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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121796/2018

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Held in Glasgow on 4 January 2019 and 28 March 2019 (Final Hearing)

Employment Judge: Ian McPherson

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Ms Caroline Stevenson — **Claimant**
In Person

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Forth Housing Association — **Respondents**
Represented by: -
Mr Neil MacDougall
Advocate

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's complaint of unlawful deduction from wages by the respondents is not well-founded and it fails, and accordingly her claim against the respondents is dismissed by the Tribunal.

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REASONS

Introduction

1. This case originally called before me, as an Employment Judge sitting alone, for a one-day Final Hearing, for its full disposal, including remedy if appropriate, at 10:00am on Friday, 4 January 2019, further to an amended Notice of Final Hearing, issued on 16 November 2018. It amended the original Notice of Final Hearing issued on 22 October 2018, and assigning the case to be called at 11.30am that morning, with one hour allocated to hear the evidence and decide the claim, including any preliminary issues.

Claim and Response

2. Following ACAS Early Conciliation, between 24 August 2018, and 17 September 2018, the claimant, acting on her own behalf, lodged her ET1 claim form with the Employment Tribunal on 16 October 2018. As a Housing Officer, in the continuing employment of the respondents, she brought a complaint of unlawful deduction from wages and, in the event of success with her claim, she sought an award of compensation from the Tribunal against the respondents. Enclosed with her ET 1 claim form, she included a two-page, typewritten paper apart, running to some fourteen paragraphs, explaining the background to her claim, and the claim that she was bringing against the respondents.

3. On 22 October 2018, her ET1 claim form was accepted by the Tribunal, and a copy served on the respondents, requiring them to lodge an ET3 response form by 19 November 2018. As the claimant had not set out the calculation of her claim in her ET1 claim form, she was required to send to the respondents, within fourteen days, details of the amount claimed and how it had been calculated by her. She did so, by e-mail to the Tribunal, and copied to the respondents, on 1 November 2018 calculating that, as at 31 October 2018, she was due an annual salary difference between her wages, and that of a colleague, in the total sum of £9,142.82.

4. On 2 November 2018, Ms Marianne McJannett, Associate Solicitor, with T. C. Young, Solicitors, Glasgow, wrote to the Tribunal, with copy sent to the

claimant at the same time, advising that she was representing the respondents, and requesting that the Final Hearing scheduled for 11.30am on 4 January 2019 be amended to allow for a full day Hearing, and not a one-hour Hearing.

5 5. Her application was made on the basis that the respondents intended to call two or three witnesses to attend to speak to the respondents' case, and as such that evidence would not be heard within the hearing time as then fixed of only one hour. Following referral to Employment Judge Shona MacLean, on 7 November 2018, she directed that the claimant should write to the 10 Glasgow Tribunal office, by 14 November 2018, to provide any comments or objections to the respondents' application to extend the listed Final Hearing from one hour to one full day.

6. Thereafter, on 13 November 2018, the claimant e-mailed the Glasgow Tribunal office, with copy to the respondents' solicitor, confirming she had no 15 objections to the listed Hearing being extended and, accordingly, an amended Notice of Final Hearing, changing the duration of the Hearing only, was issued to both parties under cover of a letter from the Tribunal on 16 November 2018.

7. By letter dated 13 November 2018, Ms McJannett wrote to the Glasgow Tribunal office, enclosing an ET3 response form on behalf of the respondents, 20 and, following its receipt at the Tribunal, on 14 November 2018, that response was accepted by the Tribunal, under cover of a letter of 24 November 2018, sent to Ms McJannett for the respondents, with copy sent to the claimant and to AC AS.

Final Hearing before this Tribunal

25 8. On 5 December 2018, following Initial Consideration of the claim and response by Employment Judge Shona MacLean, the Tribunal, under cover of a letter of that date sent to both the claimant, and the respondents' representative, confirmed that the case would proceed to the listed Final Hearing for a full day on Friday, 4 January 2019.

9. On that date, the case called before me for that listed Final Hearing. Unfortunately, on account of the need to hear evidence from two witnesses from the respondents, and the claimant, it was only possible, in that allocated sitting day, to hear evidence from the respondents' two witnesses, and the
5 case had to be continued, part heard, to a continued Final Hearing held on Thursday, 28 March 2019.

10. Case Management Orders in regard to the Continued Final Hearing, intimated orally, at the close of proceedings on Friday, 4 January 2019, were sent, under cover of a letter from the Tribunal to both the claimant, and the
10 respondents' representative, on 8 January 2019, followed by Notice of Continued Hearing issued on 17 January 2019, setting aside a further one day on Thursday, 28 March 2019, for the case's full disposal, including remedy if appropriate.

11. On the first day of this Final Hearing, on Friday, 4 January 201 9, it was agreed,
15 in discussion with the claimant, and Counsel for the respondents, Mr Neil MacDougall, Advocate, that the Tribunal would hear evidence first from the respondents' two witnesses, followed by evidence from the claimant.

12. Further to clarification of the issues in dispute between the parties, the claimant, and Counsel for the respondents, thereafter entered into, and
20 tendered to me, a Joint Minute of Agreed Facts, in the following terms: -

Joint Minute of Agreed Facts

1. ***The Respondent is a small employer;***
2. ***The Respondent employed 15 people at all material times;***
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3. ***The Respondents provide social housing services;***
4. ***The Respondents are a full member of Employers In Voluntary Housing ("EVH");***
5. ***EVH provide HR and recruiting services;***
6. ***In 2005 EVH carried out a regrading process ("the Process");***

7. *As part of the Process EVH provided a report to the Respondents which is inciuded at page 107 of the joint bundie;*

8. *Elaine Shepherd was a housing officer prior to the Process;*

9. *Ms Shepherd's position was regraded as part of the Process (along with others);*

10. *As part of the Process EVH suggested four options for salary protection Issues relating to those effected by the regrading, these are listed at page 118 of the joint bundle;*

11. *The Respondents chose to protect Ms Shepherd's salary in accordance with the fourth option;*

12. *The Claimant has been employed by the Respondents since 2003;*

13. *The Claimant commenced employment as a Housing Administration Assistant;*

14. *The Claimant is currently a Housing Officer at Grade 7;*

15. *The Claimant's offer and acceptance of employment in that role are contained from page 27 of the joint bundle;*

16. *The duties performed by the Claimant and Ms Shepherd are the same;*

17. *Lorna Ravell is also known Lorna McIntyre; and*

18. *Ms Shepherd's pay protection comes to an end in March 2021.*

13. While the respondents' evidence closed, on the afternoon of Friday, 4 January 2019, the case was adjourned, part heard, and, at the continued Final Hearing, on Thursday, 28 March 2019, I heard evidence from the claimant herself, and thereafter closing submissions from the respondents* Counsel, followed by a response from the claimant.

14. At the original diet of Final Hearing, on 4 January 2019, the claimant had produced a list of authorities, and the respondents' Counsel, Mr MacDougall, had tendered a set of written submissions for the respondents. As evidence

did not conclude on that day, and the case was adjourned, part heard, for the continued Final Hearing, I made certain Case Management Orders.

15. I required the claimant to prepare, and intimate to the respondents' representative, with copy sent at the same time to the Tribunal, an outline written skeleton of the arguments the claimant intended to make at the continued Final Hearing, and the statutory provisions and case law authorities to which she intended to refer or rely, in her closing submissions, and for her to lodge same with the Tribunal by no later than 4.00pm on Thursday, 14 March 2019.

16. In those Case Management Orders, issued to both parties under cover of the Tribunal's letter of 8 January 2019, the claimant was invited in her outline written skeleton arguments to address her reply to the points made, and cases cited, in the respondents' written submissions. It was further provided that, at the continued Final Hearing, when hearing oral submissions from both parties, the Tribunal would hear first from Counsel for the respondents, then from the claimant, and, in terms of **Rule 45 of the Employment Tribunals Rules of Procedure 2013**, I ordered that each party would have no more than one hour to address the Tribunal with their closing submissions.

17. On the first day of the Final Hearing, on Friday, 4 January 2019, by agreement with both parties, I heard evidence first from Mr John Cameron, the respondents' retired Director, and then from Ms Lorna Ravell, HR Support Manager from Employers and Voluntary Housing (EVH). The respondents' witnesses were examined in chief by Counsel, cross-examined by the claimant, and questions of clarification asked by me as the presiding Employment Judge.

18. At the continued Final Hearing on Thursday, 28 March 2019, I examined in chief the claimant, as previously agreed with both parties, she being the only witness called on her behalf, and she was cross-examined by Counsel for the respondents, in the usual way.

Findings In Fact

19. I have not sought to set out every detail of the evidence which I heard, nor to resolve every difference between the parties, but only those which appear to me to be material. My material findings, relevant to the issues before me for judicial determination, based on the balance of probability, are set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

20. On the basis of the sworn evidence heard from the three witnesses led before me over the course of this 2-day Final Hearing, and the various documents included in the Joint Bundle of Documents lodged on the first day of the Hearing, extending to 30 documents, running to 171 pages, to which, at the continued Final Hearing, as document 31, a copy of the ACAS Code of Practice on Disciplinary and Grievance Procedures was added by the claimant, I have found the following essential facts established :-

Background

1. The respondents are a housing association based in Stirling that provide rented housing and low-cost home ownership. They are registered as a social landlord with the Scottish Housing Regulator (SHR) as well as being registered as a charity with the Office of the Scottish Charities Regulator (OSCR). They have 15 members of staff including the claimant and, at the material times, their Director was John Cameron, now retired.

2. The respondents are full members of Employers in Voluntary Housing (“EWf) and as such they adopt the EVH statement of terms and conditions of employment (hereafter referred to as "terms and conditions”). The claimant is employed by the respondents as a Housing Officer on EVH Grade 7. A copy of the EVH terms and conditions was produced to the Tribunal at pages 32 to 87 of the Joint Bundle.

3. A copy of the Service Level Agreement between EVH and the respondents, undated, was produced to the Tribunal at page 138a

of the Joint Bundle. In return for full membership of EVH, the respondents agree to ***'uphold EVH agreements, and abide by JNC decisions on individual grievances and discipline."***

4. On or around 2004/2005, the respondents, as members of EVH, were involved in a re-grading of posts within the organisation and this resulted in change across the sector. This impacted these respondents and all other EVH members. The result of this was that the Housing Officer position for EVH members was re-graded from a Grade 8 position to a Grade 7 position, which is the current status of this role. This re-grading process was done in consultation with the recognised trade union, Unite the Union.

5. There were produced to the Tribunal, at pages 124 to 127 of the Joint Bundle, a copy of the December 2014 revised Memorandum of Agreement between EVH and Unite the Union, as also, at pages 128 to 138, other copy documents relating to EVH grading guidelines and pay structure.

6. Various options were given to EVH members in terms of imposing the new grade structure in order to protect affected employees. These included; (1) choose to accept the salaries in full and move post holders to the new minimum level immediately; (2) use the "employer protection" arrangements built into the new guidance, allowing it to accept the new salaries but require post holders to creep incrementally to the new starting posts over coming years; (3) adopt a halfway house approach and select a starting salary point someway between current and the minimum suggested level; or (4) accept that where any post current attracted a higher maximum salary than recommended under the new guidance that the post holder be protected. The respondents agreed to the fourth option and offered pay protection indefinitely to those employees affected.

7. The respondents had 3 employees who received salary protection. Two of these were Housing Officers and one was a Maintenance

Officer. One employee remains employed by the respondents in the same post and another still works for the respondents but was transferred to a different post in 2007.

8. The claimant commenced employment with the respondents on 8 December 2003 and as such she was aware of the regrading process which was undertaken by EVH. She was employed as an Administration Assistant (latterly changed to the role of Housing Assistant) and she was seconded to the role of Housing Officer in October 2013. She has been employed by the respondents as a Housing Officer since 1 May 2014 and she continues in this role.

9. The claimant is paid in line with the Grade 7 salary scale in her position as Housing Officer and her colleague, Ms Elaine Shepherd, is paid in accordance with the Grade 8 salary scale afforded to her by the salary protection introduced in 2005. Both the claimant and her colleague are female, and they perform the same duties for the respondents. Ms Shepherd's pay protection will come to an end in March 2021.

Claimant's Grievance: February 2017

10. In February 2017, the claimant raised a grievance with the respondents in accordance with her terms and conditions ("A14 Grievance Procedure") complaining that she and her colleague were being paid different sums for the same work.

11. The claimant did so after an informal discussion with her Director, Mr John Cameron, when he described it as unequitable that two staff were working to identical job descriptions and being paid substantially different salaries - the claimant then being paid £6,126 p.a. less than her colleague, Ms Shepherd, the other Housing Officer, despite carrying out the same role and duties on a day to day basis as each other. As at the date of this Final Hearing, the Tribunal was advised that the pay disparity was £6,289 p.a.

12. Mr Cameron advised the claimant that she could await the EVH / Unite discussions, and see whether she was satisfied with any outcome, or she could pursue a grievance to use the respondents' grievance process, which is a four-stage process, culminating with an external appeal at stage 4 to the Joint Negotiating Committee (**"JNC"**) Appeal Chair.

13. A copy of the email correspondence between the claimant and respondents regarding this grievance, between 10 February 2017 and 2 February 2018, as also minutes of meetings, was produced to the Tribunal at pages 139 to 151 of the Joint Bundle.

14. The claimant's grievance proceeded through the process, which involved an external appeal to the JNC Appeal Chair. The JNC appeal is the final stage of the internal grievance procedure, although it is to an external body.

15. The claimant met with Mr Cameron, at stage 2, on 1 March 2017, and thereafter, at stage 3, on 15 March 2017, with Margaret Turner and David Cumming, the respondents' Chairperson and Treasurer. Disappointed and feeling let down by her employer and that they had not addressed the substantial pay disparity, the claimant's statement of case was presented to the JNC Appeal Chair, who heard her stage 4 appeal on 9 May 2017.

16. By an undated decision, issued following upon the appeal hearing on 9 May 2017, the JNC Appeal Chair, a Mr Geoff Whittam, upheld the claimant's appeal, and he found in favour of the claimant, finding that he could not ignore the injustice of the situation where two members of staff were doing a job of equal value, but being paid significantly different salaries.

17. As per the copy decision produced to the Tribunal, at pages 147 to 150 of the Joint Bundle, Mr Whittam also noted that the contract of employment is between the claimant and the respondents, and not the national bodies, and his recommendation was that: ***"The appeal Chair recommends that the national bodies through the JNC come to a resolution over this anomaly dating back to 2005 as soon as possible."***

18. Following this JNC Appeal Chair decision by Mr Whittam, the respondents liaised with EVH to ensure that the issue of pay protection was covered under JNC negotiation to review the terms and conditions.

19. This exercise concluded in January 2018 and the agreement was that: ***"Historical situations which may exist where pay protection has been granted on an ongoing basis will be managed locally to agree the best solution taking account of all the facts."***

20. Mr Cameron, the respondents' Director, communicated this to the claimant in his email to her of 2 February 2018, a copy of which was produced to the Tribunal at page 151 of the Joint Bundle. He advised her of the above outcome and that the respondents' staffing subcommittee would be meeting to decide how to take matters forward. However, before the respondents were able to do so, the claimant submitted a further grievance.

Claimant's Grievance: March 2018

21. On 22 March 2018, the claimant submitted a further grievance to the respondents, by a letter addressed to Mr Gordon Mason, the

respondents' Chairperson, as per copy produced to the Tribunal at pages 152 to 154 of the Joint Bundle.

22. She complained that she had followed all of the steps of the respondents' grievance procedure in good faith, but the respondents had failed to adhere to Mr Whittam's decision and therefore her pay complaint was still unresolved. She set out the background history to the matter, and she further stated that she regarded it as a breach of the mutual trust and confidence clause implied into her contract of employment with the respondents.

23. The claimant sought "pay ***equality with my colleague who carries out work of equal value without further delay. "*** Once again, the claimant's further grievance proceeded through the respondents' grievance process, which again involved an external appeal to the JNC Appeal Chair.

24. Following upon a grievance hearing held on 11 April 2018, the respondents issued the outcome of the claimant's grievance on 18 April 2018, by letter from Mr Mason, copy produced to the Tribunal at pages 155 and 156 of the Joint Bundle.

25. The respondents refused to make any finding in relation to the claimant's complaint regarding her pay because they said that a decision regarding the complaint had already been reached through the previous grievance procedure, and that the final decision was made at the JNC Appeal hearing on 9 May 2017, even though the respondents had not implemented that decision.

26. The respondents partially upheld the claimant's grievance in respect of a lack of communication and unreasonable timescales pertaining to the process. However, the respondents offered no resolution or recommendation in respect of the aspects of the grievance that were upheld. Accordingly, on 26 April 2018, the claimant submitted

an appeal against the outcome of her grievance to the JNC Appeal Chair, she having been advised of her right to do so by Mr Mason's letter to her.

27. In this appeal, a copy of which was produced to the Tribunal, at pages 157 and 158 of the Joint Bundle, the claimant referred to "a ***serious issue regarding inequality of pay."*** The JNC Appeal Chair, this time a Mr Brian McLaughlin, following an appeal hearing on 22 May 2018, upheld the claimant's appeal, and found that the respondents had failed to resolve the matter in accordance with Mr Whittam's decision in May 2017.

28. On 22 May 2018, Mr McLaughlin heard the claimant's grievance appeal, the claimant being in attendance, and the respondents represented by Mr Gordon Mason, their Chairperson, and Mr McLaughlin's written decision, dated 29 May 2018, was produced to the Tribunal at pages 162 to 165 of the Joint Bundle, along with a copy of Mr Mason's statement for the respondent employers, at page 160 of the Joint Bundle.

29. As Mr McLaughlin decided that the claimant carried out work of equal value with that of her colleague, he found that the claimant ***"should be paid equally to that other colleague".*** He determined that the claimant should be paid equally to that of her colleague, and that this pay rise should be backdated to April 2018.

Respondents decline to Implement JNC Appeal Chair decision

30. Following the receipt of this JNC Appeal Chair decision by Mr McLaughlin, and as per the copy letter produced to the Tribunal, at pages 166 and 167 of the Joint Bundle, the respondents' Director, Mr Cameron, wrote to the claimant on 15 June 2018 outlining the

respondents' position, having considered that decision, and stating that:

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- *"The EVH system of grading guidelines had been carefully negotiated with UNITE the union over many years and the role of Housing Officer (along with other professional officers) falls within grade 7 of this grading structure.*

- *Forth Housing Association Is part of the sector wide collective bargaining arrangement and unilaterally moving away from this structure for a one-off issue is not something that Forth HA can consider. This structure has been agreed In careful negotiation over many years.*

- *The specific suggestions In the report are incompatible with the expectations the wider collective bargaining structure places upon Forth HA.*

- *An anomaly existed within the staff team whereby pay protection was agreed with an individual at the point that Forth transferred to the EVH grading system in 2005. This pay protection arrangement was agreed on an ongoing basis.*

- *This anomaly has now been addressed by our agreeing an end to the concession enjoyed by the other employee employed as a Housing Officer. Thereafter no*

members of staff at Forth HA will have any pay protection arrangements In place.

- *Forth HA believes that this resolution Is In line with the outcome report from the appeal against the original grievance which was held on 9 May 2017."*

31. In response, on 19 July 2018, as per the copy letter produced to the Tribunal, at pages 168 and 169 of the Joint Bundle, the claimant wrote to Mr Cameron expressing her serious concern regarding the respondents' refusal to be bound by their own grievance process and the decision of the JNC Appeal Chairs.

32. As an employee for over 14 years, she also stated that she felt let down by Mr Cameron, and his absence of duty of care as her employer. She also raised concerns that EVH cannot be regarded as independent and impartial in relation to this matter.

33. On 31 July 2018, in reply to the claimant, as per the copy letter produced to the Tribunal, at page 170 of the Joint Bundle, Mr Cameron wrote stating that the respondents' position was that **"the matter was closed",** and that no further correspondence would be given.

34. In those circumstances, the claimant entered into ACAS early conciliation on 24 August 2018, obtaining her ACAS EC certificate on 17 September 2018, and thereafter lodging her ET1 claim form with the Employment Tribunal on 16 October 2018, so commencing these Tribunal proceedings against the respondents.

Claimants Wages, and her Schedule of Loss

35. The claimant's contractual entitlement to wages, i.e. to be paid **£29,961 p.a.** being spinal point PA22 on Grade 7 of the EVH salary scale, and thereafter an annual cost of living increase for 1 April 2015, until she reached the top of Grade 7, at spinal point 23, was as set out

in her contract of employment with the respondents, for her Housing Officer post held since 1 May 2014, as produced at pages 27 to 31 of the Joint Bundle.

36. Her wages from the respondents, which are those properly payable to her, are those specified in her contract of employment. She has no legal entitlement to be paid wages at a higher rate than those which are expressly stated in her contract of employment with the respondents.

37. Further, the claimant was not in post, as a Housing Officer, at the time at which the former Grade 8 grading was applicable, and so she, unlike Ms Elaine Shepherd, her colleague, has no entitlement to pay protection. The claimant is, and has been, paid at the rate of Grade 7 applicable to her current post.

38. As such, the claimant has not suffered any unlawful deduction from wages by the respondents. The disparity in pay between the claimant and Ms Shepherd has now been addressed by the respondents, and the respondents have advised the Tribunal, and the claimant, that it will not continue beyond March 2021 .

39. The JNC Appeal Chairs have no legal power, express or implied, to alter the contractually agreed rate of pay for the claimant as an employee of the respondents, nor can they alter her terms and conditions of employment with the respondents.

40. The respondents were not contractually obliged to increase the claimant’s wages following upon either JNC Appeal Chairs decisions, and the Tribunal cannot imply a term into the claimant’s contract of employment with the respondents requiring the respondents to give effect to the JNC Appeal Chairs decisions.

41. There were lodged, at pages 88 to 106 of the Joint Bundle, a copy of the claimant’s payslips from the respondents from May 2017 to November 2018, showing the wages paid to her by the respondents.,

vouching she was paid £2,862.50 gross per month, later increased to £2,938.33 per month.

42. On 1 November 2018, the claimant e-mailed to the Tribunal her Schedule of Loss, with her calculation of claim at 31 October 2018, in the following terms: -

Calculation of Claim 31/10/18

Annual Salary Difference		£		
2017/18		6126.00		
2018/19		6289.00		
09/05/201 7 to 31/03/201 8		(a)	5474.24	
01/04/2018 to date (31/10/2018)		(b)	3668.58	
			9142.82	
(a) calculations	61 26/365* 22 days		369.24	
	61 26/1 2* 10 months		5105.00	5474.24
(b) calculation	6289/12* 7 months		3668.58	3668.58

43. A copy of the claimant's calculation of loss was produced to the Tribunal at page 26 of the Joint Bundle of Documents lodged for use at the Final Hearing.

Tribunal's Assessment of the Evidence

19. In considering the evidence led before the Tribunal, I have had to carefully assess the whole of the evidence heard from the three witnesses led before me, and to consider the many documents produced to the Tribunal in the Joint Bundle of Documents lodged and used at this Final Hearing, which evidence and my assessment I now set out in the following sub-paragraphs: -

(1) Mr John Cameron: Respondents' retired Director

(a) The first witness heard by the Tribunal, on the late morning, and into mid-afternoon of Friday, 4 January 2019, was Mr Cameron, aged 57 years, formerly the respondents' Director

for the last 11 years. He retired from his Director's post on 31 December 2018.

(b) In giving his evidence to the Tribunal, Mr Cameron explained his position as Director, being the senior staff member employed by the respondents, and servicing its volunteer Management Committee, which dealt with HR matters.

(c) He spoke to the small size of the respondents' workforce, and to the respondents being a full member of Employers in Voluntary Housing ***("EVH"),*** being a membership umbrella organisation for Housing Associations, where EVH provide terms and conditions of employment, and a suite of model HR/Personnel policies for Housing Association employers, who he stated pay an annual affiliation fee to EVH. The respondents retain responsibility for running their own payroll, which is not run through EVH.

(d) Mr Cameron did his best to answer questions in his evidence - in-chief, elicited by Counsel for the respondents, and in answer to the claimant's questions in cross-examination, and from my questions of clarification, and he did so often under reference, where appropriate, to relevant documents in the Joint Bundle of Documents before the Tribunal.

(e) I found Mr Cameron to be a professional witness, speaking to matters within his direct knowledge and experience, and doing so in a straightforward, matter of fact way, without any evident ill will or malice towards the claimant. Indeed, it is fair to say that he regarded her position as ***"inequitable'.*** I found him to be a credible and reliable witness, whose evidence was generally consistent with the contemporary document in the Joint Bundle.

(f) As Counsel for the respondents commented, in his written submissions, at paragraph 1.1: "This ***case is perhaps slightly unusual in that there Is very little by way of a dispute on the facts. Importantly, there Is no dispute that the Claimant has performed the same duties as a colleague who has been paid more than her. However, the absence of a dispute on the facts does not give rise to a remedy in law."***

(g) Further, as per Counsel's submissions for the respondents, at paragraph 1.3, there was no dispute that the claimant was good at her job, and a valued employee of the respondents, and they did not seek to criticise her for seeking to enforce what she believes are her employment rights.

(h) The real dispute between the parties at this Final Hearing was not the essential facts of the case, but whether the relevant law on unlawful deduction from wages gives the claimant a remedy in law against the respondents as her employer.

(2) <u>Ms Lorna Ravell: HR Support Manager from EVH</u>

(a) The respondents' second witness was Ms Ravell, from Employers in Voluntary Housing ***("EVH").*** She gave her evidence to the Tribunal from mid-afternoon on Friday, 4 January 2019 until the close of that day's proceedings. Aged 43 years, she is the HR Support Manager with EVH, which she described as an employer's federation, set up about 40 years ago, in 1978 for collective bargaining machinery for Housing organisations, and other not for profit organisations, providing a full or associate membership scheme, and access to various services, including HR advice and support, including a recruitment service, and events/training, but not payroll.

(b) Ms Ravell explained the role and structure of EVH, and the role of the Joint Negotiating Committee ***("JNC"),*** which takes the lead in collective bargaining where Unite the Union is a recognised trade union. She also spoke to the grievance procedure, set forth in the EVH standard terms and conditions of employment for staff, used by the respondents in the claimant's case, and she further explained the role and nature of the external JNC Appeal Chairs, and their decisions including those of the two JNC Appeal Chairs involved in the claimant's case, being initially Mr Geoff Whittam, and latterly Mr Brian McLaughlin.

(c) This witness, as for Mr Cameron before her, did her best to answer questions asked by Counsel, the claimant, and myself, often under reference, where appropriate to relevant documents in the Joint Bundle of Documents before the Tribunal. Not being an employee of the respondents, she was led on their behalf as an external HR witness, responsible for EVH's support in HR matters for the respondents.

(d) Like Mr Cameron before her, I found this witness to be a professional witness, speaking to matters within her knowledge and experience, and doing so in a straightforward, matter of fact way, without any evident ill will or malice towards the claimant. Accordingly, I found Ms Ravell to be a credible and reliable witness, whose evidence was again consistent with the contemporary documents in the Joint Bundle.

(3) <u>Ms Caroline Stevenson - Claimant</u>

(a) At the continued Final Hearing, on Thursday, 28 March 2019, I heard evidence from the claimant, whose evidence was elicited by a series of structured and focused questions asked by me as presiding Employment Judge, as agreed by both

parties, followed by cross-examination, in the usual way, by Counsel for the respondents.

(b) Aged 41 years, the claimant, who is still employed as a Housing Officer by the respondents, spoke to the narrative of her claim, in her ET1 claim form, and she did so, where appropriate, under reference to the various documents in the Joint Bundle of Documents before the Tribunal.

(c) Giving her evidence to the Tribunal it was clear to me that the claimant remains dissatisfied with the outcome of the respondents' reaction to the two external JNC Appeal Chair decisions, flowing from her two grievances to the respondents, and that she remains dissatisfied that she has not, to date, received equality of pay with her work colleague, Ms Elaine Shepherd, the other Housing Officer employed by the respondents, who is *pay protected" .*

(d) Despite her sense of injustice and grievance, the claimant gave her evidence to this Tribunal in a calm and measured way without any evident ill will or malice towards the respondents as her current employer.

(e) She spoke, with passion and confidence in what she clearly sees as the justice of her case, in a straightforward, matter of fact way, from her direct knowledge and experience of her situation with the respondents, and her two grievances, and I found her to be a credible and reliable witness, whose evidence was again consistent with the contemporary documents in the Joint Bundle of Documents before the Tribunal.

Parties* Closing Submissions and Authorities

20. After the close of the claimant's evidence, at the Continued Final Hearing, on Thursday, 28 March 2019, 1 heard closing submissions from both parties. In

addition to Mr MacDougall's original Written Submissions for the respondents, typewritten and extending to 9 pages, from paragraphs 1.1 to 5.1, lodged at the first day of the Final Hearing, on Friday, 4 January 2019, I also had the claimant's 10 page, typewritten Submissions, intimated on 14 March 2018, as also Counsel's 6 page, typewritten Supplementary Written Submissions for the respondents, tendered at the start of the Continued Final Hearing on 28 March 2019.

21. Along with his original Written Submissions for the respondents, Mr MacDougall lodged a list of case law authorities for the respondents, as follows: -

(1) **IDS Employment Law Handbooks, Volume 13, Wages 2.49 - 2.54.**

(2) **Employment Rights Act 1996, Sections 13, 23 and 27**

(3) Kisoka v Ratnpinyotip t/a Rydevale Day Nursery [2013] UKEAT/0311/13/LA; [2014] ICR D17.

22. On the first day of the Final Hearing, on Friday, 4 January 2019, the claimant produced a list of 6 case law authorities, on which she intended to rely, as follows: -

(1) **Reigate v Union Manufacturing Company (Ramsbottom) Ltd and Another [1918] 1 KB 592 (CA)**

(2) **Shirlaw v Southern Foundries [19261 Ltd [1939] 2 KB 206 (CA)**

(3) Camden Primary Care Trust v Atchoe [2007] EWCA Civ 714 (CA)

(4) **Kingston upon Hull City Council - v Schofield and Others [2012] UKEAT/06/1 6/1 1/DM**

(5) **Bleazard v Manchester Central Hospitals & Community Care (NHS) Trust [1994] UKEAT/278/93**

(6) **Bent and Others v Central Manchester University Hospitals NHS Foundation Trust [2012] ET/2400833/201 1**

23. Finally, along with his Supplementary Written Submissions for the respondents, on 28 March 2019, Mr MacDougall, Counsel for the respondents, provided a further list of authorities for the respondents, as follows: -

(1) **IDS Employment Law Handbooks, Volume 3, Contracts of Employment, 3.24 - 3.53**

(2) **Marks and Spencer Pic v BNP Paribas Securities Services Trust Co (Jersey) Ltd and Another [2015] UKSC 72; [2016] AC 742**

24. As copies of both parties' written closing submissions are held on the Tribunal casefile, and I have referred to them in coming to my Judgment, it is not necessary to repeat their full terms here in these Reasons, but as I cross-refer to them, and it is necessary to read them along with these Reasons, I have incorporated their full terms, *verbatim,* in the Appendix to these Reasons.

25. Given the undoubted work and effort that has gone into preparing their respective written submissions for which I am most grateful to both Mr MacDougall and the claimant, I do not consider it appropriate for me to sub-edit their work, and provide my own executive summary of their respective closing submissions. However, I do refer to the salient points where it is appropriate to do so in my Discussion and Deliberation section of these Reasons.

Respondents* Submissions

26. In making their oral submissions to me, on the afternoon of Thursday, 28 March 2019, both Mr MacDougall, Counsel for the respondents, and the claimant, summarised their respective positions, without reading *verbatim* the whole text from their respective written submissions for the Tribunal, Mr MacDougall simply adopting his written and supplementary written

submissions, the latter addressing the claimant's own written submissions lodged with the Tribunal on 14 March 2018.

27. In the course of his oral submissions, Counsel stated that the decision of the JNC Appeal Chairs is not a legal decision, based on the law for the JNC Appeal Chairs are not a *quasi-judicial* body, and he disputed that this Employment Tribunal could imply a term into the claimant's contract of employment saying that a JNC Appeal Chair's decision is binding on the respondents.

28. Recognising that there are no express powers conferred on the JNC Appeal Chairs, which he described as a ***"fairly large lacuna",*** Mr MacDougall stated that it would be outrageous for a JNC Appeal Chair to have reduced the claimant's colleague's wages, and the same would hold true of increasing the claimant's wages. Both scenarios would have been, in his submission, outwith the powers of the JNC Appeal Chair.

29. Counsel described the Chairs of having been ***"acting on a frolic of their own",*** which while clearly done with the best of intentions, and using words from the **Equality Act 2010,** this however was not an equality case, and therein he argued the JNC Appeal Chairs had fallen into error, and they had become the ***"it's not fair Tribunal'*** , and so, he argued, their decisions not being reasonable, and not being made on the basis of applicable legal principles, they were thus susceptible to challenge as *ultra vires,* meaning beyond their powers.

30. When I queried whether the respondents had taken any steps, in that scenario, to have the decisions of the JNC Appeal Chairs reduced by the Court of Session, in the sense of being legally set aside, by a petition for judicial review, Mr MacDougall for the respondents stated that the respondents had taken no such steps, and, in these Employment Tribunal proceedings, he was seeking dismissal of the claimant's claim at the Tribunal.

31. However, if I was not with his clients, then Mr MacDougall submitted that any award of unpaid wages in the claimant's favour should be limited in time,

between 1 April 2018, and March 2021, because after that time the claimant's colleague's wages will have been reduced, when her pay protection ends.

32. Further, submitted Mr MacDougall, any award to the claimant should, in his opinion, be to the date of the Tribunal's Judgment in these Tribunal proceedings which were a claim for unlawful deduction from wages only, and the claimant had not made any application to the Tribunal, in terms of a reference under **Section 11 of the Employment Rights Act 1996,** to determine what particulars of employment ought to have been included or referred to in her written statement of employment terms and conditions from the respondents.

Claimant's Submissions

33. When it came to the claimant making her oral submissions to me, I stated to her that I was conscious that in providing her written submissions, on 14 March 2019, she had done so, in response to Counsel's written submissions from the respondents, tendered on 4 January 2019, but before she had given her evidence to the Tribunal at this continued Final Hearing.

34. I had also arranged, for a longer than normal lunch break, at this Continued Final Hearing, in order that, having only that morning seen Counsel's supplementary written submissions, and further authorities, tendered at the start of the Hearing on 28 March 2019, the claimant had the opportunity to read them, and consider her own position in reply.

35. In so directing, I recognised that as an unrepresented, party litigant, the claimant was not on an equal footing with Counsel for the respondents, but it was my duty, as the presiding Employment Judge, in terms of the overriding objective under **Rule** 2, to ensure that both parties were, so far as reasonably practicable, placed on an equal footing.

36. Further, and for the claimant's benefit, I explained that Counsel had a professional obligation to bring case law authorities to the Tribunal's attention, but it was ultimately my responsibility, as the presiding Employment Judge, to consider the relevant law, as identified by both the claimant, and Mr

MacDougall, and reviewed by me, and to apply it to the facts of the case as I would find them in my findings in fact to be drafted in due course, after the close of the Continued Final Hearing.

37. In inviting me to find in her favour, and award her the appropriate sum, the claimant stated that her financial calculations, to 31 October 201 8, would need to be projected forward to the date of this continued Final Hearing.

38. While Counsel for the respondents had relied upon the EAT's Judgment in **Klsoka,** the claimant emphasised that the facts and circumstances of her case are different from the facts and circumstances in that case, and that there had been unlawful deductions from her wages from 9 May 201 7, which failing 1 April 2018, and she further stated to me that Mr McLaughlin's JNC Appeal Chair's decision had been unequivocal, and it must be followed by the respondents. She also highlighted that the ongoing discrepancy with her colleague's pay would not be rectified until March 2021.

39. When the claimant had concluded her oral submissions, I raised one further matter with Mr MacDougall, Counsel for the respondents, as he had said nothing, in his oral submissions, or his supplementary written submissions, about the various case law authorities cited by the claimant at the first day of the Final Hearing on 4 January 2019.

40. In response, Mr MacDougall stated that some of the claimant's authorities cited are referred to in the Supreme Court's Judgment in **Marks and Spencer Pic v BNP Paribas,** which he had cited in his own supplementary written submissions for the respondents, and so he had nothing further to say in that regard.

Reserved Judgment

41. In concluding proceedings, on the afternoon of Thursday, 28 March 2019, at 3.08pm, I reserved my judgment, and advised both the claimant and Counsel for the respondents that I would issue my full, written Judgment, with Reasons, in due course, as soon as possible after private deliberation.

42. This written Judgment and Reasons represents the final product from my private deliberation, on the evidence led, and closing submissions made to me by both parties, and me thereafter applying the relevant law to the facts as I have found them to be in my findings in fact, as set forth earlier in these Reasons.

Issues before the Tribunal

43. This case was listed before me for Final Hearing, for full disposal, including remedy if appropriate. As such, the principal issue for consideration was whether or not the respondents were liable to the claimant for the alleged unlawful deduction from her wages and, if so, what remedy should be granted by the Tribunal.

44. As highlighted by Mr MacDougall, Counsel for the respondents, in his original written submissions, lodged on 4 January 2019, at paragraphs 1.1 and 1.2, it is important to clarify at the outset that the legal basis for this claim is, and only is, a claim for unlawful deduction from wages, and albeit there is no dispute that the claimant performed the same duties as a colleague who has been paid more than her, this claim is not a claim for equal pay under the **Equality Act 2010,** nor is it a claim for damages arising from a breach of contract.

Relevant Law

45. In his written submissions for the respondents, Counsel detailed that the protection of wages is governed by **Part II of the Employment Rights Act 1996** and, for the purposes of these Tribunal proceedings, there are three relevant sections, being **Sections 13, 23, and 27.**

46. As analysis of the statutory provisions was not in dispute, but the claimant, and the respondents, are in dispute as to what wages are "***properly payable***" to her, and as regards the legal status of decision of the JNC Appeal Chairs, the crux of the claimant's position is the proposition that she has suffered an unlawful deduction in wages because, in her submission, the respondents

were contractually obliged to increase her wages following upon the JNC Appeal Chair decisions.

47. The claimant did not challenge Counsel's narration of the relevant law, nor do I do so. It is a most helpful analysis, and I gratefully adopt it as part of these
5 Reasons.

Discussion and Deliberation

48. In her ET1 claim form, paper apart, at paragraphs 13 and 14, the claimant set forth the legal basis of her claim as follows: -

"13. It is the Claimant's position that the Respondent's
10 *grievance procedure forms part of her contract of employment. As such the Claimant asserts that the salary properly payable to her (for the purposes of S13 Employment Rights Act 1996) since 9 May 2017 Is a salary equal to that of her colleague who carries out the same role as Housing Officer, per the decision of the JNC*
15 *Appeal Chair Geoff Whlttam. As such, the Claimant has suffered a series of unlawful deductions from her pay since that date, for which she seeks compensation.*

14. If the tribunal does not agree that the salary properly payable to the Claimant Is a salary equal to that of her colleague
20 *who carries out the same role of Housing Officer from 9 May 2017, the Claimant asserts that such a salary was properly payable to her from April 2018, per the decision of the JNC Appeal Chair Brain McLaughlin. As such, the Claimant has suffered a series of unlawful deductions from her pay since that date, for which she*
25 *seeks compensation."*

49. In the respondents' ET3 grounds of resistance, their solicitor set forth the following points:

"15. It is denied that the Respondent deducted the sums from the Claimant's wages as alleged or at all.

16. *The alleged deduction Is not for a specific sum already capable of identification and therefore does not come within the statutory definition of "wages properly payable " within the meaning of section 13 of the Employment Rights Act 1996.*

5

17. *In the circumstances, it Is denied that the Respondent made any unlawful deduction from the Claimant's wages as alleged or at all.*

18. *The recommendations given by both JNC Grievance appeals were taken Into consideration by the Respondent. The decision of the JNC Chair, Mr Brian McLaughlin Issued on the 29 May 2018 stated, "I have come to the decision that Ms Stevenson should be paid equally to that of her colleague." For the purposes of the Claimant's current claim, it is important to note the words "should be" in Mr McLaughlin's decision. It is the Respondent's position that the decision of the JNC was a recommendation and was not a binding contractual amendment to the Claimant's salary. Furthermore, the terminology used throughout the appeal of "equal pay for work of equal value" is the incorrect terminology In these circumstances. This matter is not an equal pay matter.*

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15

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19. *The EVH Terms and Conditions outline in its introduction, "if we negotiate any changes to your terms and conditions with the union, we will tell you about them in writing within a month of them taking effect." Given the wider implication across the Respondent's workforce and the housing sector as a whole and in conjunction with advice from EVH a decision was taken not to implement the recommendations of the JNC Appeal.*

25

30

20. The JNC decision did not change the Claimant's terms and conditions. Any change to a change of the Claimant's contract would have to have been done a) in accordance with the EVH Terms and Conditions which require to adhere to the Collective Bargaining Agreement which is in place with Unite the Union or b) by Individual agreement between the Claimant and the Respondent organisation.

21. While the grievance procedure forms part of the Claimant's terms and conditions the JNC as an appeal body cannot impose a change of terms and conditions on the Respondent such as was proposed In the May 2018 outcome. As such it was at the Respondent's discretion as to whether or not to follow the decision based on its business needs. No document was ever Issued to the Claimant purporting to outline an Increase in salary and she continued to work to the terms and conditions under which she was employed. Accordingly, the sums claimed by the Claimant are not wages properly payable and It is denied that the Respondent made any unlawful deduction from the Claimant's wages as alleged or at all."

50. In coming to my Judgment, I have carefully considered each of the points identified, and narrated, by Counsel for the respondents, and the claimant, in their respective written submissions lodged with the Tribunal. In doing so, I have also had regard to the ET1 claim form and ET3 response, the whole evidence led before me, the relevant law, and to parties' competing closing submissions from each of Counsel for the respondents, Mr MacDougall, and the claimant herself acting as an unrepresented, party litigant.

51. While taking this opportunity to compliment the claimant on her tenacity, and preparation of detailed, and case law referenced, written submissions, which is above and beyond what the Tribunal ordinarily receives from most unrepresented, party litigants, I have not found her arguments to be legally

well founded. Accordingly, I have decided that as her claim fails, it must be dismissed by the Tribunal.

52. Having preferred the arguments advanced before this Tribunal by Counsel for the respondents, I note and record here that I agree with Mr MacDougall's summary, at paragraphs 4.1 and 4.2 of his supplementary written submissions, that the claimant's wages which are ***properly payable '*** are as specified in her contract of employment, and they remain those which she contractually agreed in 2014.

53. While I know my decision will be disappointing to the claimant, I simply cannot imply a term into her contract of employment making all or any of the JNC Appeal Chair decisions binding on the respondents, for it is not necessary to do so as to make her contract of employment with them workable.

54. That said, and given the respondents' concession, in paragraph 1.1 of Counsel's written submissions for the respondents, that there is no dispute that the claimant has performed the same duties as a colleague who has been paid more than her, it is easy to understand how, as per paragraph 18 of the claimant's own written submissions, dated 14 March 2019, she sees the respondents as seeking to circumvent the decision of the JNC Appeal Chair, and for the respondents to be permitted to do that, it would seem to her to undermine the entire appeal procedure to the detriment of employees.

55. The Tribunal is, of course, not bound by the JNC Appeal Chairs decisions. It is bound, however, by the relevant law. In terms of my Judgment, while the claimant's situation does not give rise to a remedy for her in law, I do not see why the respondents, being now in receipt of two independent JNC Appeal Chair decisions, cannot, on their own initiative, take some steps to seek, in consultation with the claimant, some sort of recognition for the injustice of the ongoing pay disparity situation.

56. That injustice is recognised by their own Mr Cameron, as also by the external, and independent, JNC Appeal Chairs, namely Mr Whittam, and Mr McLaughlin, and with a view to fostering good industrial relations with the

claimant, as their valued employee, I do hope that the respondents can now seek to somehow resolve the anomaly between the claimant's wages, and those of her pay protected colleague, before Ms Shepherd's pay protection ends in March 2021 .

5 57. Further, given the identified *lacuna* in the express powers of the JNC Appeal Chairs, as recognised by the respondents' Counsel, I also hope that, given the facts and circumstances of the claimant's case, EVH may take a look at granting express written powers to JNC Appeal Chairs, as identified by Mr MacDougall, counsel for the respondents, at paragraph 4.2 of his
10 supplementary written submissions.

G. Ian McPherson

15 **Employment Judge**

8th May 2019

Date of Judgment

20 **Entered In register**
and copied to parties

1 0 MAY 2019

This is the Appendix referred to in the foregoing Reasons

(1) Submissions for the Respondents (4 January 2019)

5 **Introduction**

1.1 This case is perhaps slightly unusual in that there is very little by way of a dispute on the facts. Importantly, there is no dispute that the Claimant has performed the same duties as a colleague who has been paid more than
10 her. However, the absence of a dispute on the facts does not give rise to a remedy in law.

1.2 It is important to clarify at the outset what the legal basis for this claim is and, perhaps more importantly, what it is not. This claim is not an equal pay
15 claim under the **Eguality Act 2010.** Nor is it a claim for damages arising from a breach of contract. It is a claim for unlawful deductions from wages.

1.3 This submission will be structured into three sections:

20 1.3.1 first, it will first set out the requirements for a successful claim of unlawful deduction from wages;

1.3.2 secondly, it will consider the basis of the Claimants claim; and

25 1.3.3 thirdly, it will address the reasons that the claim is bound to fail.

1.3 Before doing so it is also to be acknowledged at the outset that the Respondents recognise that the Claimant is good at her job and a valued employee. Raising a claim against an employer in circumstances where
30 employment is ongoing is always a difficult undertaking. There is no criticism of the Claimant in seeking to enforce what she believes to be her employment rights.

2. The law

2.1 The protection of wages is governed by **part II of the Employment Rights Act 1996** ("the Act"). For present purposes there are three relevant sections:

2.1.1 first, **section 13** which creates the right no to suffer unauthorised deductions; and

> "(1) An employer shall not make a deduction from wages of a worker employed by him...
>
> ...(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

2.1.2 secondly, **section 23** which set the parameters for complaints to employment tribunals;

> "(1) A worker may present a complaint to an employment tribunal -
>
> (a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2))" and

2.1.3 thirdly, **section 27** which provides the relevant statutory definitions;

"(1) In this Part ***"wages",*** in relation to a worker, means any sums payable to the worker in connection with his employment..."

2.2 For the purposes of achieving a remedy arising from unlawful deduction the operative part of the Act is **section 13(3).** Importantly, that section is based upon the difference between wages ***'properly payable'*** and the amount actually paid. The Act does not define what wages are deemed to be ***'properly payable'.*** However, the courts and tribunals have stepped in to fill the void.

Wages 'properly payable'

2.3 The starting point for identifying an employee's wages will be their contract of employment. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — ***Greg May (Carpet Fitters and Contractors) Ltd v Drlnq 1990 ICR 188, EAT.*** In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion [1].

2.4 However, what is expressly stated in the contract is not necessarily the end of the matter. In considering a claim for unlawful deduction the tribunal must consider whether there is a legal right to remuneration beyond that which is expressly stated in the contract. The meaning of 'properly payable' arose for consideration by the Court of Appeal in ***New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA.***

2.5 There, C was employed by NCC Ltd, which operated a window-cleaning service. The company organised its employees by dividing them into teams. Every day NCC Ltd offered the leader of each team a number of jobs. The team leaders were not under an obligation to accept those jobs but refusals were rare. Each job came with a 'work bill price' — i.e. the amount of money

[1] IDS Employment Law Handbooks - Volume 13 * Wages - 2.52

that the team would receive for that job. It was up to each team to decide the proportion of the work bill that would be received by each team member. The majority of the work done by the teams consisted of regular jobs for which there was an established work bill price. However, as a result of falling profits, the company decided to reduce the work bill price of each job by 10 per cent. A tribunal upheld C's claim that this constituted an unauthorised deduction but this decision was overturned by the Court of Appeal.

2.6 In Morritt LJ's view, the phrase 'properly payable' suggested that some legal — but not necessarily contractual — entitlement to the sum in question was required. This, he thought, was confirmed by S.27(1), which defines wages as 'any sums payable to the worker in connection with his employment ... whether payable under his contract or otherwise'. He did not believe that the words *or otherwise' extended the ambit of 'sums payable to the worker in connection with employment' beyond those to which the worker has some legal entitlement [2].

3. Basis of claim

3.1 The Claimant has set out the basis upon which she asserts the wages 'properly payable' to her in paragraphs 13 and 14 of the paper apart to the ET 1 [page 14 of the joint bundle]. She asserts that:

> "the salary properly payable to her (for the purposes of section 13 of the Act) since 9 May 2017 is a salary equal to that of her colleague who carries out the same role as Housing Officer, per the decision of JNC Appeal Chair Geoff Whittam... [failing which on the basis of the decision of Mr McLaughlin]"

3.2 An important distinction to make at this stage is that when the Claimant refers to 'the salary properly payable' she is referring to a Band 7 salary together with the pay protection offered to those in post in 2005. The

[2] IDS supra 2.49-50

claimant's post was regraded to Band 7 so all other employees in the same post are paid within the same band. However, those who were in post prior to 2005 will receive an additional payment under the pay protection scheme.

5 3.3 Having made that distinction, the minutes of the JNC Appeal heard by Mr Whittam on 9 May 2017 are in the joint bundle from page 147. He upheld the grievance and made the following recommendation at page 150:

> "The Appeals chair recommends that the national bodies through
> 10 the JNC come to a resolution over this anomaly dating back to 2005 as soon as possible. It has been suggested that this will be addressed 'this summer', the chair urges that this be the case"

3.4 It is submitted that there is nothing contained in this decision that could give
15 rise to a legal entitlement which the Claimant could enforce against the Respondents requiring payment under the historic pay protection scheme. They are classified as 'recommendations' in the decision and make no specific orders with regards to paying the Claimant.

20 3.5 Mr McLaughlin's report following upon the appeal on 22 May 2018 is contained in the joint bundle from page 162. For present purposes, the key part appears at the foot of page 164:

> "I have come to the decision that Ms Stevenson should be paid
> 25 equally to that of her colleague and that that should be backdated to 1st April 2018"

3.6 In making that decision, Mr McLaughlin was effectively holding that the Claimant should be provided access to the historic pay protection scheme
30 despite the fact she does not qualify for it. It is not in dispute that the Respondents decided not to implement Mr McLaughlin's decision. It is essentially that failure which has given rise to this claim.

Legal status of decision of JNC Appeal decisions

3.7 The JNC is a body independent from the Respondents designated to carry out appeals arising in grievance procedures. The Claimant's contract expressly states that the JNC Appeal Chair is the final stage in the grievance procedure [page 65]. That being so, an informative case as to the status of the JNC's decisions is to be found in ***KIsoka v Ratnpinyoptip T/A Rydevale Day Nursery*** **[2014] I.C.R. D17.**

3.8 This case concerned a claim for unfair dismissal. The employer summarily dismissed the employee upon being satisfied that the employee was responsible for setting a small fire in the premises. The employee was advised of her right to appeal which would be conducted by an independent body. It is noted at paragraph 8 on page 3 of the judgment that 'the decision made at this hearing will be final'. The hearing took place and the independent panel overturned the decision to dismiss.

3.9 It is noted at paragraph 11 on page 4 that:

> "...Subsequently, the Respondent decided not to implement the appeal panel's decision. It is that failure which lies at the heart of the present appeal"

In that respect, ***Kisoka*** is on all fours with the present case; it is the failure of the Respondents to implement Mr McLaughlin's decision which lies at the heart of this claim.

3.10 In finding that the Respondent was not bound by the appeal decision the employment judge stated that 'The test remains whether the Respondent's conduct was reasonable in all the circumstances' [paragraph 14]. The employee appealed citing grounds, among others, that the judge at first instance erred in concluding that the employers were not bound by the decision of the appeal [paragraph 26].

3.1 1 Ultimately, the EAT took the view that the decision of the appeal was not binding on the respondents. It is stated in paragraph 55 that:

> "In the end therefore I return to the critical question of whether the reasoning of the Employment Judge in the present case, in particular at paragraphs 54 to 59, discloses any error of law. In my judgment it does not In my view the employment judge correctly understood the relevant law and then applied it to the facts of the individual case before her."

3.1 2 This case is authority for the proposition that a decision on appeal as part of a disciplinary procedure cannot usurp the jurisdiction or authority of the employment tribunal in a claim for unfair dismissal. It is submitted that same proposition stands true for grievance procedures in claims for unlawful deductions from wages. In other words, the fact that Mr McLaughlin decided that the Claimant should be paid equally with her colleague does not usurp the jurisdiction or authority of this tribunal to determine whether there has been an unlawful deduction in wages.

3.13 This tribunal's task remains to consider whether, as a matter of law, the Respondents are guilty of making an unlawful deduction form the Claimant's wages.

4. Unlawful deduction In the present case

4.1 The first step in considering whether there has been an unlawful deduction is to identify the Claimant's contractual entitlement to wages. The Claimant's contract of employment is included in the joint bundle at page 27. The first paragraph of her contract makes clear what her salary is and how it will increase. The Claimant signed her contract on 28 April 201 4 signifying acceptance of its terms.

4.2 The second step is to consider whether the Claimant has a legal entitlement to be paid wages higher than those which are expressly stated. It is submitted there is no such legal entitlement in the present case. The reasons for that submission are as follows:

5

4.2.1 first, the Claimant signed a contract making clear what her wages would be;

4.2.2 secondly, the Claimant was not in post at the time in which the pay protection provisions were established which preserved the entitlement to be paid at Band 8; and

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4.2.3 thirdly, referring back to the distinctions made at the outset, this is not an equal pay or damages claim that could found the basis of a legal entitlement to higher pay.

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4.3 If any of these factors were different the Claimant could reasonably be said to have a legal entitlement to be paid higher wages. But they are not.

4.4 It appears that much of the difficulty in the present case has been caused by the historic pay protection strategy put in place by the Respondents. The Claimant's colleague has benefitted from that for a number of years; probably more than anyone would have anticipated at the time. However, that is a benefit that the Claimant does not enjoy. That, if itself, does not entitle her to be paid the same as her colleague (an arrangement which is soon to come to an end).

20

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4.5 That difficulty has been compounded by the JNC appeal decisions. However, the JNC appeal decisions appear to have fallen into error by treating this matter as an equal pay claim. That applies to Mr McLaughlin in particular. He sought to achieve equal pay in circumstances where the Claimant was performing a job of equal value of that of her colleague but being paid less. On the face of it that is an entirely reasonable endeavour. However, he did not do so on any identifiable legal basis. Presumably, he

30

took the view that the Claimant had a legal entitlement to a higher wage than that stated and therefore there had been an unlawful deduction in wages. However, even if he did take that view, he cannot usurp the authority of this tribunal to make that determination.

5

4.6 For the reasons submitted above there is no legal basis upon which the claimant can assert the wages properly payable to her were anything other than those expressly stated in her contract. There was a disparity between the wages she received and her colleague received for the same work. However, that does not in itself give rise to a legal entitlement to higher pay.

10

4.7 The Claimant has not been discriminated against and did not qualify for the pay protection when it was put in place. The situation would be different if she had been discriminated against or qualified for protection and has not been paid it. But that is simply not the case here. The disparity in pay between herself and her colleague has now been addressed by the Respondents and will not continue into the future.

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5. Motion

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5.1 For wages to be deducted there must be a legal entitlement to wages at a certain level which has then been reduced. In the present case the level of the Claimant's wages has always been clear. She is legally entitled to the contractual rate agreed between her and her employer. The JNC appeal decisions do not change that. The Respondents have not taken anything away from the Claimant and therefore there has been no unlawful deduction. The tribunal is invited to dismiss the claim.

25

(2) Claimant's Submissions (14 March 2019)

Basis of claim

I assert that I have suffered an unlawful deduction from wages in terms of S13 of the
5 Employment Rights Act 1996 (ERA).

It is my position that the total amount of wages paid to me since May 2017 (failing which 1 April 2018), have been less than the total amount of the wages properly payable to me.

10

The Tribunal is therefore invited to consider the following matters:

1. Are the wages I claim "properly payable"?

15 2. Was there an unlawful deduction from my wages?

Are the wages 'properly payable*?

1. In considering whether or not the wages, being the amount due in terms of
20 the JNC Appeal chair's decision of 9 May 2017, are 'properly payable' the Tribunal must first consider whether there is a legal entitlement to them.

2. My submission is that I do have a legal entitlement to those wages on the basis that the decision of the JNC Appeal chair is contractually binding on the
25 Respondent. The Respondent's position is that the grievance procedure which is contained in the bundle at pages [63-65], is contractually binding, but that the ultimate decision of that same grievance process is not contractually binding. In my submission this is illogical, if the grievance procedure is contractual then I assert that there must be an implied term in my contract of
30 employment that the Respondent will be contractually bound by the outcome of that same grievance procedure.

3. A term may be implied into a contract of employment under a number of tests developed by the courts. The two applicable tests here are the "business efficacy" test and the "officious bystander" test.

5 4. Business efficacy test - this is when the parties intended the clause to be part of the contract. This test was discussed in the case of ***(Reigate v Union Manufacturing Co (Ramsbottom) Limited* [1918] 1 KB 592)** in the court of appeal. This case involved a contract between a company and an agent for a period of 7 years, the company became insolvent before the conclusion of the
10 7 year period and ceased to do business. The agent sought damages for breach of contract. The company argued unsuccessfully at first instance and appeal that there was an implied term in the contract that the company could terminate the agency at any time by ceasing to carry on their business.

15 5. Lord Justice Scrutton states at the bottom of **[page 6 of the print out]** "a *term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some on had said to the parties, "What will happen in such a case," they would both have replied, "Of course,*
20 *so and so will happen: we did not trouble to say that; it is too clear".*

6. In my submission, this is applicable to my case as to give business efficacy to the grievance procedure, in the contract it is necessary to imply that a decision of the grievance procedure would be implemented, otherwise, the
25 entire procedure fails in its purpose to appropriately deal with the grievances of employees. I assert that it must have been in the contemplation of the parties at negotiation that if grievance appeals were to be referred to a third party to make an independent decision on a grievance appeal, that decision would then be implemented. If there was to be no obligation on the employer
30 to implement the decision of the appeal, the appeal has no practical effect.

7. John Cameron, a former Director of the Respondent, stated in his witness evidence to the tribunal that he understood the grievance appeal outcome would be implemented and he undertook to action this for the Claimant. He also stated that in his view the decision should have been implemented. I refer to the email from John at **[page 161]** of the bundle which suggests John believed the grievance outcome would need to be implemented. It was only due to interference from EVH that Mr Cameron's decision was overturned and he confirmed in his witness evidence that when he returned from annual leave, he issued the letter which was drafted by EVH on his behalf, and merely signed by him stating that the decision would not be implemented.

8. I think it should be also be noted in this case that I believe that there is an apparent conflict in EVH's position as advisers. Having given the advice to the Respondent that they should award indefinite pay protection to my colleague, I am of the view that they had an interest in blocking implementation of the JNC decision (against all logic), to prevent any liability arising from their earlier advice. I believe that is the real reason the JNC decision was not implemented even although it was quite clearly the intention of the parties that such decisions would be implemented. As stated by John Cameron in his witness evidence, he issued the letter at **[Page 170}** of the Bundle, in response to my letter **[Pages 168-169],** which was again drafted by the EVH on his behalf, and merely signed by him.

9. It was accepted by Lorna Ravel I and John Cameron in their witness evidence to the tribunal that the Service Level Agreement between the Respondent and EVH (contained in the bundle at pages [138a]) states that the Respondent will abide by JNC decisions and that this includes decisions relating to individual grievances and disciplinary matters.

10. In my submission, taking these matters into account, it was so obviously the intention of the parties that they would refer grievance appeals to an independent body and that they would abide by the outcome reached in that

process, that it goes without saying. The business efficacy test is therefore met and it follows that it must be an implied term of my contract of employment that the Respondent would implement any decision made by the JNC during the grievance procedure.

5

11. Secondly, I would invite the Tribunal to consider the "Officious bystander" test. This is when a term can be implied if it is "so obvious it goes without saying" and derives from the case of ***Southern Foundries (1926) Limited v Shir/aw*** **[1939] 2 KB 206** heard by the court of appeal. The Plaintiff claimed damages
10 against the defendant company for wrongful repudiation of their agreement. The plaintiff was appointed managing director of the defendant company for a period of ten years. It was held at first instance and appeal that it was an implied term of the contract that the defendant would not remove the plaintiff from his position as director during the ten years of his appointment as
15 managing director, nor alter their articles to create a right in the company or anyone else to remove the plaintiff from his position of director during the ten years of his appointment.

12. Lord Justice MacKinnon created the "officious bystander test" in stating at the
20 bottom of **[page 10 of the print out]** *7f, *while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "oh of course"".*

25 13. The term must be obvious at the time of the contract, not at the time of the dispute (as at this stage one party will inevitably aver it was not obvious) and it must have been obvious to both parties.

14. In my case, by following the contractual grievance procedure I consider that I
30 was entitled to assume that a positive outcome in the JNC would be applied by the Respondent, otherwise what would be the purpose of my appeal?

Similarly, it follows that the Respondent must have believed that a decision would have to be implemented otherwise, there would have been no purpose in them agreeing to the appeal procedure to be added to the grievance. Indeed, as outlined above, Mr Cameron admitted in his evidence that he did believe that the decision should be implemented and he undertook to do so before he was advised otherwise by EVH. Further (as also referenced above) the SLA between EVH and the Respondent requires implementation of JNC decision relating to grievances. It is therefore my submission that it was obvious to both parties at the time of contract that the Respondent would be bound by any decision made by the JNC in relation to a grievance appeal and that this is sufficient to meet the 'officious bystander' test and therefore it must be an implied term of my contract of employment that the Respondent would implement any decision made by the JNC during the grievance procedure.

15. The correct process for a grievance procedure is set out in the **ACAS Code** (contained in the bundle) at pages [172] which, as the Tribunal will be aware, employers are expected to follow. Paragraph 40 states: *"Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken."*

16. The ACAS code does not address the situation whereby a grievance is upheld but the employer refuses to implement its own decision. In my submission, this is evident of the unworkable nature of such a system. I would submit that the lack of reference to not implementing a decision in the ACAS code is helpful when considering both the 'business efficacy' test and the 'officious bystander' test, as it would appear that ACAS has assumed that the decision will be implemented by employers as it is so obvious that they would do so as it is absolutely necessary for the appropriate workings of the contract for the grievance outcome to be enforced.

17. It is my submission that the decision of the JNC sitting as an appeal body should be considered the same as a decision by the employer in terms of the ACAS code and that an employee should reasonably assume any decision issued in accordance with Paragraph 40, as above, would be appropriately
5 implemented.

18. It is my submission, the Respondent is seeking to circumvent the decision of the JNC as it is contrary to the decision made regarding my appeal(s) internally. However, if the Respondent were to be permitted to do that, it would
10 undermine the entire appeal procedure to the detriment of the employees.

19. Having first established a legal entitlement to have the decision of the JNC Appeal board implemented. The primary aspect of the question to be determined is “were the wages properly payable?”

15

20. Firstly, I would like to draw the Tribunals attention to the case of ***Atchoe v Camden Primary Care Trust*** [2007] **EWCA Civ** 714.Here the employer relied on an implied term for the protection of health and safety to remove the employee from an on-call roster, which in turn meant he was no longer entitled
20 to the payments of that on call system. The EAT held the implied term was sufficient and that in relying on a contractual term, which led to the reduction of wages received did not render this an unlawful deduction. Sir Peter Gibson at Paragraph 33 **[page 6 of the print out]** stated that the starting point for considering whether the wages were properly payable must be the contract
25 of employment, *"...and, this requires consideration of all relevant terms of the contract of employment. However, that requires consideration also of any implied terms”.*

21. I have submitted that it was an implied term of my contract of employment
30 that the decision of the JNC Appeal Board would be implemented. Taking account of that implied term, the above case is persuasive that the Tribunal should first consider this term in determining whether the wages are properly

payable. Had the decision of the JNC Appeal Board from 9 May 2017 been implemented (failing which the decision to backdate my increased pay to 1 April 2018), as per the implied term of my contract of employment, I would have received a higher monthly pay from that date. As this was not done I
5 have suffered a series of unlawful deductions.

22. In the case of ***Kingston Upon Hull City Council v Scofield and Other*** **UKEAT/0616/11** a group of local authority employees claimed their jobs had been wrongly evaluated under a job evaluation scheme. The EAT held this
10 was a claim for damages not sums which were ascertained or ascertainable. At paragraph 27 **[page 7 of the print out]** the EAT held that in order to fall within S13 ERA, the claim had to be for a *"specific sum of money or a sum capable of quantification",* which had not been paid by the employer.

15 23. It is my submission, my case is distinguishable to this case as, had the group of employees in this case been able to refer to a pay value they were meant to receive it is likely the claim would have been successful. In my case, there is a clear quantifiable value that I am meant to be receiving, that being pay equivalent to that of my colleague, as per both grievance outcomes. That
20 quantifiable sum is therefore the difference between the two salaries. This is different to the ***Kingston*** case, as here the group felt they deserved to be paid more but how much more was a matter of judgement as opposed to fact. In my case I submit that I am entitled to be paid the rate clearly specified and upheld in my grievance appeal outcome.

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24. In ***Bleazard v Manchester Central Hospitals and Community Care (NHS) Trust*** **UKEAT 278/93** the employer failed to pay the contractually agreed rate to a new promoted nursing sister. Having offered the advised salary, the employer stated this was a mistake and proceeded to pay a lesser rate. This
30 case was heard prior to ERA however, the test for unlawful deductions under the Wages Act 1986 was the same. This case is an example of where there is a quantifiable sum which the employee should have been paid greater than

what they were actually paid, that sum being the difference between the proposed salary and reduced salary. As such the employee was able to determine the sums which had been unlawfully deducted and the sums were claimable, as per page 4 of the decision. This is akin to the situation before the tribunal today where there is a clearly identifiable difference between the sum being paid and the sum that should be paid, as per the JNC Appeal Board Decision.

25. The Respondent refers to the case of ***Kisoka*** in establishing the legal status of the JNC Appeal Board decision. The Respondents refer to this case as “on all fours with the present case”. I submit that it would be erroneous for the Tribunal to consider ***Kisoka*** on all fours with the matter before them. The matter before the tribunal can be distinguished from ***Kisoka*** on a number of factual grounds.

26. The primary reason for distinguishing the decision in ***Kisoka*** is that the case pertains to unfair dismissal and specifically S98 ERA. The tribunal considered whether the employer’s refusal to implement the decision of an independent appeal board meant that the dismissal was a reasonable decision by the employer in terms of S.98(4) ERA. The Respondent has quoted the Employment Judge at paragraph 14 *“the test remains whether the Respondents conduct was reasonable in the circumstances"* in reference to whether the employer was bound by the appeal decision. The Employment Judge at paragraph 14 was referring to the reasonableness of the employers decision in the context of S.98(4) ERA which is a defined statutory test. There is no such reasonableness test in S.13 ERA, which the Tribunal is concerned with in this matter and as such reference to whether the Employer’s actions were or were not reasonable is irrelevant to this case. .

27. ***Kisoka*** can be further distinguished. At Paragraph 16 the Honourable Mr Justice Singh quotes the Employment Judges decision, paragraphs 56 to 58. Within these paragraphs there are clear factors which Mr Singh holds as

pertinent in his decision making. Firstly, the reason an independent appeal body was used was because the employer was a small company with no other person at the appropriate level to hear the appeal. This was a unique situation. There were as such no clear terms between the independent appeal body and the employer unlike in this case where the JNC is specifically appointed to hear appeals in every case under the terms of an SLA which expressly states that the appeal decision will be adhered to.

28. Lastly, in my submission this case was very fact specific. The Employment Judge held that the employer was still ultimately responsible for the welfare of the children affected by the decision and where there were still reasonable concerns regarding the matter the children's welfare was paramount. There were no such overriding concerns regarding the JNC's decision in my case.

29. In my case the JNC Appeal Board had an ongoing contractual relationship with the Respondent with clearly defined terms. The JNC Appeal Board were not considering a matter of dismissal which the Respondent could dispute on grounds applicable directly to their responsibilities for child welfare. Where the Employer in ***Kisoka*** acted reasonably in not applying the appeal decision they considered several mitigating factors as outlined above, most prominently the welfare of children. In my case, the Respondent (or it's advisers EVH), simply did not like the decision of the JNC Appeal Board and did not want to implement it. As such, ***Kisoka*** should be distinguished from the present matter.

Has there been a deduction?

30. If the Tribunal agrees that the wages are 'properly payable' as I have just outlined, in my submission the Tribunal must then consider if there has been a 'deduction' from my wages in terms of S13 ERA. Where the total wages paid on any occasion by an employer to a worker is less than the net amount of the wages 'properly payable' on those occasions, the deficit counts as a

deduction. As I have not received the wages outlined as per the grievance appeal outcome, and in my submission, they are 'properly payable', I would submit to the Tribunal that I have suffered an unlawful deduction of wages in this regard. I have been subjected to a series of deductions as there has been a ‘deduction’ on each pay day since the outcome of my grievance appeal was issued, and the original decision was within the two year maximum time in which a series can run as per **S23(4)(a) ERA.**

From what date did the series of unlawful deductions commence?

31. The Respondent is quick to dismiss the decision of Mr Whittam on 9 May 2017, in the bundle at pages [147-150], as a "recommendation” and not a decision that could give rise to a legal entitlement. I submit that the Respondent is seeking to rely on a semantic technicality in emphasising the use of the word recommendation. I submit I am not asking the tribunal to read beyond Mr Whittam’s decision or suggesting he has said what he did not mean but that the statement should be taken as a whole and that it was clearly a decision which he would have expected the Respondent to apply.

32. I submit that should the Tribunal not be minded to agree the decision of Mr Whittam was sufficiently clear and binding as to mean I have suffered a series of unlawful deductions from my wages since 9 May 2017, then the Tribunal should consider I have suffered a series of unlawful deduction from 1 April 2018, as per the decision of Mr McLaughlin in the bundle at pages [162-165].

33. The Respondent refers to the decision of Mr McLaughlin in his determination of the appeal of the JNC Appeal Board being incorrect. The Respondent suggests that there was no legal basis for Mr McLaughlin’s decision. However, it is submitted that it is incorrect to regard Mr McLaughlin’s decision as akin to that of a court or tribunal. Mr McLaughlin was tasked with hearing an appeal against the outcome of an internal grievance, as the final stage of that grievance procedure. He is empowered under the grievance procedure to make a decision based on the facts before him. In Mr McLaughlin’s decision

my grievance was upheld. The legal basis for Mr McLaughlin's decision is not the issue of this matter. This case is to determine whether there has been an unlawful deduction of wages. In determining whether there has or has not been an unlawful deduction of wages the tribunal are asked to determine whether Mr McLaughlin's decision, whatever that decision may be, was it contractually binding upon the Respondent. If so, were the wages as directed in the grievance outcome properly payable and has there been a deduction from my wages.

34. In my submission it is unequivocal that the decision of Mr McLaughlin was a determination which must be followed by the Respondent.

35. The Respondent in their submissions have suggested that the discrepancy in pay has now been rectified and will not continue into the future. This is not strictly the case. The discrepancy will not be rectified until March 2021. As such, the discrepancy will remain in place for a further two years.

Conclusion

36. For the reasons that I have outlined, it is my position that the Respondent's grievance procedure forms part of my contract of employment and that the outcome of my grievance appeal was contractually binding upon the Respondent. As such I assert that the salary properly payable to me (for the purposes of S13 ERA) since 9 May 2017 is a salary equal to that of my colleague who carries out the same role as Housing Officer, per the decision of the JNC Appeal Chair Geoff Whittam. As such, my position is that I have suffered a series of unlawful deductions from my pay since that date, for which I seek compensation.

37. If the Tribunal does not agree that the salary properly payable to me is a salary equal to that of my colleague who carries out the same role of Housing Officer from 9 May 2017, then my submission is that such a salary was properly payable to me from April 2018, per the decision of the JNC Appeal Chair Brain

McLaughlin. As such, I submit that I suffered a series of unlawful deductions from my pay since that date, for which I seek compensation.

(3) Supplementary Submissions for the Respondents (28 March 2019)

Introduction

5 1.1 The purpose of this supplementary submission is to address the issues raised in the Claimant's submission.

1.2 The crux of the Claimant's submission is the proposition that she has suffered an unlawful deduction in wages because the Respondents were
10 contractually obliged to increase her wages following upon the JNC Appeal decision.

1.3 It is submitted that proposition is erroneous for two reasons:

15 1.3.1 first, because the JNC Appeal decision should not be factored into the tribunal's determination on what wages are 'properly payable' for the purposes of section 13 of the Act; and

1.3.2 secondly, even if it should, the tribunal cannot imply a term requiring the
20 Respondents to give effect to JNC Appeal decisions which require it to alter contractual terms and conditions where there is no legal basis for that decision.

2. Properly payable

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2.1 As already submitted in the principal submission for the Respondents the key to identifying the wages 'properly payable' is to identify the Claimant's legal entitlement to wages; whether that legal entitlement contractual or otherwise.

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2.2 The starting point is the contract. It is clear that from 29 April 2014 the Claimant was legally entitled to be paid £29,961 per annum. The question

for the tribunal is what changed between that date and May 2017 that increased the Claimant's legal entitlement.

2.3 The Claimant's position is that her legal entitlement to an increased wage arose solely because of the JNC Appeal decision. She does not claim an increased legal entitlement on the basis of equal pay, discrimination or any other legal basis. Her position is simply that she is entitled to more money because the JNC decided she was. In order for her to succeed the tribunal must hold that it was an implied term of the parties' contract that the JNC had the power to alter contractual rates of pay. For the reasons discussed below, they do not.

2.4 The Respondents' position is that nothing changed. The Claimant's legal entitlement to wages continues to be that which was expressly agreed in her contract. The tribunal's task under section 13 is to identify the wages properly payable to the Claimant. It is submitted that the JNC Appeal falls to be disregarded for the purposes of making that determination. In other words, just because the JNC decided that the Claimant's wages should be increased does not bind the tribunal ***[Kisoka*** refers].

2.5 Of course, that should not be of detriment to the Claimant. If the JNC Appeal decision had been arrived at on the basis of the application of the correct legal principles, the outcome of the JNC Appeal and the tribunal's assessment of the wages properly payable would be the same. However, the outcome cannot be the same because the JNC decision was not the result of the application of legal principles. That being so, it cannot give rise to a legal entitlement unless the JNC were expressly granted that contractual power.

2.6 That is where the falsity of the Claimant's proposition the Respondents have unlawfully deducted sums from her wages is to be found. In truth, nothing changed between April 2014 and May 2017 that increased the Claimant's legal entitlement to wages. The Claimant lodged a grievance on the basis

that her colleague was being paid more that her. Her grievance was not upheld because her colleague had pay protection. She appealed. The JNC saw an apparent injustice and made its decision accordingly. Not by reference to any legal principles but on the basis of what they thought should be done. Whilst that is a noble endeavour, if it is done without a legal basis then it cannot create a legal entitlement to be paid more. It does not stand up to the scrutiny which this tribunal must subject this claim to.

2.7 For these reasons, the tribunal can identify the wages properly payable to the Claimant by reference to the express terms of her contract alone. However, should the tribunal feel the need to go further and consider the implication of terms the Respondents' position is noted below.

3. Implied term

3.1 The Claimant submits she is legally entitled to higher wages on the basis of a term implied into her contract. In particular, it is submitted that 'the decision of the JNC Appeal chair is contractually binding on the Respondent'.

3.2 The test for implication of any term is that of necessity. A term will not be implied merely because it is a reasonable term or that an agreement would be unfair without it. A term can only be implied if it is necessary to do so. The most recent formulation of the test of necessity was given by the Supreme Court in ***Marks & Spencer pic v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another*** **[2015] UKSC 72.** Lord Neuberger deliver the lead judgement. In doing so he cited with approval the following test for implication at paragraph 18:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is

> effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

5 3.3 The key point in the present case is that no term will be implied if the contract is effective without it. That led to the Supreme Court holding in the rubric at paragraph (2):

> "that although, on the facts, the tenant had a powerful case for
> 10 contending that it was necessary for business efficacy that a rent apportionment term should be implied into the lease that implication was not necessary to make the lease work or to avoid absurdity"

15 ***Business efficacy***

3.4 That sentiment is echoed in paragraph 3.25 of the **IDS Employment Law Handbook** which relates to the business efficacy. It is noted that:

> 20 "A term may only be implied on this basis if it is necessary to make the whole agreement workable. Thus, in *Scally and ors v Southern Health and Social Services Board and ors 1991 ICR 771, HL,* the House of Lords felt that it would be stretching the doctrine of implication by virtue of business efficacy too far to
> 25 imply a term which was only necessary to the one isolated aspect of the whole agreement at issue in that case - i.e. pension entitlement."

3.5 Examples of the type of terms implied into contracts of employment are
30 given at paragraph 3.34 of the IDS extract. They all relate to terms required to make the employment contracts effective as a whole. In other words, without the implication the purpose of the contract would fail.

3.6 in the present case the Claimant only seeks to imply a term into the clause relating to the appeal stage of the grievance procedure. In the first place, it is submitted that such a term is not central to the effectiveness of the Claimant's contract of employment. It is stretching the doctrine of implication by business efficacy beyond breaking point.

3.7 For these reasons, it is submitted that business efficacy cannot operate to imply the term the Claimant seeks to imply.

Officious bystander

3.8 The other potential basis which crosses over with the business efficacy test is that of the officious bystander.

3.9 This test means that a term will be implied if it can be said that it is so obvious that it goes without saying. However, such terms must be treated with caution and framed with precision.

3.10 In the present case, the claimant seeks to imply a term that the Respondents will give effect to the JNC Appeal decisions. *[Full stop, (sic)]* However, in order for it to be so obvious, it must be qualified to those decisions which are both reasonable and made on the basis of applicable legal principles.

3.11 The present case is a useful illustration of that principle. The effect of the JNC Appeal decision [page 162-165] is to alter the express wages contractually agreed in the Claimant's contract without there being a legal basis to do so. It is submitted that no officious bystander would think that would be so obvious that it goes without saying. Quite the contrary, if that were a power the JNC were to have it should be made express.

3.12 If a term was to be implied regarding the effect of the grievance appeal outcome it would have to be restricted to those decisions which are both rinseable *(sic)* and had an identifiable legal basis. The JNC Appeal decision

in the present case was based on what the chair thought the Claimant should have been entitled to rather than what she was *legally* entitled to. That being so, even if such a term could be implied the decision must fall to be disregarded as being unreasonable, without legal basis and therefore
5 *ultra vires*. **[Note by Judge:** I have taken the word *"rinseable"* to be a typographical error for *"reasonable"* J

4. Summary

10 4.1 The Claimant's wages which are 'properly payable' are those specified in her contract. They did not increase overnight because of a well intentioned but erroneous decision of a JNC Appeal Chair. They remain to be those which she contractually agreed.

15 4.2 Whilst the JNC powers of disposal should be made express in the Respondents' contracts of employment the tribunal cannot imply a term making all and any of their decisions binding on the Respondents. It is simply not necessary to do so to make the Claimant's contract of employment workable.

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Employment Judge: I McPherson
Date of Judgment: 8 May 2019
Entered in register: 10 May 2019
and copied to parties