Appeal No. UKEAT/0369/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 December 2013

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

DR M R KAYANI APPELLANT

UNIVERSITY HOSPITALS BIRMINGHAM NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	DR M R KAYANI (The Appellant in Person)
For the Respondent	MS N MOTRAGHI (of Counsel) Instructed by: Messrs Bevan Brittan LLP Interchange Place Edmund Street Birmingham B3 2TA

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

Construction of increment and pay protection provisions of the National Pay Scale for NHS doctors, (NHS Hospital, Medical and Dental Staff and Doctors Public Health, Medicine and the Community Health Service England and Wales terms and conditions of service ("TCS")).

Application for costs – grounds under r 34(a) EAT Rules 1993 not made out.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent as they were before the ET below.

2. This is an appeal by the Claimant in these proceedings against the Judgment of an Employment Tribunal under the chairmanship of Employment Judge Hughes, sitting on 12 March 2013, at Birmingham, which was sent (with written Reasons) to the parties on a date which is indecipherable but appears to be 9 April of this year.

3. The Claimant represented himself both before the Employment Tribunal and before me, although I understand that he may have had the benefit of some legal advice and support at various stages. At the Employment Tribunal the Respondent was represented by Mr E Kemp of counsel and before me is represented by Ms N Motraghi, of counsel.

4. The Claimant had presented his claim form to the Employment Tribunal on 16 November 2012. His complaint was one of unlawful deductions of wages. The Tribunal summarised his complaint as being that he had been underpaid by the Respondent since commencing his training rotation with it. His position was that the Respondent had failed to protect his pay in accordance with the terms and conditions of his employment as an NHS doctor ("TCS").

5. It is relevant for the Claimant's case to note that he had been a staff grade doctor before re-entering training as an Anaesthetic Registrar. It was his contention that his basic pay as a staff grade doctor should have been protected upon his re-entering training. His arguments were based on in particular paragraph 132 of TCS.

6. For its part the Respondent had argued that the Claimant had been remunerated correctly in accordance with TCS, the real problem arising from an incorrect remuneration in his previous employment. If, as R contended, the salary agreed between the Claimant and another Trust had exceeded the salary properly payable under TCS, it (the Respondent) was not obliged to honour any such previous local agreement.

7. It was common ground that the question for the Employment Tribunal was: what was the correct amount of the Claimant's basic training grade salary by reference to TCS? The Claimant's position was that it was £65,419 (increment point 9 on the specialty registrar grade) whereas the Respondent argued it was £49,398 (increment 4 on that grade).

The factual background

8. I take the following factual background from the findings made by the Employment Tribunal.

9. At all material times the Claimant's pay was to be determined by reference to the National Pay Scale for NHS doctors, as set by the Government, which form part of the NHS Hospital, Medical and Dental Staff and Doctors Public Health, Medicine and the Community Health Service England and Wales terms and conditions of service ("TCS").

10. We join the Claimant's career history in 2008, when he was working at Ashford and St Peter's Hospital NHS Trust ("St Peter's").

11. Prior to 1 April 2008, there had been a former career grade role as staff grade doctor but that had been closed to new applicants from midnight on 31 March 2008.

12. It was the Claimant's case before the ET that, prior to 31 March 2008, he had been treated by St Peter's as if he were a staff grade doctor. There had been some support for that contention from what was referred to as the IAT form, which I understand to be the Inter Authority Transfer form, which is used within NHS trusts to document the service history of doctors. The ET found, however, that the Claimant had in fact been classed and graded at St Peter's as an SHO in aesthetics from 2 February 2005 until 31 March 2008, albeit that he may have carried out some of the work of a staff grade doctor and he had received a supplement to his SHO salary to reflect that.

13. In any event, on 1 April 2008, the Claimant was promoted to a career grade specialty doctor position and received a substantial increase in his salary at that time from £36,942 to £57,539, which put him on increment level 8 of the specialty doctor scale under TCS. Under TCS, however, as the ET found, a doctor appointed on the minimum level of that pay scale would not have actually reached increment point 8 until they had been in post for 11 years. It was thus the Respondent's position before the ET that this must have been a local level agreement between the Claimant and St Peter's, out-with TCS. As such, it would not be binding upon the Respondent when it subsequently came to employ the Claimant.

14. The Claimant then worked at St Peter's in this position until he left to re-enter training on 1 February 2012. After three years the career grade position in St Peter's he was entitled to progress onto increment point 9, which he duly did, and so he was being paid £65,419 as at February 2012, i.e. at increment point 9 on the specialty doctor scale (there being ten increment points in total).

15. On 1 February 2012, the Claimant re-entered training, taking up his training rotation as a specialty registrar in anaesthesia at Hereford County Hospital ("Hereford"). In so doing, the

Claimant was then paid by reference to a basic protected salary of £65,419, i.e. Hereford continued to pay him the amount he was receiving immediately prior to commencing his training rotation with them.

16. When the Respondent subsequently made enquiries with Hereford on the issue of the Claimant's pay, Hereford had been unable to confirm what checks, if any, had been carried out.

17. In any event the Claimant subsequently took up a second rotation of training in anaesthesia with the Respondent as from 1 August 2012. He had received his offer of this post from the Respondent by letter of 29 May 2012 specifying that his salary would be calculated by reference to the National Pay Scale as applicable to NHS staff and that he would be on the specialty registrar pay scale.

18. When the Respondent received the IAT form setting out the Claimant's service history in the NHS it concluded that he had been paid a higher salary by both St Peter's and Hereford than in fact had been properly payable under TCS. It duly set out its position in a letter to the Claimant of 3 July 2012 (see the ET's findings at paragraphs 6.12 to 6.13). It concluded that there had been errors in the approach taken to the Claimant's pay in his previous employment with St Peter's and Hereford and made it plain that if he accepted an offer of employment with the Respondent it would be on £61,728, a lower basic training grade salary than he had previously enjoyed.

19. The Respondent's letter stated:

> **"Whilst we accept your promotional increase when you commenced as a specialist doctor in 2008 it is with the deepest regret that on review your service history we are unable to compound the errors of previous Trusts thereafter. I realise that the outcome of this assessment may come as shock to you however UHB is not prepared to protect wholly incorrect salaries. Our offer is to pay you £61,728 per annum. I realise this assessment is perhaps not what you would have hoped and may be disappointing but I believe it to be**

correct under the terms of service. Please let me know if you would like to accept or reject this placement on the basis of our offer."

20. The Claimant duly accepted the placement but made it clear he did not accept the Respondent's calculation was correct and that he would challenge it.

TCS and the ET's conclusions

21. The Terms and Conditions of Service (TCS) document is a lengthy exposition of the applicable conditions to medical and dental practitioners. It (or at least the version of it with which I am concerned) runs to some 109 pages and there are headings and sub-headings that help to point the way for the reader as regards the different topics and sections.

22. As the ET identified, the material part of TCS for the purpose of this case is contained within paragraphs 121 to 135, which concern starting salaries and incremental dates. These paragraphs relevantly provide as follows:

> **"STARTING SALARIES AND INCREMENTAL DATES**
>
> **121. Except as provided elsewhere in these Terms and Conditions of Service, practitioners shall on appointment be paid at the minimum point of the scale for a post in the grade to which they are appointed; and their incremental date shall be the date of taking up their appointment.**
>
> **COUNTING OF PREVIOUS SERVICE**
>
> **Regular appointments**
>
> **122.a. Where practitioners are appointed to a post in a grade having already given regular service in one or more posts in that grade or a higher grade (measured in terms of the current maximum rate of whole-time or full-time salary), all such service shall be counted in full in determining their starting salary and their incremental date, provided that service:**
>
> **i. in the consultant grade prior to 1 April 1975; or**
>
> **ii. in the AS grade, or in grades treated as equivalent thereto, prior to 1 April 1978.**
>
> **shall count at the rate of one half.**
>
> **[…]**
>
> **Specialist/Specialty Registrar**
>
> **130. On first appointment as an SpR or StR, one increment and one only shall be given for any year or part of a year in excess of two spent previously in the SHO … grade.**

[…]

PROTECTION

132. Where a practitioner in a career grade takes an appointment in a training grade which is recognised by the appropriate authority as being for the purpose of obtaining approved training (which may include training to enable the practitioner to follow a career in another speciality) and the practitioner has given continuous service in a career grade post or posts for at least 13 months immediately prior to re-entering training the practitioner shall, while in the training grade, continue to receive a salary protected on the incremental point or threshold the practitioner had reached in his or her previous career grade appointment. Such a practitioner shall receive the benefit of any general pay awards. On reappointment to a career grade post, the practitioner's starting salary should be assessed as if the period spent in the approved raining post had been continuing service in the previous career grade. Where a practitioner re-entering training from a career grade has held a recognised raining post (or equivalent service overseas) in the 13 months of contracted employment prior to re-entering training, the intervening period spent in the career grade shall be taken as continuing service in the training grade and the practitioner will be re-appointed on the appropriate incremental point of the training grade scale. Where pay in the earlier training post was already protected under these provisions, such protection shall continue. Practitioners whose previous appointment was in the Northern Ireland, Isle of Man or Channel Islands hospital service are eligible for protection of salary under the terms of this paragraph."

PROMOTION INCREASE

133(a). Where practitioners have been paid in their previous regular appointment at a rate of salary higher than or equal to the rate at which they would (were it not for this provision) be paid on taking up their new appointment, then their starting salary in the new appointment shall be fixed at the point in the scale next above that previous rate, or at the maximum if that previous rate were higher.

[…]

INTERPRETATION

135. For the purposes of paragraphs 121 to 134:

[…]

(e). A practitioner entitled to protection under paragraph 132 shall continue to receive the leave entitlement of his or her previous post and shall receive the appropriate training grade salary plus the supplement or his or her protected salary, whichever is the greater, except that were the salary is protected at a point on the training grade scales the supplement for the new post shall be paid in any case. The appropriate training grade salary shall be determined as the point on the training grade incremental scale previously reached, plus recognition of service in the same or a higher grade subject to the provisions of paragraph 123 and such guidance as maybe published from time to time. For career grade practitioners entering a training grade, the basic salary paid in the previous appointment shall also for protection purposes not include any payments for an additional notional half-day under paragraph 14, additional sessions under paragraph 16, payments for additional Programmed Activities, our of hours or on-call, or a salary supplement as appropriate, for which the practitioner was contracted in that career grade appointment. The practitioner will, however, be entitled to have total pay in the training post calculated as if the duties contracted for in the training post had been carried out under the relevant terms of the career grade contract held before re-entry to training. For consultants in Wales this will not include the equivalent payments under paragraphs 2.27 and 2.46 of the Addendum to the Medical and Dental Staff (Wales) Handbook."

23. Thus, paragraph 121 TCS provides the default or the starting position and the subsequent provisions logically address different scenarios, which might apply to take a case outside that default category. So, for example, paragraphs 122(a) and 128, address increments on first appointment to grade and staff grade appointments.

24. The ET had to deal in some detail with paragraph 128 and also schedule 14 TCS in addressing the confusion between staff grade appointments (in respect of which employers had wide discretion in terms of the amount to be paid to appointees) and specialty doctors as from 1 April 2008 (to which reference is made in far more prescriptive terms under schedule 14 of TCS). It had found that the Claimant must have been appointed to the post of specialty doctor because the staff grade doctor position had been closed as of midnight, 31 March 2008. On the basis that the Claimant had been appointed to the career grade position as specialty doctor (as opposed to staff grade doctor on 1 April 2008), the Tribunal noted that his earlier service as an SHO would not have counted to increase the incremental part of the scale to which he should have been appointed. Therefore, the default position, absent any further adjustment permitted by the TCS, was that he should have been appointed to the minimum point in the scale.

25. As already outlined there came a time when the Claimant then re-entered training and took up a position as specialty registrar, bringing paragraph 130 of TCS into play.

26. The ET further considered the Claimant's arguments in relation to paragraphs 132 and 135(e) TCS. These are points that do not arise on this appeal (given the limited permission given to the Claimant to pursue particular grounds of appeal) but it is notable that the ET agreed with the Respondent that the reference in paragraph 135(e) - to the point on the training grade incremental scale previously reached - thus referred to *the same* training grade scale, i.e. not simply *a* training grade scale. The Tribunal concluded that it would simply be illogical to set

pay at a higher training grade by reference to the incremental point reached when on a lower training grade (see paragraph 16 ET Judgment).

27. Moreover, at paragraph 132, having made its findings as to the Claimant's entitlement under TCS for the purposes of pay protection, the Tribunal concluded that the applicable training grade salary plus supplement was in fact higher; that is paragraph 24(g) of the Tribunal's Judgment and so the Claimant's argument on this did not arise.

28. I summarise these findings briefly because the Claimant sought to refer to some of these arguments before me in his oral presentation, albeit that these points do not arise in this appeal.

29. The grounds of appeal that are before me take issue with the ET's approach to paragraph 133(a) of TCS, to the Pay Circular (Medical and Dental) 2007, and to paragraph 130 TCS.

30. Turning then to the case made before the ET on these provisions, the Claimant's position was that paragraph 133(a) should apply to any move from one grade to another irrespective of whether a promotion was involved. The ET disagreed, concluding that the Respondent was right in this regard: the use of the heading, "Promotion Increase" assisted in the construction of this particular clause. The Claimant's point was that the reference to being paid at a higher rate in the previous position than the maximum applicable to the new position must refer to his circumstances as, otherwise, the pay scale showed that there were no cases in which someone could be earning more in the junior position than the maximum scale of the higher position.

31. The Respondent's evidence before the ET on this issue was given by Mrs Miller (the Respondent's Head of Medical Resourcing). Her evidence was that there could be a few specific roles in which those less senior than specialty registrar were paid more than the highest

point on that scale. The ET accepted this evidence and concluded that the only point at which paragraph 133(a) applied to the Claimant was when he was promoted from the role SHO to the career grade of specialty doctor. In other words, it only applied in promotion cases and it did not apply in the Claimant's case at the time that was in issue.

32. On the 2007 Pay Circular, the Claimant's particular reliance on the flow chart contained in that document was also rejected by the ET. Again, the ET accepted the Respondent's argument that this concerned a direct move from the position of SHO to that of specialty registrar and thus did not apply to the Claimant, as he had taken up a career grade position of specialty doctor after being SHO.

33. It does not appear from the ET's Judgment that the arguments canvassed before me in respect of paragraph 130 TCS were dealt with in depth and I will turn to the competing arguments on that provision later on in this Judgment.

Legal principles

34. I turn then to the legal principles laying down the approach to be adopted by the ET (and, indeed, by this EAT) in answering the questions of contractual construction before it. There is no great difference between the parties in terms of the approach I should adopt. They agree that the principles I should apply are those laid down by Lord Hoffman in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896 HL, pages 912G to 913D.

35. Both parties equally place reliance on the description of the object of contractual construction laid down by Lord Hope in **Multi-link Leisure Developments Ltd v North Lanarkshire Council** [2010] UKSC47 at paragraph 11:

> **"The court's task is to ascertain the intention of the parties by examining the words they used and giving them their ordinary meaning in their contractual context. It must start with what it is given by the parties themselves when it is conducting this exercise. Effect is to be given to every word, so far as possible, in the order in which they appear in the clause in question. Words should not be added which are not there, and words which are there should not be changed, taken out or moved from the place in the clause where they have been put by the parties. It may be necessary to do some of these things at a later stage to make sense of the language. But this should not be done until it has become clear that the language the parties actually used creates an ambiguity which cannot be solved otherwise."**

36. That approach was also approved and applied by the Supreme Court, per Lord Carnwath (with whom the other members of the Court agreed), in the case of **Barts & London NHS Trust v Verma** [2013] UKSC20, a case also involving a point of construction as to the pay protection provisions of TCS.

37. The Respondent also submitted, and I do not understand the Claimant to have dissented from this, that the position is not changed by the fact that the particular contractual term is derived from a collective agreement that is then incorporated into the individual contract; see **Hooper v British Railways Board** [1988] IRLR 517 CA and **Adams v British Airways Plc** [1996] IRLR 574 at paragraph 22 per Lord Bingham, Master of the Rolls.

38. The focus in each case is on determining what the parties meant by the language used. That is to be tested by ascertaining what a reasonable person would have understood the parties to have meant, that is, "Someone who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" per Lord Clark **Rainy Sky SA & Others v Kookman Bank** [2011] 1 WLR 290 paragraph 14.

39. In construing a contract, the result dictated by a particular construction is not irrelevant, see per Lord Reid in **Wickman Machine Tool Sales Ltd v Schuler AG** [1974] AC 235 HL:

> **"The fact that a particular construction leads to a very unreasonable result must be a relevant considering. The more unreasonable the result the more unlikely it that the parties can have intended it and if they do intend it the more necessary it is that they shall make their intention abundantly clear"**

40. The point was further made in **Rainy Sky V Kookmin Bank** as follows:

> **"The court must have regard to all the relevant surrounding circumstances. If there are two possible constructions the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."**

41. This approach may pick up modern day commercial realities but it arguably reflects the traditional approach to construing contractual terms whereby, (in a quotation cited in *Chitty* 12-051) per **Robertson v French** 1809 4 East 130 at 135:

> **"Terms are to be understood in their plain, ordinary and popular sense unless they have generally in respect of the subject matter by the normal usage of the trade or the like acquired a special [it is a peculiar sense distinct from the popular sense of the same words] or unless the context evidently points out that they must in a particular instance in order to effectuate the immediate intention of the parties to that contract be understood in some other special and peculiar sense."**

42. In addition to these general points, the Claimant also relies on a passage from the practitioners text, *"The Interpretation of Contracts"* by Sir Kim Lewison, in which it is noted that, whilst a heading to a contractual clause may be taken into account in constructing the clause, it cannot override clear words in a clause or create an ambiguity where (but for the heading) none would otherwise exist. Again there is no real difference between the parties on this point of approach. The real issue in this case is where the application of these legal principles actually go in this appeal.

Arguments on appeal

43. I then come to the parties submissions. As I have said, although the Claimant did seek to address me in part on other provisions in TCS, the grounds of appeal permitted through to this

full Hearing of the appeal were limited to the arguments raised on the construction of paragraphs 130 and 133(a) of TCS and the Pay and Conditions Order 2007.

The Claimant's submissions

44. The Claimant contends that paragraph 133(a) TCS was applicable to his move from specialty doctor to specialty registrar in February 2012 and the ET erred in law/reached a perverse view to find it was not applicable because it was necessary for there to be a promotion for this provision to be engaged. It was the Claimant's argument that 133(a) does not, in terms, limit its effect to cases of promotion. Indeed, he contends, the words "higher" or "lower" would have to be inserted before the use of "appointment" in order to do this and there would be no reason for those words to be inserted. Furthermore, to so limit the provision would be to rob it of its meaning, or at least the meaning for the final point (which refers to a case where a person might have been in the previous appointment at the maximum of their pay scale). The Claimant's point is that there is no lower grade position with a greater salary than the maximum of a higher grade position. To support this contention, he took me to various documents setting out the pay scales applicable in various years, contending it was simply perverse of the ET to accept the oral evidence of the Respondent's witness, Mrs Miller, that there were roles more junior than Specialty Registrar that still paid more than the highest point in the scale. He further argued it was an error of law to give weight to the heading, "Promotion Increase". A heading can be taken into account of construing a clause but cannot override clear words or create an ambiguity where otherwise there would be none. Adding in the requirement of promotion here, the Claimant contended, created an ambiguity; was it referring simply to promotion up the scale or to a more senior post?

45. For the Respondent it was argued that this paragraph is manifestly a provision concerning promotions. The heading is a legitimate aid to construction; it signposts the way. Moreover, it

was included by the parties at the time of the agreement and it was not added later or by others and does not override any part of the actual clause nor does it render any part of that clause ambiguous. If anything, it adds clarity. The Respondent further submitted that the ET's approach disclosed no error of law or perversity in conclusion. The Tribunal was entitled to rely on the evidence of Mrs Miller. The fact that the pay documentation for particular years did not show examples of a lower graded having a maximum higher than more senior posts did not undermine Mrs Miller's evidence or reduce it to mere assertion. Mrs Miller was (and remains) an experienced employee with obvious knowledge in this area and was speaking of the application of TCS very generally over a long period of time and as encompassing many different cases and including those who might move in from non-NHS pay scales.

46. Paragraph 133(a), the Respondent submitted, was a backstop clause. If a practitioner obtains promotion but - applying the recognition of service provisions in paragraph 122 and following - they are not placed on a higher point than that they enjoyed in their lower grade, paragraph 133(a) ensures their place on the next highest point.

47. Finally, the Respondent submitted, to construe paragraph 133(a) as the Claimant urges would make a nonsense of the heading, "Promotion", which obviously referred to a substantive promotion in terms of a job and not simply as a move up the pay scale. It would also mean that the reference in 133(a) to "equal" would entitle those staying in the same post (so, not on promotion in a normal sense but taking a sideways move to, e.g., a post in another hospital) to automatically get an increase under this provision; obviously the parties did not intend that.

48. Turning then to 2007 Pay Circular ground of appeal (the second ground of appeal), the Claimant's submission was that the flow chart showed the method of transferring SHO

experience onto the Specialty Registrar grade and the ET erred in law in holding it was not applicable. Thus, the Claimant observed, the Circular clearly states:

> **"Transition will last from 1st of August 2007 until all doctors holding SHO training contracts at that time have completed those contracts or have taken up a specialty registrar post."**

49. The Claimant also adds, if the Respondent was right and this Circular did not apply to him, then the Respondent itself should not have used paragraph 130 TCS, because that would only arise under the Circular where, "thereafter for doctors entering a training post where previous experience is at SHO level only".

50. This did not appear to be a point argued below or in the grounds of appeal but one that emerged in the Claimant's submissions in reply. As such, I will deal with it at this stage. It was, in my judgment, a bad point. The Circular plainly addresses the specific case of transitional arrangements in the move from one training contract to another. It does not mean that someone in the Claimant's case who moved from SHO to career grade and then from career grade back into a training post would thereby be taken out-with paragraph 130 TCS.

51. In terms of the submission that was made both at the Tribunal (and in the grounds of appeal) on Pay Circular 2007, the Respondent's submissions in response placed reliance on the fact that the Circular stated that it concerned the introduction of the then new grade of Specialty Registrar, with Annex B concerning the principles of transition from SHO to Specialty Registrar posts including incremental points and dates. The Claimant had taken up a career grade of specialty doctor position on 1 April and that was when his SHO contract concluded or completed (to use the words in the Circular). The Claimant was therefore not eligible to transition onto the Specialty Registrar scale. His situation was not covered by either of the flow

charts contained in the Circular, it simply did not apply to those who took up substantive non-specialty registrar posts and then sought to enter a specialty registrar role at some later point.

52. Finally, by means of the last ground of appeal, the Claimant sought to challenge the Tribunal's conclusion in relation to paragraph 130, TCS. The Claimant's argument on this point is simple: by using the word "increment", this provision must mean that there must be an increase. So, contrary to the Tribunal's conclusion that this merely provided for an increase of one incremental point on the specialist registrar scale if a doctor had spent more than two years prior experience as an SHO, what should have happened is that the Respondent should have calculated how the Claimant's previous SHO experience translated to starting salary on a specialty registrar grade, which according to these principles could not be below his previous lower grade salary. The short point being that increment means increase; he should have received an actual increase.

53. In response to that the Respondent says there is no error of law, the ET was correct to construe "one increment" as meaning one incremental point. "Increment" means what it says in this context, it does not mean increase more generally.

Conclusions

54. In respect of paragraph 133(a) I prefer the arguments of the Respondent. I do not consider this to be a case where the ET inappropriately placed reliance on the heading to the clause in issue. It was a legitimate aid to construction. The heading is a signpost in the context of this agreement and is consistent with the use of headings and sub-headings within TCS as a whole. It was plainly agreed by the parties at the time and has not been inserted thereafter and it makes sense in the overall scheme of TCS.

55. Taking not just the heading but the entirety of the context in which paragraph 133(a) is to be found, I am satisfied that the ET reached the right conclusion that this provision relates to promotion cases.

56. That said, I understand the Claimant's concern should there then be (as a result of this construction) part of the clause that is rendered empty of practical meaning. I accept the guidance of the authorities: one needs to look at the result of the construction of a contractual clause to test whether the construction is correct.

57. I can also see that the pay scales that the Claimant refers to do not show examples whereby the holder of a lower grade position might be receiving higher pay than the maximum of a new appointment to a higher grade and it is plain that paragraph 133(a) allows for that possibility. The evidence before the ET was not, however, limited to those documents. The ET also had the evidence from Mrs Miller who is obviously experienced in this field and who was speaking of the application of TCS in general terms. She plainly made the point that there could be particular roles where, even on promotion, this situation arose and that therefore this part of paragraph 133(a) would therefore bite.

58. This evidence has to be seen in context. TCS is an agreement that has been in place a long time and serves many different situations. Paragraph 133(a) can encompass promotion possibilities that are outside the pay scale documentation and the ET was therefore entitled to accept the evidence from Mrs Miller as to the possibility of such situations arising, albeit that they might not be set out in the pay scale documentation. It was for the ET to decide what weight to give this evidence and I see no error in law in the conclusion she reached.

59. Moreover, I accept the Respondent's arguments that the Claimant's construction of paragraph 133(a) would give rise to consequences that the parties cannot have intended. The reference to the equal place on the scale would mean that a sideways move would always lead to an increase in pay and that cannot be what the parties can have intended. The natural meaning and reading of paragraph 133(a) is that it is applicable to promotion cases, which – it is common ground - was not the Claimant's case.

60. On Pay Circular (Medical and Dental) 4/2007, in my judgment the Claimant's case fails to comprehend the context of the transitional arrangements being introduced and dealt with by this Circular. His case simply ignores the fact that he had completed his SHO contract as at 31 March 2008. That being so, these transitional arrangements did not apply to his case. I consider the ET to have been entitled to take the view that it did (see paragraph 12 of the Judgment) and to conclude that the general provisions of TCS applied to the Claimant rather than the transitional arrangements in the Circular.

61. Lastly, paragraph 130 itself; the Claimant's argument is simply that the use of the word, "increment" necessarily means that he was entitled to more pay than he was being paid before. He reads "increment" to mean an increase so, on his argument, his pay was to be increased. That is not, however, how the word "increment" is usually used in common day parlance and it is not how the parties to TCS have used it. Within TCS, the term "increment" is used interchangeably with "increment point" and that is what it plainly refers to. The Claimant was only entitled to move up one increment point, even if that did not mean he received an actual increase in pay. Again, I see no basis for taking a different view to that already taken in this case by the ET.

62. For all these reasons I would dismiss this appeal.

63. Having given my Judgment in respect of the appeal, the Respondent then made an application for its costs under rule 34(a) of the **Employment Appeal Tribunal Rules 1993**. In particular, the Respondent contends that the appeal was obviously misconceived and that it has been brought into these appeal proceedings and to this hearing, thereby incurring unnecessary costs.

64. To support its application, the Respondent provided me with a handwritten unsigned costs Schedule in support of the costs that it might claim.

65. In my judgment the fact that party loses an appeal is plainly not sufficient to give rise to the costs jurisdiction in this Tribunal. The normal rule still remains that each party bears its own costs. For the reasons I have given it is, of course, the case that I have found that this appeal is not made out and that no point of law was ultimately disclosed such as to give rise to a proper challenge to the Employment Tribunal's Judgement.

66. That said the points raised by this appeal, in particular under paragraph 133(a) of TCS, were points which it was legitimate for the Claimant to explore in an oral hearing. Indeed it has been through oral submission that the position, certainly in my mind, has been clarified. That is why we have oral hearings in this Court.

67. It is also relevant to note that when this matter was considered on the papers as part of the sift process the judge at that stage allowed it to go straight through to a full hearing without the necessity for either a preliminary hearing or a rule 3(10) hearing. Whilst the fact that an appeal has been allowed to proceed on the "sift" will not automatically safeguard an appellant against a subsequent costs order, it is not an irrelevant factor to take into account. In all the

circumstances, I do not find that the grounds are made out under rule 34(a) to give rise to the successful application for costs.