Appeal No. UKEAT/0108/13/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
Heard on 15-17 July 2014
Judgment handed down on 10 October 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MRS C BAELZ

MS K BILGAN

ST HELENS METROPOLITAN BOROUGH COUNCIL — APPELLANT

MRS M ARNOLD & OTHERS — RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON GORTON QC (one of Her Majesty's Counsel) Instructed by: St Helens Metropolitan Borough Council Legal Services Town Hall Victoria Square St Helens WA10 1HP
For the Respondents	MR THOMAS LINDEN QC (one of Her Majesty's Counsel) Instructed by: Simpsons Solicitors 3rd floor St Nicholas House Old church yard Chapel Street Liverpool L2 8TX - and - UNISON Legal Services UNISON Centre 130 Euston Road London NW1 2AY

SUMMARY

PRACTICE AND PROCEDURE - Compromise

The Employment Tribunal erred in their reasons for holding that the Claimants were not precluded from pursuing equal pay claims in respect of a certain period by the terms of COT3s. However their decision was upheld for the different reasons advanced on behalf of the Claimants in the Respondent's Answer.

The Claimants' cross-appeal from directions for a hearing on an estoppel by convention argument precluding the Claimants' claims was academic as the basis for such an argument was the original erroneous basis for the Tribunal's decision. The decision of the Employment Tribunal was not upheld on the basis which gave rise to the estoppel by convention argument.

THE HONOURABLE MRS JUSTICE SLADE:

1. The Appellant, St Helens Metropolitan Borough Council ('St Helens') appeals from the judgment of an Employment Tribunal, Employment Judge Reed and members ('the ET'), sent to the parties on 22 October 2012 on a Pre-Hearing Review ('PHR'). The Claimant women employed by St Helens claim equal pay some on the basis that their work was rated as equivalent and others on the basis that their work was of equal value to their male comparators. The Claimants, unlike their comparators, did not receive bonus payments. St Helens resist the claims on the basis that the difference in pay arising from pay protection for the male comparators between 1 November 2004 and 2008 is due to a material factor which is not a difference in sex and is a proportionate means of achieving a legitimate aim (a 'GMF'). As stated in their ET3 Grounds of Resistance to the claims St Helens also contend that the Claimants are precluded from pursuing claims in respect of the period from 1999 or 2000 to 1 November 2004 because they had entered into COT3 agreements which gives rise to the live issue on this appeal. Some of the Claimants are members of the GMB and others of UNISON. All Claimants were represented before us, although not before the ET, by Mr Thomas Linden QC. St Helens were represented before us as before the ET by Mr Simon Gorton QC.

2. The ET recorded that the purpose of the PHR was to determine whether St Helens had established a GMF defence for the admitted difference in pay between the Claimants and their comparators in the period between November 2004 and May 2008. St Helens conceded that in that period the relevant Claimants were employed on work rated as equivalent to their male comparators and it was assumed that those who claimed they were performing work of equal value were doing so. On 1 November 2004 the Council implemented the Single Status Agreement, an agreement amalgamating different pay structures for different groups of local authority workers and introducing job evaluation with aims including the elimination of sex

discrimination in pay. The date Single Status was implemented is variously given as 1 or 4 November 2004. For the purposes of this judgment the precise date is immaterial. We will adopt the 1 November date but make no finding in this regard. The male comparators were given protection for their higher pay in the period between the introduction of Single Status to February 2008.

3. The ET held on the PHR that any variation between the contracts of the Claimants and those of their comparators was not genuinely due to a material factor which was not the difference of sex. Because the ET rejected the GMF defence, they held that St Helens had failed to address an equality issue within the meaning of the COT3s and the Claimants were able to pursue claims in respect of the period between entering into the COT3s and 1 November 2004. The ET also directed that further submissions and possibly additional evidence be heard on a defence that the Claimants were estopped by convention from pursuing claims for that period.

4. The Grounds of Appeal fall into two groups: one challenging the rejection by the ET of the GMF defence and the other the conclusion that the settlement agreements, the COT3s, entered into by the Claimants did not prevent them from pursuing their claims for equal pay in respect of the period between entering into the agreements and the introduction of Single Status. By their Respondent's Answer, the Claimants seek to support the rejection of the GMF on grounds additional to those given by the ET. They also cross-appeal from the direction given by the ET that if the Claimants were not precluded from pursuing their claims in respect of the period between entering into the COT3s to November 2004 because St Helens had failed to establish a GMF defence they would permit further representations and possibly further evidence on St Helens' argument that the Claimants were estopped by convention from doing so.

5. The hearing of this appeal was listed for and heard over three days. On the third day the parties reached agreement as to the disposal of the GMF grounds of appeal. By consent the appeal on some of those grounds was allowed. It was agreed that the ET failed to give adequate reasons for their conclusion on proportionality. The consequence of this was that the rejection of the GMF defence was set aside. The matter was remitted to a freshly constituted Employment Tribunal to determine the issue of proportionality, and therefore the GMF defence, the parties being bound by the concessions recorded in the preamble to the Order made on 17 July 2014. Also by consent, other GMF grounds were dismissed. Having heard full argument on all the grounds of appeal we were satisfied in accordance with the Employment Appeal Tribunal Practice Direction paragraph 18.3 that there was good reason for making the Consent Order. Judgment on the COT3 ground of appeal and on the cross-appeal was reserved and is now given.

Facts relevant to the COT3 ground of appeal and the cross-appeal

6. In 1997 agreement was reached between local government employers and trade unions in the National Joint Council ('NJC') to introduce a new national agreement for former APT&C and manual employees. The new handbook, the Green Book, would apply to all these employees rather than having, as in the past, different sets of terms and conditions for these groups. The 1997 agreement is known as the Single Status Agreement. An Implementation Agreement of 1997 provided that:

> **"12.1. To fulfil a key objective of single status employment, fair and non-discriminatory grading structures are needed at local level to integrate former APT&C staff and former Manual Workers."**

One of its objectives was that job evaluations would be carried out to eliminate any sex based pay discrimination. Paragraph 12.2 provided that:

> **"…In conjunction with local grading reviews the authority and the unions shall agree the terms on which there should be protection against loss of remuneration."**

7. In August 1998 approximately 510 Equal Pay claims were issued by trade unions on behalf of catering staff including the Claimants. Their comparators received higher rates of pay and bonus payments.

8. On 1 April 1999 St Helens and the trade unions entered into a Framework Agreement. The Framework Agreement provided that:

> **"The Council will issue notice that the bonus schemes will cease to exist within the areas of the NJC for Local Government Services from 1 April 2001 and the trades unions and management will enter into discussions prior to that date with a view to agreeing alternatives, including use of the Job Evaluation Exercise."**

9. The majority of the 1998 claims were settled by St Helens. COT3s were entered into on 6 December 1999 ('the 1999 COT3').

10. The 1999 COT3 is on an Advisory Conciliation and Arbitration Service ('ACAS') form. It is headed: "Agreement in respect of an application made to the Industrial Tribunal". There is a box titled "Tribunal case number". The text records that St Helens agreed to make compensation payments to the "Applicants" [Claimants]:

> **"1. …in full and final settlement of each Applicant's claim relating to equal pay/equal value and sex discrimination arising out of each Applicant's employment with the Respondent up to and including the date of payment under the agreement.**
>
> **2.The claims by the Applicants relating to any period subsequent to the date of this agreement will be stayed with liberty for both or either party to apply to the Employment Tribunal in relation to any issue in respect of the stay.**
>
> **3. Subject to (a) below, the remaining proceedings will remain stayed pending the consideration of the implementation of job evaluation as embodied in the framework agreement between the Respondent and the Applicants' trade union.**
>
> **(a) The Applicants reserve the right to request that the stay be lifted if the Respondent fails to address any equality issues under the mechanism referred to in para 3 above."**

11. A second COT3 was signed on 15 February 2000 on behalf of those who had not brought proceedings but had equal pay claims ('the 2000 COT3'). The 2000 COT3 is on an ACAS form and is headed:

> **"Agreement in respect of an application made to the Advisory Conciliation and Arbitration Service (No application made to the tribunal at the time of agreement)**
>
> **…**
>
> **1. That the Respondent agrees to pay the Applicant the sum of £1,314.43 (One Thousand Three Hundred and Fourteen Pounds and Forty-Three Pence) which the Applicant agrees to accept in full and final settlement of her claim relating to equal pay/equal value and sex discrimination arising out of the Applicant's employment with the Respondent up to and including the date of payment under this agreement. This payment is a gross payment and all necessary deductions for Income Tax and National Insurance will be made prior to payment.**
>
> **2. Any claim the Applicant may have relating to any period subsequent to the date of this agreement will not be pursued pending consideration by the Respondents of grading reviews as recommended under the 'Single Status Agreement' which includes consideration of the implementation of job evaluation as embodied in the framework agreement between the Respondent and the trade unions involved.**
>
> **3. The Applicant reserves the right to bring equal pay proceedings in respect of the period following the date of this agreement if the Respondent fails to address any equality issues under the mechanism referred to in para 2 above."**

12. On 6 April 2001 St Helens agreed arrangements with the trade unions in respect of removal of bonus payments. The agreement regarding the removal of the bonus arrangements provided:

> **"1) In line with the framework agreement signed by the Council and the trade unions, the terms of the bonus scheme will cease to apply to the areas of Cleansing, Grounds Maintenance, Cemeteries and Transport from 1 April 2001… In respect of the individual position of existing staff, the current arrangement will continue on a protected basis, initially for the period during which the Council will be undertaking work in relation to determining a revised pay and grading structure in line with the principles of single status. This work has already commenced via piloting the National Job Evaluation Scheme. The protection arrangements will be kept under review in line with this process and staff will be notified and consulted with prior to any intended changes to their contract of employment."**

13. An Employment Tribunal chaired by the same EJ as the decision under appeal, Employment Judge Reed, held in a judgment sent to the parties on 6 February 2003 that the stay on equal pay claims brought in 1998 by Ms Chorley and others agreed in COT3s entered into in 1999 was not lifted. The 1999 COT3s under consideration in those proceedings are included amongst those the subject of the current appeal. The ET held at paragraph 52 of the judgment in **Chorley** that the Council had not repudiated the 1999 COT3s. The stay was therefore binding on the parties and precluded Ms Chorley and her co-claimants from proceeding with the equal pay claims.

14. A further Agreement on Implementation of Single Status was reached with trade unions in 2004. It was agreed that Local Pay Reviews were to be completed and implemented by all authorities by 31 March 2007. Local Pay and Grading Reviews were to include proposals for pay protection.

15. On 27 October 2004 the UNISON Branch Secretary and Convenor wrote to St Helens' Head of Human Resources stating:

> **"We are generally pleased with the findings of Job Evaluation, although we understand that as previously agreed, any anomalies can be revisited/re-evaluated so as to lessen if not eradicate completely, any financial detriment to those affected. In an effort to do this we support the principles of protection, and although understanding the legalities surrounding this UNISON would not like to commit itself to any period unless legally sound. Obviously we would like to see as long a period of protection as possible and would hope that in future legislative changes may enable you to do this."**

16. The ET held:

> **"7. Single status was implemented on particular dates for particular groups of employees. The first such phase took effect on 1 November 2004. The result of the grading that took place was that, if the claimants and their comparators were paid in accordance with the relevant evaluations, the claimants would have increases in their wages but their comparators would have reductions in theirs.**
>
> **8. Rather than reduce the wages of the comparators to the level appropriate to the grade at which they had been assessed, the Council agreed with their recognised trade unions that their pay would be "protected", or maintained at their current level. The result would be that they would continue to be paid more than the claimants who had been assessed to be on the same grade as they were.**
>
> **9. It was intended that, in the course of the pay protection period, there would be an erosion of that differential, in that no cost of living increases would be paid to the comparators. In fact, however, that was not the case: the element of their wages representing basic pay did indeed rise in accordance with cost of living increases. The only erosion, in that sense, was that the element representing "consolidated" bonus was not so increased.**
>
> **10. It was anticipated at the commencement of the implementation of single status that the final phase would be completed by November 2007. The approach of the Council to similar situations in the past had been that pay protection for a period of two years was permitted. Negotiations took place between the Council and the trade unions, the Council initially offering a six month protection period and the trade unions seeking an indefinite protection period. The parties eventually agreed that protection would come to an end two years after the projected final phase i.e. in November 2009."**

The conclusions of the ET on the COT3 issue

17. The ET held of paragraph 3 of the 1999 COT3 that:

> **"49. On the face of it, the "remaining proceedings" can only refer to proceedings instituted after the date of the COT3, since all of the proceedings that were then in existence were settled.**

> **50. The stay referred to in the first part of paragraph 3 would, on the face of it, apply pending implementation of single status."**

Of paragraph 3(a) of the 1999 COT3 the ET held:

> **"51. However, sub-paragraph (a) provides that the stay may be lifted. Although it refers to the right of the applicants to "request" the stay be lifted, there would not appear to be any sensible basis to deny them the removal of the stay if they were able to establish the condition referred to, namely that the respondents had failed to address any equality issues under the single status mechanism. What we took this rather opaque phrase to mean is that a stay would be imposed unless the Council failed to meet its equal pay obligations in its introduction of single status.**
>
> **52. In our view, our determination that there was no genuine material factor accounting for the difference between the wage levels of the claimants and their comparators meant that there had indeed been a failure on the part of the Council to address a particular equality issue and therefore, on the face of it, the claimants were entitled to a removal of the stay."**

18. The ET held that paragraph 3 of the 2000 COT3 was to similar effect as the 1999 COT3 although there was no reference to a stay. Claims would not go forward pending the implementation of Single Status. However paragraph 3 provided that such claims could be brought in respect of the period following the agreement if St Helens failed to address any equality issues under the mechanism in paragraph 2. The ET held:

> **"56. …the Tribunal having determined the Council had failed to establish its material factor defence, it followed that there had been a failure to address an equality issue and therefore (again, on the face of it) the relevant claimants were entitled to take their claims forward."**

The relevant statutory provisions

19. The claims were brought under the **Equal Pay Act 1970** ('EqPA'). Section 77 of the **Sex Discrimination Act 1975** provided:

> **"(3) A term in a contract which purports to exclude or limit any provision of this Act or the Equal Pay Act 1970 is unenforceable by any person in whose favour the term would operate apart from this subsection.**
>
> **(4) Subsection (3) does not apply—**
> **(a) to a contract settling a complaint to which section 63(1) of this Act or section 2 of the Equal Pay Act 1970 applies where the contract is made with the assistance of a conciliation officer;**
> **…"**

The statutory provisions applicable to such claims in respect of acts after or continuing after 1 October 2010 are now included in the **Equality Act 2010**.

Submissions of the parties

20. Mr Gorton QC contended that the ET erred in holding that St Helens had failed to "address any equality issues" within the meaning of paragraph 3(a) of the 1999 COT3 and paragraph 3 of the 2000 COT3 because they had dismissed the Council's GMF defence. St Helens had addressed equality issues by introducing Single Status. It was not open to the ET on the facts to hold that St Helens had failed to address equality issues when it was not suggested that the Council had not properly and expeditiously implemented Single Status.

21. It was submitted that the ET failed to identify the obligations on St Helens in introducing Single Status. They did not consider the Implementation Agreement for Single Status or the Framework Agreement of March 1999. Mr Gorton QC contended that the obligations on St Helens in introducing Single Status were: (a) the introduction of a new equality proofed and agreed pay and grading system; (b) back pay for those who had been underpaid previously; and (c) pay protection for those who would lose out on regrading or evaluation of their posts. Had the ET referred to the relevant documents they would have found that St Helens had addressed the equality issues required to be considered under the Single Status Agreement.

22. Mr Gorton QC submitted that the COT3s referred to the implementation of Single Status. They were not concerned with the consequences of the successful introduction of equality compliant job evaluation. It was this which gave rise to the need for pay protection for the "losers" and the GMF defence. Not extending to the Claimants the higher pay which was the subject of pay protection was not a breach of St Helens' obligation to address equality issues under Single Status which was referred to in paragraph 3 of the COT3s. Accordingly it was said that there was no basis upon which to lift the stay on proceedings. Further, it was

contended that the ET erred in holding that because St Helens' GMF defence to the Claimants' claims for equal pay failed, equality issues had not been addressed under the mechanism contemplated by the Single Status Agreement. It was submitted by Mr Gorton QC that on a proper construction of the COT3s the stay on proceedings could only be lifted if equality issues had not been addressed in implementing Single Status. As shown by the trade unions' agreement that Single Status had been implemented, that precondition had not occurred and the stay remained in place.

23. Mr Gorton QC submitted that the ET erred in failing to have regard to the decision in **Chorley** that the stay imposed by the 1999 COT3 remained in place and that the Claimants would have to apply to lift the stay on fresh proceedings.

24. Mr Linden QC contended that the effect of the 1999 COT3 was that no claim could be brought in the period between the date of settlement of the claims and the date of implementation of Single Status. The stay expired on implementation of Single Status in November 2004.

25. Mr Linden QC submitted that the meaning of the COT3s is plain. Both the 1999 and the 2000 COT3s provided by paragraph 1 for full and final settlement of claims relating to equal pay/equal value and sex discrimination up to and including the date of payment. As for claims or potential claims in relation to the period after that date there was to be a cessation of hostilities until the date of introduction of Single Status. The COT3s only imposed a stay or prohibition on presenting new proceedings in the period from the date of payment of settlement sums to the date of implementation of Single Status, 1 November 2004. The possibility of applying for a lifting of the stay referred to in the 2000 COT3 in respect of the period after the payment of settlement sums. The 1999 COT3 applied if St Helens did not consider

implementation of job evaluation and any equality issues under the Single Status or Framework Agreements or did not do so within a reasonable time.

26. It was submitted on behalf of the Claimants that after Single Status was introduced the stay on claims in existing proceedings of claims in respect of the period after the date of payment under the COT3 and the prohibition of new claims in respect of that period was lifted. Paragraph 3(a) of the 1999 COT3 applied during the period before Single Status was implemented. After implementation the stay ceased to apply in any event.

27. Mr Linden QC did not accept Mr Gorton QC's submission that it was the intention of the parties to agree a full and final settlement of all the equal pay claims, including in respect of the period after payment of settlement sums. The factual background which in accordance with the guidance in **Investors Compensation Scheme** was an admissible aid to construction did not support such a conclusion. The current claims are in respect of the additional pay of male comparators who had been identified on job evaluation. This was not an issue in the period up to November 2004 as job evaluation and pay protection decisions had not yet been taken.

28. Further, Mr Linden QC contended that the decision in **Chorley** relied upon by Mr Gorton QC does not assist St Helens. It was merely concerned with whether at the time the applications by the Claimants were considered by the ET in that case, 13 January 2003, St Helens had failed to address any equality issues under the Single Status Agreement as contemplated in the Framework Agreement. That the EJ had found that at that time St Helens was not in breach of their obligations under the COT3 does not assist in determining the length of the stay imposed by the COT3s or whether there was a subsequent breach by St Helens of their obligations under the settlement agreements.

29. Whilst Mr Linden QC did not disavow the reasoning of the ET on the COT3 issue, in effect his submissions rendered irrelevant the question of whether the dismissal of the GMF defence represented a failure to address equality issues within the meaning of the COT3s which was the basis on which the ET reached their decision.

Discussion and conclusion

30. The outcome of the appeal from the decision of the ET on the COT3 issue depends upon whether they erred in their construction of the COT3s and, if they relied on erroneous reasons, whether their decision can be upheld on the grounds set out in the Claimants' Respondents' Answer.

31. There is no dispute between counsel over the proper approach to the construction of the COT3s. It is that which was set out by Lord Hoffman in the well known passage in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896. Amongst the five principles set out were the following at page 912H and 913C:

> **"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.**
>
> **…**
>
> **(4) …the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean."**

In **Bank of Credit and Commerce International SA v Ali and Others** [2001] ICR 337 Lord Bingham approved the general principles applicable to interpretation of documents summarised by Lord Hoffman in **Investors Compensation Scheme Ltd**. Lord Bingham made clear at paragraph 8 that the object of the court in construing a document was to give effect to what the parties intended. Lord Bingham held:

> **"To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction**

so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective state of mind but makes an objective judgment based on the materials already identified."

32. In our judgment the submissions of Mr Linden QC on the construction of the 1999 and 2000 COT3s are correct. By its title the 1999 COT3 is an agreement in respect of applications which had been made to the ET in the cases set out in a Schedule to the ACAS form. Equal Pay claims relate to the past but also by reason of **Equality Act 2010** section 66(1) and its predecessor have the effect of statutorily modifying the contracts of successful Claimants which has an effect on future pay. An equal pay claim therefore has both a past and a future element. We therefore do not accept the observation of the ET at paragraph 49 that the reference to a stay of "remaining proceedings" in paragraph 3 of the 1999 COT3 "can only refer to proceedings instituted after the date of the COT3". Not all the claims made in the proceedings which had been issued were settled. Paragraph 1 of the 1999 COT3 made it clear that it was "each Applicant's claim … arising out of employment with the Respondent up to and including the date of payment" under the COT3 which was settled. The existing proceedings also related to claims for ongoing pay disparity. It was this element of the existing proceedings which was stayed. As Mr Linden QC rightly observed, a stay can only apply to proceedings which have been issued given that an ET has no power to stay claims which have not been issued.

33. Paragraph 2 imposes a stay on the claims relating to any period after the date of the COT3. In our judgment this does not impose a perpetual stay. The paragraph refers to the possibility of applying to the ET "in relation to any issue in respect of the stay". The issues in respect of the stay are not set out in paragraph 2 but in paragraph 3(a). Paragraph 2 must be read together with the subsequent paragraphs.

34. Paragraph 3 of the 1999 COT3 specifies the duration of the stay of that element of the claims for equal pay in the then existing proceedings which related to the period after the date

of the agreement. Paragraph 3 provides that the stay on that element of the claim which remained after the settlement payment in respect of the past employment would come to an end on implementation of the Single Status Agreement. That occurred on 1 November 2004. Accordingly the stay imposed by the 1999 COT3s came to an end automatically on 4 November 2004 without the need for a request that the stay be lifted. The provision in paragraph 3(a) enabled a Claimant to request that the stay be lifted if St Helens failed to address any equality issues under the mechanism in paragraph 3, which included consideration of job evaluation. This enabled the stay to be lifted before it would automatically come to an end on the implementation of Single Status as provided in paragraph 3.

35. The 2000 COT3s, as their heading shows, were entered into by individuals who had not made applications to the ET at the time of entering into the agreement. Claims for equal pay up to and including the date of payment under the COT3s were settled. Potential Claimants agreed by paragraph 2 that they would not pursue equal pay claims which they may have relating to any period after the date of the 2000 COT3 until grading reviews as recommended under the Single Status Agreement and implementation of job evaluation as referred to in the Framework Agreement had been considered. The agreement reached in the 2000 COT3s was that no new claim for equal pay in respect of the period after the date of the 2000 COT3s, 28 February 2000, would be presented until after consideration of the matters referred to in paragraph 2. The prohibition on presentation of new claims to an ET came to an end on 1 November 2004, the date of implementation of Single Status.

36. In our judgment the ET erred in holding that failure to establish a GMF defence for unequal pay between November 2004 and 2008 constituted a basis for lifting a stay on proceedings or claims for unequal pay between the date of entering into the COT3s and November 2004. The decision of the ET that the Claimants were not precluded by the COT3s

from pursuing equal pay claims in respect of the period between the date of the COT3s and 1 November 2004, the jurisdictional issue raised in paragraph 4.4 of the ET3, is upheld for the different reasons set out in the Claimants' Answer in the EAT. In our judgment on a proper construction of the 1999 and 2000 COT3s the stay on the existing and prohibition of new equal pay proceedings in respect of the period after entering into the agreements came to an end by operation of the provisions of the COT3s on 1 November 2004, the date of implementation of Single Status. The appeal from the decision that the Claimants were not precluded by the COT3s from pursuing equal pay claims in respect of the period between the date they entered into the COT3s and 1 November 2004 is dismissed.

The cross-appeal

37. Mr Linden QC contended that the ET erred in directing that representations and possibly further evidence would be heard on an argument that the Claimants were estopped by convention from pursuing their equal pay claims in respect of the period from the date of entering into the COT3s to 1 November 2004. He submitted that such a direction should not have been given as an estoppel by convention argument was bound to fail.

38. The estoppel by convention submissions advanced by Mr Gorton QC was summarised in paragraph 95 of his skeleton argument as follows:

> **"95. …if the argument was to be run that the loss of the GMF defence by R would mean that that would be a failure by R to meet its obligations under Single Status, it must be open to R to argue that all the parties had acted on the assumption that Single Status had been successfully implemented (which they had) which would give rise to an estoppel by convention argument…"**

39. It is clear from paragraphs 56 and 57 of their judgment that the ET directed that the estoppel by convention argument be considered because they decided that the Claimants were entitled to pursue or bring their claims notwithstanding entering into the COT3s because of the failure of the GMF defence. The ET reasoned in paragraph 52 that the Claimants were entitled

to a removal of the stay in the 1999 COT3s because the failure of the GMF defence established that St Helens had failed to address a particular equality issue as referred to in the agreement. For the same reason the ET held that Claimants who had entered into the 2000 COT3s were entitled to take their claims forward. Mr Gorton QC on behalf of St Helens based an estoppel by convention argument on the Claimants' trade unions' position that they considered Single Status properly implemented. If they had expressed reservations about the pay protection for certain male employees, which was the focus of the GMF defence, settlement discussions could have taken place. It was submitted that St Helens relied upon the acquiescence to their approach by the trade unions to their detriment. The Claimants who were represented by the trade unions were therefore precluded from acting inconsistently with that position.

40. Mr Gorton QC further contended that in any event this EAT should not interfere with a case management decision of the ET to hear argument and evidence on the estoppel by convention point.

41. The decision on the COT3 issue is upheld not on the basis relied upon by the ET but on the proper construction of the COT3s. The stay of existing or prohibition on new proceedings had expired on 1 November 2004. The attitude of the trade unions to whether Single Status had been properly implemented was not relevant to the duration of the stay or prohibition of presentation of new proceedings.

42. St Helens contended that Single Status was implemented on 1 November 2004. This was also the position of the trade unions. The issue to which the estoppel by convention point was directed – that St Helens had failed to establish a GMF defence and therefore failed to address an equality issue as referred to in the COT3 agreements – is no longer relevant. It is not the basis upon which the decision on the COT3 issue has been upheld. The estoppel by

convention point is now academic. The direction by the ET permitting further representations and possibly evidence on the point is set aside.

Disposal

43. The appeal from the COT3 decision is dismissed.

44. No Order is made on the cross-appeal save that the direction of the ET for further submissions and possibly evidence on estoppel by convention is set aside.

45. As a consequence of the Consent Order seal date 17 July 2014 the decision that any variation between the contracts of the Claimants and those of their comparators was not genuinely due to a material factor which was not the difference of sex has been set aside and the matter remitted to a differently constituted Employment Tribunal for re-hearing in accordance with the terms of the Order.