Appeal No. UKEAT/0011/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 June 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

THE EQUALITY AND HUMAN RIGHTS COMMISSION — APPELLANT

MS JENNIFER EARLE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ADRIAN LYNCH QC (of Counsel) Instructed by: Equality & Human Rights Commission Fleetbank House 2-6 Salisbury Square London EC4Y 8JX
For the Respondent	MISS MELANIE TETHER (of Counsel)

SUMMARY

CONTRACT OF EMPLOYMENT – Damages for breach of contract

The Claimant accepted a job which provided for a salary range, within which there were a number of incremental steps from the lowest level (at which she started) to the top, the "rate for the job". She was assured by an HR officer of the Employer that she would be granted progression through the incremental steps if her performance was satisfactory. There were to be annual progression reviews. However, the contract of employment when setting out the terms for progression expressly stated that there was no obligation on the employer to grant progression, and provided not that progression was solely dependent on performance but "included" performance. The EHRC was subject to severe financial constraints arising from a tightening of Government funding, and did not award the claimant (or anyone in her position) either progression or a progression review. An Employment Judge's decision that the contract was to be construed so that she had a right to progression subject only to satisfactory performance contradicted the clear meaning of the contract, and was set aside. The EHRC was nonetheless in breach of contract by failing to hold a review, but the reality was such that the claimant would not have been awarded an incremental increase because the EHRC's finances would not permit the payment of such an increase to the claimant and those in her position.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. For reasons delivered on 15 August 2013 Employment Judge Milton, sitting at London (South) Employment Tribunal, held the Claimant's claim that she should be paid arrears of wages arising out of a breach of contract should succeed. The appeal turns upon the meaning of the contract of employment which she entered into. If the Judge was wrong in his conclusion as to the construction of that contract, he was in error of law.

The Facts

2. The Claimant was a senior legal policy advisor, who was recruited in 2009 at a salary of £43,680. That was expressed to be "for the year 2008/09". The contract was not simply a written statement of terms of employment, given pursuant to the **Employment Rights Act 1996**, but was agreed by the parties to be the contract of employment between them. It contained a whole agreement clause (Clause 22), which read:

> **"This contract supersedes any previous oral or written agreement between the EHRC and you in relation to the matters dealt within it. It contains the whole agreement between the EHRC and you relating to your employment as at the date of the contract except for any terms implied by law that cannot be excluded by the agreement of the parties."**

3. The contract plainly envisaged that the Claimant would be appointed at a particular level. In her case that was level 5. Within that level there were a number of incremental points. The contract, at box 5 in a covering statement, expressly says:

> **"£43, 680 per annum rising to £53,093 per annum commencing on £43,680 per annum"**

4. That plainly envisaged that the Claimant might legitimately expect that she would move within level 5 from the base toward the top. There was a chart, which showed that there were five points within level 5 beyond the starting pay. These points were described as performance points except for the highest, which was described as "rate for the job". An interpretation on its

own of this schedule might suggest, therefore, that subject to performance the Claimant would move from starting pay which was below the rate for the job up to the rate for the job after passing through the intermediate four points.

5. In its detailed clauses, under the heading "remuneration", the contract said this:

> **"5.1 As at the date of these conditions, you will be paid at the rate set out in part I of this Statement payable monthly [that is the rate to which I have just referred], on or around the 28th of each month. Alterations will be notified to you as and when made or noted on your PAYE slip.**
>
> **5.2 Salary levels will be reviewed in line with Cabinet Office and Treasury Pay Remit guidelines.**
>
> **5.3 Progression through the salary range will be reviewed annually on or around 1 October in each year until the maximum of the range for your role has been reached. Any progression review will include an assessment of your performance during the preceding 12 months. There is no obligation on the EHRC to increase the level of your basic salary at a review. Any increase awarded in one year will not create any right or entitlement or set any precedent in relation to subsequent years."**

6. I make these observations about clause 5. First, it treats the increase in pay under two headings. One is the increase in salary. The other, separately, is what might be described as incremental progression. The Claimant complained that she had not had the incremental progression to which she was entitled. Reading clause 5.3, the Judge concluded at paragraph 10 that the conclusion as to the proper meaning of clause 5.3 was "really quite straightforward". He said:

> **"I find the words of the contractual documentation to be absolutely obvious and clear. In my judgment and finding the whole language phraseology and linkage between the words, the years and the figures, all point solely in one direction. It is, I find, obvious that the Claimant was employed under a contract with an express mechanism and right for her to receive a 'starting salary' and then a salary increment, triggered by the annual Performance Review subject only to one condition namely a condition of satisfactory performance."**

7. It is clear that the wording of clause 5.3 does not, on the face of it, convey a right to incremental progression subject only to satisfactory performance. The words simply do not appear. The Judge was persuaded that that was the proper way to construe the clause for the reasons he gave at paragraph 10 and because of the emphasis which he placed upon the words

"progression through" at the start of clause 5.3, indicating a steady rise in salary, the words "will be" in front of the words "reviewed annually", indicating an obligatory review of the employee's progression and drew from the words "until the maximum of the range has been reached", wording which was fully consistent with "the whole picture of a five-year progressive salary increment arrangement". That is certainly one thing which it was not: it was agreed before me that there was no automatic right to a salary increase. Moreover, to say that a term is "consistent with" a provision does not much assist because it may be consistent also with the opposite interpretation.

8. The Judge was persuaded to his view, also, by considerations which he set out at paragraph 13, not as to what the contract said but to what it did not say. He took the view that the third sentence, which said in clear terms that there was no obligation of the EHRC to increase the level of the basic salary at a review, was "an escape clause" (see paragraphs 14 and 15).

9. He thought that, this being an exception to what was otherwise to him an obvious contractual provision, it needed to be construed strictly. The effect of construing it as the Respondents sought was to give them a wide-ranging and absolute discretion which would not correspond with sensible industrial relations (paragraph 17) and therefore, at paragraph 18, concurred with the submission made to him by Miss Melanie Tether, who appeared before him as she has on the appeal before me on behalf of the Claimant, that "all this sentence is doing is, on a belt and braces approach, confirming that the salary incremental increase at the review stage is condition upon a successful outcome of the review", going on to add:

> **"The critical sentence on which the Respondent's case is based in my judgment is simply a confirmation that is perfectly possible that an employee may go through a review process (without necessarily perhaps being so mediocre as to warrant dismissal procedures) but not actually achieve a satisfactory level entitling her to a salary increase)."**

10. Because the Judge took the view that he did that the contract was as clear as he thought, he did not find it necessary to rely on or take into account matters in relation to the context in which the contract had been formed which had been put before him in evidence and argument, nor explicitly to consider a range of authorities relied on by Counsel. He did, however, say something about the context, observing that the clause should be interpreted objectively so as to give it a sensible and workmanlike construction and concluding that at the time that the contract was entered into the parties would not necessarily have seen that the economic crisis that subsequently hit government spending would occur. It was essentially for funding reasons that the Respondent had not paid any member of staff recruited outside those who came from the previous three organisations which were disbanded when the Respondent EHRC was formed ("the legacy bodies"). At paragraph 28 an alternative conclusion as to the effect of the critical sentence in paragraph 5.3:

> **"...it was not reasonable for the Respondents to operate the clause so as to exclude the Claimant's salary increments. I stress that insofar as the instructions come above from the Treasury it is clear that those instructions did not apply to 'contractual obligations'. I find that it is a circular argument for the Respondent to claim that, to put the matter simplistically since there is a pay freeze, they are entitled to escape liability for contractual obligations when that pay freeze has been expressed not to apply to contractual obligations."**

11. As to this, I observe immediately that it assumes that there were contractual obligations. Whether there were is the whole point of this appeal.

12. Subsidiary and alternative arguments were addressed to him. The Claimant had described how, prior to appointment, she had spoken to a Ms MacDonald, whom the Judge found authorised to deal with salary matters on behalf of the EHRC. She spoke by phone. Ms MacDonald told her that she would be appointed at the bottom of the scale. She argued that because of her experience she would justify a higher starting point. She was told that it was settled policy to start all new recruits at the bottom of the salary scale:

> **"I was surprised by this as I had rarely encountered such an inflexible approach and in the course of my professional career I had generally been able to negotiate a higher starting salary.**
>
> **9. However, Ms MacDonald went on to say that the salary would increase by annual increments on the published scale, subject to satisfactory performance. This confirmed my previous experience of working in public sector organisations, and my understanding of usual practice in relation to pay progression in the public sector.**
>
> **10. I was disappointed with the starting salary offered to me but Miss McDonald's assurances persuaded me that I would not be on the bottom of the scale for long and my salary would soon progress up the scale."**

13. She described how subsequently she received a letter formally offering her the post, which described her annual salary as being £43,680 per annum, significantly, she thought, as being "for the year 2008/9". The implication of that was that she would start at that point but could expect increments. She read it as being an increment provided her work was satisfactory. It was around late March and early April that she received the contract containing the terms which I have already set out so far as relevant.

14. As to the words which Ms MacDonald spoke, the Judge appeared, at paragraph 30, to think that it might be a separate contractual agreement. It was not a "puff" of the kind discussed in **Carlill v Carbolic Smoke Ball Company** [1892] EWCA Civ 1. It was in response to a specifically addressed concern by the Claimant about the modest starting salary. There was, he thought, consideration for the assurance. This language addresses the formation of a contract. He did not however deal there with the impact of clause 22 of the written contract which followed in March/April, which denuded the prior contract (if it was such) or collateral warranty (if it was that) of any effect, unless for some reason its words would be regarded as inappropriate or not as reflecting the true intention of the parties and what had actually been agreed between them at the time.

15. At paragraph 31, also under the heading "subsidiary/alternative arguments", the Judge said this:

> **"Insofar as the Respondents have relied, perfectly understandably, on [he specified two paragraphs] I find that the recent *Commerzbank* decision [that is a reference to the case of *Atrill and Others v Dresdner Kleinwort Ltd and Anr* [2013] EWCA 394, IRLR 548 CA] is authority for the proposition that in appropriate circumstances assurances of this kind should be construed as being within the terms of the contract and thus overrule/define the discretion supposedly contained in the written terms of the contract (which I have found in the foregoing paragraphs not to be the case)."**

That paragraph is somewhat Delphic. I shall return to it.

16. Then at paragraph 32 he thought that the assurance given by Ms MacDonald was a "general piece of evidence about the context and intention of the original agreement" which confirmed his view as to the appropriate construction.

17. Finally at paragraph 33 he added:

> **"If necessary I also find that the way in which the Respondents chose to operate clause 5.3 by simply not holding any performance reviews and consequentially in turn not providing the opportunity for a pay increment was in my judgement a perverse exercise of the discretion and thus unlawful..."**

18. All these findings are challenged on this appeal by the EHRC. I shall deal with each in turn.

The Contract

19. The general principles of the construction of an employment contract are not in doubt. First, parties are generally taken to mean what they say and to say what they mean in a written contract. Secondly, the meaning to be drawn from the words they use must be viewed objectively but in context and not by reference to the subjective desires or intentions of the parties. Thirdly, insofar as important, the question is what has really been agreed between the parties (see **Autoclenz v Belcher & Ors** [2011] UKSC 41). In determining what the real agreement is it is relevant to ask, in the employment context in particular, what its purpose is as

between the parties. All contracts are formed in a context. It is common sense to work out what they mean to the parties, placed as they were at the time they made the contract.

20. Next, a contract of employment is dynamic in nature. It has been described by Mummery LJ in **Commerzbank v Keen AG** [2006] EWCA Civ 1536 as "relational". The terms may thus vary over time, even if the contract is originally in writing, to take account of the relationship between the parties and its development. That principle, however, does not apply here, since there is no suggestion that there has been any agreed alteration or variation of the contractual terms reached in 2009 and as to which it is recognised that the agreement in writing is not just a statement of terms and conditions but actually a contract.

21. In viewing the context, I bear in mind the words which it is unnecessary to repeat, so familiar as they are, that were spoken by Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society and Others** [1998] 1 WLR 896 between pages 912 and 913.

22. I have the misfortune of differing from the Employment Judge as to his construction of this contract. I acknowledge Miss Tether's points that the reference to a rising salary range for a particular level, the reference to progression through the range, to the salary as at a particular year, and to annual reviews, are all persuasive of a shared optimism by employer and employee that the Claimant would move upward within the pay level as well as upward by whatever general pay increase there might be.

23. But the Claimant contended here that, provided only that her performance was satisfactory, she was entitled to move to the next incremental point. I cannot construe that as

fitting with clause 5.3. The words "There is no obligation on the EHRC to increase the level of your basic salary at a review" are part and parcel of the clause. They are not expressed as a proviso or an escape clause, although the Judge chose to see them that way.

24. If the words in the first few sentences remained as they were (and are), it would be plain that a salary rise was not automatic. Progression would be until the maximum of the range was reached. No particular timescale was provided. Progression would include an assessment of performance. That suggests, since it is the only criterion singled out for specific mention, that the performance of the individual was of particular importance in reaching a decision whether there should be progression or not. But it was not the only criterion. As Miss Tether conceded realistically in submission, the words "will include" provide space for other considerations, albeit unspecified, also to be taken into account.

25. The words stating that there is no obligation could not be clearer to that effect. They are emphasised by the words which follow in the final sentence of the clause. It is plain from that sentence that there is no particular relationship of a threshold type between performance or award in one year and award in the next.

26. The Judge at parts of his Judgment appears to have thought that this clause gave rise to an automatic right to progression unless performance were unsatisfactory. But those words do not appear. Though performance is assessed, there is nothing to the effect which is often found in employment contracts, such as "subject to satisfactory performance you will...". In the context of employer and employee when it is important to ensure that there should be no misunderstanding about salary progression, the inclusion of the third sentence has an obvious

purpose. It is to make it clear that there may not be an increment despite performance being generally satisfactory or reaching a particular standard.

27. Miss Tether submits that the progression review is an individual one. The contract undoubtedly uses the words "your" in a number of places such as "your role", "your performance", "your basic salary". If the progression review is to include an assessment of individual performance, it has at least to that extent to be an individual review. The sense of this clause, as I see it, is that the employee would be entitled to have the question of her onward and upward progression through the salary range considered each year. The consideration would take into account her performance. What was in view was potentially an increase within the level from one increment to another. But I cannot read the clause in the face of words which deny any obligation as if they were imposing one, which is the effect of the Judge's conclusion.

28. It is, in my view, open to an employer acting within the terms of this contract not to award an increment. This, however, arises by virtue of a choice given to the employer within the contract. Though not expressed by using the word "discretion", this is what it is. There is copious authority that, when it comes to the exercise of a discretion within the context of an employment contract, an employer is not entitled to exercise that discretion irrationally or capriciously. He must not exercise it wholly unreasonably. Burton J, in the case of **Clark v Nomura International plc** [2000] IRLR 766, expressed the test at paragraph 40 as being the equivalent of that adopted in the Administrative Court in judicial review. It is unnecessary to argue in this case about that approach. I note only that in commercial contractual cases (see **Socimer International Bank v Standard Bank London** [2008] EWCA Civ 116) a contractual discretion is limited as a matter of necessary implication by concepts of

honesty, good faith and genuineness and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Rix LJ said, paragraph 66, that

> **"Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care."**

29. The approach, whether there is any real difference between that adopted in commercial or employment contracts, is very much to the same effect. It was not, in my view, open to the employer, under this contract, simply to deny what would otherwise probably have been an incremental progression capriciously, arbitrarily or wholly unreasonably. If Miss Tether is right that the only circumstances which contractually in context can be taken into account in a progression review are characteristics personal to the employee, then the basis on which this employer denied any progression, namely lack of the necessary funding, would be perverse or wholly unreasonable within that test.

30. However, I cannot read the clause as necessarily limited to purely personal characteristics. Although I suspect that the parties to this contract would not have had as clearly in mind in 2009 the economic circumstances to which the government was subsequently subject, nonetheless the context of any employment decision in respect of pay for one member of staff will take into account what other members of staff are also being paid. That is industrial reality. It might be thought wholly unreasonable, for instance, for a pay increase to be denied to one employee who was factually in exactly the same circumstance as other employees for whom a pay rise was granted by reliance on a discretion which permitted it. The pay of one employee may have to be kept in reasonable balance with the pay of others in the interests of good management.

31. I do not, therefore, see here the context as requiring, nor the words as including (which they plainly do not) a restriction to circumstances which are purely personal. I have no doubt that the principal matter for consideration is performance. That is the only criterion which is specified. But because it is not the only criterion, it may not be a conclusive criterion. The circumstances in this case, says Mr Lynch QC, are such and so exceptional that it was permissible within the test set out by the cases for there to be no incremental progression here in the Claimant's case, just as there was not in the case of any other employee who was a new entrant to the EHRC as opposed to being a legacy member of staff.

32. It follows that the Judge was wrong to come to the primary conclusion he did, as he expressed at paragraph 20. I turn to the subsidiary arguments, which are pressed by Miss Tether in support of the conclusion which the Judge in any event reached.

33. She submits that in paragraph 30 and 31 the Judge found that the comment made by Ms MacDonald was not merely a casual comment. The EHRC, she maintained, could not rely upon the entire agreement clause because it was not always a complete answer. She relied for this point on the **Royal National Lifeboat Institution v Bushaway** [2005] IRLR 674. That was a case in which the Appeal Tribunal upheld the entitlement of an Employment Tribunal to hold that the Claimant had been an employee of the Appellants throughout the period that she had worked for them, notwithstanding that she had had what was described as a contract of employment for less than the necessary period of service to claim unfair dismissal. Prior to that she had worked ostensibly as an agency worker. The Tribunal, however, found that the reality of the agreement between the parties despite the written terms were such that she was an employee. The fact that those written terms included an entire agreement clause could not be relied upon by the employer.

34. It seems to me that this is a different case. The first question is what has been agreed between the parties. The effect of **Bushaway** is that the entire agreement clause was not actually part of the real agreement between the parties. There is no dispute here that the entire agreement clause is part of the agreement. As such, I accept the submissions of Mr Lynch that, as exemplified by **White v Bristol Rugby Ltd** [2002] IRLR 204 and by the case of **Innterpreneur Pub Co v East Crown Ltd** [2000] 2 EGLR 31, a decision of Lightman J, upon which the Judge in **White v Bristol Rugby Ltd** relied (see paragraph 28), is to the effect that an entire agreement clause obviates the need for any search for some remark or statement upon which to found a claim to the existence of a collateral warranty. The operation of such clause is not to render evidence of the collateral warranty inadmissible but rather to denude it of any legal effect.

35. The second way in which Miss Tether prays in aid the conversation with Ms MacDonald is to argue that it amounted to an interpretation of the contract which was shortly to be supplied. If so, it would not be caught by Clause 22. It would not be inconsistent with the contract. It would not be a side agreement. It would be an explanation agreed between the parties as to the true meaning of the words or, alternatively viewed, part of the context within which those words fell to be construed.

36. In paragraph 31, it may well be that the Judge was attempting to express this. I have set out that somewhat Delphic paragraph above. Viewed textually, the agreement between the Claimant and Ms MacDonald could not overrule a discretion contractually given. That would be precluded by the operation of the entire agreement clause. It could define the discretion. That faces the difficulty here that the contract was not specifically present before the parties at the time of the conversation. If the parties had the precise provision in mind, then it might have

had some effect. Miss Tether submits that in general terms the parties were anticipating entering into a contract. I accept that it was part of the general evidence as to what might be expected of the contract by the parties at the time that the contract was entered into. I have little doubt that, had economic circumstances been otherwise, the contract would probably have fulfilled those expectations. But that is not the same thing as requiring the construction of Clause 5.3 to mean that which is contended for. I have taken this into account in my earlier conclusion as to the true meaning of 5.3. If it is necessary to do so, I simply add that viewing this point separately does not drive me to a different conclusion.

37. The next point taken in defence of the decision by Miss Tether was that the Respondents were in breach of contract by failing to hold a progression review individually with the Claimant. What happened was that the Respondent decided that it would be pointless to do so for her and others in her position because the EHRC simply had no funding to pay for progression. The government remit was not such as to permit it.

38. It is not, in my view, devoid of purpose to hold a progression review despite the difficulty of funding, experienced elsewhere during the credit crunch, as it has been shown that frequently discussions are made about grading which may have potential effect once economic circumstances improve. Although Miss Tether argues that each year is to be viewed separately from each other year in terms of progression, this is not actually what Clause 5 provides. There is no very obvious reason to me why, in the context of the ongoing relationship between employer and employee, a progression review may not indicate how an employee is placed for future progression once economic circumstances ease. There was therefore a point, as it seems to me, in holding such a review. In any event, the contract, on my reading of it, entitled the Claimant to have such a review.

39. The Judge did not reach any finding on this. I floated with the parties in argument what the consequence would be if I were to decide in favour of Mr Lynch's arguments on Clause 5.3 but to hold that there was nonetheless contractually a right to a progression review. Here Miss Tether argued that the Claimant had performed well. If she had had a review at which performance was a major criterion, as it would contractually have to be, she would have had a real chance of incremental progression. To deny her an incremental progression would be to exercise the discretion in breach of the principles expressed in **Clark v Nomura**, echoing those expressed by Timothy Walker J in **Clark v BET** [1997] IRLR 348, paragraphs 7 and 9-11; **Mallone v BPB Industries Ltd** [2002] ICR 1045 (see in particular paragraphs 12, 40 and 41); **Horkulak v Cantor Fitzgerald International** [2005] ICR 402, in particular at paragraphs 70-72; and **Keen v Commerzbank AG** [2007] ICR 623, which confirmed the general approach between paragraphs 52 and 56. I accept that that is the approach. The issue is, taking the view that I do of the contract, whether I should remit the matter for a decision to be made by the Tribunal as to any finding of breach and remedy. Miss Tether has argued that, notwithstanding the recent decision of the Court of Appeal in **Jafri v Lincoln College** [2014] WLR (D) 178, I should determine the consequences here myself, exercising the powers of the Employment Tribunal. Mr Lynch, for his part, takes the same course. He asks me to take account of the primacy of performance, of the lack of material showing that truly economics permitted what might otherwise have been expected to be a steady upward salary progression. He takes me to witness evidence which was, and was accepted to be, before the Tribunal, in particular from Claire Field, the Respondent's Deputy Director of People Strategy, and David Ede, the Respondent's Director of Resource Management.

40. I have considered their respective submissions and I think that, in the circumstances of this particular case, it is just that I should determine the issues. To do otherwise would be to

expose the parties to further delay, expense and inconvenience and to utilise the resources of the Tribunal further, denying them thereby to other litigants. In part, I reach this view, I must confess, because I am impressed by the force of the Respondent's financial case. As Mr Ede put it at paragraph 11 of his witness statement,

> **"...consideration of whether to exercise any choice or discretion in regard to making such payments [that is incremental payments] would, inevitably, have to have resulted in a negative answer."**

He went on to explain the funding reasons that lay behind it.

41. I have considered Miss Tether's submission, relying in part upon correspondence between the EHRC and government in relation to their funding to meet their contractual obligations. My conclusions are that the EHRC was critically dependent upon the government remit. In colloquial terms, it had to go cap in hand to ensure that it could meeting binding contractual commitments already entered into. That does not suggest that there was any room for those payments which it was not contractually obliged to make but could choose whether to become obliged to make or not.

42. Though the parties would, absent the crisis in government funding, have hoped - reasonably - that there would be progression through the pay scales, I cannot see that in this case EHRC would have wished to make any additional payment to Miss Earle or other similar employees in her position if it could avoid it. I have already concluded that it was entitled to take account of matters which were not purely personal to the employee under the contract. It follows that in the somewhat exceptional circumstances of recent years, the holding of a review would not, in this case, have led to the making of any incremental payment to Miss Earle. I have to put her in the same position in which she would have been had the contract been fully and properly performed. There is an element here of assessment of the chances of what might

have been. However, I cannot see that there is any realistic chance against this background that she would have received even a percentage of the incremental payments she sought.

43. It follows that, despite a deeply impressive argument from Miss Tether on behalf of the Claimant, the appeal must be allowed, it be declared that the contract was not broken and therefore the decision set aside.

44. Miss Tether has asked me to mention the background as part of the context within which the EHRC contract was formed. Each of the prior organisations, namely the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission operated different terms and conditions. They were harmonised once the ECHR took over. For those who had been members of staff of the legacy bodies, it was agreed that they would have automatic progression until they reached grade level 3, halfway between the bottom salary range and the rate for the job. Accordingly, at the same time as the Claimant was held back by the financial considerations which I have described, they proceeded. It was relevant, submitted Miss Tether, to the construction of the contract to note that, in respect of the CRE, salary increases were to be determined by performance as assessed in annual appraisals. There was a review annually. There was no automatic guarantee there that there would be an increment or an increment to any particular level. But it was expressly subject to being appraised as satisfactory or better. This was therefore a qualifying criterion but heavily and only linked to performance on the face of it. The DRC contract provided that increases in pay would depend on performance in this job, and there were detailed provisions set out at page 67 of the staff handbook, creating pay zones with pay steps at 20%, 40%, 60%, and 80% of the zone and including guarantees where performance was assessed at being good, though it was emphasised that the progression mechanism was not

incremental and did not mean that colleagues would automatically move on to the next pay step year on year. In the EOC pay progression was related to performance and in the staff handbook, under "performance management", it was said that the individual employee's annual pay award was determined by the box marking awarded under the performance assessment scheme.

45. These are all slightly different, but informative of the general background within those organisations. They were succeeded by the contract which I have set out. If they were part of the context (and I put it that way because the Judge, taking the view he did as to the plain meaning of the contract, did not think it necessary to set out any particular conclusions), then they do not in my view require any different interpretation of clause 5.3 from that which I have set out above. Nor does it seem to me that they require any different a conclusion on the question of what the consequence would have been if the EHRC had honoured its contract formally by having an individual performance review in the Claimant's case.