent's methodologies give rise to a valid job evaluation as defined in section 1(5) of EQP

4. The respondent is entitled to rely upon its job evaluation for the purposes of section 2A(2A) of the EQP by reason of it not having been shown that either:

   (i) there are reasonable grounds to suspect that it is based upon a system which discriminates on the grounds of sex or

   (ii) that there are reasonable grounds to suspect that it is otherwise unsuitable to be relied upon

5. The application to job families and the role profiles and the design and evaluation/scoring of such profiles are not measures taken to protect/maintain the level of pay of the competitors: the integral parts of the methodologies forming part of a valid, non-discriminatory job evaluation used to determine grade and WCD pay respect of all material employees.

6. Insofar as Assimilation, Pay Protection and the Employee Development Commitment are discriminatory, those matters are justified.

In its supplementary judgment of 2 May 2014, the ET confirmed the provisional judgment to which it had come in the earlier written reasons. The ET explained the need for the second hearing thus:

> "Having concluded that both grade and WCD have to be brought into account in determining the rating of the work and whether the work of one employee has been rated as equivalent to that of another, the Tribunal considered how that is properly to be decided. This is not a point on which the Tribunal heard submissions from the parties and the Tribunal's conclusions should be regarded as provisional so that parties can be given an opportunity (for 42 days from the date of promulgation of this judgment) to ask to make further submissions."

8. The Tribunal convened to hear those further submissions. The GMB claimants chose not to attend. The Tribunal heard no evidence and relied on the findings of fact made in the earlier judgment. It set out the law in abbreviated form, having set out the relevant statutory provisions fully in the earlier judgment.

9. In applying the law to the findings in fact, the ET stated at paragraph 27 the following:

> "Briefly stated, the Tribunal found that the respondent's methodology employed two separate factor plans in evaluating the work of the material employees. The application of each factor plan involved the analysis of work under relevant headings with each level under each factor under each factor plan being awarded a score. Each pay grade was defined in terms of a range of point scores as was each level of the WCD payment. The respondent's methodology expressed the value of each job in terms of x grade points and y WCD points which, by identifying the particular grade and WCD points ranges within which those points fell, translated into grade n and WCD level z."

10. The Tribunal found, relying on the case of **Springboard Sunderland Trust v Robson** that the translation of points into grades forms part of the evaluation, with the result that the rating of the work is found in terms of the pay grade and the WCD level.

11. Reading both judgments together, the Tribunal found that the factors used in the evaluation were of the kind identified in section 1(5) EQP as interpreted in the cases, and that no factors of any other kind were used in the evaluation. Neither the grade factor plan nor the WCD factor plan alone contained all the necessary factors that ought to be considered. Taken together the grade factor plan and the WCD factor plan included all material factors found in the jobs in question. There were no grounds for suspicion of sex discrimination or other unsuitability in terms of section 2A2A EQP.

12. The ET found that the pay protection used by the respondent was discriminatory, but found that it was objectively justified. At paragraph 881 the ET stated:

> "On the facts found, the payment of unjustified bonus was the reason why some employees received transitional payment. The majority-at least two to one- fell into protection for some reason other than the payment of bonus and the ground has not been laid for a finding that the reason for others falling into protection was tainted by sex."

13. The ET directed itself at paragraph 882 that it had to decide if the employer knew or should have known that its previous pay arrangements were discriminatory, under reference to the cases of **Bury** and **Bainbridge**. It found (paragraph 885) that the respondent did know that its payment of bonus could not be justified at the time it took its decisions on pay protection. It then considered whether the payment of pay protection could be justified.

14. At paragraph 895 the ET found that:

> "There is nothing to suggest that the respondent's thinking in 2006 went beyond offering pay protection to the pre WPBR earnings of those who would otherwise have suffered an immediate loss of income. The respondent did not consider for a moment offering anything by way of pay protection to those employees who would not suffer an immediate drop in earnings…"

Having made that finding the ET then considered whether the respondent's actions were objectively justified. It found at paragraph 897 that while it had heard evidence that the cost of extending pay protection would be "enormous", that that was not sufficient to amount to justification. The ET noted that had the respondent extended pay protection so as to eliminate or reduce discrimination, other workers might have made claims. It found that the respondent could have protected the pay of those losing out due to reasons other than bonus payments. It found that course of action would have been likely to cause industrial unrest.

15. The ET then found at paragraph 900, as follows:

> "Recognising that the respondent continued the discriminatory effect of the former bonus payments by the using of the transitional payment. The Tribunal concluded that the respondent's action to meet their legitimate objectives pass the test of proportionality for these reasons."

16. The reasons which follow are that WPBR immediately reduced the discriminatory effect of the former bonus arrangement. Protection of former discriminatory bonus arose in

respect of less than one third of all payments of pay protection. The ET balanced that "against the advantage of a rule that treated alike all of those whose reckonable pre WPBR earning exceeded reckonable WPBR earning." We understood that to mean that the ET found it proportionate to treat all the same, to avoid the industrial unrest referred to above. The next reason given is that the pay protection was limited to three years and in some cases would be for less time.

17. The ET dealt with assimilation at paragraph 904, finding that there was insufficient evidence for it to reach a conclusion, and at paragraph 911 after discussion of samples by finding that there was an explanation of the assimilation arrangements which is not sex tainted.

18. The ET then found that as regards gardeners and some canteen workers questions were raised but there was insufficient evidence before the ET to enable it to make any decision.

19. The ET dealt with EDC between paragraphs 726 and 746. It described the scheme as operating at individual and collective levels. The assertion of the claimants is noted at paragraph 735, as being that the scheme was devised with the improper objective of maintaining unlawful pay differentials.

20. Lastly the ET found that the operative date of the JES was 1 April 2006. At the hearing before us no one disputed that finding.

The legislation

21. The legislation which applies in this case is the Equal Pay Act 1970 as amended, and in particular sections 1(5) and 2A(2A). It is convenient to set the relevant parts of the sections out:

> "**1**-(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.
>
> (2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the 'woman's contract'), and has the effect that—
>
> (a) where the woman is employed on like work with a man in the same employment—
>
> (i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and
> (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term;
>
> (b) where the woman is employed on work rated as equivalent with that of a man in the same employment—
>
> (i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and
> (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term.
>
> (c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment—
>
> (i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and
> (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term.
>
> (3) An equality clause falling within subsection (2)(a), (b) or (c) above shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor—
>
> (a) in the case of an equality clause falling within subsection (2)(a) or (b) above, must be a material difference between the woman's case and the man's; and

(b) in the case of an equality clause falling within subsection (2)(c) above, may be such a material difference.

(4) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences.

(5) A woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value, in terms of the demand made on a worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value but for the evaluation being made on a system setting different values for men and women on the same demand under any heading.

2. — Disputes as to, and enforcement of, requirement and equal treatment.

(1) Any claim in respect of the contravention of a term modified or included by virtue of an equality clause, including a claim for arrears of remuneration or damages in respect of the contravention, may be presented by way of a complaint to an employment tribunal.
...

2A.— Procedure before tribunal in certain cases.

(1) Where on a complaint or reference made to an employment tribunal under section 2 above, a dispute arises as to whether any work is of equal value as mentioned in section 1(2)(c) above the tribunal

may either—

(a) proceed to determine that question; or
(b) require a member of the panel of independent experts to prepare a report with respect to that question;

(2) Subsection (2A) below applies in a case where—

(a) a tribunal is required to determine whether any work is of equal value as mentioned in section 1(2)(c) above, and
(b) the work of the woman and that of the man in question has been given different values on a study such as is mentioned in section 1(5) above.

(2A) The tribunal shall determine that the work of the woman and that of the man are not of equal value unless the tribunal has reasonable grounds for suspecting that the evaluation contained in the study—

(a) was (within the meaning of subsection (3) below) made on a system which discriminates on grounds of sex, or
(b) is otherwise unsuitable to be relied upon.

(3) An evaluation contained in a study such as is mentioned in section 1(5) above is made on a system which discriminates on grounds of sex where a difference, or coincidence, between values set by that system on different demands under the same or different headings is not justifiable irrespective of the sex of the person on whom those demands are made."

Grounds of appeal

22. The Fox Cross claimants grounds of appeal were:

(1)(a) that the ET erred in law in finding the JES satisfied section 1(5), the onus being on the respondent. The ET decided the JES was valid not because it found evidence to that effect, but because it perceived a lack of evidence of invalidity;

(b) that the ET erred in finding the JES valid despite its using generic role profiles, lacking in detail; the allocation of jobs to profiles and to job families was not done using common criteria and all of the factors in the scheme; and the end result produced two scores, a grade and a working context demands (WCD) expressed only as a payment. The failing in regard to role profiles was said to apply the JES to all of the demands of any job. The failure led to a failure to apply a fundamental principle of the recast equal treatment directive, namely that the JES must apply the same criteria regardless of the gender of the person doing the job, as required by the case of **Rummler**.

(c) the ET erred in law in finding nothing suspicious in the fact that gardeners of different grades were grouped together for WCD evaluation.

(2) If the ET was entitled to hold that the WPBR was a study for the purposes of section 1(5) of EQP, it erred when considering whether there were reasonable grounds for suspecting that it was otherwise unsuitable to be relied on, in particular by applying a test of reasonable responses rather than the low threshold test of the existence of reasonable grounds to suspect, and by requiring the claimant to prove unsuitability; by focussing on the results of the scheme rather than be considering its design. Further the ET erred by placing considerable reliance on the existence of appeals within the scheme as evidence of validity and reliability. Further, the ET erred by proceeding on the basis that it could find no reasonable grounds for suspicion

in the absence of expert evidence, and the ET failed to have proper regard to the statistical evidence.

23. The grounds in respect of pay protection were that the ET erred in finding that the discriminatory measures taken were justified. The ET erred by not finding that the Employee Development Scheme was discriminatory as it was not available to those not in detriment. Lastly, the ET erred in finding an insufficiency of evidence on assimilation.

24. The Unison claimants' grounds of appeal were essentially the same. They expanded on the challenges to the ET's findings on the validity of the JES.

25. The only ground on which the GMB claimants proceeded was that the ET had reached a decision that no reasonable tribunal properly directing itself could have reached in respect of justification of pay protection.

The case before the EAT on the validity of the JES - an overview

26. The case for the claimants, put broadly, was that the claimants had a right to a judicial determination of the claims that they had not been afforded equal pay for work of equal value. That is a fundamental right under European law. If an employer claims to have a scheme for valuing jobs, it requires to be a valid scheme, as interpreted in the cases under section 1(5), and be free of reasonable grounds for suspicion of sex discrimination or other unsuitability under section 2A(2A). The scheme in this case had no mechanism to evaluate jobs as required by that section, and was at least such as to raise suspicion of unsuitability, and therefore was not a valid scheme. While the respondent lead evidence about the scheme, no expert was called to speak to its efficacy. The scheme produced two results, one for grade pay and one for WCD pay. That was said to be unusual, and no expert evidence was led to

commend it. Counsel for the claimants criticised the methodology of the scheme whereby jobs were put into role profiles, which were proxies for jobs, and then into job families. They argued that there was no attempt to evaluate the demands of any actual job.

27. The claimants argued that the ET erred in law by reversing the onus and seeking evidence of invalidity or unsuitability from the claimants. It then proceeded to make positive findings as to validity which were based on a lack of proof of invalidity. It erred in respect of expert evidence, by stating that it lacked the necessary expertise to find the scheme invalid without expert evidence. It then found the scheme to be valid, despite its having declared a lack of expertise. Further, the ET applied the wrong test when considering whether there were reasonable grounds for suspicion that the scheme was unsuitable to be relied on, as it sought proof whereas the test was lower than that, requiring only reasonable grounds for suspicion.

28. The claimants' case was put both at a high level of generality and in detail. At the ET, much evidence had been led of the workings of the scheme. Claimants had given evidence about their own jobs with a view to showing that the job evaluation carried out by the respondent had not captured the demands made by individual jobs. Before us, counsel for the claimants made submissions setting out the history and the philosophy of the legislation. They then made arguments on the ET's interpretation of the burden and standard of proof, and also made arguments about the detail of the methodology of the JES and the findings made by the ET relating to that.

29. Mr Bowers, counsel for the respondent, noted firstly the nature of the litigation. The background was that the respondent was engaged in an ambitious project to bring staff and

manual workers together under one pay scheme. It involved around 30,000 employees with 3000 different jobs. Before the review (WPBR) the council operated as collective agreements the blue book for APTC staff and the green book for manual workers. It had a huge task to review all pay arrangements including those inherited from other councils which had been amalgamated into one local authority. The project was the delayed implementation of the national single status agreement known as the red book, dated 1999. That required that a job evaluation exercise was carried out in order that the local authority could implement a new fair and non-discriminatory pay and grading structure. The respondent had a large and disparate work force. The fundamental point counsel made was that it is not necessary as a matter of law to stick rigidly to any particular job evaluation scheme and as can be seen from reported cases, job evaluation is not an exact science. Different schemes are acceptable. The scheme does not require to be perfect and it is almost inevitable that there will be some things in any scheme which could be done better. The respondent decided to use a scheme which had elements of the Greater London Provincial Council scheme, (GLPC) a well-known and often used scheme. The stages of the process involved creating job families, developing role profiles, evaluating role profiles, and allocating role profiles to job families. That process enabled each job to be given a grade score. The respondent then assessed Work Context Demand (WCD) and each job was given a score under that heading. The scheme was developed for the respondent by Dr S Watson, a person with experience in the field of job evaluation. While the scheme was developed for the respondent it used concepts commonly used in such schemes, but the existence of two scores was unusual. The ET heard evidence of the way in which the scheme worked from Dr Watson as well as from employees of the respondent.

30. Before the ET there were 29 witnesses and the case lasted for 37 days, with a bundle of documents exceeding 4,000 pages. Following all of that evidence, the ET found (paragraph 471):

> "that the closing submissions were almost totally devoid of any suggestion that any score awarded to a claimant or comparator was not justified by reference to the demands of the work on the employee."

Counsel argued that the ET had listened to all of the evidence and had then produced written reasons which were logical and fully explained. It made findings in fact about the evaluation of jobs and the allocation of role profiles to job families. That was the proper task of the ET and it could not be overturned on appeal on a factual matter unless it had acted perversely.

Submissions of the claimants in relation to the JES

31. Mr Allen and Mr Dalgleish divided submissions between them to save duplication, having produced a joint skeleton argument.

32. The submissions made in writing and orally were to the following effect. We must construe the legislation by bearing in mind that EU law gives women and men the right to equal pay for work of equal value, putting it broadly. There is a right to have a judicial determination of an assertion of those rights. The effect of the ET judgment is that the claimants have not had a judicial determination. The European Communities Act 1972 provided for equal pay for work of equal value. Article 157 of the Treaty on the Functioning of the European Union (TFEU) provides that that right is to be given legal effect in the UK and must be "enforced allowed and followed accordingly." The case of **Commission of the European Communities v UK** is authority to the effect that the UK has to provide a mechanism for enforcement of the right to equal pay. The right is now set out in Article 17 of the Recast Directive (Directive 2006/54/EC) as follows:

"Article 17

Defence of Rights

1. Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedure for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the alleged discrimination is said to have occurred has ended.

2. Member states shall ensure that associations organisations or other legal entitles which have, in accordance with criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his/her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment."

33. Thus counsel argued that it was essential that a claimant was entitled to a judicial determination of a claim; she could not be denied that simply because an employer claimed to have evaluated her job under a JES. Sections 1(5) and 2A(2A) have to be read as requiring an employer who seeks to use a JES as a shield to show that it does conform to the requirements of the sections. He referred to the case of **Redcar (no 1)** and to **Alabaster v Barclays Bank** as cases where UK legislation was read in such a way as to conform with rights provided by EU law.

34. The ET erred by accepting as valid a JES which produces two separate assessments following different processes which cannot be cross referred. The effect of such a scheme is to preclude an employee knowing if her job has been rated as equal to another person's job. In the system put before the ET it found that in order to understand what a worker would be paid she had to look to three different processes which are WPBR, WCD, and a tariff which is concerned with non-standard working practices, referred to as NSWP. The first two have some evaluative process in them; the third does not. The ET took out of consideration the third and surveyed the way that the other two worked. No argument was presented to us on the lack of any decision on NSWP, and so we say no more about it.

35. Counsel argued that the ET had found that the scheme evaluated some demands in one way, producing grade pay, and some in another, producing WCD pay. That meant that there were two systems of evaluation, which produced a result which did not give an answer to the question which is vital in all cases: is the female's job of equal value to the male's job? It is a problem if the female's job might be of greater value under one of the two systems and less value under the other, but there is no way of moderating the two systems. Counsel argued that a scheme had to produce a result which could be evaluated by the court. If the system used by the respondent does not comprehensively answer the question, it gives an outcome that could not be reached lawfully by judicial process. Under reference to EQP section 1(5) he submitted that the subsection refers to "an equal value" and not a series of values. In response to Mr Bowers' submission on the Interpretation Act 1978, counsel argued that this was a situation in which the context indicated otherwise, and so the singular should not be read so as to include the plural.

36. The scheme methodology involved developing a role profile, which was not a description of the demands of a job, but rather a proxy for several jobs. The method by which this was done was found by the ET to be novel and untested; nevertheless the ET found that the claimants had not shown it to be invalid. The ET had misunderstood the challenge made to the design of the scheme. It proceeded to look at the results of the scheme, and found no visible errors. From that it concluded that there were no errors. The ET frequently referred to a lack of expert evidence from the claimants; it was in error in doing so as it was not for the claimants to show that the scheme was invalid. Instead the onus lay on the respondent to show it was valid under section 1(5). The ET further erred by placing considerable weight on the existence of an appeal mechanism in the scheme; it failed to put

appropriate weight on unchallenged evidence that no records were kept of allocation to job families, thereby rendering appeal difficult, and further no records were kept of appeals. There were no set conventions for the work of allocation and evaluation. It was unlikely that several people working on the scheme with no agreed conventions would apply it consistently.

37. Counsel then addressed section 2 and submitted that the ET had erred in applying section 2A(2A), by seeking proof from the claimants of the scheme being unsuitable, whereas the test was whether there were reasonable grounds for suspicion of its unsuitability. The legislation provided that if an employer had a JES compliant with section 1(5), the ET still had to check to see whether the JES was "otherwise unsuitable to be relied on". The system itself must exclude discrimination. In recital paragraph 9 of the recast Directive, 2006/54/EC is stated

> "…in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and training and working conditions, those workers may be considered to be in a comparable situation."

That lent support to his argument that the value of work must be assessed in a single scheme. Thus to evaluate whether workers are receiving equal pay for equal work, there must be a comparison of total pay of the workers in one self-contained scheme.

38. Mr Bowers argued that no such argument was made before the ET, and that it could not be introduced before us. We can find no trace of any such argument in the ET's judgments and we are therefore not prepared to entertain it now. We were not fully addressed on it but it is at least not obvious to us that the terms of the Directive are such as to proscribe the form of a JES in the terms suggested by Mr Allen.

39. We did not understand counsel to be in dispute on the correct interpretation of section 2A(2A). We can deal with this as a separate matter, because in the end we do not understand there to be a dispute. We accept the exposition put before us, which we set out. Mr Allen submitted that the effect of the original section 2A resulted in long equal pay cases where the ET heard from experts. The introduction of section 2A(2A) allowed the ET to determine whether a JES is compliant without remitting the case to an expert. He submitted that the scheme in this case is novel, and is truly complicated. The JES is made up of at least two or perhaps three components. He anticipated that Mr Bowers for the respondent would argue that the respondent has many staff and it is therefore very complicated. He argued that is true, but is not a defence to the point.

40. Mr Bowers submitted that even if there is a valid JES that is not the end of the scrutiny by the Tribunal. Section 2A(2A) enables there to be exceptional cases where there is a valid JES but the Tribunal has reasonable grounds for suspicion that either the system discriminates on grounds of sex or that the evaluation is such that there should be reasonable grounds for suspicion that it is "otherwise unsuitable to be relied on".

41. He argued that Parliament was required to bring this section in by Council Directive 75(117)/EEC. This can be seen in the case of **Rummler v Dato-Druck GmbH ECJ [1987] ICR 774**. That the case involved a consideration of article 1 of the Directive which is in the following terms:

> "The principle of equal pay for men and women outlined in article 119 of the Treaty, hereinafter called 'principle of equal pay' means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.
>
> In particular, their job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex".

42. In the case of **Rummler**, the court had to consider a job classification system which provided for increased pay in proportion to increased muscular effort. The court was concerned about that because in general terms increased muscular effort is more likely to be found in men than in women and so such a scheme might lead to a breach of article 1. The local court therefore referred certain questions to the ECJ. The court between paragraphs 13 and 25 found as follows:

> "17. The answer to question 1 must therefore be that Council Directive (75/117/EEC) of 10 February 1975 on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women does not prohibit the use in a job classification system for the purpose of determining rates of pay, of the criterion of muscle demand or muscular effort or that of the heaviness of the work if, in view of the nature of the tasks involved, the work to be performed requires the use of a certain degree of physical strength, so long as the system as a whole, by taking into account other criteria, precludes any discrimination on grounds of sex …
>
> 23. The Directive lays down the principle of equal pay for equal work. It follows that the work actually carried out must be remunerated in accordance with its nature. Any criterion based on values appropriate only to workers of one sex carries with it a risk of discrimination and may jeopardise the main objective of the Directive, equal treatment for the same work. That is true even of a criterion based on values corresponding to the average performance of workers of the sex considered to have less natural ability for the purposes of that criterion, where the result would be another form of pay discrimination: work objectively requiring greater strength would be paid at the same rate as work requiring less strength.
>
> 24. The failure to take into consideration values corresponding to the average performance of female workers in establishing a progressive pay scale based on the degree of muscle demand and muscular effort may indeed have the effect of placing women workers, who cannot take jobs which are beyond their physical strength, at a disadvantage. That difference in treatment may, however, objectively justified by the nature of the job when such a difference is necessary in order to ensure a level of pay appropriate to the effort required by the work and thus corresponds to a real need on the part of the undertaking: see *Bilka-Kaufhaus GmbH* v *Weber Von Hartz* (Case 170/84) [1987] ICR 110. As has already been stated however a job classification system must insofar as the nature of the tasks in question permits, include other criteria which serve to ensure that the system as a whole is not discriminatory.
>
> 25. The answer to the second and third questions must therefore be that it follows from Council Directive (75/117/EEC) that (a) the criteria governing pay rate classification must ensure that work which is objectively the same attracts the same rate of pay whether it is performed by a man or a woman; (b) the use of values reflecting the average performance of workers of one sex as a basis for determining the extent to which work makes demands or requires effort or whether it is heavy constitutes a form of discrimination on grounds of sex, contrary to the Directive; (c) in order for a job classification system not to be discriminatory as a whole, it must, insofar as the nature of the tasks carried out in the undertaking permits, take into account criteria for which workers of each sex may show particular aptitude".

43. Mr Bowers argued that sections 2A(2A)(a) and 2A(3) represent the UK Government response to the requirement of enabling employees to argue that the evaluation "was otherwise unsuitable to be relied upon". Unsuitability is confined to the individual evaluation

rather than the whole system. The concept of reasonable grounds for suspecting this was introduced by the Equal Pay (Amendment) Regulations 2004. Mr Bowers argued that in the case of **Fox Campbell & Hartley v UK (1991) 13 EHRR 157** the definition of reasonable grounds for suspecting was given as the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.

44. Thus Mr Bowers argued that the existence of section 2A(2A)(a) and (b) requires the ET to satisfy itself that there are no reasonable grounds for suspicion either that the system is influenced by sex discrimination or that a particular evaluation is not suitable to be relied on.

45. We accept counsel's submissions and do not find any dispute.

46. Returning to matters in dispute, on the burden of proof, counsel for the claimants argued that the case of **Bromley v Quick** was clear authority that onus was on an employer to show that there has been a job evaluation study which satisfies the requirements of section 1(5). Counsel emphasised that because a study can operate as a shield for an employer it is all the more important that it is properly devised, and then properly tested by the court.

47. The ET was said to have erred in paragraphs 376 to 377 and 380. In case management prior to the hearing, the EJ had enquired if parties intended to lead expert evidence and had been told they did not. At paragraph 376 the ET recognised that a job evaluation leading to two separate points values was novel. It then stated at paragraph 377:

> "377. In the tribunal's judgment, the answer to the question lies within the technical expertise of an expert on job evaluation. None of the parties have called an independent expert who could provide the tribunal with an opinion as to the legitimacy of using this technique. The absence of expert opinion evidence to assist the tribunal and to provide a proper foundation for submissions by counsel was a frequently recurring issue in that the Tribunal's deliberations as, indeed, it had been in questions from the bench during the course of the hearing."

48. Counsel argued that the ET required the claimants to bring evidence to show the invalidity of the scheme, thereby inverting the onus. If the ET thought that expert evidence was needed and none was brought, then that should be to the disadvantage of he who asserted the validity of the scheme, that is the respondent. At paragraph 378 the ET stated as follows:

> "378. The tribunal takes this opportunity to set out its position in relation to expert evidence. As will be apparent from these reasons, the Fox claimants and the Thompsons claimants mounted an attack on the respondent's methodology that was, at least in part, a rather technical attack on the design and application of that methodology. The Tribunal has been shown first instance decisions made by Employment Tribunals in England considering the validity of differently designed methodologies and written guidance offered by the EHRC and the English local government National Joint Council and the Greater London Provincial Council. None of these sources have considered the methodology employed by the respondent. Counsel's submissions do not amount to evidence. The members of the tribunal have an acquaintance with the principles of job evaluation but none of the members would hold themselves out as experts in that field. The Tribunal can no more be expected to rely on its own knowledge to reach conclusions about technical matters within the professional competence of those qualified, trained or experienced in the practice of job evaluation than would a court dealing with the nature, extent and consequences of a personal injury be expected to have sufficient knowledge of medical matters without the evidence of experts."

Thus the ET was entitled to take the view that expert evidence was needed but as the onus was on the respondents that did not enable the ET to decide, in the absence of expert evidence as to invalidity, that JES was in fact valid.

49. Counsel referred to paragraph 442 in which the ET found that the absence of independent experts resulted in some difficulty. It found that it lacked the experience to fully evaluate Dr Watson's judgment in the abstract. Nevertheless, in paragraphs 445 and 446 the ET took the view that because there were no outcomes which they regarded as questionable ultimately they could find that the scheme was valid. Counsel argued that the ET erred in law by doing so in as much as it reverse engineered the scheme, as well as putting the onus on the wrong party. At paragraph 470 the ET returned to the question of the claimant's failure to call an expert witness. It noted that it would have allowed the claimants to call an expert witness as the tribunal

> "can no more be expected to carry out its own evaluation armed only with a factor plan and a role profile than could a judge in the civil courts be expected to make an assessment of the nature and extent of some personal injury armed only with some x-ray plates and laboratory test results."

Nevertheless, by paragraph 531 the ET decided that the respondent had not made any errors in the allocation or evaluation exercises. They found that there was no expert evidence to undermine the assessments made. At paragraph 548 the ET came to the view that the question whether the information contained in the role profile is properly to be regarded as sufficient to enable an evaluation to be carried out is a technical matter in respect of which the evidence of an expert is required. The ET found that it had nothing more than the assertion of counsel [for the claimants] that the role profile was not fit for the purpose to which it was put. At paragraphs 549 to 550 the ET found that the claimants' failure to say how the jobs "ought to have been scored along with the claimants themselves being perceived to have accepted the score" is positive proof that the scores were correct. Counsel argued that that showed two errors, firstly the confusion between design and implementation challenge, and secondly requiring the claimants to prove invalidity.

50. The claimants raised a question about grade boundaries, the point being that they sought to argue that a valid scheme would have testing of boundaries to see whether there were clusters of people of either sex just above or just below grade boundaries which might suggest discrimination. The ET found at paragraph 690 that there was no evidence, expert or otherwise, about this. At paragraphs 698 and 701 the ET relied on that lack of evidence to make a positive finding. In summing up, the ET at paragraph 713 relied on Dr Watson's evidence and the failures of the claimants to call any other expert to express contrary opinion. Counsel argued that the ET was in error by finding that the methodology was sound due to an absence of proof that it was not. Counsel for the claimants submitted that the analysis by the ET was superficial and self-fulfilling. The ET directed itself that in several crucial issues it required expert evidence but then proceeded to find that the scheme was valid without any such evidence.

51. In attacking the rating mechanism of jobs found by the ET to be valid, counsel argued that the ET had found that the scheme gave a rate for the job despite the fact that there was no defined mechanism for converting the separate scores under grade and WCD into a single combined score, as set out at paragraphs 382 to 390 and paragraph 37 in the second judgment. Counsel argued that the ET found a scheme for rating which was not provided for in the JES. That much was clear, given that the ET found that there were various ways in which it could be done. In selecting a method, the ET cured a fundamental defect in the scheme and validated it.

52. Counsel referred to **Eaton v Nuttall** for the proposition that there should be no subjective judgment by management about the work; if that was required, then it was not a valid scheme. He argued that **Bromley v Quick** showed that the jobs all had to be evaluated under the same headings. He drew attention to **Springboard**, noting that the full results of the scheme have to be considered.

53. In the current case, the first stage is that core pay is determined by giving a grade. The jobs are put into role profiles which operate as a proxy for individual jobs. It is the role profile that is evaluated, not the job. There could be varying numbers of jobs comprised within a job profile; in discussion counsel accepted that some job profiles might contain few jobs. The jobs were grouped by management. No notes were kept of how that was done and so the ET was not given evidence to show how it was done.

54. In discussion counsel agreed that the ET could look at the results of a JES, but he maintained it must not put too much weight on them. At paragraph 447 and 448 there was a discussion about a crèche assistant compared to a car park attendant. Counsel explained that

that was a direct challenge in which the claimants offered to prove that those two should not have ended up in the same job profile. He argued that the respondent had the burden of showing why they were in the same grade. Counsel argued that the ET misunderstood what the claimants had to do in respect of expert evidence. They did not have to suggest that another result would have ensued. They argued that the methodology itself was not a good methodology rather than that it had been used wrongly.

55. The claimants did not have to show that the scheme was incompatible with section 1(5); rather the employer had to show that it was compatible. In interpreting section 2A(2A), the ET asked itself the wrong question. Counsel argued that in paragraphs 516 to 564 the ET set out the correct test, in that they did know that they had to ask if they had grounds for suspicion. They found that they did not. He argued that they erred in that because they based it on the results. Counsel argued that there were no definitions and protocols for the respondents to work to; it was unrealistic to think that many people operating a scheme over a number of years with no conventions and definitions would all act consistently. His submission to the ET is quoted as being that each decision should have had full written reasons, but he submitted that was a misunderstanding; he had simply sought short reasons for decisions. In any event he submitted that the ET were wrong to say that an award of points is enough because an employee will know the evaluation was for example 8 points. That is not enough; an employee is entitled to know why she got 8 points. The finding at 595 was an example of reverse engineering and an explanation of the appeal and review process. That process lacked records.

56. Paragraph 604 showed that the ET found that as it had no examples of people being put in the wrong group, it was not prepared to find that any errors had been made. Counsel

argued that was another example of the ET getting the onus wrong. In paragraphs 620 to and 622 the ET found no reasonable grounds for suspicion by finding no inconsistency in results. That attitude is further explained by the ET under the next heading, "The consequences of failing to follow wise guidance" in which the ET discusses a submission put to it by counsel that the respondent had failed to follow good practice guidelines and other guidance. The ET stated at paragraph 624 that it makes a distinction between the risk that an outcome may result if some step is not taken and the event of which there was a risk actually eventuating if the step was not taken. They regarded the respondent's failure to take steps that wise guidance suggests should be taken as not immaterial, but as only part of the picture. The ET states at paragraph 625 that the:

> "claimants are not required to show on the balance of probabilities that the evaluation is unsuitable to be relied upon; showing reasonable grounds to suspect is enough."

It finds that the claimants have not however shown that adverse consequences have eventuated from any failure to follow wise guidance.

57. The ET in paragraph 706 onwards gave its findings on compliance with sections 1(5) and 2A(2 A). It found that the evaluation was analytical and thorough; that those carrying it out were diligent and that the outcomes were consistent. At paragraph 713 the ET noted that the scheme but was novel and untested, but found it had been put to the test by the ET in the hearing. At paragraph 714 the ET explained in its view about the different standards and burdens of proof. It stated as follows:

> "In considering the ….evaluations generally, the Tribunal has had to wrestle with different standards and burdens of proof. The claimant seeking to rely on an equivalent rating pursuant to section 1 (2) (b) EQP must prove on the balance of probabilities that the work of the claimant and that of the comparator must have been given an equal an equivalent rating under the study of a kind contemplated by section 1 (5) EQ P. A respondent seeking to rely on an equivalent rating to defeat an equal value claim made pursuant to section 1 (2) (c) bears the burden of proving, on the balance of probabilities, that the job of claimant and comparator have been rated as equivalent under a study of a kind contemplated by section 1 (5) EQ P. Even if the respondent proves that fact, the claimant will not be prevented from pursuing an equal value claim in respect of a comparator given a different rating if the claimant discharges the burden of showing reasonable grounds to suspect either discrimination (as defined in section 2 A (3) EQ P) or unsuitability."

Counsel's position was that while the ET had correctly set out the standards and burdens of proof, it had not correctly followed its own self-direction.

58. Counsel argued that the position of the gardeners was that those in grades 1 to 5 all got the same WCD score. He argued that the evidence given was such as should have raised a suspicion in the minds of the ET. He referred to their findings at paras 691 to 693. He argued there had been evidence that grade 3 upwards had to have vocational qualifications, which grade 1 and 2 did not. Those latter grades did repetitive work under the control of others. He argued that despite these differences they all got the same score and so it did not make sense for the ET to say at paragraph 693 that there was no cogent evidence that there should be a difference.

59. Counsel for the Unison claimants did not insist on the argument said to have been made at the ET that under section 2A(2A)the onus was on the respondent. He accepted that the claimants had at least a burden to raise matters from which suspicion might ensue. He advised that he did not recall taking a stand different from Mr Galbraith –Marten at the ET, despite the ET's report to that effect at para 76. He invited us to find that the ET had applied too high a standard of proof. The ET sought cogent evidence whereas all they had to reach was a suspicion.

60. Counsel had argued at the ET that the design and implementation of WPBR and WCD favoured male workers. By invitation of the ET, parties had presented an agreement on statistics, set out in paragraph 629 and following paragraphs. The ET did not find the agreement helpful, partly because it was in conflict with a production which counsel referred to (see paragraph 635). In any event the ET noted counsel's submission at paragraph 641, to

the effect that an ET can find disparate adverse impact on one sex on the basis that a smaller number or proportion of women than men receive a particular payment.

61. The ET disagree, explaining under reference to **Enderby** and the EOC Code of Practice on Equal Pay the necessity of finding that jobs of equal value are being considered. The ET then discusses examples of jobs where the demand on the employee varies according to, for example, the need to work permanent night shift. At paragraph 66 the ET found that no expert evidence was led by the claimants to show that any WCD payment had been wrongly evaluated. It was suggested in cross examination that things were not as they should be, but the ET did not find any admission made by the respondent as a result. Nor did it find any evidence from which it inferred the mistakes were made. It found at paragraph 669 that the claimants sought to have the ET make a decision about the points which should have been awarded; that it was not prepared to do. It considered the examples given by the claimants and found nothing suspicious about them; absent expert evidence it concluded there were no grounds for suspicion.

Submissions of the respondent in relation to the JES

62. Mr Bowers submitted that the key to understanding this scheme is to see WPBR as a review of pay and conditions on a huge scale. The ET made findings about the methodology of the JES they were entitled to find. The grade factors were evaluated in accordance with 8 of 11 factors in the London scheme, which scheme is not criticised. The ET found that WCD points were evaluated according to an expanded version of that scheme.

63. Counsel argued that an Employment Tribunal can only decide on the evidence presented before it. There was a lack of evidence from the claimants, and while they were

entitled to proceed by cross examination, the ET had not found any support for their assertions from answers in cross. As an example he referred to the claimants' complaints about appeals, and noted in paragraph 8 on page 59 an explanation of the ET considering all of the evidence and submissions made and finding in favour of the respondent.

64. Mr Bowers reminded us that the decision must be read as a whole. He confirmed that we should read both judgments together. He referred to the cases of **Aslef v Brady** and **Fuller v Brent** as authorities which are clear that ET judgments must be read as a whole, and that some infelicities of expression may be expected. While some of the ET's findings about its ability to make findings without expert evidence might at first blush appear to suggest that they had inverted the onus, a careful reading showed that they had not. He argued that the only errors in law raised in this part of the case were in relation to the onus and standard of proof and to two values being part of the scheme. All the other issues are issues of fact for the tribunal. There was no ground of appeal that the decision on statistics was perverse, presumably because the ET had shown it understood the situation and gave full reasons for its decision. Mr Bowers referred to the case of **Jafri v Lincoln** at paragraph 53 in which the judge refers to the Employment Tribunal as an industrial jury and the EAT as a legal supervisor. This point is also made in the case of **Bromley v Quick**. It was particular apposite in this case where the lay members and indeed the chairman of the ET were very experienced at job evaluation.

65. He then turned to the connection with European law and said that this is a job classification scheme and that is not only permitted but encouraged by EU law. The **Commission v UK** case has nothing to do with the present case. It concerns a time at which the Court found that the UK legislation was insufficient; it was amended and is now compliant with European law. Counsel argued that the submission that there was no judicial

determination in this case was wrong. There was an ET which lasted for 37 days. There was a judicial determination of whether it was a valid scheme, which was suitable and which did not have discrimination built in. He then referred to the case of **Alabaster**; it found that the Employment Rights Act 1996 did not provide a suitable remedy for the employee. That is the ratio of that case and it does not apply to this case.

66. Counsel accepted that the scheme could be described as a "pioneering" scheme. Of course an employer takes a risk when introducing a new scheme; the ET knew that. However the whole point of permitting variation is that large employers can be different from small employers and the only question is "Does it pass muster?" The ET was fully alive to the points that the claimant's representatives were making; Dr Watson was in the witness box for six days and Mr Murray, the official of the respondent who explained the work done by the respondent, for seven days. Counsel argued that the ET were entitled to accept Dr Watson's evidence about his previous employer's practice. In any event the ET took a careful view of Dr Watson's evidence and did not accept all that he said. An example of that is at paragraph 411 where they found his view not to be sound. They counselled themselves against putting too much emphasis on his evidence. In paragraph 442 the ET gave its view of Dr Watson's expertise. The ET stated that if the claimants had put up an expert the whole hearing could have taken a different course, but they did not.

67. Counsel argued that the ET set out clearly the scheme which it found to exist. At paragraph 280 of the ET judgment there are five important stages set out. The first one concerns job families. All role profiles were evaluated by reference to all of the GLPC scheme, except the WCD points. Not a single point was taken by the claimant's representatives against the way that was done. All sample claimants were found to have

appropriate role profiles. Therefore the present case is very far removed from the case of **Bromley v Quick** where the claimants' jobs were not evaluated.

68. At paragraph 418 of the judgment the ET found that the allocators, of whom there were 20, had to put the job profiles into the correct family. Paragraph 423 sets out the method and counsel emphasised that evaluation in the context of job families is not a new approach. He submitted that the ET properly considered the interconnection and separateness of evaluation and allocation as can be seen at paragraph 549 and 558.

69. According to Mr Bowers it was a feature of Mr Dalgleish's submissions that there was no testing therefore the scheme is inappropriate. In paragraph 577 it is found that failure to test does not give reasonable grounds for finding suspicion. This is an exercise of judgment by the tribunal. It is not susceptible to review by the EAT.

70. At paragraph 595 the ET correctly said that they could only rely on an appropriate comparator. The allocation toolkit was discussed and it was not correct to say that there was no evidence as to the reasoning, as Dr Watson gave such evidence. He was cross-examined and the ET picked up his explanation at paragraph 406 showing that they had thought about it and accepted it. He emphasised that job evaluation is not about what the employee actually does but about the demand that the job makes. At paragraph 407 of the ET judgment they set this out properly.

71. Counsel argued there is nothing to prevent an equal value having two subsets. He referred to the Interpretation Act 1978 which provides that unless indicated to the contrary, the singular includes the plural. In the second judgment from paragraphs 27 to 37 the ET

found that the two-factor plans read together deliver "a rating". There is no battle between the core pay and WCD pay as they are co-existing mechanisms combining to set pay. That is consistent with the decision in the Springboard case.

72. Mr Bowers referred to the cases of **Dibro**, and to **Eaton v Nutall** for the appendix which sets out a different range of ways of doing this task. Each way of doing it is as good as another. He referred to was **England v Bromley** as authority for the proposition that one may modify a scheme and test it by the modification. The scheme in that case was the forerunner of the London scheme and the dissatisfied worker tried to argue that he had been wrongly classified. He did not succeed in that because it is up to the employer to decide what scheme to use, and it is for the ET to decide if the scheme chosen by the employer is valid. He then referred to the European case of **Rummler** arguing that at paragraph 16 it is stated that the national court may determine on a case by case basis whether it has been an effective scheme. Counsel referred to the case of **Bromley v Quick** and pointed out that the jobs were not evaluated at all and that is why the court found that it was not a valid scheme. He argued that the case of **Diageo** was authority that it was not for the ET to ask if it is a good or a bad scheme, but rather simply is it analytical and impartial?

73. He then turned to authorities on section 2A(2A). In order to have a suspicion, there must be facts causing suspicion. He submitted that the ET was right at paragraph 81 that it was a question of fact; it was appropriate to find facts; and they were wholly alive to the fact that this was a low threshold test.

74. On the onus of proof, Mr Bowers' submission was that the ET properly directed itself and there was no misapplication of any direction though he accepted that there were some

infelicities of expression which he said was not unexpected in such along judgment. He argued that it was unusual that the onus of proof would actually have any impact once the evidence was out.

75. We understood counsel to be agreed that an employee bringing a claim has to show that the comparator is paid more than her. The onus is on the claimant. The onus is on the respondent in section 1(5) to show that they do have a compliant scheme. The onus on section 2A(2A) is on the claimant.

76. Mr Bowers agreed that the ET was fully alive to this as can be seen from paragraph 714, in which he argued that the ET had directed itself correctly. Counsel referred also to paragraphs 40 and 74 which set out the understanding of the ET as regards section 1(5) and section 2A(2A). Both of those paragraph showed that the ET understood the position. He argued that the ET rejected the submission made by Mr Dalgleish at the ET about onus, on which he no longer seeks to rely. At paragraph 90 they set out correctly where the burden of proof lies. They gave themselves correct direction at paragraphs 101, 103 and 106. Therefore counsel argued that the claimants had not shown that the ET had made any error of law. At paragraph 393 the ET set out correctly its understanding of the way in which various methodologies may be used in job evaluation. He submitted that the way that we should read this is that the ET would have preferred expert evidence but as none was led they did the best they could.

77. At paragraph 690 the ET found that there was no evidence led before them to show that those with the equal levels of demand were given an unequal ratings or those with unequal levels of demand were given equal ratings or that the dividing line between the levels

had been drawn so that an important predominantly female group fell just below the WCD boundary or an important predominantly male groups fell just above it. Mr Bowers submitted that the claimants could lead such evidence and use such comparators as they thought fit; they had failed to lead any evidence which would enable the ET to make the findings that they sought. The ET made detailed findings at various places, for example paragraphs 147 and onwards and paragraph 477 and onwards where they set out detailed findings in fact. At paragraph 479 they had no hesitation in rejecting the evidence of Mrs Peters and at 482 and 489 they did not believe Mrs Green, and at 492 she accepted was put to her in cross examination by him. Detailed findings were made at paragraphs 516, 518, 531, 532, 552, 553 and 556. All of these conclusions show that role profiles were accurate; they were done under a valid scheme and there is no error in law.

78. Mr Bowers submitted that the question about the gardeners was a matter of judgment. The conclusion is not perverse when one understands three things about the evidence as follows: (1) we are looking at the demands made by the job not by the actual work; (2) Mr McLelland's evidence about scores is not sinister; and (3) many senior gardeners would be required to do the more manual work. Counsel referred to the evidence to the effect that the respondent needed operational flexibility. The gardeners were considered as a group. The ET was entitled to find this acceptable. There was no error of law.

79. Regarding at the argument about experts Mr Bowers summed up as follows. The difference between the parties was that the respondent could have presented expert evidence but did not; the respondent did however present a large amount of positive evidence including Dr Watson who was experienced on the facts of the case although he was not an expert witness. The claimants in contrast did not present any supporting evidence. What

they sought to do was to advance their case by skilful cross-examination over many days taking the risk that cross-examination may not take yield any evidence contrary to that led in chief. That was the result found by the ET.

80. The ET note that the claimants make technical attacks on methodology and so that is why the ET might expect there to be expert technical evidence. At paragraph 430 the ET did its best absent expert evidence. At paragraph 531 it made findings in fact, noting that there was no expert evidence to undermine the assessments. Similar findings are made at paragraphs 547 and 548. At paragraph 672 the ET say that they would not accept an attack without expert evidence. At paragraph 713 they realise that Dr Watson is not an expert and that they accept that they just had to do the best as they could.

81. We find that the ET heard evidence from Dr Watson, who was the person employed by the respondents to devise the scheme. It was clear that he did not give evidence as an expert. He did however give evidence that his former employers, Hay, had employed the approach of taking in two separate evaluations such as those used by the respondent. The ET found "in the absence of any evidence to the contrary" it could and should draw an inference that the technique of using two points scores to produce two elements in the pay package is legitimate.

82. Mr Bowers argued that the ET were correct in their analysis of the law on statistics. The case of **Nelson v Carillion** paragraphs 92-95 is important because the point is not grappled with by the claimants. Statistics are only of use in equal value claims: **Enderby**. Between paragraphs 626 and the ending of the chapter the ET look at the statistics in detail. They do not find what the claimants seek to show. At paragraph 645 they see it as a matter

that requires enquiry. The ET decided that did not have enough material to reach Mr Dalgleish's proposed findings.

83. Counsel summed up on the ET judgment by saying this was a massive case which needed enormous reserves and skill in case management. There were many issues and evidence both oral and documentary. The judgment is logical and coherent and deals with it all. It must be read in light of the arguments put before it.

84. The conclusions regarding section 1(5) and section 2A(2A) are set out in the findings from paragraph 706 onwards. The ET found that the grade factor plan and the WCD factor plan were both used to look at the demands made on the employee by the job in question. In paragraph 708 the ET finds the study is analytical, at 709 it finds it is not slapdash, at 710 it finds it is objective, at 711 it finds that the outcomes were consistent, and at 712 the ET finds that the respondent has shown that the claimants and comparators were rated in a way that complies with section 1(5) of EQP.

85. The ET continued in paragraphs 713 to 725 to give detail of its findings and self-directions on the burden, which is on the respondents to show validity and on the claimants to raise questions concerning grounds for suspicion. It found at paragraph 717 that the system had been put to the test in the hearing. The ET found no evidence that suggested discrimination. At paragraph 722 the ET stated clearly that the claimants were relieved by the legislation of any need to proof discrimination or unsuitability on the balance of probabilities. The ET sums up in paragraph 724, finding that the JES is valid and raises no grounds for suspicion. No errors of law were made.

Reply for the claimants

86. In reply counsel for the claimants argued that the London scheme had been re-engineered and broken up by Mr Watson, but no evidence of the underlying analysis was led. The claimants made a design challenge but the ET blurred the line between implementation and design. The ET failed to distinguish between design and implementation. Fundamentally, they failed to apply the tests set out in section 2A(2A) to the design questions and misapplied the evidence and have misdirected themselves.

87. Mr Allen argued that the case of **Commission v UK** was certainly relevant; the ET knew that it was involved in EU law. A worker is entitled to claim before an appropriate authority. It becomes incompatible with EU law if an employee is effectively prevented from having a judicial determination. Therefore if the tribunal says, as he argued this one does, "I do not know how it is structured but it looks all right" it is not enough. He reminded us that this is a very low standard; simply reasonable grounds for suspicion.

88. Mr Allen argued that the grade factor of a job could be "a" and the WCD could be "z". Another job could have a grade factor "b" and WCD "y". The difficulty is that you cannot compare of these.

89. In relation to expert evidence, paragraphs 378 and 548 show that the ET was not willing to conclude it understood exactly what the merits and demerits were absent evidence. The only conclusion it could reach was to accept that it needed expert evidence

An overview of the ET's reasons

90. Counsel for all of the parties accepted that the ET had given itself correct directions in various places throughout its long judgment; they disagreed however on whether the ET had followed those directions. It is useful to set out the most important directions given by the ET. The controversy about the JES is described thus at paragraph 17:

> "At the heart of the WPBR lies what the respondent contends is a valid job evaluation. In very broad terms, there were issues as to which parts of the respondent's WPBR payment system were determined by job evaluation; whether the evaluation was of a kind that satisfied the test in section 1 (5) of EQP; whether that evaluation could be relied upon as between claimants and comparators; and whether there were reasonable grounds to suspect that the process failed one or both of the tests in section 2A (2A) EQP."

The ET appreciated that the claimants criticised the methodology of the JES as well as the way in which it was implemented, stating in paragraph 18:

> "The tribunal's approach was to make findings in fact as to the elements in the WPBR pay package and the way in which those elements came to be determined. In doing so, the tribunal made findings in fact as to the design of what was said to amount to the job evaluation methodology and to the way in which that methodology was applied. The tribunal had before it the criticisms of the methodology and the way in which it was applied and, in making its findings in fact, the tribunal had regards to the facts it could properly find material to those criticisms."

The ET directed itself in paragraph 37 onwards on the requirements of a JES contemplated by section 1(5) of EQP. It stated that the claimant's job and that of her comparator must have been given an equal value, in terms of the demand made on the worker under various headings (for instance, effort, skill, decision) on a study undertaken with a view to evaluating the jobs in those terms. It reminded itself that the evaluation is not of the work but of the demands made on the worker in carrying out the work.

91. In considering the task of job evaluation, the Tribunal found that it is not a precise science and that there is no generally accepted method by which the valuation must be carried out. There are no standard factors and no established rules to guide those who design evaluations. The ET reminded itself that the law requires equal pay rather than fair pay. The test of a JES is whether the methodology complies with sections 1(5) and 2A(2A) EQP. The

ET referred to the case of **Eaton v Nuttall**, setting out the appendix from that case which gives a brief description of methods of job evaluation. In paragraph 40 the ET reminded itself of the finding in that case that:

> "To satisfy section 1 (5) a study must satisfy the test of being thorough in analysis and capable of impartial application. It should be possible by applying the study to arrive at the position of a particular employee at a particular point in a particular salary grade without taking other matters into account, except those unconnected with the nature of the work (see **Eaton Ltd v Nuttall**)."

The ET then considered the case of **Bromley v Quick**, recognising that as an important decision on job evaluation. The ET recorded the submission made by Mr Galbraith-Marten (counsel then appearing for the Fox Cross claimants) at paragraph 55 to the effect that a job evaluation study may only be relied upon where the woman's job and the man's job are actually evaluated. It gave its answer to that submission at paragraph 58 where it stated:

> "The issue that the court was considering was whether the claimants' jobs and the comparators' jobs have been evaluated in a study which satisfied the requirements of section 1 (5). The question that it was necessary for the court to ask in order to determine that issue is whether the comparators' jobs had been rated in a single such study. The answer, on the facts, is that none of them had. In the tribunal's judgment, the ratio of **Bromley** is that a job evaluation study cannot be relied upon for the purposes of section 1 (5) or section 2 A (2A) EQ P if the job of the comparator has not been rated on a study that evaluates their jobs in terms of the demand made on a worker under various headings (for instance effort, skill, decision.)"

The ET listed points which were *obiter* in that case but which it regarded as important. As these were not in dispute before us it is not necessary to quote the list; but we mention point 8 at page 19 of the ET reasons, as follows:

> "In practice, where there has been a job evaluation study and there is evidence from the employer as to how that study was carried out, the claimant might to (sic) point to particular matters as indicating, or possibly indicating, that the system involved direct or indirect sex discrimination. Natural justice will then require that the employer be given an opportunity of explaining these matters. In some cases it may be easy for an employer to show that some point taken is based on a misunderstanding of what happened or of how some figures were worked out. In other cases the point taken in may be more difficult or impossible for the employer to surmount. It will be for the Employment Tribunal to decide, at the end of the hearing, whether or not they are satisfied that there are reasonable grounds to suspect that the evaluation made in the study was made on a system which discriminated on grounds of sex."

We quote that paragraph because the claimants argued that the ET wrongly put the onus on them. It seems to us that the ET, in the paragraph quoted above, sets out its understanding which requires to be borne in mind when deciding if the ET erred in respect of onus.

92. At paragraph 63 the ET referred to the case of **Diageo plc v Thomson** and listed principles it took from that case which included that the study must be thorough in analysis and capable of impartial application. It noted that almost every study could be subject to suggestions that it had some defects but that will not necessarily render it invalid. The question will always be whether the study is thorough in analysis and capable of impartial application. We do not understand this self-direction to be in dispute.

93. At paragraph 74, the ET set out correctly the effect of section 2A(2A) which is that an evaluation cannot be relied upon to defeat an equal value claim made by a claimant who relies on a comparator whose work has been given a different value if the tribunal has reasonable grounds to suspect the evaluation is made on a system that discriminates on the grounds of sex (the discrimination test) or the evaluation is otherwise unsuitable to be relied on (the suitability test). It is not necessary for claimant to prove on the balance of probabilities that an evaluation fails the discrimination test or the suitability test. It is enough that there are reasonable grounds for suspecting that the evaluation fails one or both.

94. At paragraph 76 the ET notes the history of section 2A(2A). In subparagraph (3) it notes that the burden of proof is no longer on the employer to show the absence of reasonable grounds. The ET states that Mr Bowers and Mr Galbraith-Marten agreed that the burden of establishing these grounds is on the claimants. Mr Dalgleish is noted as disagreeing; before us, Mr Dalgleish submitted that that was a misunderstanding. The ET set it out correctly in the following way where they say that they are adopting reasoning from the cases of **Brennan** and **Hartley**:

> "in our judgment, the scheme of the legislation is to allow an employer to deploy the shield of a qualifying job evaluation in resisting a claim based on a higher-rated comparator but to allow the employee to cause that shield to be cast aside by showing reasonable grounds for suspicion. If that is done, the employer has an evidential burden to explain away, wholly or in part, the matters advanced

> by the employee or to make out matters not relied upon by the employee with a view to casting the allegedly suspicious in a different light."

The ET went on to consider the JES. It was not satisfied that the claimants had shown any grounds for suspicion of sex discrimination, nor of other unsuitability of the study.

95. The ET found the job evaluation scheme unusual in that it employs two factor plans to determine two separate components and the evaluation of the job is complete only when both are taken into account. The claimants submitted to the ET that such a plan cannot enable an employee to identify a comparator who has been given an equivalent rating and therefore to whom the claimant can compare herself except in a case in which the grade and the WCD level happened to be the same. The submission before the ET was that such a job evaluation study is not compliant with EQP. In paragraph 36 of the reasons, the Tribunal quote the submission made to them as follows:

> "Whilst it is possible to say that jobs with identical profiles are of equal value it does not necessarily follow that jobs with different profiles are not of equal value."

The ET rejected that conclusion. It noted that it is not a question of jobs having identical profiles. It found that the point about the study used by the respondents is that in determining grade pay, employees fall into the same pay grade as employees allocated to a different role profile when the demands made by particular jobs are evaluated by the application of the grade factor plan and the points awarded to the respective jobs fall within the same points ranges. Thus for example a clerk may be in grade 3 and therefore entitled to the same grade pay as a road worker who is also evaluated as being grade 3. The question of WCD pay requires to be determined also, and may result in the clerk and the road worker having different levels of pay.

96. The ET found at paragraph 37 the following:

"There is however nothing before the Tribunal either by way of binding authority or an authoritative statement of job evaluation practice to say that a job evaluation is apt only if it results in a single value. It was urged upon the Tribunal that it was not to attempt to fill any lacunae in the respondent's methodology. We conclude, however, that the effect of the claimant's submissions is to seek to create a lacuna – the absence of a mechanism or rule for bringing the grade and WCD scores together – rather than to work with the methodology as it is. The Tribunal is clear that there is nothing in the respondents methodology that allows an employee to seek higher grade pay based on a factor brought into account only in respect of WCD pay or vice versa: the two factor plans work together but separately to deliver a rating a rating expressed 'grade n plus WCD level z.'"

The ET set out its decision on the question of a job evaluation study which produced two scores in the second judgment from paragraph 42 to paragraph 45 as follows:

"42. Nothing heard in this further hearing caused the Tribunal to doubt its earlier conclusion that the respondents methodology was section 1(5) compliant and did not give rise to reasonable grounds for suspecting discrimination or unsuitability. The Tribunal recognises, however, that it heard only about sample claimants. It accepts Mr Galbraith-Marten's submission that there may be particular individuals about whom the Tribunal has not heard whose circumstances may fall to be considered on their own facts. The claimants had the opportunity to bring forward such cases as part of the exercise of selecting sample claimants. The Tribunal has determined the issues before it on the basis of the sample claimants and comparators and not on the basis of some other unidentified or unspecified claimant or comparator and hypothetical circumstances that might be found to exist.

43. As a general proposition the respondent's methodology results in the lion's share of job evaluation-based pay to flow from the application of the grade factor plan and a much smaller element from the application of the WCD factor plan. A comparison between the respondent's methodology and the GLPC methodology shows that 8 of the 11 GLPC factor headings were used by the respondent to determine grade pay and the demands under the three remaining GLPC factors were used by the respondent to determine WCD pay, albeit it expanding the three factors into five and increasing the number of levels under each factor. The Tribunal concludes that, for example, under the respondent's methodology, a person evaluated as grade one cannot claim to be doing work equal to that of a person evaluated as grade two regardless of the grade one person's level of WCD. A person evaluated as level C for WCD cannot claim to be equal to a person evaluated as level D for WCD. Whether those circumstances properly should lead one to label the WCD element as subordinate may be simply a matter of semantics. The Tribunal heard nothing that properly led to a conclusion that assessing the factors in the grade factor plan and the factors in the WCD factor plan in the way that was done gave rise to a reasonable ground for suspecting discrimination and/or unsuitability.

44. Only Mr Bowers showed the Tribunal any authority. We found nothing in **Bromley** or **Springboard Sunderland Trust** to be directly on the point although the passages to which the Tribunal was taken contain helpful reminders of the need to consider whether the results 'look right' and to have regard to the full results of the scheme. The Tribunal did not simply consider the methodology as a whole, conclude that it 'looked right' and so found that it was not unsuitable. Rather, as appears in our promulgated Reasons, the Tribunal considered the methodology element by element , criticism by criticism and made and set out its findings. Having done that, the Tribunal concluded that the respondent's methodology 'looked right' in the sense that it did not give rise to reasonable grounds for suspecting discrimination or unsuitability. In reaching those conclusions, the Tribunal had regard to the full results of the scheme insofar as those results were shown to us in the course of the hearing.

45. Having considered the matter further, and for the additional reasons set out herein, the Tribunal confirms the conclusions set out in the judgment promulgated on 9 December 2013."

Discussion and decision on the JES

97. The ET asked itself the vital question in paragraph 370 of its judgment, as follows:-

> "370. If the application of both the grade factor plan and the WCD factor plan are capable of amounting to a job evaluation of the kind required by section 1(5), when are two jobs to be regarded as having been given an equivalent rating for the purposes of section 1(2)(b) EQP?"

The ET was shown no authority in which job evaluation leading to two separate points values had been considered. It therefore asked itself whether it was legitimate to employ such a methodology. No expert witness was led on this matter. The parties were asked at a case management discussion if they wanted to rely on expert evidence and indicated that they did not. Dr Watson, the architect of the JES, was led in evidence, by the respondent. The ET stated as follows at paragraph 380:

> "380. Dr Watson told the Tribunal of his career history and that he is a member of the ACAS panel of experts for the determination of equal value. He gave evidence as a witness of fact and not an independent expert entitled to express and opinion. One of the facts to which Dr Watson could speak was that Hay, by whom he had previously been employed, to his knowledge had used the technique of considering demands under two separate evaluations. The Tribunal accepted that evidence. The Tribunal understands Hay to be an important player in the job evaluation world. The Tribunal regards as significant that Hay has employed the approach of taking out into a separate evaluation the consideration of working context demand factors such as those used by the respondent. In the absence of any evidence or authority to the contrary, the Tribunal drew the inference that the technique of using two points scores to produce two elements in the pay package is a legitimate approach to job evaluation."

98. Having decided that as a matter of fact Hay had used a scheme involving two separate evaluations, the ET considered the scheme used by the respondent in this case. It found that that the demands on the employee were not measured by the grade factor plan alone, at paragraph 383. It was necessary to take into account also the factors found in the WCD factor plan.

99. The ET noted, at paragraph 384, that the question then becomes how one is to decide whether the work of one employee has been rated as equivalent to the work of another when there are two factor plans. It decided that as it had not heard submissions from parties on that

subject it would give conclusions which should be regarded as provisional, and would allow parties the chance to make further submissions.

100. The ET then gave its provisional conclusions. It eliminated the simple addition of the two sets of points, because that would involve double counting. It then considered, at paragraph 386 whether the aggregate cash value of grade pay and WCD pay could be used. It found it could not, because grade pay is affected by incremental points; workers may be on the same grade, but receive different pay because of different placing on incremental scales within the grade. Addition of grade pay and WCD points could thus have the effect of workers' equivalence being affected by where they stood for the time being on the incremental pay scale. Further, a worker at the top of a pay scale could end up earning more than a person at the bottom of the next highest grade, once WCD pay was taken into account. The provisional conclusion of the ET was that adding the grade pay and the WCD together was a recipe for chaos.

101. At paragraph 387 the ET set out an alternative approach, that of treating the level of WCD as subordinate to grades. They envisaged employees having a grade determined by the application of the grade factor plan and ranking equally only with those within that grade who have the same or lower level of WCD. They state the following:

> "387….In effect there would be grade plus the first level of WCD, grade plus the second level of WCD and so on. Even though the aggregate cash pay of grade-plus-relatively-high-WCD might be more than the aggregate pay of someone on the next higher grade but with little or nothing by way of WCD, the latter would always be regarded as having a higher rating."

The ET thought that dealing with equivalence in this way was in accordance with the reason given for taking the measurement of those demands considered in the WCD factor plan into a separate evaluation. The ET explained this in paragraph 389 as follows:

> "389. Those within a grade but paid a higher level of WCD pay would properly be able to say that the higher level of demand had resulted in a higher rating by the application of a job evaluation. Those

within a grade would not be able to contend that they were given an equivalent rating to anyone evaluated to a higher grade. Complications flowing from incremental progression would be avoided."

102. The ET gave its view about the methods it had discussed. At paragraph 390 it found:

> "390. The Tribunal recognised evaluating in the way that the respondent has done will produce 'winners' and 'losers'. There will be winners who get something by way of WCD pay who would not have been carried into the next higher grade had the respondent simply used the GLPC factor plan. Equally, there will be others who would have been carried into the next higher grade under the GLPC factor plan and have to settle for a WCD payment that is less advantageous. The Tribunal has been showed no statistics covering the workforce as a whole to show that the pay of men tended to be higher, or the pay of women lower, that it would have been under the GLPC approach. Statistical evidence looking at the overall incidence of WCD payments or of average WCD payment values simply misses that point. Further there is nothing in the closing submissions to reflect an attempt to use the sample claimants and comparators to show what they would have had using the GLPC methodology, a matter that would be likely to have required expert evidence."

Thus the ET gave its provisional view, later confirmed, that the existence of grade pay and WCD pay as necessary parts of any evaluation of a particular job did not imply that the scheme was one which should engender suspicion.

103. The way in which the two scores were to be dealt with was clearly an important part of the scheme and we find it strange that the ET did not have evidence before it in the first hearing setting out the method, which must have been known to Dr Watson and to the respondent. The ET having decided that this matter had not been covered to its satisfaction reconvened and gave parties an opportunity to address it, and then made its decision. It is a question of fact for the ET firstly as to how the evaluation is performed, and secondly if the method found to exist is one which is objective and which enables valuation of demands of work so as to enable jobs to be graded.

104. The ET made a vital finding in fact at paragraph 398 to the effect that the evaluation carried out by the respondent consisted of the application of the grade factor plan to each of the role profiles so as to determine the number of points that would constitute the grade score and the subsequent translation of that grade score into a pay grade together with the

application of the WCD factor plan so as to determine the WCD score and the subsequent translation of that scored into the WCD pay. It found that:

> "398… The grade cores and pay and WCD scores and pay represent the value of the job for the purposes of EQP."

105. We find that the ET was entitled to accept Dr Watson's evidence that his former employer, Hay, used a scheme with two values. We did not find the argument about the Interpretation Act 1978 helpful. There are two scores produced for each employee by this scheme. The ET found that both the grade score and the WCD score should be taken into account in showing that jobs had been evaluated, and if two jobs produced scores identical in each category, they were "equal". We find that the ET was entitled to come to that decision. We can find no error of law in the decision of the ET

106. The ET then went on to consider the submissions made to it about the respondent's methodology. It found that the various job evaluation methodologies in common use, including GLPC, Scottish Joint Council, NHS Agenda for Change and Hay each take their own approach and deploy their own factor plan. Thus one methodology may obtain a different result from another. Two jobs might be regarded as equal using one methodology but unequal using another. The ET noted that if one methodology consistently produced results in which jobs traditionally done by women frequently did less well than in the results using another methodology, there would be an issue to be considered. In doing so the ET demonstrated its correct understanding that the question before it was whether the JES complied with the legislation and case law. It was not a question of whether it was the best JES or even a "good" JES as opposed to a "bad" JES; rather the question was of validity under section 1(5) and lack of grounds for suspicion under section 2A(2A).

107. The ET described the methodology in question in this case as being based on the GLPC scheme, but noted that it was modified, and that therefore it was the modified scheme which had to be considered. (**England v Bromley**). The ET commented that the sample claimants and comparators with which it had to deal were doing jobs likely to be found in many local authorities. It found, at paragraph 395, that the claimants did not show the tribunal that schemes used in other Scottish authorities by applying other methodologies give different results.

108. The ET then embarked upon a study of the "allocation tool kit" used by the respondent. In doing so it was considering the way in which the respondent had set about classifying jobs under the JES. The ET made detailed findings on the various complaints made by the claimants. The ET directed itself that section 2A(2A) of EQP required the tribunal to consider only whether there were reasonable grounds for suspicion, rather than proof on balance of probabilities, when looking at the results of the methodology. It then went on to consider the criticisms made of the allocation tool kit. It found, at paragraph 403, that any significant gap in knowledge or understanding by the persons carrying out the allocation would show up in the results. It found it had no reasonable grounds for suspicion that the scores awarded to any of the role profiles of the sample claimants or comparators under a grade factor plan indicated that the claimants had been allocated to a role profile that did not properly reflect the demands made by the work. It noted that it was not actually asked to make such a finding, but had before it a submission that some of the people carrying out the allocation lacked the knowledge or understanding to perform the task.

109. The ET noted, in paragraph 405, that the function of the allocation tool kit is to identify the role profile within a job family that properly describes the job under

consideration. Under the authority of the case of **Bromley**, it found that there was no need for the work of a particular employee to have been given an equivalent rating to the work of another employee. It is sufficient that the particular employee is one of a number of employees who do work that is the same, or not materially different, so that a study and evaluation of one member of a group is in effect a study of all the members of the group.

110. At paragraph 406 the ET found that the allocation tool kit had the effect of funnelling jobs into a single role profile. Thus people carrying out different jobs, for example, a cleaner working in offices and a road sweeper cleaning the streets, could be put into a single profile. The tribunal found that there was no difficulty with that. It explained, in paragraph 407, that section 1(5) EQP does not require evaluation of tasks. Rather it requires evaluation of the demand made on a worker under various headings, for instance effort, skills, and decisions. The ET recognised that while what was being considered was demand made by work, the funnelling of jobs into role profiles would not be valid if its purpose or its effect was to mask a significant difference since between jobs. That being so it went on to consider what amounts to a significant difference in the context of job evaluation. The ET set out its position in full at paragraph 411 thus:

> "Under any one heading, the definition takes the form of a ladder in which there is a rung at a level and has a number of points. One cannot get more points than those applicable to the first rung unless one meets the definition attached to the second rung and so on up the ladder. It follows that a difference between two jobs is significant only if it is sufficient to produce and match with a different description under one or more headings. If the difference is not sufficient to have that effect, it is incapable of producing a different score under any factor heading. It follows, in the tribunal's judgment that differences between two jobs are necessarily not significant for the purposes of job evaluation unless the differences are such as to properly result in a different score under at least one of the headings in the factor plan. If the differences between two jobs would not result in a different score under at least one of the headings in the factor plan, the two jobs would be awarded precisely the same point score and, hence, would be given an identical pay grade. Doctor Watson appeared to be less than convinced by this proposition but with all due respect to him, the Tribunal considered that his position on the point was not sound."

We pause to note that Dr Watson was the architect of the scheme and it seems strange that the ET decided that his view was not sound. Nevertheless, the ET went on to explain some of the

criticisms made of the application toolkit and its reason for rejecting them. It noted at paragraph 412 that Mr Dalgleish made criticisms about the role profiles and the allocation tool kit which Dr Watson had designed so that they would work together. The tribunal found nothing suspicious about that. In so doing, it took into account that in the case of the sample claimants the role profiles properly reflected the work done. It noted a criticism made by Mr Galbraith-Marten that the drafting of the role profile is a critical part of the methodology because anything missed at that stage cannot subsequently be brought into account in evaluation. The ET, correctly in our view, asked itself the following questions: what was missing from the role profiles of the sample claimants and comparators and what was included that ought to have been omitted and what was misunderstood? The ET did not find an answer to that from the evidence led.

111. The ET note Mr Dalgleish as criticising the method used by the respondent as being different from that used in the NHS Agenda for Change evaluations. The ET made the point that the greatest care is required when comparing steps in different methodologies: what is correct for the one may not be correct for the other. It narrated that job families are based on kinds of jobs rather than on the more traditional local authority department service, so that for instance there is a clerical and administrative job family which brings together all those who do that kind of work whether they work in for example the education department or the social work department.

112. The ET goes on to explain in paragraphs 417 and onwards that allocation and evaluation are separate and distinct processes. It describes the method by which the allocators went about the task. It found at paragraph 421 that it did not accept Mr Dalgleish's criticisms of the allocators as having knowledge of, and making reference to, hierarchy. The

ET found, in contrast, that looking at the role profile next above the one indicated by the application of the toolkit and looking at the profile that is below was a useful quality checker of the results of applying the toolkit. It draws a distinction, of vital importance, between properly using knowledge of the hierarchy in this way and improperly seeking to preserve pre-existing hierarchies. The ET states as follows in paragraph 421:

> "The role profiles were intended to reflect levels of job found in a job family. There was no credible evidence that they did not. The tribunal heard nothing to suggest that that had been historical disparities in pay grade between employees in the same line of work. The only historic disparity related to gender of which the Tribunal heard concerned the payment of bonus. "

113. At paragraph 422 the ET came to consider Mr Galbraith-Marten's oral submissions. At paragraph 423 it pointed out that allocation is the task of placing the job in the profile that properly reflects the demands of the employee within the vertical hierarchy of jobs in the family. That does not seek to compare jobs in different families, which is the role of the evaluation. The ET describes evaluation as being a system which scores each role profile according to the grade factor plan resulting in a number of points. This enables comparison between say a gardener and a clerical worker. The ET states the following:

> "Grade points are the common currency in which the value of jobs that expressed as a result of the evaluation and which allow the comparison between the value of work of jobs that may be very different. Using Mr Galbraith Marten's example of apples and pears, by scoring each under headings such as colour, sweetness, aroma, texture and so on, one adds up the points in order to conclude whether apples and pears are of equal value. It is the total points scored over an appropriate range of factors that allow the determination of the relative worth of two distinct fruits, or in this case, jobs."

114. Returning to Mr Dalgleish's submissions, at paragraph 429 the ET stated that it did not accept his submission that the relationships matrix was concerned only with supervision. The ET went on to explain how the work in this particular section was carried out by stating:

> "The matrix at page 122 brings together 'contact influence' in the vertical axis and 'people management' in the horizontal axis. The first two columns headed 'minimal' and 'assist team members'. It is only in the third column that 'supervisor' appears, and the first column that 'manage' appears and the seventh column that 'direct' appears. Each role in the vertical axis addressee is the nature of the contact. A person with minimal responsibility for people management could be scored at levels R1, R2 and R3. A person whose contact with team members amounted to giving assistance rather than supervising could score from R2 to R 7. At the general level, such scores make sense to the Tribunal in that it is not difficult to envisage there being within a local authority highly qualified seasoned professionals who give skilled advice and guidance without having a supervisory or

managerial remit."

At paragraph 430 the ET dismissed Mr Dalgleish's submission that wrong factors were chosen for the PCS family. The ET found there was no evidence of that. It found that such a point would require expert evidence and there was none.

115. The ET noted at paragraph 432 that there was a great deal of cross-examination about whether home carers gave "advice". The position of the respondent was that they did not. The ET accepted that. The ET explained that the evidence showed that more senior employees make decisions about the care a person is to have from a home carer. The home carer delivers intimate personal care and practical assistance. Unless there was an emergency requiring the summoning of urgent medical assistance, any departure from ordinary personal care and practical assistance was to be referred to a supervisor who would give instructions. Against that background that the ET found that the carers did not give advice.

116. Mr Dalgleish's submission that there was confusion around the knowledge and skills matrices did not find favour with the tribunal. The ET did not find it suspicious that there is something of an overlap between knowledge and skills, going on to explain that in many jobs that is indeed an overlap between these two items. At paragraph 435 the ET noted Mr Dalgleish's submission that not all of the factors in the grade plan were used in the application toolkit. It found no difficulty with that, because it found that allocation and evaluation have entirely different purposes. Allocation is concerned with the identification of the correct role profile in a family: evaluation is concerned with the value of the job described by a role profile. All the factors in the respective factor plans were used in evaluation.

117. At paragraph 436 the tribunal record Mr Dalgleish's submission that an admission from Dr Watson that different results would have resulted from using different factors in the allocation process showed that the evaluation was unsuitable to be relied on. The ET found that was not so. They found that it was likely that there would be different results but they did not find any invalidity in that.

118. At paragraphs 437 and onwards the unusual aspect of the scheme having two factor plans was discussed. The ET found that despite there being two evaluations and two payments there was an evaluation common to all employees. The ET repeated its finding, at paragraph 439 that:

> "Allocation determines the family and level within the job family of the job under consideration. Evaluation, leading to a point score, determines the number of points a job scores and it is that number of points that determines the pay grade into which the job was placed. It is the evaluation of the role profiles that may result in clusters of jobs within the distribution of points and which may be influential in determining whether the grade boundaries fall but the fact that a particular job falls in this role profile rather than that has no bearing on the evaluation of the role profile."

119. At paragraphs 441 and 442 the ET set out a matter that was raised before us. In the first paragraph the ET report on Dr Watson's proposition that different factors could be employed to differentiate levels in different families, which the ET was inclined to accept. At paragraph 442 the ET states the following:

> "Having said that, the tribunal was very conscious that Dr Watson's evidence as to what he did was based on his opinion as to the soundness of his judgements within the field of expertise of a person skilled, qualified and experienced in the mysteries of job evaluation. The absence of independent experts able to express an opinion on Dr Watson's work left the tribunal in some difficulty. Whilst the tribunal could bring to bear the eye of interested lay people with some understanding of job evaluation, the tribunal simply lacked the expertise to fully evaluate Dr Watson's judgment in the abstract."

The ET states at paragraph 445 the following:

> "The parties knew the methodology and the outcome of the application of the methodology: they had both 'route' and 'result'. The Tribunal expected that the selection of sample claimants and comparators had been carried out so as to enable the Tribunal to see, through the circumstances of the sample claimants and sample comparators, that there had been questionable outcomes (to deliberately use a phrase that does not appear in the statute so as to convey a concept of the widest import.)"

It found that the claimants' criticisms paid little or no attention to result and whether there was a proper basis for finding suspicion that the outcome was unsuitable when the result was taken into account along with the route. The ET gave what appear to be examples in paragraphs 447 and 448 by stating that Mr Galbraith-Marten introduced the treatment of the post of crèche assistant, being exercised that that job had been allocated to the same role profile as the job of car park attendant. Neither crèche assistant nor car park attendant was in the list of sample claimants and sample comparators. The ET found that the attack by Mr Galbraith-Marten was based on his view of the crèche assistant providing high quality child care and the provision of stimulating play and activities. The tribunal found there was no evidence on which to make out such a case. The ET accepted that the role of crèche assistant was properly described as a babysitter. The profile to which both jobs were allocated was in the Community Facility User Support profile. The tribunal found that that captured the job in question. It was not submitted that some other role profile was more appropriate. The attack according to the tribunal was based on no more than that one must be suspicious of a methodology that evaluates the demands on someone who looks after children as being the same as someone who looks after parked cars.

120. We have narrated at length the reasoning of the ET to show that it considered fully the detailed submissions made to it. Thus the ET gave careful and detailed attention to the many and various criticisms made of the JES. That enabled judicial consideration of the JES, which counsel submitted was one of the essential purposes of the legislation. We find that that examination of the JES by the ET was lengthy and thorough. The ET made findings of fact from which it inferred that the JES was valid under s1(5) and that it had no grounds for suspicion under s2A(2A). We accept counsel for the respondent's argument that the ET had the function of considering the evidence and finding facts, in the absence of perversity we

have no right to interfere with that. We detect no error in law in the decision making of the ET

Submissions of the Fox Cross claimants in relation to pay protection

121. Mr Allen began by explaining that when a large organisation such as the respondent introduced a new pay system it was almost inevitable that some employees would receive less pay under the new scheme. Such workers were described as being in detriment. Many organisations took steps to protect the pay of such employees, usually on a time limited basis. It was hoped that cost of living increases would come into effect by the end of the period of protection, so that no employee had to accept an actual reduction in wages. The respondent had two other elements to their protection scheme; the assimilation process, whereby a worker in detriment would be assimilated to the new pay grade at in such a way as to minimise his notional reduction in pay; further, workers would be assisted by the respondent to increase their skills and move up the grades by using Employee Development Commitment (EDC). None of these provisions were in themselves objectionable; the claimants' position was that they excluded employees who should have been paid at a higher rate pre WPBR. Thus women who were entitled in terms of the legislation to equal pay, but had not got it, because the respondent did not comply with the law, were not given pay protection and so were still treated less well than the employees who did get pay protection. Counsel submitted that the ET did find that the pay protection scheme was sex tainted, albeit that it was a grudging acceptance. It then proceeded to find that the discrimination was justified. At paragraph 895 the ET found:

> "[Glasgow] did not consider for a moment offering anything by way of pay protection to those employees who would not suffer a drop in earnings….to put it simply [Glasgow] was interested in protecting the pay of the 'losers', that is those who would otherwise see an immediate reduction in their pay packets, and not add to the pay of those perceived as 'gainers'…"

122. Counsel argued that finding made plain that the respondent had no aim in mind in excluding the employees against whom it had discriminated pre WPBR. While justification after the event was in law possible, it should be subject to the greatest scrutiny, under reference to the case of **O'Brien v Ministry of Justice**, where the Supreme Court found that it would be difficult for the Ministry to justify the proportionality of the means by which it carried out its aims if it did not examine alternatives or gather the necessary evidence to inform the choice at that time.

123. Counsel referred to the cases of **Redcar and Cleveland BC v Bainbridge** and **Bury MBC v Hamilton** as the leading authorities. He argued that the burden of justification lay on the employer. It required proof of the aim of the employer together with an assessment of the proportionality of the action taken to achieve the aim.

124. Counsel argued that the respondent was entitled if it so wished to make arrangements via assimilation, EDC and pay protection to increase the incomes of those in detriment following WPBR; but it had not justified making such arrangements only for those who would suffer a reduction in pay post-WPBR. He argued that in paragraph 885 the ET found that the respondent knew that it is decision on pay protection would continue sex discrimination. Mr Dalgleish argued that no argument was made at the ET about actual figures and pay protection. That would be a matter for a remedy hearing. Claims were not quantified. He argued that the ET agreed that there was *prima facie* discrimination and the question was has objective justification been established.

125. The ET excluded assimilation from its conclusions, which was a decision described by counsel for the claimants as baffling. He argued that assimilation and pay protection stood

or fell together. The point taken by the claimants was a general point, referring to the way the system of assimilation worked. The argument was generic, not to be reduced to the individual claimant.

126. Counsel argued that the system of assimilation was sex tainted, on the same basis as pay protection. He argued that pay protection and assimilation march hand in hand; he sought a generic ruling on whether the process was discriminatory or otherwise.

127. Mr Dalgleish adopted Mr Allen's submissions. For the GMB claimants Mr McNeill argued that following WPBR those who would be in detriment had their pay increased, while the GMB claimants did not have matching increases paid. During the three year pay protection period, the claimants were employed on work rated as equivalent with men who were still paid more than them. The claimants whom he represented made no claim for any period prior to April 2006. Counsel argued that the ET had arrived at a view which no reasonable ET properly directing itself could have come to. Mr McNeill submitted that sample and generic claimants are not mutually exclusive in that samples can suggest answers for the generic point. The respondent led evidence that the cost of extending pay protection would be enormous; counsel submitted that the ET found correctly that cost alone did not amount to justification. Further the evidence was only that cost would be enormous, which was not specific.

128. The ET found the respondent's pay protection justified and proportionate, setting out its reasons for that at paragraphs 901 to 903. Counsel summarised those reasons as follows:

(a) WPBR resulted in only some of those who had received bonus getting pay protection and so it immediately reduced the discriminatory effect of the former bonus arrangements

(b) At least 2 out of 3 of those who got pay protection had not previously been getting discriminatory bonuses

(c) Pay protection lasted for only three years.

Counsel argued that the reasons found did not show why it was proportionate to perpetuate a pay difference. The respondent and the ET had concentrated on why it might be reasonable to protect the pay of those in detriment, which missed the point.

Submissions for respondent on pay protection

129. Mr Bowers argued that the ET had made findings of fact which out not to be disturbed unless it had actual perversely. In any event, in order to show justification, the respondent did not have to show that no other course could have been taken. The pay protection point was heard first, but Mr Bowers argued it was irretrievably bound up with the arguments on validity of the JES. The claimants had to prove pre WPBR discrimination between claimants and comparators. He argued that the claimants position had been obscure, as found by the ET at paragraph 839, where it stated:

> "[the claimants] pleadings were of little help in identifying the facts that the claimants would seek to prove in order to show that particular claimants were entitled to claim particular terms by way of pay protection relying on a particular comparator or comparators."

130. Counsel argued that the claimants had not proved that individual sample claimants had suffered unlawful discrimination. The ET found the evidence led on behalf of the claimants from Mr McLuckie, a union official, to be unreliable. Thus the ET found at paragraph 787 that the claimants did not call evidence to demonstrate what the areas of discriminatory bonus were. The claimants submitted only that pre WPBR bonus was

discriminatory, and yet not all those in receipt of pay protection had been in receipt of bonus. The ET had to decide if the pre WPBR payments of sample claimants and comparators were discriminatory. Mr Bowers for the respondent argued that the ET had made findings of fact which could not be disturbed unless it had acted perversely. The evidence led did not focus on the claimants and did not show that they had been subject to sex discrimination. One of them, Mrs Green, had received a bonus pre WPBR.

131. Counsel submitted that the case had been subject to case management. Sample claimants were chosen by the claimants and were expected to be "factor rich" so that decisions on their evidence would be of use in other cases. He argued that the ET found at paragraph 890 that the principal objective of the new scheme was to take out unfairness as well as unlawful discrimination. The ET had not found any discrimination proved from the evidence led.

132. We accepted that the ET had not found the evidence from the claimants clear in showing that they were discriminated against when compared to their chosen comparators. The confusion about whether the case used test claimants, sample claimants or generic arguments was shown in this section of the reasons. We did not accept the argument that no discrimination had been found in light of the findings at paragraphs 881, 882 and 883. The ET found in those paragraphs that the payment of bonus gave rise to discrimination, and that in some cases, the loss of bonus led to pay protection.

133. Mr Bowers argued that the ET had not missed the point in the way asserted by the claimants; it knew that it had to consider not the payment to the comparators but rather:

> "[the] failure to bring the claimants up to such discriminatory wage as the comparators enjoyed under a previous pay regime and then afford the same measure of protection as was afforded to the claimants." (See paragraphs 129 and 772.)

Mr Bowers argued that pay protection required to be justified if and only if it arises from pre-existing discrimination, as found in the cases of **Haq**, **Armstrong v Newcastle upon Tyne NHS Hospital Trust**, **Gibson v Sheffield CC** and **Bury v Hamilton**. The ET showed at paragraph 127 that it understood this.

134. On justification, counsel argued that paragraph 52 of **Bainbridge** gave approval to the dicta in **Cadman v HSE** (paragraph 52) that:

> "the justification must be based on a legitimate objective. The means chosen to achieve that objective must be appropriate and necessary for that purpose, subsequently modified in **Haq** to 'reasonably necessary'".

The task was one for the ET as an industrial jury, and the EAT could not overturn the ET's decision unless it was perverse. Mr Bowers argued under reference to **Bainbridge**, **Bury**, **Haq** and **Seldon** that there was no bright line when considering if a scheme was justified. There was a narrow range within which an employer could select a proportionate response even if it continued indirect discrimination for a limited period. He referred also to the EU cases of **Hennigs v Eisenbahn** and **Specht v Land Berlin** and **Land Berlin v Mai**.

135. Counsel argued that the agreement of unions to the scheme was relevant, under reference to **Loxley**. The GMB had sought lifetime protection and no union had sought pay protection for these not in detriment. The ET found the legitimate aims to be:

(a) To fulfil obligations under single status agreement (paragraphs 796, 788, 887)

(b) To take out unfairness (paragraphs 889 890)

(c) Not to place itself so as to be unable to compete with private sector (paragraphs 890 791)

(d) To produce a soft landing for employees who would lose money.

As to the final issue of proportionality, the ET considered that pay protection was time limited: that it was needed to persuade the union to agree: there was a lack of request for any

other system from unions: it immediately reduced the discrimination: most payments of pay protection had no trace of discrimination.

136. Mr Bowers accepted that the burden was on the respondent as regards justification. He summed up the issue as whether the respondent's pay protection provision, including protecting pay of some men who had previously received discriminatory bonuses but who were mostly men and women whose prospective drop in pay had nothing whatever to do with sex discrimination, was a proportional means of achieving legitimate aims.

137. Mr Bowers referred to the case of **Hennigs**. The court found it was not unreasonable for the social partners to adopt the transitional measures appropriate to avoiding loss of income; and that no further justification was needed, there being a broad discretion in the field of determining pay. In the case of **Specht** a similar decision was reached. Mr Bowers referred to an article written by Mr Allen and Miss Masters in the Employment Lawyers Association Briefing November 2014, commenting on these cases, to the effect that economic validity is relevant to proportionality.

138. Counsel referred to **Seldon** as authority that one can justify *ex post facto*. He emphasised that this was a question of fact, to be decided by ET.

139. Mr Bowers accepted that the ET had to decide the issue, and were not correct if they thought that the test was whether or not the decision of the respondent was a reasonable decision. We agree with him.

140. In response Mr Allen submitted that no proper justification had been found by the ET. If an employer cannot afford to pay all those who should get payment, then it should "spread the pain" and not just discriminate against one section of society and pay others. The ET was correct to find that cost alone could not be justification. What it did say was that the object was to get the unions to sign up to the new pay scheme. It also found that there was concern that some of the employees who provided care in the community might be priced out of contracts which had to be tendered. Proportionality was discussed by the ET in paragraphs 900 to 903. However, counsel argued that the respondent put up an argument on cost, which failed. He asked: cost is not a justification, how do paragraphs 901-903 stand-up? He argued that it could have been justified thus –"if we pay the green circle people the same as the red circle people we will be priced out of the market. We are not doing this and it is for their own good". But, he argued, the respondent did not say this.

Employee Development Commitment (EDC)

141. The ET dealt with EDC as a discrete matter between paragraph 726 and 746. It describes the scheme at paragraph 730 quoting the respondent's words as follows:

> "We will start to work with you to agree your development and career plans and help you develop new skills. These will provide opportunities for you to protect your income, including better utilising your current skills, enhancing your current job and applying for higher level posts within the Council."

The ET found in paragraph 731 that the effect of the scheme was that the respondent would assist workers who would be earning less money after WPBR to regain their previous level of earnings. The ET found that this worked on both a collective and an individual level. The respondent offered to employ service reform where there was an advantage to it in doing so. It would reorganise the way in which it delivered its services so as to give rise to financial benefits to the respondent which could be shared with the workforce by restructuring jobs so that the jobs could properly attract the higher rate of pay. The ET found at paragraph 733 that there was no question of the service reform being used simply to take employees out of

pay detriment; it was used only where there was a service need for it.

142. The claimants offered to prove that EDC was devised with "the improper objective of maintaining unlawful pay differentials." The ET found that there was no direct evidence or any evidence from which such an inference could be drawn. It accepted that the respondent did differentiate between those who were in detriment and those who were not, in that it required a person to be in detriment with a consequent loss of earnings exceeding £500 per annum to be eligible for EDC. Thus a person who should have been paid at the same rate as the bonus earner but had not been so paid would not be in detriment and would not get the benefit of EDC.

143. The Tribunal found (at paragraph 739) that the question of the effect of EDC was not one falling within the law of equal pay but rather within the law of sex discrimination. It found at paragraph 744 that the claimants had not begun to lead evidence of a kind that would allow the Tribunal to determine whether a complaint of sex discrimination was sustainable. In paragraph 746 the ET gives its view about EDC by stating that an assertion in respect of training and development that was not offered to some workers but was offered to others gives rise to a standalone claim of sex discrimination. The Tribunal convened to hear a preliminary issue, set out and noted above, and it did not include any standalone claim of sex discrimination. The ET therefore found that the matter fell for a full and final determination of all the issues in a hearing.

144. Mr Allen submitted that EDC was part of pay protection. He did not accept that it was a claim under the Sex Discrimination Act.

145. In our opinion the ET was entitled to come to such a view. It is a matter peculiarly within the decision-making of the ET and we do not intend to interfere with it. We do not make any decision on whether the matter is part of pay protection or not; we decide that there is no error in law in the ET deciding to consider that question at the full hearing.

The ET's decision

146. The ET turned to the issues of pay protection and assimilation between paragraph 747 and 911. The ET defines "assimilation" as the transition of an employee from the pre-WPBR pay system to a particular incremental point within the WPBR pay grade. In a case where an employee who is assimilated in accordance with the ordinary WPBR assimilation rules would have less by way of WPBR reckonable earnings than his pre-WPBR reckonable earnings, the employee would be placed on the lowest incremental point within the WPBR grade that would result in earnings that at least match the pre-WPBR reckonable earnings. The ET describes the pleadings and notes in paragraph 754 when dealing with the GMB applicants, that the essence of the respondent's case is justification including the impossibility of quantifying the value of any claims of individuals who might assert a right to benefit from the incorporation of the pay protection provision.

147. The arguments put before the ET are set out from paragraph 765 which refers to red circling, assimilation, and EDC. The claim includes the following:

> "At no point was any, or any meaningful, consideration given to extending the majority of protection arrangement to those women who, to the knowledge of the Council, had been underpaid by reference to their male comparators for years and who would, by virtue of the same protection arrangement, continue to be underpaid."

The position of the respondent was noted as being in its skeleton argument that assimilation often causes difficulty and there is no single correct answer. The purpose was to manage the transition from the old pay system to the new in a way which was workable, affordable and

acceptable to the unions and union members. The respondent pointed out that those were found to be legitimate objectives in the case of **Hartley**.

148. The respondent also pled that putting all "green circled" employees on the lowest pay point would have been discriminatory because the majority of them were women. It therefore decided that for grades 1-4 assimilation would take place based on length of service except for red circled employees who would go to the top of the scale. For grades 5-7, employees were assimilated to the lowest point within their grade which would preserve their pre-WPBR earnings.

149. The respondent argued in light of the case of **Loxley v BEA Land Systems Ltd** that the agreement of the trade unions was relevant. It was accepted their agreement could not render lawful a scheme which was otherwise unlawful, but it was argued that the Tribunal should attach some significance to the fact that the collective parties have agreed a scheme which they consider to be fair.

150. The respondent made reference to the case of **Hennigs v Eisenbahn** which they argued gave the employer a broad discretion in the field of determining pay. The respondent argued that, on the authority of the case of **Bury MBC v Hamilton**, pay protection could be justified by an ET applying the test of proportionality. Reference was made to the case of **Barry v Midland Bank** to the following effect:

> "What is required is the application of the principle of proportionality i.e. an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition, applying the principle that the more serious the discrimination the more cogent any justification must be. The employer does not have to demonstrate that no other course could have been taken."

The respondent sought justification on the grounds of cost plus potential industrial relations problems. It also however sought to argue that it did not actively consider extending pay

protection to any other groups or to making a payment of any sort to green circled employees; and it was not asked to do so by the trade unions. The trade unions sought lifetime protection for those who were to get protection but settled for three years.

151. It was argued before the ET that it was essential that the respondent knew that what it was doing was continuing discrimination. While it was known that there were "pockets of discrimination", it was argued that the claimants had not called evidence to demonstrate what areas of discriminatory bonuses there were. The respondent's fall-back position was that if there was sufficient knowledge of discrimination then it could be justified. The justification put forward was that the unions had agreed it; that the scheme was similar to that found to be legitimate by the majority of the court in **Haq v Audit Commission**, being the prevention of the comparators from suffering a loss in pay and the prevention of the loss of skills and experience. It was argued that the claimants had failed to produce evidence to show that they were discriminated against in the period pre-WPBR.

152. It seems to have been accepted in the submissions made on behalf of the respondent that cost on its own would not suffice and that what was required was "cost plus". The "plus" which was relevant was the potential industrial relations problems of redundancies or cuts in service delivery caused if the wage bill increased too significantly. Reference was made to a strike threat in respect of residential care staff, refuse collectors road sweepers, and social workers.

153. The submissions put forward on behalf of the respondent about assimilation are noted at paragraph 799 where once again it was argued that the arrangements were not indirectly

discriminatory, but if they were, they were justified. The process adopted by the respondent was said to be not dissimilar to most other such schemes.

154. The ET went on to make findings in fact between paragraphs 803 and 830. It found at paragraph 805 that there were no "transitional points" which had been mentioned in the pleadings on behalf of the Unison applicants. They note that that is a reference to a scheme whereby those who would otherwise receive a substantial increase in earnings are placed as a lower point. No doubt for completeness the ET found that that did not happen in the current scheme. We need say no more about it, as it did not feature in the case before us.

155. The ET found at paragraph 807 that none of the parties led evidence from which it could make comprehensive findings of fact as to those who received paid protection being affected by gender. They found that the gender makeup of those receiving pay protection was broadly 50/50. At paragraph 813 it found that some men in traditionally male dominated occupations received pay protection because their pre-WPBR earnings included bonus. That did not apply to every comparator. However, in paragraph 816, the ET found that the respondent had responded to a Notice to Admit with admission that:

1. the respondent had known for some considerable time prior to 2005 that it potentially had an exposure to equal pay liability;
2. the same equal pay issues that the respondent was facing were being experienced throughout local government and beyond;
3. the pre- WPBR pay and grading structure was convoluted, old fashioned and lacked transparency;
4. there were pockets of indirect pay discrimination within the pre-WPBR pay and grading structure;

5. the respondent will make no positive case comparators or that any GMF defences would have succeeded in their cases.

156. The ET made findings between paragraphs 831 and 911. It seems to us that the vital findings are at paragraph 858 in the following terms:

> "The Tribunal considered whether the pay protection arrangements had the effect of continuing past pay discrimination."

Paragraph 861 includes the following:

> "The respondent has made concessions in relation to the payment of bonus. We concluded that we cannot go behind those concessions, and therefore proceeded on the basis that the respondent has no defence in justification to the pre-WPBR bonus payments. ... It was for the respondent to provide, at least an explanation, for pay differences, if not objective justification and, whether by reason of its concessions or otherwise those explanations or justifications have not been forthcoming."

At paragraph 881 the Tribunal found the following:

> "On the facts found, the payment of unjustified bonus was the reason why some employees received a transitional payment. The majority – at least 2 to 1 – fell into protection for some reason other than the payment of bonus and the ground has not been laid for a finding that the reason for the others falling into protection was tainted by sex."

At paragraph 883 the ET found:

> "The Tribunal has proceeded on the basis that the respondent's payment of bonus gave rise to discrimination."

At paragraph 885 the ET found that the respondent was fixed with constructive knowledge that its bonus schemes could not be justified at the time it took its decision on pay protection.

157. Having found that there was known discrimination the ET then went on to consider whether or not that could be objectively justified. It did so in the context of having found at paragraph 895 that the respondent did not consider for a moment offering anything by way of pay protection to those who would not suffer an immediate drop in earnings. It found at paragraph 897 that there was not sufficient before it to mount an attempt at justification based on cost. It then found at paragraph 900 that:

> " the Tribunal concluded that the respondent's actions to meet their legitimate objectives passed the test of proportionality for these reasons."

The reasons given in the paragraphs 901 to 903 are as follows:

> "901. Firstly, an effect of WPBR was to put in place pay arrangements that resulted in only some of those who previously were paid bonus falling into pay protection. The 20% bonus earners in street cleansing do not appear to have fallen into protection at all. Of the refuse collectors and refuse drivers, it seems only those (or some of those) with the (Wheelie Bin) suffix did. Amongst the Gardeners and Road workers those at the 1 level seem to have required protection but not all of those at the 2 and 3 levels did and those at the 4 level appear not to have done at all. The Tribunal concludes that WPBR immediately reduced the discriminatory effect of the former bonus arrangements.
>
> 902. At least two thirds of those who fell into protection were from the APT&C sector. Bonus was not an issue in that sector. There has been no evidence before the Tribunal to show that discrimination in respect of pay was an issue in the APT&C sector. The Tribunal attached weight in assessing proportionality to the fact that the protection of former discriminatory bonus payments was probably an issue in respect of less than a third of all cases of pay protection and balanced that, in particular, against the advantage of a rule that treated alike all of those whose reckonable pre –WPBR earnings exceeded reckonable WPBR earnings.
>
> 903. That the transitional allowance was time limited was important. In effect, any pay advantage accruing from the payment of discriminatory bonus would leave the system on the expiry of the three-year period. Further, since the commencement of that period was back-dated to 1 April 2006, the transitional payment remained in place for a little over two years from the time the workforce agreed to the WPBR terms. Moreover, the respondent strove to eliminate detriment, and, hence, the transitional payment, through the Employee Development Commitment. As appears in the Departmental reports, for some, service reform was introduced in the very early days following the implementation of WPBR so that eh required period of protection in those cases was very much less than three years."

Assimilation

158. The ET gave its decision on assimilation at paragraph 904 finding that there was an inadequate evidential base on which the Tribunal could reach a conclusion. That was because it had not been made clear in evidence whether a bonus earning employee without the length of service to assimilate to a point in the grade sufficient to match his pre-WPBR earnings would have been regarded as red circled or not. None of the sample complainants and comparators illustrated the answer. Thus it found that the claimants, who made the assertions about assimilation, had not brought evidence to back the assertions up. The ET did find, at paragraph 910 that any advantage given by assimilation to the highest point in the grade would be non-permanent, because those assimilated below that point would take an incremental step each year. That meant that there was no unlawful discrimination in assimilation.

Decision on pay protection

159. The case of **Haq** was relied on by counsel for the respondent before us. In our opinion, the case is not in point. It relates to a reorganisation of senior and junior jobs into one job. There were 11 people working in the more junior job all of whom were women and five in the more senior job of which three were men working full-time and two were women job sharing. A new job was created and replaced the old jobs. The pay grade remained the same. The Audit Commission used a pay protection policy in which people moved to another job in the same grade retained their previous position on the pay scale. Nine women and two men were appointed to the new jobs. Because the men were transferred to new jobs they kept their previous position on the pay scale. The practical effect of that was that the women's salaries ranged from approximately £26,000-£32,000 while the men's salaries were approximately £37,000.

160. The women brought proceedings against the Audit Commission alleging indirect sex discrimination caused by a combination of the amalgamation and the application of the pay protection policy. The first point of dispute between the parties was whether there was indirect discrimination. If so, the second point of dispute was whether the Audit Commission had established that the indirect sex discrimination was objectively justified as being for a legitimate aim pursued by a proportionate means.

161. The employment tribunal allowed the indirect sex discrimination claims. It found that prior to amalgamation there had been a justifiable distinction between the two roles as they did different work. Amalgamation of the roles created a disparity between men and women who were doing the same work. It also held that the Audit Commission had not made out the defence of objective justification. It rejected the Commission's contention that it had the

legitimate aims of preventing the comparators suffering a reduction in pay, and retaining their skills and experience. In consideration of the proportionality, the employment tribunal considered other ways of carrying out the restructuring. It found that the discriminatory effect of amalgamation could have been eliminated by careful attention to assimilation. Alternatively, the discriminatory effects could have been at least reduced by red circling the pay of those on higher pay points. As it was, the extent of the pay disparity was significant and it had potential to increase over time.

162. The EAT allowed the Commission's appeal. While it was accepted that the outcome of the reorganisation was that the men were paid more than the women, the EAT found it was nothing to do with gender, but rather reflected the fact that all employees affected by the amalgamation came into a new role preserving the previous remuneration. There was nothing to suggest that the original pay disparity was tainted by sex. In any event, the EAT held that objective of justification was made out. It found that the pay protection policy was legitimate firstly as a matter of fairness to the employees concerned and secondly because, if they had not been protected it would have been difficult to retain them and the employer was likely to have been prejudiced by losing their services. It found that the practice of pay protection, which did not incorporate past discrimination, was a proportionate way of achieving the aim of keeping staff. The claimants appealed to the Court of Appeal.

163. It refused the appeal. The court found that after amalgamation the claimants and the comparators were doing the same work but for significantly different pay. The pay protection policy ensured that the difference in pay continued and increased. There was in the circumstances a rebuttable presumption of discrimination. The EAT had been entitled to substitute its view that the indirect sex discrimination was objectively justified as having been

for a legitimate aim pursued by proportionate means. The majority of the court found that fairness to the employees concerned and the desire to retain their services were legitimate aims. It found that the employment tribunal had made suggestions of a red circling without asking itself the correct question which was how was the Audit Commission to have achieved its legitimate aim of retaining skills and experience. The same objection applied to suggestions of assimilation.

164. Thus, this case concerns the difficulties of amalgamating two separate jobs into one. The difference in pay in the two separate jobs was not tainted by sex. Once the amalgamation happened, the difference in pay was tainted by sex. That indirect discrimination was found to be justified because the legitimate aim firstly of protecting the men's pay and secondly of retaining their services was found to be a proportionate response. In the current case, the original discrimination caused by a payment of bonus was found by the tribunal to be sex tainted. That original discrimination was continued by the payment of pay protection. There was no finding by the ET that the continuation of discrimination by means of pay protection was necessary to keep the services of the workers involved. We therefore do not find that the case of **Haq** is of assistance in the current case.

165. The cases which are of assistance in resolving questions of pay protection are **Redcar** and **Cleveland BC v Bainbridge** in the Court of Appeal and **Bury v Hamilton** in the EAT. In **Bainbridge**, the Court of Appeal held that the employer had a duty to consider whether pay protection would continue discrimination. If the employer had no evidence to show that it addressed its mind to the problem or attempted to avoid or reduce that discrimination, then the employer had not shown that the pay protection scheme was an appropriate and proportionate means of achieving a legitimate aim.

166. We noted that the **Bainbridge** case is a local authority case and that the underlying facts are similar to the facts in the current case. The law is reviewed in the report and at paragraphs 51 and 52, reference is made to the cases of **Barry v Midland Bank** and **Cadman v Health and Safety Executive** which deal with the way in which an employer shows objective justification.

167. In **Cadman**, the European Court of Justice stated the requirement of the principle as follows:

> "The justification given must be based on a legitimate object. The means chosen to achieve that objective must be appropriate and necessary for that purpose."

168. In **Bainbridge**, the Court of Appeal stated at paragraph 106:

> "Here the superficial and overt reason for inclusion in the pay protection scheme was the suffering of a wage drop on changeover day. That was not, on the face of it, anything to do with sex. But if one then looks at the underlying reasons why the men suffered a wage drop on changeover and the women did not, the questions and answers go as follows: Why did the men suffer a drop in pay? Because they lost little bonuses. Why did the women not suffer a drop in pay on that day? Because they had been underpaid and the period preceding changeover . Why had been underpaid in the preceding period? Because there had been unlawfully discriminated against in that period. The two had been entitled to the same pay as the men who had been on bonuses. Thus the reason for the new pay differential was causally related to the historic unlawful sex discrimination."

169. The description given in paragraph 106 quoted above applies in principle to the situation in the current case provided always that the claimants can prove that they have ended up post WBPR with less money than a person who does a job rated as equivalent, but who has got pay protection because he was previously on a bonus.

170. The Court of Appeal turned to the objective justification at paragraphs 109 to 140. It held that the apparent holding by the EAT in that case that, if arrangements were tainted by sex, then they could not be justified, was incorrect. Justification applies to indirect

discrimination only and always depends on the circumstances. The Court of Appeal held that the EAT was entitled to overturn the employment tribunal if and only if the employment tribunal had reached a decision it was not entitled to reach. It therefore examined that decision. From paragraph 117 onwards arguments put in behalf of the employer are considered by the court. It found at that a difficulty in calculating the amount of pay by which the claimants had been underpaid did not amount to justification. The argument that the reason for pay protection was to provide a soft landing for those who suffered a pay drop on changeover day and therefore did not apply to the claimants who were actually going to receive an increase on changeover day was not accepted. The employment tribunal had accepted that the only way that the agreement could be reached between employer and employees was to offer the men pay protection. Had the employer tried to reduce the men's pay that there would have been industrial unrest and so the tribunal accepted that the avoidance of such industrial unrest was a legitimate objective. The tribunal however held that excluding the women from the scheme was discriminatory. The tribunal then had to consider whether the means adopted, that is exclusion of the women, was appropriate and necessary to achieve the objective. The tribunal noted that the discrimination would last only for three years and was reducing and that no one would be admitted as a new employee with the benefit of the differential. It found that the views of the women had not been taken into account when the negotiations had taken place and it found that the employer had simply not applied its mind to the discriminatory effect of the exclusion of the women. The Court of Appeal found that the factors in combination were an adequate and proper basis for the tribunal's conclusion that the employer's need to phase out discrimination did not justify the use of a pay protection scheme which excluded the women claimants who were either known to be successful, or who might be proved to be successful, in their claims for equal pay.

171. The Court of Appeal was addressed on the question of the meaning of the case of **Smith v Advel Systems Limited**. That was a case concerning direct discrimination in which the European Court of Justice laid down that the correction of recognised direct discrimination must be full and immediate. The court found that as indirect discrimination can, unlike direct discrimination, be justified, that the case was not on all fours with the **Bainbridge** case. It stated the following at paragraph 133:-

> " however, by analogy with **Smith**, where the old indirect discrimination has been recognised and attempts are being made to correct for the future, the employer will have great difficulty in justifying the continuation of any discriminatory element. That is because he must do his best to comply with the fundamental principle of equal pay, which applies to the eradication of indirect as well as direct discrimination. … There will, of course, be many gradations of knowledge between, one the one hand knowing that the old arrangements were and the new ones will still be discriminatory and, on the other hand having no reason to think that they might have been. In such intermediate positions, the employer's knowledge of the circumstances will be relevant to the issue of justification".

The court at paragraph 136 stated:-

> "….However, that the facts of the **Redcar** case show that the employer knew that one of the important purposes of the Green Book scheme was the elimination of past discriminatory pay practices. It knew that it had been discriminating against at least some of the White Book women claimants. They knew that, under the new arrangements, the bonuses and allowances which had given rise to the past discrimination were being abolished and that that was why the men who had been receiving them were being given pay protection. The employer must or should have realised that the women, who had been discriminated against in the past, were going to be discriminated against under the new scheme by being excluded from pay protection. Yet, as the tribunal found, there was no evidence that they had applied the minds to this problem or had made any attempt to avoid a reason reduce the discrimination. They had not even attempted to cost the inclusion of the women".

172. The court went on to find that the employment tribunal were "clearly correct" to reject the employer's arguments on justification.

173. At the same time as hearing the **Bainbridge** case, the Court of Appeal heard the case of **Middlesbrough BC v Surtees**. That case had been heard by the employment tribunal and the EAT. The court found that the EAT was not entitled to hold that the employment tribunal's decision could not stand. It pointed out that a decision on justification is essentially a question of judgment for the employment tribunal in its capacity as an industrial jury.

174. The court was concerned about apparent inconsistencies between the cases of **Bainbridge** and **Middlesbrough**. The Court of Appeal found that the argument accepted by the EAT in the **Middlesbrough** case was that in large employers with many jobs to reorganise, the employer will always be entitled to say that it must continue to discriminate against the women for another 3 or 4 years, albeit to reducing extent, because it cannot afford to bring them into line with the men at the time of your organisation. The court describes that as a "very surprising and undesirable general conclusion". It accepts that a large public employer might be able to demonstrate that the constraints on its finances were so pressing that it could do no other than continue discrimination and that might amount to justification. The Court of Appeal stated at paragraph 177:-

> "If the general rule suggested by the appeal tribunal were to apply, employers would be able to allow the pay structures to fall out of compliance with the law and then, when forced to do something about it as the result of claims being brought, would be able to assert that they could legitimately take a further 3 or 4 years to bring the pay structures into compliance. We do not think that such a situation is consistent with the provisions of the 1970 Act which have now been in force for over 30 years. We consider that it will be possible for an employer to justify the continuance of indirect sex discrimination through the discriminatory application of the pay protection scheme but not as a matter of course and only where the employer satisfies the test of justification as et out in **Barry/Cadman**".

175. In the case of **Bury MBC v Hamilton**, heard along with **Sunderland City Council v Brennan,** the EAT took note of the Court of Appeal's views in **Bainbridge**. At paragraph 57 it states:-

> "It appears from **Bainbridge (2009) ICR 133** that there is no universal … not even any single touchstone by which those arrangements that can be justified can be distinguished from those that cannot. The question is one for the assessment of the tribunal in each case applying the test of proportionality. But it is fair to observe that the Court of Appeal's approval of the decision of both the **Redcar** and the **Middlesbrough** tribunal is upholding the woman's claim to pay protection (and indeed the comment that the former was plainly right) suggests that, to put it no higher, employers will not be able to justify withholding pay protection from claimants without advancing cogent and specific reasons from what is in effect a continuation (albeit limited) of past discrimination".

176. In the current case, ET found that the objective of the respondent, as described by Mr Murray and his evidence, was to produce a modern pay structure that eliminated a range of allowances of one kind or another that had found their way into the respondent's pay arrangements. The ET found that the respondent had a need to bring in a single job

evaluation and grading structure. It found, at paragraph 890, that the respondent's principal objective in bringing in new pay arrangements was to take out of the payment system whatever unfairness as well as unlawful discrimination that existed. The objective was of high importance to the respondent. A subsidiary objective was to achieve that principal objective without placing itself in a position in which its in-house workforce could not compete with private sector contractors for work across a broad range of the respondent's activities. The ET found these to be legitimate objectives. Having made those findings, the ET made findings about the desirability of the soft landing which the respondent wished to provide for those who would lose money under the new scheme. It also made the following finding, at paragraph 895:-

> "There is nothing to suggest that the respondent's thinking in 2006 went beyond offering pay protection to the pre-WPBR earnings of those who would otherwise have suffered an immediate loss of income. The respondent did not consider for a moment offering anything by way of pay protection to those employees who would not suffer an immediate drop in earnings. In particular the respondent did not consider that you should treat those who had been paid less than comparators by reason of the comparators' bonus as earning the same as those comparators when establishing reckonable PP-WPBR pay. Further, the respondent did not consider that if a post-WPBR comparator was paid a transitional payment by reason of the pre-WPBR bonus, the claimant ought also to have that transitional payment. To put it simply, the respondent was interested in protecting the pay of the 'losers' that is those who would otherwise see an immediate cash reduction in their pay packets, and not add to the pay of those perceived as 'gainers'. In fairness to the respondent the trade unions did not ask such arrangements".

177. The ET found that respondent was in some difficulty in seeking to justify its position on cost grounds as it had not led evidence to show even an approximate cost of extending the transitional payments.

178. At paragraphs 898 and 899 the ET set out some difficulties that it could see might affect the respondent if it had extended pay protection so as to lessen or eliminate its discriminatory effect. The ET then found at paragraph 900 that the respondent's continuation of discrimination passed the test of proportionality, for the reasons, quoted above, and set out in the ET's paragraphs 901-903.

179. We have decided that the reasoning of the employment tribunal does not accord with the law as set out in the cases of **Bainbridge** and **Bury.** The ET found as a fact that the employer did not consider extending protection because it regarded the women as "gainers". It was interested only in protecting the pay of the "losers". We do not find that the respondent led evidence from which a legitimate aim could be found; and no proper consideration of proportionality of the scheme was made by the ET.

180. We do not find that the cases of of **Hennigs** and **Specht** assist the respondent in the current case. We accept that in principle pay protection which continues indirect sex discrimination may be justified. We accept that such justification may be ex post facto. Each case will depend on its own facts. There requires to be a legitimate aim and a proportionate implementation of that legitimate aim. The ET does not set out findings in fact which support such a finding in law. Mr Bowers accepted that the ET had to decide the issue, and were not correct if they thought that the test was whether or not the decision of the respondent was a reasonable decision. We agree with him that this was a matter to be decided by the ET; but we find that they have not set out findings in fact which enable the decision they have reached in law.

181. On assimilation, the claimants' position was that the ET had not engaged with the arguments put before it. The judgment at paragraph 6 is that insofar as assimilation is discriminatory it is justified. The reasons, at paragraph 904, state that assimilation in grades 1 to 4 was by length of service; it was not clear whether a bonus earning employee without the length of service needed to assimilate at a point sufficient to meet his pre WPBR earnings would have been regarded as red circled. There was no evidence of a claimant and

comparator to show what would happen in such a situation. The ET found there was an inadequate evidential basis for it to reach a conclusion.

182. Counsel for all of the claimants argued that at the ET there had been no argument that the attack on assimilation was to be confined to any particular claimant. Rather the generic point was made that a person in detriment was assimilated to a higher point than a person not in detriment. If the reason for being in detriment was the previous payment of bonus which was tainted by sex discrimination, then that method of assimilation continued the sex tainted system. They argued that the principle was to be decided at the pre hearing review, but no individual claim was to be determined there. That would be a matter for a further hearing. As they put it, pay protection and assimilation march hand in hand. They wanted a generic ruling on whether the process was discriminatory or otherwise.

Conclusion

183. For the reasons we give in this judgment, we allow the appeal in part. We are satisfied that the ET erred in law in finding that pay protection was brought in to satisfy a legitimate aim, and that it was implemented in a proportionate manner. The aims found by the ET were to provide a soft landing for bonus earners, and to avoid being unable to make competitive tenders. The first aim is an aim that many employers will have when bringing in a new system and is unobjectionable; but it does not engage with the point at issue, which is why should those who have been discriminated against and therefore underpaid, perhaps for years, not enjoy the same payments? There was no evidence before the ET that the respondent considered the position of female workers who had not been in receipt of bonus and who should have had equal pay with men who were in receipt of bonus.

184. The second aim is of a different character. It could, if it had been costed and considered and compared with payment to those previously discriminated against have provided objective justification for the pay protection scheme. The test of proportionality may have been met if it had been shown that the scheme was designed to meet the aim, and was a reasonably necessary way of doing so. There was no such evidence. Thus the ET had no factual basis on which to make its finding in law that the continuation of discrimination was justified.

185. We allow the appeal in so far as it relates to pay protection and assimilation. We accept the arguments made by counsel for the claimants that in this case on the facts found by the ET assimilation and pay protection are so closely connected that they should be dealt with together. We appreciate that the claimants were able to choose their comparators and we accept from the ET that they did not lead evidence to show that a particular claimant compared to a particular comparator suffered discrimination as a result of the method of assimilation. We find however that the ET did find, apparently without its being in dispute, that assimilation was in some instances to the point on the scale which would preserve pre-WPBR earnings. That is to continue discrimination in the same way as payment of pay protection.

186. We refuse the appeal in so far as it relates to EDC. We agree with the ET that the matter should be dealt with at the full hearing which will follow.

187. We find that the ET was entitled to find that use of two values for a job is not an indication of invalidity of the JES. It is a question of fact for the ET to determine how the evaluation is done. It found that a job valued at grade pay x and WCD y would be equal to

another different job which attracted the same scores. We have not found that it erred in law in so finding.

188. We find no error in law in the reasons of the ET. It directed itself appropriately on the onus of proof, and we do not accept that it failed to follow its own directions. It considered technical challenges to the JES of varying sorts. It was entitled to decide the validity or otherwise of the scheme in light of the evidence led before it. In expressing the view that expert evidence might have been helpful, the ET expressed an opinion it was entitled to hold. The claimants did not lead any expert evidence to show inadequacy of the JES. The respondent led the designer of the JES and the council official responsible for its implementation. The ET was entitled to find facts and draw inferences from that evidence. It was correct to note that assertions put to witnesses in cross examination did not amount to evidence, and it was entitled to find that the witnesses led by the respondent were not successfully challenged in cross examination. The claimants have had a judicial determination of their claim for equal pay by the ET adjudicating on the claims made about the scheme, in a pre-hearing review. Individual claims will require to be proved.

189. We therefore remit the case to the ET to proceed as accords.

Appendix: cases lodged by parties

CASE NAME	REFERENCE
Eaton Ltd v Nuttall	**[1977] ICR 277**
England v Bromley London Borough Council	**[1978] ICR 1**
O'Brien v SimChem Ltd	**[1980] ICR 573**
Arnold v Beecham Group Ltd	**[1982] IRLR 307**
Commission v UK	**[1982] ICR 578**
Rummler v Daton-DruckGmbH	**ECJ [1987] ICR 774**
Bromley v Quick	**[1988] IRLR 249**
Dibro v Hore	**[1990] ICR 370**
Fox, Campbell and Harley v UK	**(1991) 13 EHRR 157**
Springboard v Sunderland Trust v Robson	**[1992] ICR 554**
Diageo PLC v Thomson	**EATS/0064/03**
Paterson v London Borough of Islington	**EAT 347/03**
Alabaster v Barclay Bank PLC (formerly Woolwich plc) and another	**[2005] ICR 1246**
ASLEF v Brady	**[2006] IRLR 576**
Madarassy v Nomura International PLC	**[2007] IRLR 246**
Middlesborough Borough Council v Surtees and others (No.2)	**[2007] IRLR 981**
Defrenne v Sabena	**[1976] ICR 547**
Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland	**[1982] ICR 578**
Brunnhofer v Bank der österreichischen Postsparkasse AG	**[2001] 3 CMLR 9**
Armstrong v Newcastle upon Tyne NHS Hospital Trust	**[2006] IRLR 124**

Associated Society of Locomotive Engineers and Firemen (ASLEF) v Brady	**[2006] IRLR 576**
Loxley v BAE Land Systems Ltd	**[2008] ICR 1348**
Redcar and Cleveland BC v Bainbridge No.1	**[2008] ICR 238**
Redcar and Celveland BC v Bainbridge No.2	**[2009] ICR 133**
Hartlepool BC v Dolphin	**[2009] IRLR 168**
Gibson v Sheffield CC	**[2010] ICR 708**
Birch v Walsall MBC	**Transcript 10.09.2010**
Bury MBC v Hamilton	**[2011] ICR 655**
Brent London Borough Council v Fuller	**[2011] ICR 806**
Hennigs v Eisenbahn-Bundesamt, Land Berlin v Mai	**[2012] IRLR 83**
Seldon v Clarkson Wright & Jakes	**[2012] ICR 716**
Haq v Audit Commission	**[2013] IRLR 206**
North v Dumfries and Galloway Council	**[2013] ICR 993**
Specht v Land Berlin and Land Berlin v Mai	**[2014] ICR 966**
Hershaw and others v Sheffield City Council	**[2014] ICR 1120**
Seldon v Clarkson Wright & Jakes (No 2)	**[2014] IRLR 748**
Ministry of Justice v O'Brien	**[2013] ICR 499**
Hartley v Northumbria NHS Trust	**2009 ET**
Enderby v Frenchay Health Authority	**[1994] ICR 112**
Council of City of Newcastle Upon Tyne v Allan	**[2005] IRLR 504**
Harris v Academies Enterprise Trust and others	**UK|EAT/0097/14/KN**
Equal Pay Act 1970 ss. 1, 2 and 2A	