Appeal No. UKEAT/0350/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On Thursday 9 October 2014
Handed down on 19 December 2014

Before

HER HONOUR JUDGE EADY Q.C.

(SITTING ALONE)

MS H STEEL — APPELLANT

LONDON BOROUGH OF HARINGEY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	In person
For the Respondent	Mr Jake Davies, counsel

SUMMARY

UNLAWFUL DEDUCTION OF WAGES

Complaint of unlawful deduction from wages arising from the Respondent's failure to pay the Claimant at scale 4; the level at which her job had been evaluated as part of a benchmarking process prior to implementation of Single Status.

The ET found the local Single Status Agreement was varied by agreement between management and trade unions so earlier benchmark job evaluations would stand unless a re-evaluation was sought on the basis of a different job description or HR was asked to carry out the evaluation (earlier benchmark evaluations having been carried out by external consultants).

Further held: circumstances had arisen whereby a new job description was drawn up in respect of the Claimant's job. That gave rise – consistent with the agreed variation – to a re-evaluation of the Claimant's job, at scale 3 rather than 4. The re-evaluation itself was done properly, in accordance with the terms of the Single Status Agreement, and was not tainted by any desire on the part of the departmental management to see a lower evaluation of the job.

The Claimant had thus been paid the sums due to her; there was no unlawful deduction.

Those conclusions were open to the ET on the evidence, which comprised oral testimony as well as documentation relied on by the Claimant. The reasons were adequately explained and no error of law arose from rolling up the parties' agreed list of issues into one key question.

Appeal dismissed.

HER HONOUR JUDGE EADY Q.C.

Introduction

1. I refer to the parties as the Claimant and the Respondent. The appeal is that of the Claimant against a Judgment of the Employment Tribunal ("the ET") sitting at Watford (Employment Judge Clarke QC, sitting alone, on 6-7 December 2012 and 8 February 2013), sent to the parties on 6 March 2013. The Claimant appeared before both the ET and EAT in person. The Respondent was, and is, represented by Mr Davies, counsel.

2. Save for a relatively small, conceded underpayment, the ET dismissed the Claimant's claim of unlawful deductions from wages relating to her claim that her job had been evaluated at scale 4 and she was entitled so to be paid. She appeals from that ruling.

3. This was the second time the ET had been charged with the determination of the Claimant's claim. In May 2011, Employment Judge Pettigrew ("the Pettigrew ET") had ruled that her claim was outside the ET's jurisdiction. The Claimant successfully appealed and the matter was remitted for consideration by a different ET.

The background facts (taken from the ET's findings of fact)

4. The Claimant was employed by the Respondent as gardener/groundsperson as from 26 May 2006. Her terms stated she was employed as gardener grade 3, with entitlement to certain productivity and performance bonuses. The terms also recorded that her contract was subject to amendments negotiated through national or local collective bargaining.

5. In 2004, local authorities and recognised trade unions agreed to introduce "Single Status" salary schemes, which involved the harmonisation of pay scales for administrative and manual staff. At a local level, over a two year period, the Respondent negotiated with trade union representatives on an equal pay and conditions package (which covered grade structure, job evaluations, reviews and appeals, pay protection and other contractual provisions), concluding with implementation of Single Status in 2008 (when employees voted to accept a terms and conditions collective agreement).

6. Prior to implementation, the Respondent had agreed with the trade unions to conduct some benchmark job evaluations to test the application of the proposed job evaluation scheme and plotting of the results into a proposed structure of grade boundaries. Under this process, grade 3 gardeners were evaluated as being appropriately placed on a scale of 4 under a new Single Status pay scale ("the 2007 evaluation"). The Single Status Agreement was produced after the 2007 evaluation. Under it, the job evaluation scheme (under which the benchmark jobs had been evaluated) was adopted.

7. The ET found the Single Status Agreement did not deal with the use of evaluations already undertaken as part of the benchmarking exercise: it did not refer to them; its language in terms of evaluations was in the future tense. That said, the Claimant – who was a trade union shop steward – and Mr Davies, the Respondent's Head of Human Resources, both took the view that the benchmark evaluations would stand for a particular role unless someone challenged them. So far as both employer and trade union sides were concerned, the benchmark evaluations would remain the default position unless someone asked for an evaluation on the basis of a different job description or for Human Resources to evaluate the job description used by the consultants in the benchmarking exercise.

8. Turning to the gardener role, this fell under the Respondent's Parks' Department. Progress there on the implementation of Single Status was slow. There was a concern relating to budgetary considerations. In or about early July 2009, it was suggested that grade 1 and 2 gardeners did similar work to grade 3 gardeners, so should be covered by same job description and graded at same level. That proposal was taken forward but on the understanding that it would mean that a new job description would then have to be drawn up for all those concerned; that is, for existing grade 3 gardeners as well as those at grades 1 and 2. There was no dissent from that course (by management or trade unions) and this is what happened. The new job description was then evaluated; at which point it was assessed at scale 3 ("the 2009 evaluation"). Allowing that this was a desirable result for the Respondent's management, the ET specifically found the 2009 evaluation was carried out in accordance with the JES; the result was not influenced by any management comments, hopes, or expectations or by any budgetary constraints (see para. 12.9).

9. There followed a further evaluation and an appeal and the matter was also subject to a grievance process. Although the raw scores changed slightly during this process (which included trade union involvement at the appeal stage), the grading remained unchanged.

The ET proceedings and reasoning

10. As indicated above, the Claimant's claim was initially considered by the Pettigrew ET, where the view was taken that a claim based on a pre-existing evaluation (that is, one carried out prior to the Single Status Agreement coming into force) was bound to fail. On appeal to the EAT (His Honour Judge Shanks sitting alone), a different view was taken:

> **"Although the words from the collective agreement … ("Phase 1 *will* evaluate all manual graded jobs" (my emphasis)) certainly indicate that an effective evaluation could only take place *after* the agreement had come**

> **into force, consideration of the agreement as a whole against the factual background makes it quite possible (indeed likely in my view) that the contractual intention was that evaluations already carried out as at September 2008 would be effective for the purposes of the agreement: there is obviously no reason in principle why this should not be so; it would be entirely consistent with what Ms Steel and her colleagues were told at the time; and, most tellingly, the provisions in the agreement dealing with Phases 2 and 3 … make it clear that the agreement contemplated that there would be evaluations which would be effective for the purposes of the agreement which were expected to have been carried out before September 2008; …"** (para. 26)

11. Given that it was possible for the Single Status Agreement to be operative on the basis that pre-existing benchmark evaluations would continue to be effective, the EAT held that the Claimant's case – her job had been evaluated at scale 4 and she was entitled to be paid accordingly – was within the ET's jurisdiction. HHJ Shanks ruled that the Claimant:

> **"… ought to have been allowed to present [her case] properly. There may well be a number of factual and legal issues arising from it which, if the parties so require, will need to be considered by the [ET] on their merits."** (para. 28)

12. On remission to the ET, the case was considered at a case management discussion ("CMD") on 7 September 2012, at which the parties agreed a list of issues.

13. At the substantive re-hearing, the ET identified two key issues. Only the first is now relevant: was the bench mark evaluation of the Claimant's job in February 2007 (an evaluation made as part of the work done in the lead up to the Single Status collective agreement) conclusive as to the evaluation of Claimant's job?

14. The ET had before it some 800 pages of documentation and received oral evidence from the Claimant and from three witnesses for the Respondent. Having made findings of fact on the evidence, the ET asked whether the 2007 evaluation of the Claimant's job at level 4 was such that she was entitled to be paid at that level, in accordance with the local Single Status Agreement, as from 1 April 2007. Applying the normal rules of contractual interpretation, it was observed that the Agreement made no provision for any evaluation to be utilised save one made in accordance with its terms. The 2007 evaluation (which led

to a level 4 grading) was done as part of a benchmarking exercise prior to the Agreement, not in accordance with its terms: it was not done after the Agreement and was carried out by external consultants, not in accordance with the processes set out in the Agreement.

15. That said, the ET acknowledged that, as a matter of convenience, management and trade unions had agreed that benchmark evaluations would stand unless someone took issue with them, whereupon an evaluation in accordance with the terms of the Agreement must take place. That was an agreed variation to the collective agreement.

16. Pursuant to that variation, the evaluation of gardener grade 3 at level 4 would have stood but for such a challenge. Equally pursuant to that variation, however, it did not stand because it was decided to have a single new job description for gardeners at grades 1, 2 and 3. That new job description was then evaluated in accordance with the Agreement. That process of evaluation replaced the earlier (2007) benchmark evaluation.

17. The ET found that there was no express time-limit within which parties could ask for an evaluation under the terms of the agreement. Moreover, it accepted the Respondent's evidence: it did not regard job evaluations as finalised until all jobs in the relevant department had been evaluated. Before then, issues could arise in respect of what should be/should have been included and both management and trade union side might ask for re-evaluations to take place where earlier results had seemed to lead to discrepancies. That being so, the ET accepted it was still open to the Respondent to re-evaluate the jobs in the Parks Department in 2009. The jobs in that department had not all been evaluated at that time; indeed, certain job descriptions were still to be finalised.

18. In the alternative, the ET found it was an implied term of the Agreement that there was a reasonable period within which a challenge could be made to an earlier evaluation; that period would not expire until all the evaluations in a department had been completed.

19. Returning to the question it had identified, the ET was satisfied that the Claimant's job had been provisionally - in the sense of a benchmark evaluation - evaluated at level 4, but that was not binding on the Respondent. An appropriate process had been undertaken, with a new job description, so as to arrive at a level 3 evaluation.

20. The ET then returned to the issues identified at the CMD, giving short answers to each question; making clear these were based on the findings already explained. For convenience, the relevant questions and answers are set out in the box below.

1.1	Could an evaluation at Scale 4 in Feb 2007 (or at any other time prior to the signing of the agreement) constitute an effective and binding decision within the terms of the (local single status) agreement?	Yes.
1.2	Was an evaluation of the C's job at scale 4 within the terms of the Agreement carried out after Sept 2008?	Yes.
1.3	Was an evaluation of the C's job at scale 3 within the terms of the Agreement carried out after Sept 2008? In particular: a) Were there any circumstances within the Agreement that allowed for an evaluation carried out by HR to be replaced and, if so, what were those circumstances and were they applicable in this case? b) Was the process of placing all gardeners Grades 1-4 on one job description estimated to be evaluated at scale 3 in accordance with the terms of the single status agreement?	a) Yes b) Yes, but it was not forbidden
1.4	If an effective evaluation was carried out at scale 4, either before or after the Agreement, what should have been the C's basic wage in the period 1/4/07-15/10/10?	n/a
1.5	If an effective evaluation was carried out at scale 4, either before or after the Agreement, what further wages were properly payable over and above those that were actually paid for the period 1/4/07-15/10/10 (including any bonuses, protected allowances and compensatory payments?)	n/a

The Appeal

21. The Claimant appeals against this ruling. Her Notice of Appeal was initially considered on the papers by His Honour Judge Serota QC, who took the view that certain of the proposed grounds disclosed no reasonable basis for the appeal but that others would need to be considered at an Appellant-only Preliminary Hearing.

22. The Claimant sought oral hearing in respect of what would otherwise have been the dismissal of part of her grounds of appeal and this was listed to come before the Honourable Mr Justice Lewis at the same time as the Preliminary Hearing. Having heard from the Claimant, Lewis J ruled the appeal could proceed to a Full Hearing on the first part of ground 1 and grounds 2 and 3 of the Notice of Appeal, that is:

    (1) There was a breach of the ET Rules 2004, in particular r 30(6) relating to the information to be included in the written reasons.

    (2) The ET failed to make findings of fact it was required to make or failed to give sufficient reasons.

    (3) The ET made findings of fact unsupported by any evidence and/or reached a decision which no reasonable ET, properly directing itself in law, could have reached.

23. In permitting those grounds to proceed to Full Hearing, Lewis J identified the following issues (reflecting the particulars at paras. 5, 6 8, 9 and 10 of the Grounds of Appeal):

(a) Whether the ET properly considered the circumstances in which it was possible to re-open an evaluation of a job after the Single Status Agreement came into effect?

(b) Did those circumstances apply to this particular case?

(c) Was the ET correct in its understanding of the timing and the date by which such requests for re-consideration could be made?

The relevant legal principles

24. The Claimant relies on rule 30(6) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**, which (relevantly) provided:

> **Written reasons for a judgment shall include the following information –**
> **(a) the issues which the … Employment Judge has identified as being relevant to the claim;**
> **(b) if some identified issues were not determined, what those issues were and why they were not determined;**
> **(c) findings of fact relevant to the issues which have been determined;**
> **(d) a concise statement of the applicable law**
> **(e) how the relevant findings of fact and applicable law have been applied in order to determine the issues….”**

25. She further reminds me of the Judgment of the EAT in **Greenwood v NWF Retail** [2011] ICR 896, which states that an ET judgment must comply both in substance and in form with r 30(6) of the **2004 Rules** and a failure to do so will amount to an error of law. That said, the judgment will not be erroneous as a matter of law simply because the structure of the rule is not visible on the surface of the decision so long as its constituent parts can be unearthed from the material underneath.

26. The Claimant also relies on the guidance laid down by the Court of Appeal in **Meek v City of Birmingham District Council** [1987] IRLR 250, where ETs were reminded that “there should be a sufficient account of the facts and of the reasoning to enable the EAT,

or on further appeal, this Court to see whether any question of law arises …". Further, see the observations of Morison J in **Tchoula v Netto Foodstores Ltd** EAT/1378/96:

> **"What a tribunal should do is to state their findings of fact in a sensible order (often chronological), indicating in relation to any significant finding, the nature of the conflicting evidence and the reason why one version ahs been preferred to another"**

27. The Claimant also submits that the importance of making findings of primary fact was apparent from the judgment in **Chapman and anor v Simon** [1993] EWCA Civ 37.

28. In seeking to make good her submission that the Employment Judge erred in law in his findings of fact, the Claimant relies on the injunction of Lord Donaldson MR in **Piggott Brothers Ltd v Jackson** [1992] ICR 85: an ET "will fall into error if it makes a material finding of fact that is unsupported by any evidence".

29. Finally, the Claimant stressed that, as well as setting out findings on issues identified during the hearing, ETs must give parties the opportunity to be heard on all material issues which they seek to determine, **Albion Hotel (Freshwater) ltd v Maia E Silva** [2002] IRLR 200, **Ladbrokes Racing Ltd v Traynor** UKEATS/0067/06/MT.

30. Without conceding their relevance to the appeal, the Respondent did not take issue with any of these statements of legal principle.

Submissions

The Claimant's case

31. The ET's Judgment did not comply with rule 30(6) ET Rules 2004; it did not follow and resolve the issues agreed at the CMD but, instead, identified different key issues and questions but failed to invite the parties to address it on those points.

32. Moreover, the key issue thus identified was insufficient to resolve the issues between the parties (as agreed at the CMD). The key issue had been as highlighted by HHJ Shanks; was the replacement of scale 4 by scale 3 done on a legitimate basis?

33. During the course of argument it seemed that the Claimant was saying that the conclusion reached by HHJ Shanks on the earlier appeal meant the ET was bound to find that Single Status allowed that the 2007 evaluation was to go forward and there could be no basis for a finding of any variation to that agreement. That argument went further than the basis on which this appeal had been permitted to proceed and would suggest that HHJ Shanks had reached final conclusions on the facts, without hearing any evidence.

34. The Claimant said that if she were not permitted to put her case so high, she would put it in the alternative on the basis that the ET had been wrong to think that Single Status did not comprehend that previous evaluations would be used and relied on for the reasons set out by HHJ Shanks. There was therefore no need for any variation.

35. Turning to the findings made, specifically, in respect of the ET's key findings as to how it had been decided that there should be a re-evaluation of the gardener 3 job (paras. 12.4 and 12.5), it was incumbent upon it to look carefully at the Respondent's case and to test that against the contemporaneous documentation and the pleaded case. The Respondent accepted the written witness statements and its written submissions below did not contend that the trade unions had suggested an amalgamated job description for gardener grades 1-3. The only evidential reference was in the cross-examination of Ms Mathieson (Head of Advice and Employee Relations) and she acknowledged she might have been wrong

about the date; it might have post-dated the 2009 evaluation. The ET's finding that someone had sought this was unexplained. It had, further, failed to set out the parties' respective cases. The Claimant's case was that the idea must have been generated by management side with no input from trade union side; the documentary evidence supported this view, see (for example) the internal emails, not copied into trade union side, in which the Respondent referred to amalgamating the gardener job descriptions. The ET failed to refer to that documentation, which had been all the more necessary as it heard no direct evidence from anyone participating in the relevant discussions.

36. The evidence was compelling: the Respondent's internal communications showed no concern that the gardener job descriptions needed re-consideration. This only arose after costings were carried out; it emerged from management side. See the ET's finding that, prior to the decision to re-evaluate the gardener jobs, there were budgetary concerns in the Parks' Department. The crucial point was who had suggested the amalgamation of the gardener job descriptions. The Claimant did not accept that her evidence was as recorded by the ET (para. 12.5). Any reference in the evidence to trade union involvement related to the subsequent period (November 2009), not the decision to amalgamate the jobs and carry out the new evaluation. She had not accepted that the suggestion of a re-evaluation had been made by a trade union representative; it had not been put to her in cross-examination and the parties were not given the opportunity to make submissions on the point. This had not been a case made by the Respondent in advance of the re-hearing: it was essentially a late answer to the manipulation issue identified by HHJ Shanks.

37. The ET failed to set out the evidence and then reached conclusions contradicted by the documents. It failed to set out key facts in a clear order; referred to few dates and failed to

record important facts relevant to the issues. The ET had observed "it does not matter who actually had the idea" (para. 12.5), but the Claimant disagreed: it mattered greatly.

38. Generally, the ET appeared to simply accept the Respondent's case at face value, without subjecting it to any critical scrutiny. From para. 12.9 onwards, the reasons focused on Ms Mathieson's evidence. There was no reference to the Claimant's evidence as to when trade union side learnt of the re-evaluation (they only received notification shortly before the evaluation was due to take place). It was apparent from the Respondent's internal documents that a large percentage of jobs had been evaluated by external consultants and no issue arose. It was also apparent that the intention all along was to use pre-Agreement evaluations, which had been done in a large number of cases. The only exception was where a concern had been raised about a large differential (e.g. Team Leader positions). The gardener evaluations did not fall into this category. The communications to staff indicated grade 2 and 3 gardeners had been evaluated; there was no question about those evaluations or about the gardener job descriptions. It was only later that the decision was made to amalgamate the gardener job descriptions; that seemed to be generated by HR. The Respondent's documentation seemed to show management had determined that the gardeners would be placed on scale 3 *before* the job descriptions had been re-written. The ET's findings failed to engage with the detailed chronology. Had it done so, it would have found the evaluation was carried out before the job descriptions had been finalised.

The Respondent's case

39. For the Respondent, Mr Davies raised a concern as to how the Claimant's case had been put in respect of the finding on variation. The Respondent had not understood the appeal had been permitted to proceed on that basis.

40. In any event, HHJ Shanks had not reached a final view on the Single Status Agreement; at most he was stating a provisional view as to what was likely. He could do no more as he had heard no evidence. Further, the Claimant had accepted ET that, although evaluations carried out prior to Single Status would stand, benchmark evaluations could be challenged (see the finding at para. 11.2.8 (wrongly stated to be 10.2.8)). It was also accepted in the Claimant's skeleton argument for the appeal (para. 55).

41. Thus, however, the default position arose (whether under the Single Status Agreement, as HHJ Shanks might have thought likely, or under a variation to that agreement, as the ET found), it was common ground that it was open to challenge and re-evaluation.

42. Turning to the grounds of appeal, on the Rule 30(6) point, the Respondent contended the ET's reasoning was clear and based on permissible findings of fact. The Claimant criticised the lack of reference to dates but reading the Judgment in its entirety made the chronology clear: para. 11.2 gave the period; the date of the Single Status agreement was common knowledge but was also referenced in the Judgment. The ET was plainly focussing on what was important; on the wood rather than the trees.

43. There was an error in the transcription of the answer to CMD question 1.2 but that was not part of the appeal and did not assist the Claimant.

44. As for the Respondent's case, Ms Mathieson's witness statement dealt with the relevant points: the ET did not need to refer to the Claimant's evidence, Ms Mathieson had agreed the job descriptions had not been run past the trade unions and employees.

45. As for whether the ET had been wrong in recording that the Claimant had accepted that it was likely that the trade unions had agreed to the re-evaluation, the point did not go anywhere. The crucial point was that the evaluations could be challenged by someone; it did not matter who that was. Similarly, trying to carry out any detailed analysis of the management e-mails did not assist: the evaluation was carried out by HR, not management. Moreover, the oral evidence went further, see (for instance) the Employment Judge's note of Ms Mathieson's evidence:

> **"In answer to a question about when concerns with regard to the gardener Grade 3 job descriptions were raised, Ms Mathieson recounted speaking to trade union representatives about this and suggested that those representatives said that a new job description should be evaluated. She stated "they were supportive of evaluation and participated in the process". The [Claimant] then asked further questions in response to which Ms Mathieson explained how, at the request of either the trade unions or staff representatives (she believed that the former was more likely) the gardener Grades 1 and 2 had also been evaluated by way of a composite job description with gardener Grade 3. The Claimant then cross examined her on whether the trade union had expressed concerns about this. Ms Mathieson said that the trade union was aware of what was going on. It was then suggested to her that the production of a composite job description was something of which the trade union was unaware. She responded (consistent with her previous evidence, see above) that she thought that the trade union had raised the matter themselves, but they were certainly aware of it being undertaken. …"**

46. That note was in the Employment Judge's comments provided to the EAT as part of this appeal. The Claimant had been unable to identify any errors in the Employment Judge's response, despite being afforded the opportunity to do so by Lewis J.

47. As for the Claimant's evidence, as the ET had recorded (para. 7), she was not present at all the relevant meetings.

48. Should the EAT be minded to allow the appeal, the matter would have to be remitted again to the ET. Given that the Claimant had always accepted that the benchmark evaluations could be challenged, it would not be open to this Court to substitute its view for that of the ET as to what had then taken place.

The Claimant in response

49. The Claimant maintained that the Respondent's case had shifted during the proceedings; most recently in response to ruling of HHJ Shanks. Even now, the Respondent's argument was in conflict with the documentary evidence. As for the reference to the Claimant's evidence (recorded by the ET at para. 11.2.8), she had never accepted any challenge could be raised and then lead to a re-evaluation. She had only allowed that this could happen where there was a challenge for reason, e.g. where there was a substantial differential. In any event, as the Respondent had pointed out, she was not at the meetings in question and so her evidence on this point was simply based on her reading of the documents.

50. As for the basis of the appeal, the parts struck out related to the fair hearing issue, not whether there was a contradiction on the evidence accepted by the ET.

51. Although the Judgment included some dates, the references were not complete and there was, more generally a jumbled mixture of fact and inference. The ET should have set out its findings of fact, followed by the inferences drawn.

52. On the question of disposal, the documents were available to this Court as they had been to the ET; the issue could be resolved here. The Claimant would prefer not to have third hearing and felt exhausted by the process thus far.

Discussion and conclusions

53. Although the grounds of appeal appear to raise issues of adequacy of reasons and/or perversity, the Claimant's case really starts with the basis of the remission to the ET after

the first appeal. Reading para. 26 of that Judgment (see para. 10 above), the Claimant takes the view that it was not open to the ET, at the remitted hearing, to find other than that the 2007 evaluation would be effective for the purposes of the Single Status Agreement. It was wrong in reaching the conclusion it did at para. 13.1. That being so, there was no need for it to find (para. 13.2) that this possibility had been allowed by means of a variation agreed between management and trade union side. Absent such a variation, there was equally no basis for finding this was subject to allowing for possible future challenge and re-evaluation under Single Status (para. 13.2).

54. The first difficulty for the Claimant is that this is not the basis on which the appeal was permitted to proceed. It would amount to saying that the ET was bound by the EAT's finding as to the meaning of the Single Status Agreement. That would have significant repercussions for the basis on which the ET went about its findings of fact; it would have proceeded on an entirely mistaken assumption as to the issues it was to determine. I do not read the Judgment of Lewis J as permitting this appeal to go forward on that basis.

55. In any event, I cannot see that the point is a good one. HHJ Shanks had plainly stated a "possible", albeit (in his view) "likely", conclusion. I do not read his Judgment as reaching a final conclusion on this point. Had he done so (and that might have been surprising given that he had heard no evidence), the Order for remission would have made that plain. It did not. Moreover, I do not believe that either party understood the ET at the remitted hearing to have been so bound. If that had been the understanding, I cannot see that there would have been any need for issue 1.1 (Could an evaluation at Scale 4 in Feb 2007 (or at any other time prior to the signing of the agreement) constitute an effective and binding decision within the terms of the (local single status) agreement?).

56. Accepting this limitation to her appeal, the Claimant sought to put the point on a different basis. For the reasons given by HHJ Shanks (so, for the reasons leading him to the conclusion that it was "likely" the Single Status Agreement contemplated that there would be earlier job evaluations that would still be effective for its purposes), she contends that the ET reached an impermissible finding. The difficulty with this argument is that it seeks to limit the evidence to the documentation available to the EAT at the first appeal. It is apparent, however, that the second ET had regard to more than that in determining the issue of contractual intent. Furthermore, the conclusion reached by the ET is not, in my judgment, inconsistent with the view expressed by HHJ Shanks. Both allowed that earlier (benchmark) evaluations could stand after implementation of Single Status; they simply got to that position by different routes. HHJ Shanks considered it was possible to read the Single Status Agreement as allowing for that possibility. The ET considered that it required evaluations to be carried out in accordance with its terms but management and trade union side had pragmatically agreed there should be a variation to this requirement to allow for earlier evaluations to be used where there was no challenge.

57. Even if I was wrong on this point, I do not accept that the ET was not entitled to reach the conclusion that it did. First, for the reasons I have already set out, I do not consider that it was limited in the scope of the remission to adopt the same view expressed by HHJ Shanks. It was entitled to consider the evidence going to the question of contractual intent and form its own view. Second, given the evidence before the ET at the remitted hearing (both documentary and oral), it reached a permissible conclusion. Apart from relying on the reasoning of HHJ Shanks for his provisional view, the Claimant has not directed me to anything to suggest that the ET was not entitled to reach that conclusion. That may be

because, ultimately, the Claimant's case is founded upon the same premise: Single Status comprehended the possibility (whether under its own terms or by reason of an agreed variation to those terms) that earlier benchmark evaluations might continue to be effective subject to possible challenge and re-evaluation in certain circumstances.

58. This brings me on the next point, which is the Respondent's contention that this submission goes nowhere. The ET records his understanding of the Claimant's evidence and position before him as being that "the benchmark evaluations would stand unless someone (on either side) challenged them" (para. 11.2.8). The fact that this is noted after recording that the Claimant was a trade union shop steward suggests that the ET saw this as reflecting her understanding in that capacity. In any event, however, it was entitled to take account of how she was putting her case. It is, moreover, not vastly different from the way in which she has put her case before me, albeit that she seeks to stress that she was only conceding that a challenge would be permissible if made "for a valid reason".

59. On the case before it, therefore, the ET was plainly entitled to find that – however it had been allowed that benchmark evaluations carried out pre-implementation of Single Status would continue to be effective (whether because the Agreement itself allowed for that or because that was a variation agreed between management and trade union side) – any earlier evaluations might be subject to re-evaluation if challenged. On the Claimant's case that would need to be restricted to cases where the challenge was "for a valid reason" but (for the reasons I set out below) I do not see that this makes any substantive difference.

60. I turn then to the findings on the challenge made to the gardener grade 3 evaluation. In so doing, I note the ET's general observation on the testimony it heard:

> **"6. … I was struck by the care with which the respondent's witnesses sought to answer questions. I am satisfied that where they were unable to explain particular documents (or what had led to their production) this was because they were involved in Single Status implementation across Haringey (not just for the Parks Department) and they found it difficult to separate out what was happening in various departments (and why) when recalling matters which took place so long ago.**
> **7. The claimant has a clear grasp of the detail of this matter. She readily accepted that there were meetings which she was not a party to and that where this was so, she could only speculate as to what was happening and seek to interpret the documents written at that time."**

61. The relevant findings of the ET then follow in a clearly structured way. They are based, first, on the finding that there was express agreement between management and trade unions that the earlier benchmark evaluations would stand unless someone challenged them, in the sense of asking for an evaluation on the basis of a different job description or for the evaluation to be carried out by human resources rather than simply taking the evaluation of the consultants (para. 11.2.8). This finding of fact was made on the basis of the evidence of Mr Davies, the Respondent's Head of Human Resources, the background documentary material and the Claimant's own evidence. At the risk of repeating what I have said before, I consider it to be an entirely permissible finding.

62. Turning to events within the Parks Department, the ET found that there was a need to produce further job descriptions for jobs which had not been the subject of benchmarking (para. 12.2) and, at some stage in July 2009, the suggestion was made that grade 1 and 2 gardeners should be covered by the same job description as grade 3 gardeners. It was this that led to the new job description being drawn up for those grades (paras. 12.4-12.6).

63. It is right to observe that at this stage the ET makes clear that, in the absence of direct evidence, it was drawing inferences from the material available. The reasoning is made transparent. It identifies the primary facts upon which it relied (the frequent meetings between trade union representatives and individual members of the Parks' Management (para. 12.4); the discussion between Ms Mathieson and Parks Department managers and

the lack of dispute as to the similarity of duties between the grades in question (para.12.5); the fact that the trade union representatives concerned did not suggest that they were unhappy with this process or that the Respondent should simply apply the benchmark evaluation as determinative for grade 3 gardeners (para 12.7)) and makes clear as to the inferences drawn from those facts and the reasons for so doing. In this respect, the ET was drawing on the evidence before it; not solely from the documents (to which I have been referred by the Claimant) but also to the oral testimony of Ms Mathieson and Ms Isiktan (a Human Resources Adviser). I cannot say that the conclusions reached as a result were absent any evidential foundation or, given the evidence, almost certainly wrong (perverse).

64. Having thus found, the ET was entitled to take the view (as it did, see, e.g., paras. 12.8, 12.15.2, 13.3, 13.7) that the re-evaluation of the gardener grade 3 job was in accordance with the agreement between management and trade unions. On the Claimant's case, given the new job description, re-evaluation was for a valid reason. On the Respondent's case (accepted by the ET) it was permissible because there was a different job description.

65. Having found that there was good reason for the re-evaluation (a reason that met the terms of the agreement between management and trade union side), the ET further found that it was then carried out in accordance with the terms of Single Status. This is a significant finding because the Claimant's case is that the entire process was concocted to ensure that the Respondent did not have to meet the higher costs involved in paying grade 3 gardeners at scale 4. The ET plainly had regard to that case and considered its plausibility on the evidence. It allowed that it might well have been the case that mangers within the Parks' Department would have welcomed a possibly lower evaluation of the

job (see para. 12.6) but, having heard Ms Mathieson and Ms Isiktan give evidence under cross-examination, concluded:

> **"12.9 Ms Mathieson saw documents which revealed the above thinking of the Parks Department management. She took from that their hope (possibly an expectation) was that the new job description would be evaluated at Level 3. I am quite satisfied that in evaluating it at that level, neither their comments, nor their hopes and expectations, nor any budgetary constraints influenced her. She, together with her colleague, Ms Ishiktan, evaluated the job description in accordance with the Job Evaluation Scheme and their joint outcome was at Level 3."**

66. The Claimant seeks to challenge the finding that there was a proper basis for the re-evaluation by contending that the ET ignored relevant evidence. I have spent some time cross-checking the various references the Claimant has made in the documents before me but am unable to agree with her. For example, I do not accept that the ET ignored the evidence referring to the possibility of re-evaluation in cases where large differentials had emerged. It expressly referred to that as part of the factual matrix: see para. 11.2.5, where it found that, prior to implementation of Single Status, this was one of the possibilities that had been referenced in the discussions between management and trade union side. Separate to that, however, it expressly found – accepting the evidence of Mr Davies – that there was agreement with the trade unions that the benchmark evaluations would stand unless someone asked either for evaluation on the basis of a different job description or for human resources to evaluate the job description used by the consultants in the benchmarking exercise (para. 11.2.8). I cite that as an example but the point holds good more generally. It is not that the ET ignored the evidence (on the contrary, I consider its reasoning demonstrates a good grasp of it), it is, rather, that it did not accord certain parts of the evidence the weight that the Claimant sought. Picking through a selection of the documents available to the ET (as the Claimant has done on this appeal) does not begin to replicate the evidential picture the ET had. It simply serves to demonstrate why matters of evidential weight are for the ET and not the EAT.

67. Having thus addressed the Claimant's arguments on these points, I return to the questions posed by Lewis J, when letting this matter proceed. It seems to me that proper analysis of the reasoning makes clear that the ET did indeed properly consider the circumstances in which it was possible to re-open an evaluation of a job after implementation of Single Status. It gave the matter some thought and its conclusion derives from the oral evidence of Mr Davies as well as the documentary evidence and the evidence from the Claimant herself. It is, further, apparent that it found that those circumstances (the new job description) applied in this case. The ET also reflected at some length on the question of the timing applicable for such re-evaluations (see paras. 13.5-13.6). The conclusions reached all seem to me to have been entirely open to the ET on the (oral and documentary) evidence before it.

68. I turn then to question of the adequacy of the reasons provided for the conclusions reached. One point taken by the Claimant relates to the way the ET approached the agreed list of issues. Rather than using these as the structure for the reasons, it gave responses to the questions they raised in summary form at the end of the document. It is also apparent to me that the answers given contain at least one typographical error: given the conclusions reached by the ET, I simply do not think it is possible that the ET intended to give a positive answer to question 1.2 (was an evaluation of the C's job at scale 4 within the terms of the Agreement carried out after Sept 2008?). It is perhaps a pity that this point was not resolved at an earlier stage of the appeal proceedings and I have reflected on whether I should utilise the **Burns/Barke** procedure to obtain clarification from the ET on this point. I note, however, the clear statement that the answers to these questions are "based on the findings I have already made". As it is obvious that the ET never found

that the Claimant's job was evaluated at scale 4 after September 2008 (indeed, that was not even the Claimant's case), I consider that is unnecessary to refer this question back.

69. The more substantive point raised by the Claimant is whether thus providing summary answers to the questions raised by the list of issues rendered the reasoning inadequate. I do not consider it does. The answers are expressly based on the preceding findings of fact. It is trite law that Judgments must be read as a whole. That is all the more obviously so where, as here, the ET has expressly stated that the summary conclusions listed are derived from the earlier detailed findings of fact.

70. The Claimant further criticises the ET for identifying the key issues for determination rather than simply utilising the list drawn up by the parties. I do not consider this to give rise to a proper objection. It was a case management decision for the ET. Rather than breaking down the key issues into several parts (as the parties had done), it chose to roll them up into one broader question. In so doing, it did not lose sight of the points taken by the parties and the findings of fact enable the reader to answer the questions raised by the parties' list of issues in adequate detail. This is point of form rather than substance. The form adopted by the ET does not vitiate its conclusions in any way. It did not deprive the parties of the opportunity to address the case the ET was considering. It is apparent that the key issue identified by the ET comprehended the more detailed list of issues agreed by the parties. Addressing the latter necessarily addressed the former.

71. I similarly reject the Claimant's criticism of the reasoning as failing to provide sufficient detail in terms of dates etc. I simply do not think this complaint is born out on any fair reading of the reasons provided. I also consider that the Claimant is wrong to complain of

any apparent focus on the evidence from the Respondent's witnesses (in particular, Ms Mathieson). Given that it was largely the Respondent's actions that were under the spotlight, it is hardly surprising if the evidence of its witnesses received particular attention. That is all the more so when the Claimant – as she observed to me – was not present at many of the relevant meetings and so simply could not give direct evidence that would assist on many aspects of the case. As no other trade union witnesses were called, it is unsurprising that there was particular attention given to the evidence of the Respondent's witnesses (particularly Ms Mathieson, given her role in the re-evaluation).

72. For all those reasons, I dismiss this appeal.

73. By way of postscript, I observe that the delay in handing-down this Judgment arises from the fact that I undertook to follow up certain cross-references that the Claimant wished to rely on in support of her argument. The hearing of the appeal had started late because the Claimant was delayed and she felt too exhausted to continue later in the afternoon so as to complete all the points she wished to make. Unhappily that meant that there was insufficient time that day for me to follow up the Claimant's points, reflect on the submissions and give Judgment. I returned to this task at the first available opportunity thereafter but that has inevitably led to delay in the preparation of the Judgment.