



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

Respondent

Ms D Dowsett & Others

AND

University Hospitals of
Morecambe Bay NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields

On: 31 March 2017 (reading day)
3-7 April 2017

Deliberations:

25 April 2017

Before: Employment Judge Hargrove Members: Mr L Brown
Ms E Menton

Appearances

For the Claimants: Mr R Stubbs of Counsel
For the Respondent: Mr D Bayne of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:-

1 The jobs of:

Connell, a Central Sterile Services Department Assistant (CSSD);
Dowsett as Auxiliary Nurse/HCA;
Walsh as Clinical Support Worker;
Joanne Williams as Phlebotomist;
Wilson as Auxiliary Nurse

are of at least equal value to that of the comparator Applin as a Maintenance Assistant.

- 2 The job of Jill Williams as a Non Clinical Assistant is not of equal value to that of the comparator Applin.

REASONS

- 1 This hearing is the first substantive hearing in this very long running equal pay multiple, which began in 2003. There have however been at least 50 case management hearings and the Stage 2 process with hearings commenced as long ago as 2008. There were a number of hearings in that year in particular to consider the contents of the job description concerning the comparator Applin at a time when the claimants were all represented by Stefan Cross Solicitors. At that stage there were equal value claims with a comparison period ending as long ago as 1 October 2004 and so claims after 1 October 2004, when the Agenda for Change evaluation came into effect and there was in particular a challenge to the validity of the Agenda for Change job evaluation which was considered at a hearing before another Employment Judge in Hartley in 2009. The challenge failed and in consequence Stefan Cross Solicitors withdrew many thousands of the equal value claims and a whole series of equal pay multiples against the NHS. The withdrawal left thousands of claimants unrepresented. There was a lengthy process whereby the unions assumed representation on behalf of some at least of the unrepresented claimants but, since there was no remaining challenge to the validity of the job evaluation study under AfC, broadly speaking the unions represented by Thompsons chose to rely upon different comparators from those relied upon by Stefan Cross Solicitors and in particular comparators whose jobs had been rated under the same bands of AfC after 1 October 2014.
- 2 In this multiple lead claimants in Bands 2, 3 and 5 to 7 together with comparators had been identified by the end of 2012. There was a reduction of the number of lead claimants in the course of case management hearings which took place in 2013. On 31 January 2014 there was a resumed Stage 1 hearing (the Independent Expert having been appointed since 2007) where the Tribunal considered an application by the claimants in Band 3 to withdraw the requirement on the Independent Expert on the basis that the Tribunal could decide the issue of value without the necessity of an Independent Expert on the basis that Band 3 claimants were relying upon the comparator Applin who was also the comparator for the Band 2 lead claimants without the necessity for an Independent Expert's report. That application was successful. The Tribunal is not currently aware whether or not any concession of equal value has been made in respect of the Band 3 comparators. That is a matter which will need to be looked at at a subsequent case management hearing. Stage 2 orders were not finally made until 30 July 2015. In the interim the parties were attempting to agree the job descriptions for the lead claimants in Bands 2, 6 and 7. There was an interim report prepared by the Independent Expert which was received by the Tribunal and the parties on 30 September 2015 which identified to the parties the factor headings which the Independent Expert was intending to rely upon to assess the jobs. There were also factor definitions. At that stage 14 factors were identified.

The first set of reports produced by the Independent Expert were sent to the parties in November 2015. At that stage the Independent Expert elected to mark all of the Band 2 jobs under 10 of the 14 factors only upon the basis that the other four factors were not relevant to the Band 2 jobs but were relevant for the Band 6 and 7 jobs. At that stage of the reports the Independent Expert had not identified level definitions for each factor. In effect the Independent Expert had adopted a GEL scheme specifying the factors on which the job holders were rated the same, the factors where the claimant's job was marked higher, and the factors where the comparator's job was marked higher. He did not make recommendations or state conclusions as to whether the jobs were or were not of equal value in all cases.

In response, following some delays the parties wrote to the Employment Tribunal expressing at length some concerns as to the report's format on 15 January 2016. The e-mail is at pages 2103-2105. The Tribunal directed that the e-mail should be copied to the Independent Expert as a series of queries under the rule 12 procedure in Schedule 3. The Independent Expert responded on 18 February 2016. He acknowledged the difficulty of comparing jobs on the basis of a GEL scheme alone without ranking scales (we will call these for the sake of simplicity level definitions) inserted into each factor, and indicated that he had already undertaken work creating rating scales for each factor and that they could be "restored with some text editing" (see pages 105 -107).

By the time of a case management hearing which took place on 22 March 2016 the Independent Expert had prepared a sample second report for the lead claimant Dowsett (Auxiliary Nurse) which did contain rating scales for the 10 factors upon which the lower rated jobs in the cohort (Band 2) had been assessed. A timetable was then set for the sending of the rating scales for each factor to the parties, and for the production of second reports for each of the job holders, by 29 April 2016. The parties were then given a further opportunity to provide questions on the second reports under rule 12 by the end of May 2016. There were delays of the parties until July 2016. A wholly excessive number of questions were then asked of the Independent Expert in particular by the respondent concerning both methodology and the scoring under the factor scales. In the case of the respondent it amounted to over 300 questions.

The process was delayed in July 2016 when the parties' then representatives then indicated to the Tribunal that there was to be an attempt to settle disputes. A joint meeting was to take place in an attempt to resolve matters by the end of July. However that was unsuccessful and in early August 2016 the respondent changed representation. That engendered further delay until a further case management discussion took place in September 2016, the first attended by the respondent's new representatives, at which it was ordered that the Independent Expert answer some of the questions put by the respondent in respect of methodology only. A timetable was identified for the parties to submit a reduced and agreed final list of other questions to be put to the Independent Expert by 20 October to which the Independent Expert was to respond by 30 November. It was at that hearing that the final hearing was first fixed for February 2017. However, by 28 October the parties had still not agreed a final list of questions. It

transpired that the respondent's new representative had only received the files of papers from the previous representative a week earlier. The timetable was revised on 28 October for the respondent to provide a reduced list of questions to the Independent Expert by 29 November and for the Independent Expert to respond to those questions which he considered to be relevant by 13 December 2016.

On 19 December 2016 the final hearing listed to take place between 6 and 10 February 2017 was postponed and was relisted, with a reading day, to take place between Monday, 3 April and Thursday, 13 April. Orders were made for the answers from the Independent Expert to be incorporated into his final report by February 2017 and the parties were ordered to indicate to each other by 28 February all of the score challenges to be raised in respect of the reports and also to identify to each other and to the Independent Expert and the Tribunal any methodology challenge which any part intended to raise. A joint report to the Tribunal was required to be sent by the parties as to the score challenges by 17 March. Unfortunately the Tribunal became unavailable to sit on the second week of the hearing between 10 and 13 April 2017 and at a subsequent case management hearing it was ordered that the hearing from 3 to 7 April should remain and a second tranche of hearings was fixed for July 2017. Counsel originally instructed on behalf of the respondent then peremptorily withdrew and there was an application by the respondent to postpone the April hearings which was refused at a case management hearing. That is a summary history of this litigation.

- 3 By the time of the reading day the parties' representatives had helpfully provided to the Tribunal a complete schedule of the methodology challenges raised by the respondent and of the score challenges in respect of each of the jobs from both parties. A short telephone case management hearing took place at the start of the reading day on 31 March 2017. It was determined that the Tribunal would deal with the methodology challenges raised by the respondent and the score challenges in respect of the **Band 2 claimants** only at the hearing to take place between 3 and 7 April. The challenges in respect of the **Band 6 and 7 claimants** are to be dealt with at the July hearing. The Independent Expert's final report incorporating the answers to the questions and dated 1 February 2017 is at pages 5-160 of the five volume bundle of documents. Of particular relevance to this hearing, there is a schedule of all the lead claimants and comparators at page 112, Appendix A. There is a list of the 10 factor scheme under which the Band 2 factors alone were marked, at page 150 – Appendix F. This identifies the factors as being (1) Knowledge, (2) Manipulative skills, (3) Analytical skills, (4) Communication skills, (5) Responsibility for care, (6) Responsibility for physical resources, (7) Physical effort, (8) Mental effort, (9) Emotional effort, (10) Working conditions. This is in fact the report for the Connall/Applin comparison but the documents are common to the reports for all of the Band 2 claimants. The factor definitions are contained at pages 36, 43, 45, 46, 49, 56, 58, 59 and 60. Pages 126-135 set out the rating scales (level definitions) for each of the 10 factors. They are the same for each of the claimants and the single comparator. There is a further useful document at page 160 which sets out the maximum levels at which he marked the cohort of Band 2 jobs on each of the 10 factors. In fact, Appendix E identifies the number of levels

and the level definitions which he regarded as being of particular relevance to the cohort of Band 2 jobs. Level definitions are not in all respects the same as the level definitions which he applied to the Band 6 and 7 jobs. There is a more detailed explanation of the application of the level definitions at page 159 of his report. It became apparent during the hearing that the different levels for each factor were intended only to enable to claimant's job and that of the comparator were placed in an order – "ordinative" was the adjective used to describe it. It was not intended to represent a particular value for each level. Thus for example the fact that a claimant scored one level lower on one factor than her comparator but one level higher on another factor would not necessarily mean that the differences would cancel each other out. It is not appropriate to ascribe marks to each level, e.g. level 1 – 5 points, level 2 – 10 points and level 3 – 15 points because the differences in level were not intended to represent the same difference in value of the demands of the job – such as does occur under AfC, the AfC job evaluation scheme, and in some Independent Experts' reports. In short, a difference in level would only be a "meaningful difference in value" would not measure it mathematically. This is a form of implicit rating of the factors.

4 Summary of process followed at the April hearing and conclusions

By agreement with the parties we started with the two methodology challenges relevant to the Band 2 jobs, challenges 1 and 3. Challenge 2 only applies to the Band 6 and 7 jobs. Challenge 4 is in effect a challenge to the overall method of assessment of value as between the jobs. Where the sum total of scores found favoured the comparator in terms of levels, in the absence of the application of rating to the factors the Tribunal should conclude that the jobs were not of equal value. This is a matter which we will comment on in our final conclusions.

5 Methodology Challenge 1

This is identified in the schedule by the respondent as follows:-

"By excluding any factor for planning and decision making, there is a risk that elements of the jobs have not been measured".

As stated above in his two reports the Independent Expert chose to mark the Band 2 jobs under the shortened 10 factor scheme as opposed to the 14 factor scheme. The circumstances in which the Independent Expert's decision in this connection was made is described in more detail at pages 30 onwards of his report:-

"My initial approach to defining factors and rating scales to measure differences in the demands for these factors was based on examining all of the jobs which comprises the population of jobs which were the subject of the claims i.e. all of the claimants and all of the comparators. From this analysis I identified a total of 14 factors. The task of developing a plan based on rating scales for these factors was however complicated by the distribution of the population of jobs for regions explained in section 4 of the paper on measuring value (Appendix G).

The solution which I adopted which is explained in section 4.5 of this report was to create a plan for assessing the Band 2 claims which excluded four of the 14 factors which were included in the original list.

From using the rating scales to assess one of the Band 2 claims it became apparent that for several factors both jobs were rated at the lower level. The implication of this is that neither of these factors had a substantial impact on assessing the value of either job or on the task of comparing the values of the different jobs.

I reviewed the information recorded for the jobs of the other Band 2 claimants to identify if this feature was likely to be repeated and it became apparent that it would indeed be repeated.

The explanation for these results can be traced to the fact that the scheme has been devised to cover the full range of jobs covering claims linked to four different pay bands. The factors which have little impact on the Band 2 claims are likely to have a significant impact on the outcome of some of the other claimants (those in the higher bands), but they are not relevant to comparing with jobs which are the subject of this claim.

The factors which this factor applies to are:-

Responsibility for information;
Responsibility for finance;
Responsibility for human resources;
Planning and decision making".

Mr Bayne' argument put in cross-examination of the Independent Expert on this particular methodology challenge was that the removal of the factor of planning and decision making would have an undue detrimental effect upon the evaluation of Applin's job because it was asserted that decision making was an important aspect of Applin's job. As a starting point we consider whether we agreed that the job descriptions of Connell and Applin had been marked under the level definitions used when the Band 7 jobs were measured under this factor, would inevitably have scored at level 1, as the Independent Expert claimed or whether as the respondent submits Applin should have scored at level 2. Levels 1 and 2 for planning and decision making are set out at page 1248 of the bundles. Level 1:-

"The job holder's work is subject to established routines and involves following established instructions. There are few requirements to exercise initiative or to make decisions. There is ready access to supervisory guidance if any more complex disruptions to establish routines are encountered".

Level 2:-

“Duties are carried out in accordance with established written or oral instructions with some freedom to make minor adjustments to cope with operational problems or unforeseen contingencies.

There is some involvement in workload planning to ensure that the availability of staff and other resources are taken into account in devising schedules or timetables.

Decisions which are made are choices regarding how to apply standard procedures or instructions, or determining the appropriate actions to take in response to emergencies. Some decisions may cover issues which are complex. The impact of the decisions is confined to the operations or services provided by the department in which the job holder is employed”.

Having considered all of the passages in both job descriptions to which we have been referred, we are satisfied that Applin would not have scored at level 2. Both jobs require the job holder to work to established routines following established instructions. There were few requirements to exercise initiative e.g. Connell could re-prioritise or fast-track the sterilising of instruments if required. Applin if given the written document with three categories of priority of work at A to C could elect to perform a C job at a lower priority if he was closer to the site of the next task with higher priority. In an emergency, if he happened to be close he could safeguard the site but had instructions to contact a supervisor to obtain further instructions. Mr Bayne argued that decision making was of paramount importance which was reflected in its express identification which is contained in section 12C of the Equal Pay Act and the Equality Act. In this respect decision making is merely an example of a factor which may be included in a scheme. It is not prescriptive of a factor which must be contained in every scheme. It is now covered by a number of responsibility factors. We accept that the Independent Expert permissibly incorporated the very low level of responsibility into the analytical skills factor. We note that the applicant scored level 2 on that factor, see page 128, “Some judgments may be more complicated in terms of features such as checking more variables or drawing together data from a more varied range of sources”. By contrast Connell scored 1, “The number of variables which have to be considered in planning and decision making activities is limited”. If the Independent Expert had scored both jobs in addition under an eleventh factor of planning and decision making, they would have scored equally under that factor and the claimant Connell would have had 8 factors where they scored equally rather than 7. Since a responsibility for planning and decision making is incorporated into the two levels for analytical skills to have marked that element of responsibility also under planning and decision making would have resulted in double counting.

- 6 The next relevant methodology challenge is number 3, double counting challenge. It is detailed as follows:-

“The requirement of a job holder to provide patients with personal care forms part of level definitions under responsibility for care, communication skills and emotional effort creating a risk of double counting”.

We accept the claimant's argument that in the factors concerned factor 5 - responsibility for care, factor 4 - communications skills, factor 9 – emotional effort and factor 2 – manipulative skills, the Independent Expert was in fact scoring different skills and demands and different elements of the job than those scored in responsibility for care. We note that the Independent Expert extended the factor definition for responsibility for care to include what has been called in other cases indirect responsibility for care. This is indicated by passages at pages 52 and in particular 53 in the definition of the responsibility for care factor:-

“The jobs which are the subject of the claims in this particular dispute involve comparators who are employed in the estates department. The responsibility which is most obviously reflected in the work of the employees in this department is that covered by factor 6 (responsibility for physical resources) in this assessment scheme.

This work also includes responsibilities for safety which are more demanding than those imposed by the work of many other departments in the hospital. The claimant's submission expresses some concern about this statement. My point is that many risks of exposure to accidents or infection reflect the work of those who repair and service the facilities which should be recognised as one element of the responsibility for care.

Communication skills are required and measured at level 3 in circumstances of the provision of “personal care, customer service, employee relations”. Note that it does not only apply to nurses. Nurses or nursing assistants would be expected to score highly under this factor. In fact, Connell and Applin scored the same, at level 2. It is not the same as the element being scored under responsibility for care. As to emotional effort this focuses on the effort required of the job holder as a witness rather than a participant of the pain and distress displayed by patients and relatives – see level 1 definition at page 134. Exposure is unlikely and the situations do occur are exceptional the employee's role is that of a witness rather than a participant. Again one would expect a nurse or nursing assistant with direct contact with patients to score higher because the job holder is expected to become involved, see the last paragraph in level 2. As for manipulative skills at F2, “care” does not appear directly in the factor definition – see page 44, “Other features include the level of difficulty of handling activities involving equipment, materials, people, or tissue”. It includes circumstances where the manual handling of patients is required but also of physical equipment used in patient care as well as equipment handled by the comparator. We accept that manipulative skills are a separate feature of the nursing type jobs which requires separate measurement. We also accept that there will be clusters of factors which will apply to particular types of jobs and under which they will intend to score highly. The same would apply to the comparator's job in particular reference to the factors of physical effort and manipulative skills. Comparator score at level 4 the highest possible level for physical effort. We accept that scheme clearly and adequately reflected different demands and skills across the range of jobs”.

- 7 We went on to consider the individual score challenges in respect of the comparator Applin. These were:-
- 8 In respect of factor 2, knowledge, the respondent asserted that he should have been scored level 3 rather than the Independent Expert's level 2. At the time the comparator entered the job (date unclear but sometime in the 1990s) there was no pre-entry qualification required for the job. The ability to do the elements of the job required work based learning. The job description at page 1916 indicates that the job holder could learn the basic procedures within 6 weeks but that it would take 6 months to encounter every single type of job likely to be encountered. This is comparable to the length of time it would take the CSSD worker (Connell) to gain knowledge for her job; and she too was assessed at level 2 although that process would not be completed for two years. The comparator's job description, paragraph 45 on page 1915, indicates that during the comparison period – 2000 to 2004 – the Trust would require a Level 1 NVQ or alternatively equivalent experience working e.g. on a building site or for electrical contractor. The Level 1 NVQ is a very low qualification and the job holder would qualify anyway under the level 2 definition, "No pre-entry requirements are required but some regard to ability to cope with work based learning would be a criterion on assessing suitability for employment". This is not a level 3 job which requires evidence of knowledge of a craft type job, see in particular the first paragraph of the level 3 definition at page 126. It does not get to an intermediate level between 2 and 3 either.
- 9 The second challenge to the score allocated to Applin was in respect of factor 2, manipulative skills. The Independent Expert scored Applin at level 2. The challenge was not from the respondent but from the claimant who asserted that Applin should have scored at level 1 on the basis that he used less manipulative skills than the claimant's cohort of jobs. The alternative submission from Mr Stubbs for the claimants was that if Applin should remain at level 2 the claimants should also be scored higher. We accepted the Independent Expert's rationale for scoring Applin at level 2 which is set out at pages 80-82 of the report. The factor definition of this factor set out at 43-45 states:-

"This factor measures differences in the level of skill required to cope with the demands of the job and reflects different abilities required to manipulate tools, equipment or vehicles. It reflects an understanding that many occupational skills involve a mixture of perceptual activities. An employee who has a skill absorbs data from various sensory inputs such as visual observation, feeling of controls of equipment etc, the data is processed by the brain to generate various physical outputs ... Differences in skill reflect features such as the complexity of tools or equipment used, the number and variety of tools used, the number of variables which have to be monitored. Other features include the level of difficulty of handling activities involving equipment, materials, people or tissue".

The level 2 definition at page 127 of this factor states:-

“Some duties involve handling materials, tools, equipment or patients. Difficulties may arise from features such as working space, awkward shapes, intricate components, patient comfort. Sensory demands of these activities are generally straightforward ...”.

The Independent Expert referred in particular to the job description of the comparator at page 1921. This illustrates one of the difficulties of comparison which the Tribunal has had. The job descriptions set out the elements of the jobs under different headings from the particular factor heading used in this case. Paragraphs 78 and 79 of the comparator’s job description falls under a paragraph headed “Physical demands including physical effort, manual dexterity and coordination”. This clearly equates to some of the elements of manipulative skills. In his report at pages 80-81 the Independent Expert referred to paragraph 79 and the job holder’s involvement in activities involving the movement of materials requiring gross coordination to exercise skill in upper body movements including working in confined spaces or using ladders or scaffold. Involvement in short cycle fitting operations with occasional use of hand tools such as screwdrivers indicates that there is some need for fine coordination. In assessing candidates applying for appointment to this post it is likely that greater emphasis would be placed on the requirement for gross coordination. In this respect the claimants asked the following question of the Independent Expert, “On what basis is ‘using ladders or scaffolds’ appropriate to manipulative skills?”, to which the Independent Expert replied, “There is a recognition that working at heights involves the need for awareness of an additional variable which requires attention when carrying out handling activities”.

In these circumstances we conclude that the Independent Experts of the comparator at level 2 was amply justified. However we then went on to consider an alternative submission from the claimants that if the comparator should remain at level 2 then other claimants should be assessed higher, at level 3. We have already referred to passages in the factor definition for manipulative skills. The level definitions are at page 127. We cite in level 3 definition having already cited level 2 above. Level 3 reads:-

“Some duties involve handling activities which require particular care. The demands for such care may reflect the delicacy of equipment/materials or concerns relating to physical contact with patients. There may be a need for precision in working with technical specifications. The volume or complexity of material entered by keyboard may require an enhanced level of proficiency in keyboard operation. It is accepted that gross coordination occurs in both jobs. The difference is in fine coordination in the assembly of the trays (in the case of Connell), ‘involving handling activities which require particular care or precision’”.

The Independent Expert conceded that in doing his assessment he had not backtracked into the task analysis in the job description to retrieve weaknesses in the factor analysis in the job description (of Connell). The relevant passage in the job description of Connell under the factor heading of physical demands (physical effort, manual dexterity and coordination) was very short in two paragraphs on page 1639 of the job description, paragraphs 75 and 76:-

“Manual skills are required in moving instruments, loading trolleys and loading trolleys into and out of washing, dryers and autoclaves.

For the safety of staff and also the equipment there is a need to observe correct techniques for loading and unloading trays. The job holder lifts equipment in accordance with her manual handling training”.

At paragraph 78 it is simply recorded “hand eye coordination is required for manipulation of equipment”. His attention was also drawn to paragraphs 17-19 in the task analysis section of the job description on page 1631, which he conceded that he had not taken into account. On this basis he conceded that there was a case for marking Connell at level 3 or at level 2+. We are definite in our conclusion that this claimant has established a meaningful difference in demand or skill required between Connell and Applin particularly when speed and accuracy is required in packing – see especially at paragraph 94 of the job description at page 1642.

- 10 The next challenge, to the Independent Expert’s score of level 2 to Applin on factor 3, analytical skills, the respondent submits that it should be level 3, the claimants submit that it should be level 1. Here we consider the factor definition for analytical skills at pages 45-46 and the level definitions at page 128, levels 1, 2 and 3. The Independent Expert’s assessment is at pages 83-85 of the report. Our conclusion stated shortly is that the comparator clearly scores at level 2 of the level definition. The comparator has a wide range of different activities or tasks in multiple environments in a busy hospital. He draws (simple) data from “a more varied range of sources” – such as drawings, see level 2 on page 128. On the other hand he does not get into level 3 because he does not use judgments drawing on knowledge gleaned from an occupational discipline in which the job holder is trained (see the level 3 definition).
- 11 This was a challenge by the claimant against level 2 being scored by the comparator under factor 5, responsibility for care. The claimant submitted that the appropriate level was level 1 on the basis that the comparator did not meet the level 2 definition. However during the hearing the claimant withdrew the challenge. This factor for care of others is not confined to patient care and it also includes health and safety not only to patients but also others, visitors etc. The claimant achieves level 2 for the patient care element. The comparator gets into level 2 because of the indirect patient care and responsibility for health and safety.
- 12 The final challenge to the comparator’s score was to factor 9, emotional effort, where the Independent Expert scored at level 1 but the respondent asserted that the comparator should be at level 2. This challenge from the respondent was also withdrawn on the basis of a misreading of level 2. Level 2 has three paragraphs, we will insert paragraph numbers:-

“1 Some duties are carried on in work areas where patients are clearly in distress or there is intemperate behaviour.

OR

- 2 Exposure to emotional strain occurs during involvement in disputes over issues relating to employee relations or customer service.
- 3 The employee is expected to become involved in managing immediate responses to such situations. The nature of the response may include providing care of comfort or attempting to defuse or resolve disputes ...”.

The respondent had originally read paragraph 1 as being separate and distinct from both paragraph 2 and paragraph 3. The Independent Expert explained however that paragraph 3 was also included in the alternative phrase contained in both paragraph 1 and paragraph 2. The respondent concedes that the comparator does not comply with the requirements of paragraph 3.

- 13 We now consider the challenges to the scores of the claimant Connell, the CSSD Assistant. The first challenge was from the respondent to the Independent Expert’s assessment of Connell at level 2 for factor 4, communication skills. The respondent asserted that it should be assessed at level 1 rather than 2. The claimant agreed with the Independent Expert’s score at level 2. The relevant passage in the factor definition is at page 46 of the report and the level definitions for levels 1 and 2 are at page 129. Level 1 reads:-

“Duties are generally carried out in isolation with limited needs to exchange information with others. Any messages received are likely to be straightforward. Most exchanges involve information which should generate little difficulty in listening, understanding or explaining. Information provided is straightforward, factual data which can be shared without any need to exercise discretion over the substance or manner of response. Most contacts are with work colleagues. Level 2, communication with others involves exchanging information relating to issues which are straightforward in terms of subject matter. These exchanges occur frequently in undertaking the duties of the job. Most exchanges involve information which should generate little difficulty in listening, understanding or explaining. The accepted norms of customer service in communication with others should be observed. If issues arise which involve more complex or sensitive information these are likely to be referred to a supervisor. The last two sentences of the level 2 definition so contain a step up from the level 1 responsibility”.

The relevant parts of the job description are at page 1642, paragraphs 96 and 97.

There is very little direct information to communications in the job description other than that contained in paragraphs 96 and 97. However we note that at paragraph 47 on page 1635 under Job Reports it states:-

“The job does not require any formal qualifications but a candidate requires a good standard of education including literacy and communication skills”.

Mr Bayne reminded us that we are not entitled to make assumptions of fact but we are entitled to look at the tasks which she performs and which are described and which must entail a degree of communication. At paragraph 10 there is a reference to two staff, one at least a CSSD – who were allocated to the clean end have to go to the operating theatres (7 in number) to collect dirty instruments. This task is also for that reason relevant to the scoring of physical efforts. Dirty instruments are transferred to the dirty end. There is a communication by means of a red key to indicate any instruments to be given a priority. There is an initial cleaning process by hand which requires some form of selection. The instruments are then put into a washing cycle – a choice has to be made. If instruments are missing the CSSD has to telephone the theatre – see paragraph 16. If an instrument is damaged the CSSD also has to telephone the theatre – see paragraph 27. The instruments have to be unloaded and packed into a selection of trays with different instruments on each. There must be communication to perform the process of selection:-

“Checking is required by the team. The loaded trays are then placed in the autoclave. If a process does not pass the Bowie Dick test the job holder is required to report to his/her supervisor. The majority of the wards are visited by the job holder on each day. The job holder may be asked to fast track items on request from theatre staff. The job holder has to answer the telephone on occasions in a department where there are 18 people employed and to assist new starters in the supervisors absence – see paragraph 7. The job holder together with other team members looks after new staff, does not leave them to work on their own – see paragraph 8. In these circumstances we find that the job holder does achieve level 2. There is a parallel with the comparator who frequently visits wards to perform tasks and needs to communicate with particular staff. Both are providing a customer service, they are not only contacting work colleagues”.

- 14 The next challenge to Connell is to the Independent Expert’s score of level 3 for factor 7, physical effort. The respondent challenges asserting that it should be level 2.

The factor definition is at page 58 of the bundle. The level definitions pertaining to this dispute are at page 131. Level 2:-

“Some tasks involve spending short periods of time on activities which require explosive effort, working in confined spaces or in constrained positions. Such periods of time occur frequently and alternate with longer periods spent in carrying out sedentary activities”.

Level 3:-

“The work requires involvement in a range of activities which are physically demanding. Periods of involvement in such activities alternate with periods of carrying out activities which are less physically demanding. Some activities involve effort which is more intense. Others involve periods in which effort has to be sustained over a longer period of time. Working in confined spaces or from awkward postures can be required but is not likely to be required frequently”.

The respondent’s argument was that the claimant’s job did not require “explosive efforts” over relative short periods of time and longer periods of physical activity. Mr Kennedy said that the paradigm example would be someone who is required to load materials and deliver them to a site and unload, to an extent applied to the comparator who we note scored at level 4 under this factor.

We have already described in some detail the regular tasks which the job holder performed. We note that in visiting theatres each day the claimant was involved in standing and walking in each shift. The job holder might walk up to three miles on a shift when assigned to distribution – see paragraph 92, page 1641 of the job description. Paragraph 93:-

“During the shift there are frequent requirements to lift trays or move trolleys from location to location as well as into the washing and cleaning machines and autoclaves. The job holder is sometimes required to carry heavy items which are colour coded to indicate the degree of caution needed to move them. Pushing and moving the trolleys as required. In the autoclave area there is a greater demand for lifting which is carried out during the shift e.g. when unloading the autoclave. This could be categorised as an ongoing requirement to exert light physical effort with frequent requirement to exert more physical effort to moving equipment such as hip sets (10kgs), heaving operational packs or moving trolleys on which multiple pieces of equipment are placed. Note also content of page 100.1, activities, particularly in the operation of the washers and autoclave are carried out in temperatures which can reach 80 degrees Fahrenheit. See paragraph 100.1. The theatres are on a different floor so that the job holder has to use the stairs while a dumbwaiter is used to move the trolley. The job holder spends the greater part of the day on her feet”.

The Independent Expert recognised in his report, at page 97, that “The claimant makes very little reference to the effort demands of the job ... It would have been helpful if these demands had been described more clearly in her statement”. He was however speaking about the task analysis at paragraphs 92-93 which we have already set out. He expressed a concern that the work was quite demanding under this factor. This led to a question from the claimant as to whether it should be at level 4. He responded, “I am not persuaded to revise (the original rating at 3)”. We agree with the Independent Expert’s original evaluation.

- 15 The final challenge to Connell’s score came from the respondent who challenged level 3 for factor 8, mental effort, and asserted that it should be level 2. The factor definition noted was set out at page 59 of the bundle. The level definitions set out at pages 132-133. The Independent Expert asserted that although he

had defined three factor levels he would expect the Band 2 jobs could be restricted to two levels and that was confirmed by the overall scores of the job holders under this factor. All of them scored at level 2 except for Connell who scored at level 3. The level 1 and 2 descriptions for mental effort in the 14 factor scheme. There is however a difference in the level 3 factor definitions. In the 14 factor scheme there were two alternative gateways to level 3. In the 10 factor scheme only the second gateway retained for the Band 2 jobs thus it reads (see page 133):-

“Duties involve handling and making effective use of tools, materials or equipment used in clinical procedures or support services. There is responsibility for using the correct items of equipment, careful use of equipment, operating in accordance with safe working practices. There is responsibility for identifying any needs to replenish stocks of consumable items. The job holder contributes to the remainder of a safe and clean work environment in the work areas in which the duties are carried out”.

The second gateway is we accept, not well delineated and the Independent Expert admitted that he had difficulty with the rating of Connell under this factor. We were referred to paragraphs 10, 14, 17 and 23 of the claimant's job description which described the tasks of “dirty end”, the precise process of cleaning the dirty instruments, the dismantling of instruments prior to washing and the loading of the washing machines. At page 102 in his report he states:-

“This feature of the work of this claimant is distinctive and unusual for jobs at this level. The two lower levels provide for differences which reflect mainly exposure to risks at levels below the more serious hazards which may be encountered in the workplace. The extent of exposure to hazards in the sterile supplies unit is comparable with the two jobs which would place this claimant at level 2. The demand for concentration in tray assembly task is essential without regard to the exposure of risks. These are complex tasks. It is important to check that all instruments are included and that they are laid out in the precise order they are required in the operating theatre. There is need for visual acuity in selecting the correct instrument when many are visually similar. Many of the activities require the claimant to remain visually alert to spot various features which would have an adverse feature on the quality of the contents of the instrument pack. This is a task which is unusually complex for jobs which would be covered by a grading at band 2 in the NHS grading system. There is a case for recognising that the job should have an advantage under this factor relative to the comparator (and other Band 2 claimants). The original definition for level 3 which was derived from analysing the work of Bands 6 and 7 level jobs would not provide a higher rating. A scale which reflects differences between jobs rated in lower NHS bands can reflect such an advantage. I am satisfied that a rating at a higher level than the comparator for this factor is correct. I would be prepared to edit the alternative level definition to reflect more accurately the work of this claimant”.

Whether we reflect this by awarding Connell a notional level 3 based on a revised level definition or we merely record that there is a meaningful extra demand on the claimant does not in our view make any material difference. This means that the claimant should be recorded as being at level 3 under this factor but it applies only to the claimant Connell.

- 16 The next challenge was a challenge by the respondent to a level 2 awarded to Jill Williams, the non clinical assistant on factor 1, knowledge. Level 1 of that factor, at page 126 states:-

“Need to become familiar with the limited range of routine procedures. The demand as to know what to do with little or no need to exercise discretion based on experience. Literacy to read material such as safety instructions and the ability to count batches and read and record numerical date when required. No pre entry qualifications are required”.

We have accepted the respondent’s challenge that the score should be revised down to level 1 from level 2. We note in particular from the job description that the job holder performed a limited range of routine procedures. There was a variety of different tasks described in the job description at pages 1727-1729. They are all of an essentially simple nature and could reasonably be described as routine and the jobholder knows what to do and has little or no need to exercise discretion as described in level 2. The actual jobs described the job description under key duties, main tasks activities at paragraphs 16-55 could be described on uncomplicated with a non diverse range of operations, also in level 2. We were referred by Mr Stubbs to the fact that the claimant had to help with the feeding of patients – page 1724, paragraph 31. However it was also noted that she would not actually feed the patients herself.

- 17 Jill Williams – this is the claimant’s challenge to the Independent Expert’s assessment at level 2 in factor 4, communication skills. The claimant asserted that she should have been assessed at level 3. We agree with the Independent Expert’s analysis of the contents of the claimant’s job description and his assessment of level 2 under this factor as contained in pages 714-716 of the report. There is a high level of frequency involvement in contacts which have a low level of intensity. Exchange of information is with other members of staff on the ward and other departments most of which is simple factual data. When this score was challenged by way of a question to the Independent Expert, the Independent Expert responded at page 717:-

“It is the high frequency of contacts does not elevate the level of skill to that which is comparable to some of the other claimants whose contact with patients involve exchanges which are more demanding in terms of issues such as sensitivity or contention. We agree with the Independent Expert, level 2 is the appropriate level for this job holder in this factor.

- 18 The next challenge was a challenge for responsibility for care, factor 5. The Independent Expert scored at level 2 but the claimant asserted level 3. We accepted that the level definitions at levels 2 and 3 for this factor are not well defined. Level 2 does not well define the direct care responsibility to be achieved

as opposed to the indirect care for a safe environment which is dealt with in the second paragraph of level 2. The claimant has a responsibility for personal care such as toileting, washing and other simple tasks whereas clinical matters are dealt with by HCAs. Some proportion of the claimant's duties do contribute to the wellbeing of patients within the first sentence of level 3. We do not consider that it satisfies the test of a substantial proportion of her duties. We note paragraph 97 of the job description at page 1731, "The job holder does not have direct responsibility for patient care. She takes instructions from the team leader. We accept the Independent Expert's argument, level 3 is typically designed for a nursing or nursing assistant job, there is responsibility for clinical work. This does not apply to the claimant.

- 19 We did not deal with the final two challenges to this job holder's scores, which came in each case from the respondent on factor 7 where the Independent Expert scored the claimant high at level 4 and the respondent asserted level 3 and factor 8 where the Independent Expert scored level 2 and the respondent asserted it should be reduced to level 1. The reason for that was that as a result of the respondent's successful reduction of the score on factor 1 knowledge from 2 to 1 and the claimant's failure to achieve success in increasing the communication scores and responsibility for care from level 2 to level 3, this claimant had a cumulative deficit of three factors as between herself and the comparator. The comparison could only get worse if either of the respondent's additional challenges were decided in the respondent's favour.
- 20 Running short of time during the hearing the parties agreed that we should have a provisional look at a single challenge to the claimants Dowsett, Walsh and Wilson (auxiliary nurse, CSW and nursing assistant) on the factor of knowledge. Putting the matter shortly we have accepted that level 2 is the correct score for knowledge for each of these job holders on the basis that they had work based learning, became familiar with procedures which were more complicated or with a more diverse range of operations because of their involvement in clinical tasks.
- 21 There was finally a challenge to the job holder Wilson, the auxiliary nurse, on factor 9 – emotional effort, where the Independent Expert had assessed her at level 3 which was the same level as the other nursing cohort, Dowsett, Walsh and Williams. The respondent's challenge was that it should be assessed at level 2. Putting matters shortly the Independent Expert agrees there is a significant difference between the emotional efforts required by the other auxiliary nurses which did not apply to Wilson, namely that she was engaged in working only on a ward which was an all female rehabilitation ward and in those circumstances she was not exposed rather than acutely ill patients.
- 22 There follows a summary of the total Independent Expert's ratings for each of the claimants' jobs and that of the comparator incorporating the Employment Tribunal's findings on the disputed scores. There is also an analysis of the same and of the different scores for each of the claimants as against the comparator.

Job Holder Name	Total Score	Differences Between Claimant Job Holder &	Number of Factors Where Claimant &	Number of Factors Where Claimant	Number of Factors Where Comparator
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		Comparator	Comparator Are Equal	Exceeds the Comparator	Exceeds the Claimant
Comparator Applin	21	-	-	-	-
Connell	21	0	6	2	2
Dowsett	22	+1	4	3 (1, + 2)	3
Walsh	22	+1	4	3 (1, + 2)	3
Jill Williams	18	-3 <i>Note: two score challenges remain outstanding from the respondent. This is the minimum by which Applin's score exceeds Jill Williams'.</i>	5	1	4
Jo Williams	23	+2	3	4 (1, + 2)	3
Wilson	21	0	4	3	3

23 The Tribunal heard submissions from the parties' counsel as to whether we should in consequence of these results find in favour of or against equality in respect of each comparison with the comparator. The Employment Tribunal will summarise its submissions but first it sets out some directions of law with regard to the assessment of equality. The Employment Tribunal referred the parties to an earlier Employment Tribunal decision on that topic in *Oliphant v Northumbria Healthcare NHS Trust 2500076/007*. Copies were provided to the parties during the hearing. The decision was that of a Tribunal consisting of this Employment Judge and one of the members in this Tribunal, Ms Menton. It is of course not binding upon the Tribunal but it was not appealed. The parties have not disputed that it contains directions which are also appropriate to this case and have not disputed the correctness of the directions - see especially paragraphs 12 and 13 on pages 9-16 of the judgment. The following is a summary of them:-

23.1 The burden lies upon the claimant to prove that her job is at least of equal value to the comparators job.

23.2 That there is no requirement that a party challenging an Independent Expert's reports conclusions or recommendations should have to persuade the Tribunal that the report should be rejected or show that it was plainly wrong. The report of an Independent Expert does not carry any special status and should not carry more weight than any other expert's report. But the report should carry considerable weight. See **Tennant's Textile Colours Limited v Todd [1989] IRLR page 3.**

23.3 The Tribunal is entitled to form its own view of which parts of the report, including the methodology, it accepts or rejects. Even if an Independent Expert has found that the job of the claimant is of slightly less value than the comparator it does not follow that the Tribunal is not entitled to find equality, but it must have cogent reasons for doing so. The same would apply vice versa if the claimant scored slightly higher than the comparator.

- 23.4 The Tribunal cited the following passages from the EAT judgment in **Southampton and District Health Authority v Worsfold/South Tees District Health Authority v Lawson** EAT598 and 827/98, approving a passage in the ET judgment:-

“Equal value should not be interpreted as a direct equivalent in score or greater, but should be assessed in broad terms in a practical setting. The Tribunal therefore finds that an overall measurable and significant difference is one which the Tribunal would expect to see reflected in the real world in terms of employment for which equality is sought”.

So from the Court of Appeal decision in **Hovell v Ashford & St Peter's Hospital NHS Trust** [2009] ICR page 1545 per Lord Justice Elias, paragraph 31-41 and in particular at paragraph 34:-

“34 A tribunal may be persuaded that a very small difference in points, particularly in the context of a wide ranging job evaluation study which was focused on bench jobs and has not involved a direct comparison of the jobs in question does not reflect a material difference in the nature of the two jobs.

35 I agree with the employment judge however that equal value does not mean nearly equal value and I reject Mr White's submission that jobs are equal if they are substantially equal.

...

37 Like the employment judge I do not accept the more extreme submission advanced in the alternative argument. In my judgment the judge was correct in stating that the fact that there was only a small difference in the points assessed was not in itself capable of establishing that jobs were of equal value. The claimant who simply says no more than my job has been weighted in the JES within a mark or two of the comparator cannot by that assertion alone expect to succeed in an equal value claim. At the very least she must set the difference in the context of the particular JE study and explain why the difference should be ignored, and she risks the tribunal not being persuaded by her submission.

38 Nor do I think that the analysis is assisted by introducing the language of presumptions or shifting the burden of proof. The onus of establishing equal pay always rests on the claimant. The tribunal will have to determine the issue by considering all the evidence before it. Of course there may be cases where the claimant has adduced evidence making a strong case which will succeed in the absence of any contradictory evidence. That is frequently the case in any

trial and does not involve any formal shift of the burden of proof”.

After an analysis of these and other authorities the Employment Tribunal concluded at page 15:-

“It is from these citations that we conclude that it is open to an Employment Tribunal to find that a claimant’s job which scores close to but lower than a comparator’s job may nonetheless be of equal value but the Tribunal will need to have cogent identifiable reasons related to the way in which the jobs were assessed or scored under the methodology which justifies the bridging of the gap and the finding of equality”.

24 **Closing submissions**

Mr Bayne for the respondent submitted that equal does not mean nearly equal. Secondly the fact that the comparator is ahead by one factor does not mean that they are not equal because there maybe underlying reasons for the difference. The same principle would apply where the claimant is plus 1 on one factor. The burden lies throughout on the claimant to overcome any differences in scores. Even if factors all scored the same there was still room for a finding of no equality. He pointed to the fact that the factors had been marked on an ordinal scale not an evaluative scale. He made individual submissions about the Connell comparison pointing out that there were six factors marked the same, that the claimant was plus 1 on factors 2 and 8 but that the Employment Tribunal had originally suggested that the appropriate score on factor 2, manipulative skills, should be between 2 and 3 rather than a full 3. He then referred to the two factors where the comparator was plus 1 namely factors 7 and 3 where he asserted that there was a big difference in value between levels 2 and 3. He made submissions on Wilson where there were four factors the same and three less and three more. The three where the comparator scored more included knowledge, analytical skills and physical effort were important factors and he invited the Tribunal to conclude that they were not of equal value. In the cases of Walsh and Dowsett he noted that there was a double jump on emotional effort for those two job holders and he submitted they were outweighed by the three factors in favour of Applin on the analytical skills, physical effort and physical resources.

The claimants’ submissions were that in the final reports the Independent Expert had asserted that all the jobs were equal. He relied upon the **Hovell** judgment to indicate that the fact that the two jobs were in the same band was itself enough to be suggestive of equal value. He referred also to the passage cited above in the **Worsfold/Lawson** case, invited the Tribunal to look at the number of equals. He submitted that although the scales adopted by the Independent Expert were ordinal rather than evaluative it was at least an attempt to find material, meaningful differences. He also referred to the number of different levels available in the Band 2, 10 factor scheme. There were four levels under which physical effort and manipulative skills could be marked, introduced a potential bias in favour of men because these were factors under which men including Applin were to be expected to score high whereas the corresponding caring

factors, responsibility for care, communication skills and emotional effort had only three levels.

25 **Conclusions**

We start with the finding that the methodology implied by the Independent Expert for the Band 2 jobs was robust. We have rejected the two methodology challenges put forward by the respondent. We conclude that the choice of factors was apt to capture the particular skills and demands of all the jobs in this cohort. We accept that there were some deficiencies in the level definitions. In particular we have identified that there were two instances where the step changes in levels were unclear, but that is not uncommon where very different jobs are being compared. We accept that it is occasionally very difficult to draft level definitions apt to cover range of jobs of this kind. In some cases the Independent Expert has to draft alternative gateways as occurred in this case. Generally speaking we accept that the level definitions were however also apt to identify meaningful differences in demand between the jobs, the claimants and the comparator.

We consider the overall similarity of levels to be a good indicator of value:-

2 scored the same as the comparator (Connell and Wilson);
2 scored +1 (Walsh and Dowsett);
1 scored +2 (Jo Williams); and
1 scored -3 (Jill Williams).

Having considered the nature of Jill Williams' job as set out in the job description; and the unsuccessful score challenges in her case we conclude that the overall mark validly detects a meaningful difference in value between her job and that of Applin, in his favour, notwithstanding that there were five factors which demonstrated equality. We conclude that her job is not of equal value with that of Applin and we are not surprised by that result.

Next we considered Jo Williams job. We note the overall +2 score and that although there were only three factors scored equally with Applin there were four where she scored higher – one by two levels, whereas Applin scored one level higher on only three factors. We are satisfied that her job was at least of equal value to Applin's and probably of greater value.

Dowsett and Walsh scored, similarly to each other; with one level difference in their favour overall compared to Applin. There were four levels marked equally and three where they scored higher and three where Applin scored higher. However in respect of one of the factors they scored two levels higher. That too demonstrates at least equality of value.

That leaves the two claimants Connell and Wilson whose over factor level scores were the same as Applin. In Connell's case she scored at the same level as Applin on six out of ten factors. We conclude that it is adequate to establish equality with Applin. Wilson's job is more marginal. There were only four out of ten scores at the same level and three each in favour. Placing our trust in the

robustness of the scheme we conclude that on the balance of probabilities her job is of equal value to Applin's.

EMPLOYMENT JUDGE HARGROVE

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

3 May 2017

JUDGMENT SENT TO THE PARTIES ON

4 May 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL