



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103783/2018**

**Preliminary Hearing held at Dumfries on 6 March 2023**

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**Employment Judge M Robison**

**Ms M Weatherup**

**Claimant  
In Person**

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**Dumfries & Galloway Council**

**Respondent  
Represented by  
Mr G Mitchell  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

1. The respondent's application for strike out which failing deposit order under rules 37 and 39 of schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused.
2. This claim will now be listed for a hearing on whether the claim should be struck out in terms of rule 3(1)(a) of schedule 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

### **REASONS**

1. This preliminary hearing was listed following a case management preliminary hearing which took place on 9 February 2023.
2. At that preliminary hearing, a decision was made to revoke the decision of Employment Judge Eccles made on 1 September 2022 to fix a hearing on the question whether the claim should be struck out under rule 3(1)(a) of schedule 2 of the Employment Tribunals (Constitution and Rules of Procedure) 2013 (the 2013 Rules).

3. That decision was varied and the issue to be determined at this hearing was whether the claim should be struck out as having no reasonable prospect of success in terms of rule 37(1)(a) of schedule 1 of the 2013 Rules, or alternatively, whether it has little reasonable prospect of success in terms of rule 39, in which case a deposit order should be made.
4. The first day of the hearing listed for the rule 3(1)(a) strike out hearing was therefore converted to this hearing, and the additional two days which had been listed discharged.
5. It had been understood that the matter would be dealt with on the basis of legal submissions only. This matter was reconsidered at the outset of the hearing, when it was agreed that, subject to any unforeseen issues, no evidence would be heard and parties would make legal submissions only.
6. A joint file of documents was lodged, to which reference was made during the submissions.

#### 15 **Submissions for respondent**

7. Mr Mitchell had helpfully lodged written submissions prior to the hearing, which Ms Weatherup had the opportunity to consider. Mr Mitchell addressed these written submissions in oral submissions. The respondent's position is summarised as follows.
8. The respondent relies on the decision of the Employment Tribunal following a preliminary hearing which took place on 17 and 18 August 2020, issued 2 October 2020, that "the claimant has not undertaken like work as Mr Blayney in terms of Section 65 (1) (a) of the Employment Act 2010."
9. The respondent relies heavily on the findings in fact in that judgment, findings made after two days of evidence which resulted in a 20 page judgment with numerous findings in fact.
10. The respondent's position is that the claimant does not have the right, at this stage, to pursue the equal value claim. This is because the next stage in procedure for equal value claims is set out in rule 3(1)(a) of schedule 3 of the 2013 Rules. This requires the Tribunal to strike out the claim if, under section

131(6) of the Equality Act 2010, the Tribunal determines that the work of the claimant and comparator are not of equal value, because there are no reasonable grounds for suspecting that the evaluation in the study is based on a system that discriminates because of sex or is otherwise unreliable.

- 5 11. The respondent confirms that for the purpose of this hearing, they proceed taking the claimant's claim at its highest, that is that the evaluation of the claimant's job in 2017 was unreliable, although that is not conceded. Assuming that the claimant was successful at that stage, the next stage is for her equal value claim to be determined. This would require an assessment of the value  
10 of each of the roles. It would either be by a Judge hearing evidence or more likely by an appointed expert in terms of schedule 3 of the 2013 Rules.
12. Whatever "scheme" is used by any independent expert, the respondent argues that it would almost certainly have values/scores attributed in terms of responsibility and in terms of people management etc. These are objective and  
15 relatively clear factors. Mr Mitchell stressed that there was no question that the claimant performed her work really well, that it was complex work, and that she had saved money for the council, but he submitted, that is not the question for the equal value hearing.
13. Mr Mitchell then set out 10 ways in which the respondent asserts that the  
20 Employment Tribunal in the like work judgment found that the job of the comparator involved more than the claimant, as follows:
- (i) Management of the respondent's contaminated land functions, which the claimant was not doing (paragraph 105);
  - (ii) responsibility for strategic commissioning of the waste collection  
25 service (paragraph 105);
  - (iii) development and delivery of waste management infrastructure (paragraph 105);
  - (iv) accountability for external locations (paragraph 105);

- (v) requirement for knowledge across the whole area of his responsibility (including contaminated land) (whereas the claimant's role was restricted to the PFI project) (para 106);
  - (vi) responsibility for ensuring the respondent discharged its statutory and regulatory duties across the service as a whole (whereas the claimant's involvement was related only to the PFI project) (para 107);
  - (vii) people management responsibility for ten direct reports (para 108);
  - (viii) ensuring implementation of policy and procedures (para 108);
  - (ix) prioritising and re-prioritising service and department activities (para 108); and
  - (x) oversight of an operational site in Stranraer (para 109).
14. He asserted that there was nothing on the other side of the equation which the claimant could rely on to assert that she did more than the comparator.
15. On the status of the findings in fact of another Tribunal on a different legal question, while Mr Mitchell accepted these were not binding on this Tribunal, he submitted that they were highly relevant to the prospects of success question.
16. Mr Mitchell accepted that the date at which the assessment would be made was still to be determined but agreed that it would be between September 2016 and February 2019 at which time the comparator was redeployed and ceased to be part of the environment service. Since that time however, he argued that the claimant's workload had reduced, so the position is even more stark.
17. He asserted that it was "certain" that the equal value claim by the claimant would not be successful even if the evaluation study was not reliable as a "block". He submitted that the Tribunal should make an assessment that no evaluation scheme, however composed, would arrive at the claimant's job and her comparator's job being of equal value. As such, he argued that there are no reasonable prospects of success in relation to the equal value claim, being the only claim that the claimant has left. That failing, he argued that there are

certainly “little” reasonable prospects of success and so a deposit should be ordered as a condition of the claimant proceeding.

18. With regard to the relevant case law, Mr Mitchell relied in particular on *Mechkarov v Citibank NA* 2016 ICR 1211, and in regard to the considerations to be given by the Tribunal in a strike out application argued as follows:
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- (i) Only in the clearest case should a discrimination claim be struck out: here the respondent asserts that this is a clear case, where relevant findings in fact can be relied on.
  - (ii) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence: here evidence has been heard and a judgment issued.
  - (iii) The claimant's case must ordinarily be taken at its highest: that has been done given the hypothetical position taken in relation to the JES.
  - (iv) If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out: the respondent considers that this is the position here.
  - (v) A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts: there is no need here since there has been a hearing of evidence and a judgment.
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19. Mr Mitchell accepted that the threshold for strike out is a high one in the usual discrimination case, where no evidence has been heard. He argued however that this is not a usual discrimination case, not least because evidence has been heard with very relevant factual findings, but also because this is a claim for equal value which is more “mechanical” or “scientific” than the assessment in a usual discrimination claim.
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20. On the question of taking the claimant’s claim at its highest, the Tribunal in the like work judgment found that there was “little in the way of material factual dispute”. Mr Mitchell pointed out that it is not the case that the claimant is asserting that there are matters which she wishes to prove that are disputed
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such as different responsibilities. Mr Mitchell submitted that his argument also involves taking the claimant's claim at its highest in respect of the equal value question (as well as the job evaluation block question), by which I understood him to mean that this was the case even if she could prove what she offered to prove.

21. The respondent submits that this is a stark and clear case, given the Tribunal's findings, and the claimant's only remaining claim of equal value has no reasonable prospects of success for the following reasons:

(i) If the claimant succeeds before the employment tribunal in raising a well-founded suspicion that her evaluation is not reliable, she will be entitled to pursue her equal value claim. That claim, says the respondent, is bound to fail.

(ii) It is accepted that it does not automatically follow from the tribunal's conclusion that the claimant's work was not like that of her comparator that his job is of greater value. Nonetheless, in the judgment dated 2 October 2020 particularly at paragraphs 104-110 there are a number of comments and conclusions which suggest that that will be the likely if not the inevitable outcome of any assessment. In particular, the comparator's job is at paragraph 108 described as involving "a higher responsibility" than the claimant's; at paragraph 110 it is said that the comparator had "wider responsibilities and additional work".

(iii) If the claimant is permitted to pursue her argument that her 2017 evaluation was unreliable then the respondent will require to answer those allegations and an evidential hearing of perhaps four or five days in duration will be needed to dispose of the point. If the point is resolved in the claimant's favour the multi-stage equal value process would then have to be followed to a conclusion.

(iv) That will involve an enormous consumption of financial and other resources.

- (v) The most that the claimant could achieve from success in such a hearing is that she would be entitled to have her job assessed as against the comparator's.
- (vi) The conclusions from the previous hearing would suggest that she has little or no reasonable prospect of succeeding in that comparison.
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22. If the Tribunal is not with the respondent and if claims are allowed to proceed, the respondent makes an application under Rule 39(1) for a deposit order of up to £1,000 in respect of each allegation relied upon as a condition of advancing those allegations on the basis the claim has “little reasonable prospect of success.” The respondent accepts that there was just one claim outstanding, that is only one allegation in respect of which a deposit order can be made (so the maximum deposit is £1,000).
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23. Mr Mitchell submitted that a Tribunal has greater leeway when considering whether or not to order a deposit than when decided whether or not to strike out (see *Van Rensburg v Royal Borough of Kingston-Upon-Thames and others* UKEAT/0096/07; UKEAT/0095/07). This case established, he argued, that the Tribunal should have regard to the likelihood of the party (usually the claimant) being able to establish facts essential to their case, and in doing so to reach a provisional view as to the allegations being advanced. Mr Mitchell also relied on the decision of the President of the EAT in *Tree v South East Coastal Ambulance Service and another* UKEAT/0043/17.
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### **Claimant's submissions**

24. The claimant had prepared a “written statement” and responses to the respondent's submissions, upon which she based her oral submissions. These are summarised as follows.
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25. She submits that she can successfully argue that she is employed on work of equal value with her comparator and that her claim should not be struck out. She argued that this is not a clear cut case.
26. The claimant emphasised at the outset of her submissions that the focus now is on the question of equal value in terms of section 65(1)(c) of the Equality
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Act, and section 65(6) which references factors such as effort, skill and decision-making. These matters were not considered in the like work judgment. These include, for example, qualifications, specifically she has a post graduate diploma in PFI contracts which is something her comparator does not have; and also there is no account taken of her level of knowledge. There is no comparison in relation to these factors with her comparator in the like work hearing where the Tribunal was considering different circumstances. She focused in that hearing on showing how her work was like her comparator's, and she did not go out of her way to refer to these differences or to show how different her job was from his.

27. She believed that she had not argued the case as well as she could have and that this was partly because she found the video hearing difficult.

28. She also set out the background circumstances to support her argument that her claim should not be struck out. In particular, she does not accept that there was no further right of appeal following a re-evaluation of her job which was undertaken at her request in May 2017, as she was advised. Grievances which she lodged then and subsequently remain outstanding more than five years after she raised them.

29. She expressed concern about how managers managing multi-million pound projects were in her opinion undervalued, and that their jobs poorly evaluated by the respondent's JES. She argues that this fails to properly evaluate the skills for such roles and fails to recognise the efforts, skills and demands and this has resulted in some major projects failing.

30. She submitted that it would be in the interests of natural justice to allow her claim to proceed. She submitted that once her role is fully understood she will be able to show that, in terms of effort, skill and decision-making, that her job is of equivalent, or greater, value to that of the comparator.

31. She turned then to address the points raised by the respondent in submissions. She asserted that the findings in fact from the like work judgment are not binding on this Tribunal.



32. She submitted that the findings in fact were in any event inaccurate, by reference to the letter dated 11 February 2021 from the Tribunal which confirmed that a certificate of correction had been issued. This related to the reference at page 35 based on Ms Shennan's witness statement, to the fact that "the claimant was offered a promoted post of Waste Management Strategy Manager on 26 January 2017. This post was graded at salary level band 13". This was, following dialogue by the Tribunal with the claimant and the respondent, corrected to replace "on" with "with effect from".
33. This she said had a very important bearing on the equal value claim. In particular, it was not accurate to say that she was offered promotion on 26 January 2017. Rather, her role was re-evaluated between April and June 2018, as confirmed by John MacEachern (council solicitor) in an e-mail dated 20 June 2018. A job description was attached for waste management strategy manager graded at band 13 (page 86). This was backdated to 16 January 2017. However, the claimant had continued in the same job and in the same post as waste prevention officer from February 2005 (post number 5/698 and JE reference U384), with the same reference for the environment officer job description (band 12, page 67) (with attached e-mail dated 23 October 2017) (page 102) (which said she had no right of appeal) and again for waste management strategy manager (page 86).
34. The evaluation between April and June 2018 was an evaluation of her existing role, rather than a promotion, and she was asked whether the re-evaluation was acceptable, which was backdated to 16 January 2017, that is 20 months prior to the date the evaluation took place. The waste management strategy manager had a far wider remit which much greater demands. This simply confirmed that her job had not been properly evaluated in the first place.
35. In the like work hearing, the council argued that her job was the environment officer role, yet when it was re-evaluated it was described as waste management strategy manager. She submitted that her duties were not fully recognised during the like work hearing because consideration was given to the environment officer role. The waste management strategy manager role

had a far wider remit than the environment officer role and although she had not accepted the "promotion" that was the job she was doing.

36. She did not accept the re-evaluated role and she did not accept the job description but the respondent acted as if she did, by increasing her salary and paying her backpay.
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37. The job description attached to the email showed that she was responsible to the head of infrastructure (Steven Herriot) and to the director of EEI (Alastair Speedie). This was a more senior reporting line than the comparator. The job description also states that she deputises for the head of service and the director when needed, and that is greater responsibility than the comparator had.
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38. With regard to responsibility for employees, her job description states that she deputised for her comparator. She had lodged documents for the like work hearing which showed that he was out of the office between 12.30 and 2 pm and after 4 pm, when she would require to deputise for him. She also chaired the PFI operations meetings and instructed staff regarding performance management of the contract. She asserted that in regard to the comparator's role in people management, he was not fulfilling his duties (giving the example of her not having had a professional development review as she ought to have done).
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39. She submitted that there were lots of examples of work which she was doing which was not recognised because she was dealing with one contract, whereas her comparator was doing other things as well. However there was no mention of the waste PFI contract in the job description.
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40. She also referenced concerns about how her workload came to be increased following a restructuring referenced in the like work judgment. This was when James McLeod was appointed infrastructure manager, the intention being that the duties of the service manager environment (Mr Blaney) would be subsumed into that role. However most of those duties remained with Mr Blaney, but from this point in time her comparator stepped back from the PFI
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project and was doing other things. That included the oversight of an operational site in Stranraer, which had been undertaken by a band 11 post.

41. She said that she was overseeing data performance management as well as legal and technical advisers and these put significant demands on her. She was brought into the project because of her communication skills, and other soft skills which were essential for successful management of projects and to protect the council from risk which had not been taken into account.
42. By way of example, in the environment officer role, this was scored 1 for dealing with relationships, whereas dealing with relationships is a fundamentally important aspect of contract management. The claimant explained she was dealing with a difficult contract where relationships with technical advisers and legal advisers and other partners in the PFI contract could be very awkward. She said that it takes special skills to deal with these arguments and to keep good relations with the contractors and to keep the contract running smoothly.
43. She argued that those undertaking the job evaluation did not understand what her role involved; but rather the evaluation was based on what the documents said she did, which was the same as she had done in 2005, whereas her role had changed significantly over the years; and it was not based on what she was actually doing.
44. She confirmed that she had provided two folders of documents to demonstrate the type of work she was doing, which included dealing with the landfill tax dispute which took four years to resolve and was of significant value to the council. The witnesses who gave evidence at the like work hearing did not know what she did on the ground. The claimant also referenced her pleadings (page 18, paragraph 31) and expressed concern that the information supplied to undertake the evaluation was incorrect, particularly the financial information. One of the witnesses based their decision on paperwork alone and had not even observed her or her comparator at work.

45. She said that there would be additional documents which she could lodge to support her claim for equal value. Further, she added that much of the like work judgment was based on oral evidence in any event.

46. With regard to ability to pay, she confirmed that she is employed by the council  
5 and with an annual salary of almost £50,000.

### **Respondent's response**

47. Mr Mitchell took issue with the claimant's general point about aspects not covered by the like work judgment. He asserted that the judgment did cover the points raised by the claimant.

10 48. He referred to the fact that the Tribunal in the like work hearing had reference to a joint set of productions and a supplementary set of productions lodged by the claimant (paragraph 4). The references to the contract are covered in the judgment (eg paragraph 11). The judgment references the claimant's qualifications, which have been taken into account (paragraph 23). It  
15 references her work on the landfill tax reconciliations (paragraph 24). The finding in fact at paragraph 29 that she had been promoted on 26 January 2017, was corrected to read "with effect from" that date. Further in the letter from the Tribunal dated 11 February 2021, the Employment Judge stated that the change made no difference to the overall conclusion, and thus any  
20 confusion did not impact on the judge's view. The judgment references the claimant's involvement in the TUPE transfer from the PFI service contractor in-house (paragraph 31). It references the fact that the change of reporting line to Mr Herriot. While the value of the contract is not reflected in the evaluation, other responsibilities are evaluated which are not related to  
25 financial value. The judgment covers all the relevant factors, including dealing with relationships.

49. The judgment notes at paragraph 33 the post of service manager attracts salary level of band 14 to 17; the claimant's role attracts level 11 to 13. Mr Mitchell understands that the comparator was on band 15.

30 50. The claimant is not saying that the findings in fact relating to the comparators job are being disputed, but these duties are greater duties than those

undertaken by the claimant. While the claimant was in a very busy role, she would not be aware of all of the roles undertaken by her comparator.

51. The judgment states that there is little in the way of material facts in dispute (paragraph 53). The claimant appears to indicate that she would rely on more detail to address the same point. His position is that there is no point which the claimant has raised in this hearing which was not covered in the judgment, which must be considered to be highly relevant. While strike out is an extreme option, this is the very type of case where it was envisaged that it would be appropriate to strike out.

#### 10 **Deliberations and decision**

52. I turned to consider these arguments (which I have set out in some detail) and whether the claimant's only remaining claim should be struck out.

53. In summary, Mr Mitchell argued forcefully that this was one of those rare "discrimination" claims which it would be appropriate to strike out on the grounds that it has no reasonable prospects of success. He suggested that if the strike out provisions were ever to be relied on then this is the very type of case envisaged for such a ruling.

54. He accepted that the threshold to establish strike out is a high one, and particularly in an Equality Act case, he accepted that it was an exceptional step. However he argues that this is one such case. He argues that this is not a standard discrimination case where sensitive disputed facts must be assessed, but rather the question here for determination is whether or not the jobs are of equal value. This he described as a "mechanistic" or "scientific" process based on the elements of the jobs done by the claimant and the comparator. Crucially this is a case where there has already been a hearing on the question of like work, evidence has been heard, documents have been considered, and findings in fact have been made.

55. Although he accepted that the Tribunal was considering a different question and that the findings of the like work Tribunal were not binding on this Tribunal, he argued that the facts which had been found are highly relevant to the question of the prospects of the claimant succeeding in her equal value claim.

56. He identified 10 findings in that judgment which he said pointed to the comparator's job being more extensive than the claimant's. However, he argued that none were identified (in the like work judgment) which might indicate that the claimant's role was more extensive.
- 5 57. He pointed to the fact that the Tribunal in the like work judgment had stated that "there was little in the way of material factual dispute". He submitted that the claimant does not point to facts which she states she disputes regarding the findings of the like work Tribunal relating to the comparators' job. This would mean that no matter what approach an independent expert would take  
10 she could not show that overall her job was of equal or greater value than her comparators.
58. The claimant on the other hand argued that the findings in fact were not binding and that the Tribunal had considered a different question, that is whether the she was doing like work with her comparator and had not considered the  
15 question about "effort skill and decision-making". While she suggested that she had not presented her case as well as she could have done, she had focused on the aspects of her job which were "like" her comparators, whereas she had not led evidence about those aspects of her job that were different from her comparators which she considered to be relevant for the equal value question.
- 20 59. While it may be that she does not otherwise dispute the findings of the like work Tribunal in regard to its conclusions based on the evidence heard, she argued that the like work Tribunal had misunderstood the factual matrix in respect of the offer of a promotion, and she said that was significant, and that it was highly relevant to the equal value question.
- 25 60. Further, she said that there was further evidence to be heard in regard to the equal value question. In particular, she referenced the fact of her qualifications; her level and scope of knowledge; the deputising duties for more senior colleagues as well as for her comparator; her relationship with others, including  
30 lawyers and technical advisers; overseeing of performance management; communication skills, as well as the value of the project which she was involved with. The claimant said that there were additional documents which she would rely on in any equal value assessment.

*Strike out*

- 5 61. I was of the view that there are a number of factors which point to this being a case where strike out may well be appropriate. In particular, this is a case where evidence has already been heard and another Tribunal has made findings in fact on relevant matters; the findings of that Tribunal, although not binding, are highly influential.
- 10 62. The like work Tribunal found that the material facts were by and large not disputed; and in particular the like work Tribunal found that the job of the comparator involved more in certain material respects. This included the fact that the claimant had no direct reports while her comparator had responsibility for ten direct reports; that the comparator managed other functions above those managed by the claimant, including contaminated land functions and strategic commissioning of the waste collections service; and that the comparator has a broader responsibility for the whole scope of work. This all indicates that the comparator job is more extensive than that of the claimant, especially when there were no obvious findings in respect of which the claimant's job was more extensive than the comparators.
- 15 63. However, that only takes things so far. Crucially, I take account of the fact that the like work Tribunal was considering a different legal question to the one which will require to be considered in regard to the equal value claim. The facts which the Tribunal found following evidence are only those material to the legal question to be answered, namely the question of like work. Further and in any event those findings are not binding on this Tribunal. The legal question to be answered, and specifically a comparison against factors such as effort, skill and decision-making, has yet to be considered.
- 20 64. Mr Mitchell has accepted that this Tribunal will approach the strike out question taking the claimant's case at its highest. That means, he submits, that the question is to be approached on the basis that the claimant will be able to show reasonable grounds for suspecting that the evaluation was unreliable.
- 25 65. Thus this Tribunal proceeds on the basis that the claimant can show that the JES is unreliable. It is understood that the claimant is currently a band 13 and
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that the comparator was a band 15. Although Mr Mitchell argued that these evaluations were not close, I cannot accept that, when it is accepted for the purposes of argument, that the JES was unreliable.

- 5 66. Further, when accepting the claimant's case at its highest, this must also involve accepting for the purposes of argument that the equal value claim will also be taken at its highest.
- 10 67. That would normally mean that the Tribunal should accept that what the claimant offers to prove she can prove. The claimant is offering to prove that the responsibilities involved in her job are of equal or greater value than the comparator. This is apparent from the claim that she makes and she emphasised this in oral submissions.
- 15 68. Unlike a discrimination claim, all of the facts which she offers to prove are not necessarily set out in written pleadings. Equal value claims are not like discrimination claims not least because they have their own unique set of rules.
- 20 69. Although this is a legal question to be determined by the Tribunal, it would be unusual for the Tribunal itself to make the equal value assessment based only on evidence but without expert reports. If there is no expert evidence (for example from partisan experts) the Tribunal will almost invariably appoint an independent expert to inform its decision.
- 25 70. The facts upon which the independent expert will rely to produce a report on the equal value question are determined at a stage 2 equal value hearing in accordance with schedule 3. We have not yet reached that stage, so the scope of facts to be relied on by any independent expert who undertakes an evaluation is not yet finalised.
- 30 71. Although the like work Tribunal found that there was little by way of material factual dispute, the facts found were to determine the like work question and not an equal value claim. The claimant asserts that there are facts which she would dispute which she understand the respondent will rely on to show equal value, not least in relation to the extent to which responsibility (for people) has been taken into account. She disputes Mr Mitchell's assertion that she is not seeking to prove that aspects are disputed such as different responsibilities.



72. Although the respondent asks the Tribunal to find that no equal value scheme however composed would arrive at the claimant and comparator's job being of equal value, not only does this Tribunal not yet know the facts which will be relied on, the Tribunal is not aware of what approach might be taken by an independent expert. It is the Tribunal which makes the final decision, informed by the independent expert's report, including scores and weighting. This Tribunal is not yet aware of what scores or weighting might be attributed to the skills and responsibilities involved in the two jobs.
73. I take into account the fact that the claimant is a party litigant who represented herself at the like work hearing. The claimant focused in the like work hearing on how the two jobs are alike but not on their differences.
74. The claimant has also raised a concern about a potential misunderstanding of the like work Tribunal in regard to the significance of the promotion which the claimant argues was not in fact a promotion. There is at least an argument that the like work Tribunal was not clear about the claimant's position on this matter, given the amendment to the facts found through a certificate of correction that she was given a promotion not "on" but "with effect from". At the very least there may be a misunderstanding about the implications of that re-evaluation which may be relevant to the equal value question.
75. As discussed during the hearing, the fact that the next stage (valid JES strike out stage) is likely to be time consuming and costly is not, in my view, a relevant consideration for strike out.
76. It has been said that strike out is a draconian step which should only be made in exceptional cases (*Mbuisa v Cygnet Healthcare* UKEAT/01119/18). The question is not whether it is possible that the claim might fail or even that it is likely that the claim will fail, rather whether the claim has *no* reasonable prospects of success (*Arthur v Hertfordshire Partnership University NHS Foundation Trust* UKEAT/0121/19 and *Balls v Downham Market High School* EAT/0343/10).
77. I cannot with confidence conclude that this claim has no reasonable prospects of success because the facts which will be relied on to make the equal value

assessment have not yet been finalised. The claimant is offering to prove that her job is of equal value with her comparator. Taking the claim at its highest, accepting the JES is to be presumed unreliable, that the claimant has expressed concern about the promotion or re-evaluation of her job being  
5 misunderstood, given that re-evaluation scored her job at band 13, whereas the comparator was a band 15, I could not say that there were no reasonable prospects of success.

78. The respondent's application for strike out on the grounds of no reasonable prospects of success is therefore refused.

10 *Deposit order*

79. I have concluded that it cannot be said that there are no reasonable prospects of success. However, the respondent argues, should I not accept their argument that there are no reasonable prospects of success, that I should conclude that there are little reasonable prospects of success.

15 80. Mr Mitchell pointed out that the Tribunal has greater leeway when considering whether or not to order a deposit than when deciding whether or not to strike out, by reference to the case of *Van Rensberg*. In that case, the then President stated that the Tribunal "must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response"  
20 before making such an order.

81. On the question whether there is a proper basis for doubting the likelihood of the claimant being able to establish facts necessary, it might be said that the like work Tribunal findings relating to the two jobs are sufficient to indicate there are doubts that the claimant could establish the necessary facts. However, as  
25 discussed above, this Tribunal is considering a different legal question and is not yet aware of all of the facts that will be relied on to seek to establish equal value.

82. Mr Mitchell also referenced the decision of the President of the EAT in *Tree v South East Coastal Ambulance Service*, where reference is made at  
30 paragraph 22 to the role of the deposit order in "avoiding unnecessary wasted time and resource on the part of the parties". He argued that account could

therefore be taken, in regard to the deposit order question to the fact that to proceed will involve an “enormous concentration of financial and other resource”.

5 83. While it may be that this is a factor in deciding whether to grant a deposit order, whether there would be wasted time and resource is determined relative to the prospects of success question. This Tribunal can say that there would be or would be likely to be wasted resources and cost only if there were sufficient misgivings about the claimant being able to establish the facts essential to the claim, such that there was little prospects of success.

10 84. As discussed above, an equal value claim is a unique type of claim. For the reasons discussed above, I take the view that the Tribunal at this stage in proceedings does not have all the facts upon which it would make any assessment of whether the jobs were of equal value or not.

15 85. For all the reasons that point to it not being possible to say that there are no reasonable prospects of success, it is not possible to say that there are little reasonable prospects of success.

### **Conclusion and next steps**

86. The respondent’s applications for strike out which failing a deposit order are therefore refused.

20 87. Unless parties propose otherwise, a hearing will now be fixed to consider the respondent’s application for strike out under rule 3(1)(a) of schedule 3 of the 2013 Rules. Date listing letters should therefore be issued to fix a hearing on mutually suitable dates.

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**Employment Judge: M Robison**  
**Date of Judgment: 19 April 2023**  
**Entered in register: 20 April 2023**  
**and copied to parties**

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