



EMPLOYMENT TRIBUNALS (SCOTLAND)
Case No: 4103783/2018

Held in Dumfries on 13, 14, 15 and 20 November 2023
Employment Judge M Robison

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Ms M Weatherup

Claimant
In Person

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Dumfries & Galloway Council

Respondent
Represented by
Mr S Miller
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application for strike out in terms of rule 3(1)(a) of schedule 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused.

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This case will be listed for a further Stage 1 equal value hearing by CVP for one day to consider whether to determine the equal value question; or to require an independent expert to prepare a report; and related case management issues.

REASONS

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1. This preliminary hearing was listed to consider 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). This followed the decision of the Tribunal that the claim should not be struck out under rule 37 of the 2013 Rules, nor should a deposit be ordered as a condition of proceeding in terms of rule 39.

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2. This hearing was a stage one equal value hearing. The provisions of paragraph 3 of the equal value rules of procedure set out in schedule 3 of the 2013 rules relate to the conduct of a stage 1 equal value hearing. Paragraph 3(1) states that "where there is a dispute as to whether one person's work is of equal value to another's...the Tribunal shall conduct a hearing which shall

be referred to as a stage 1 equal value hearing and at that hearing shall strike out the claim (or the relevant part of it) if in accordance with section 131(6) of the Equality Act 2010 (EqA) the Tribunal must determine that the work of the claimant and the comparator are not of equal value”.

- 5 3. In this case the claimant and her comparator’s roles have not been rated as equivalent under a job evaluation scheme. The issue for determination by the Tribunal is whether the claimant’s claim should be struck out, as would normally be required where her role has not been rated as equivalent with that of her comparator, because the evaluation of her job and/or that of her
- 10 comparator is “otherwise unreliable” in terms of s.131 EqA.
4. This hearing was presided over by a judge sitting alone, in line with rule 12 of the 2013 rules, which states that there may be more than one stage 1 equal value hearing in any case. Rule 3(3) of schedule 2 states that, “any power conferred on an Employment Judge by Schedule 1 may (subject to the
- 15 provisions of this Schedule) in an equal value claim be carried out by a full tribunal or an Employment Judge”. Rule 55 of schedule 1 is headed “Constitution of tribunal for preliminary hearings” and states that “Preliminary hearings shall be conducted by an Employment Judge alone, except that where notice has been given that any preliminary issues are to be, or may be,
- 20 decided at the hearing a party may request in writing that the hearing be conducted by a full tribunal in which case an Employment Judge shall decide whether that would be desirable”. No such application was made and there was no objection to proceeding although it is understood it has been the practice for hearings on this question to be presided over by a full tribunal.
- 25 5. Prior to hearing evidence, the Tribunal dealt with an objection by the claimant to the respondent’s documents being lodged late. The claimant had lodged documents which had been copied by the respondent in the usual way, numbered in sections A to G of the volume of productions lodged. The respondent’s documents were available in sub-divider H of the file. The
- 30 respondent’s documents had been forwarded to the claimant on Friday 3 November 2023, rather than Monday 30 October 2023. Mr Miller explained that the delay lodging those documents was because the claimant had not

responded to requests for confirmation of the factors which she disputed. This meant that he had to defer interviewing witnesses, and this task was further delayed by the October holiday.

- 5 6. I allowed the respondent's documents to be accepted although late for the following reasons. I did not accept that the claimant would be prejudiced by their late lodging. The claimant had more than a week to consider the documents. I appreciate that she is not legally represented, but I decided that any potential prejudice could be addressed by giving the claimant more time if requested at appropriate junctures to consider the documents. Specifically, 10 I intended to allow her time to consider them after her evidence but before she was cross examined. It transpired that the claimant's evidence in chief concluded on the first day and she had further time to consider the documents. She was given an opportunity to give further evidence on the second day before she was cross examined and before the respondent's 15 witnesses gave evidence.
7. The Tribunal first heard evidence from the claimant as noted above. The claimant had produced a written version of her evidence, which although not treated as a formal witness statement, there being no objection from Mr Miller, she used as a framework for her oral evidence. The respondent then called 20 two witnesses, Ms McWhinney and Miss Lorna Taylor.
8. The evidence was concluded within three days, the hearing having originally been listed for six days. The hearing adjourned after the evidence to allow parties to prepare submissions to be heard on the last day listed, Monday 20 November 2023. Mr Miller helpfully agreed to provide an outline of his 25 submissions in writing to the claimant on Thursday 16 November 2023, which gave the claimant some time to consider them and prepare her own oral submissions for the Monday. She produced a written outline of her submissions which she passed to the Tribunal and Mr Miller, which she addressed in oral submissions, following Mr Miller's oral submissions.

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Findings in Fact

9. Based on the evidence heard and the documents lodged, the Tribunal makes the following relevant findings in fact.

Respondent's policies

- 5 10. Since the implementation of single status in 2009, the respondent has used the Scottish Joint Council for Local Government Employees Job Evaluation Scheme (B1). The relevant edition is the third edition, dated November 2015.
11. This sets out principles of job evaluation, including “evaluate jobs not people” and “assume acceptable performance of the job” (B6). This scheme uses 13 factors.
- 10 12. The respondent’s relevant Job Evaluation/Job Grading Review Policy was created in July 2014 (A1). This explains the procedure for the evaluation of a new job at section 2.
13. At section 3, it sets out the procedure for the “evaluation of existing post – request by manager” and at 3.1 the criteria to be met before an application for re-evaluation of an existing post can progress, which relate to the extent of changes in duties.
- 15 14. At 3.2 it sets out the documents which managers will be required to complete to provide the factual basis of the re-evaluation, namely: application for re-evaluation form – with signed agreement from employee where appropriate; job evaluation questionnaire completed by post holder in respect of the demands of the changed job; current job overview document (JOD) and factor level scores breakdown; current job description and person specification; proposed job description and person specification; current and proposed section/team organisational chart; and the signature and comment from the relevant head of service.
- 20 25 15. The evaluation will be undertaken by an assigned job analyst using the COSLA gauge “evaluator” software and a JOD will be produced. The JOD and evaluation agreement form will be sent to the requesting manager for comment and confirmation as to its factual accuracy and for discussion of any amendments.
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16. The manager is required to complete an evaluation agreement form normally within 5 working days of receipt of the above documentation. The team member will provide the final version of the JOD and confirm the grade of the job in writing with the head of service, relevant manager and appropriate HR contact. The post holder will be notified of the outcome of the process in writing normally within 5 working days of the receipt of the agreement form.
17. Section 4 is headed “evaluation of existing posts – request by employee” and states that individuals who believe that changes in their job content and responsibility fully meet the relevant criteria should discuss the changes with their line manager. If the line manager agrees the job has sufficiently changed, the process to be followed is that outlined in section 3 and the application will be led by the manager.
18. Section 4 states further that where the parties cannot reach agreement, the employee and the line manager must complete the relevant sections of the application for re-evaluation submission form and send the form to their head of service. Where the head of service agrees based on evidence presented that the job has sufficiently changed, the process to be followed is that set out in section 3 and is led by the head of service. If management does not agree, the head of service is to complete their part of the application for re-evaluation submission form and send it to HR. In such circumstances where there is no management agreement, “the submission will be entered into the appeals procedure for formal consideration”.
19. The appeal procedure is set out at section 5 which states applications will be considered as admissible to progress through to appeal if they meet one or more of the following grounds: factual inaccuracy in either the inputs or the outputs of the evaluation process; failure to apply the local job evaluation procedure; misapplication of the factor definitions, levels and guidance of the SCJE Scheme. Such submissions will be considered by the local job grading review panel (JGRP) “with no further right of appeal”.
20. The respondent has also produced local guidance, revised 2011 (H62- H86)

21. The claimant commenced employment with the respondent on 16 May 2005 as waste prevention officer in the department of planning and environment services. The role (reference 5/698) reported to Greig Blayney then principal officer waste policy (A156). At that time the role had no responsibilities for finance (A160).
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22. The claimant's duties evolved and in 2008 she became involved in the respondent's waste private finance initiative (Waste PFI), which was the single largest project being operated by that department. Her duties included the waste prevention programme and attending PFI project meetings, then chaired by her line manager, Mr Blayney.
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23. In April 2009, following the implementation of single status, the claimant's waste prevention officer role was graded at salary band 11. The claimant was issued with a new contract of employment (A127). Her line manager's post was created 11 July 2011 (A142), a job description prepared in September 2012 for the role of service manager environment (A141) and evaluated by the guage software on 7 June 2013 at band 15 (A142-A149).
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Changes to claimant's duties

24. The claimant's duties changed from around April 2012, when she was tasked with working on further duties associated with the Waste PFI project. In particular, by that time Mr Blayney had reduced his involvement in the administration of the PFI project and in participation in the operational meetings. The claimant increasingly undertook these roles, which included monthly invoice checking, landfill tax advance payments, RDF payments and insurance payments for the PFI project which she largely administered for the respondent.
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25. The claimant's duties were subsequently further increased to include involvement with other projects and working groups including the communication of the council's kerbside recycling services.

26. In 2016, a restructure exercise was undertaken by the respondent which impacted on the economy, environment and infrastructure (EEI) directorate where both the claimant and her line manager (Mr Blayney) then worked.

27. Prior to July 2016, Mr Blayney had reported along with the service manager infrastructure (James McLeod) to the head of infrastructure and transportation (Steven Herriot). These two posts were to be replaced by one person in the role of infrastructure manager, who was to manage the PFI contract. This post was matched to Mr McLeod. The new structure chart showed that Mr Blayney no longer reported directly to Mr Herriot but was to report to Mr McLeod (D2). Although on paper Mr McLeod managed the PFI contract in practice he was not involved.

28. In September 2016, the claimant was appointed, along with Mr Blayney, as the council's representative on the Waste PFI contract (D34). This meant that she could have formal discussions with all the PFI partners and issue and sign off formal contract correspondence. Prior to that, she had to arrange for Mr Speedie or Mr Herriot to sign it off in Mr Blayney's frequent absences. The duties associated with that contract were increasingly undertaken by the claimant, and the contribution of Mr Blayney decreased.

29. From around this time, the claimant was reporting directly to Mr Herriot and to Alastair Speedie, director of the EEI directorate (see D45/46).

Application for re-evaluation

30. Because of these changes to her role, there having been no manager led proposal for re-evaluation, on 29 May 2017, the claimant made an application for a re-evaluation of her role by completing the application for re-evaluation form (A10 to A41). The claimant confirmed that she would attend an appeal hearing to present her own case. The claimant's line manager, Mr Blayney, confirmed that he was in agreement with the application for re-evaluation.

31. Under factor head 10, responsibility for financial resources, the form stated that "the employee has been responsible since 2012 for ensuring that the £12 million (16/17 figures) annual spend on the PFI is properly managed and accounted for throughout the year..."

32. This application was supported by the head of service (Mr Herriot) and signed by him on 30 May 2017, who completed the comments section as follows (A17): “I am fully supportive of Moira’s application for re-evaluation and acknowledge that her role has changed significantly in recent years with the development of the Waste PFI contract. This has led to her increased role in contract management and financial responsibility associated with her new formal role under the contract as Contract Representative. I am in agreement with the comprehensive statements made by Moira that reflect the scope for the work and the level of responsibility in the post. I have discussed this re-evaluation with the Director who has also confirmed his strong support for the post to be re-evaluated to reflect the current increased and significant responsibilities of the post”.
33. This support from the head of service meant that the claimant’s initial application for re-grading was no longer to be dealt with under the “employee-led” procedure (section 4) but to be dealt with as a “manager led” evaluation (section 3). This meant in particular that the claimant’s right to have an appeal hearing if she was not in agreement with the outcome of the re-evaluation was removed. It also meant that her line manager had to produce a proposed job description and person specification.
34. On 31 May 2017, the claimant’s line manager Mr Blayney e-mailed the claimant on the subject of job re-evaluation, copying in Mr McLeod, Mr Herriot and Mr Speedie. He attached a re-evaluation form signed by himself and the head of service, and an updated job description and person specification for the change in role under the working title of environment officer. He stated that “I have accepted your changes to these other than management of the PFI budget which is my responsibility and the management of staff because you have no direct reports but I have confirmed in the evaluation that you previously had a member of staff for a temporary period for the purpose of backdating. I have changed the wording of Waste PFI contract management to ‘areas of responsibility’ because other staff have varying levels of management and monitoring responsibilities for different areas of the contract. If you could provide the JE I will submit this for you later today to allow HR to consider the banding” (A97).

35. The job description for the proposed environment officer post (band 12 with a JE reference U384 and a ref number 5/698) which Mr Blayney prepared included under job activities the entry “ensure that the very large annual waste PFI contract budget, with a spend in excess of £10 million is controlled and managed” (A54-55).
36. The claimant did not believe that what was produced by Mr Blayney accurately reflected her job, duties or responsibilities. She e-mailed Mr Herriot stating that she believed that what was proposed continued to undermine the work she did on the PFI project.
37. That e-mail continued: “To put on the structure chart that I do “PFI invoices/reconciliations” is an insult. Removing budget responsibility does not reflect the work I do with the payments throughout the year, since I am the one who does all the invoicing and monitoring for them, and you approve the majority of them so I’m not quite clear where Greig’s role in budget management is in that. Continuing to work in the current environment with Greig will not be good for my health. The attached diary extract shows Grieg’s availability on the days that he is here this week and next week, and these are typical weeks: private appointments between 12-2 pm and private appointments from 3 pm onwards. Therefore, if needed I am deputising (or receiving his calls) for nearly half the week. During normal 9 am – 5 pm working hours he is not here to manage the PFI contract for half the week (E4). Please can you have a look at this response from Greig. He is clearly not in agreement with the detail I wrote in my sections of the evaluation form. If that is the case, this needs to be reflected when the papers go to HR and I wish to have a copy of those papers when they are sent....”
38. Mr Herriot replied on 31 May 2017, advising that he would review the conflict with Mr McLeod (E4). On 1 June 2017, the claimant advised of items of dispute for them to take into account, relating in particular to employee and budget responsibilities.
39. On 5 June 2017, the application was submitted to HR by Mr McLeod. Carol Armstrong (HR) advised that the job evaluation questionnaire was missing

and asked for it to be returned by 9 June 2017. That document was required for a manager led re-evaluation.

40. On 9 June 2017, Mr Blayney sent job evaluation documents to HR stating that he very much supported the re-evaluation due to the change in duties. He attached a completed job evaluation questionnaire (JEQ) (E7). According to procedure, the JEQ document should have been completed by the claimant.
41. On 9 June 2017 Mr McLeod advised the claimant that the JEQ and other edited documents were submitted by Mr Blayney without any consultation with him, and that he had asked HR to ignore his e-mail and that the claimant would be sending in the JEQ. He apologised “for any confusion or distress this may have caused” (E7). Later that day, the claimant forwarded the JEQ to HR and Mr McLeod (E9).
42. On 20 July 2017 Mr McLeod called the claimant to advise that Lorna Taylor, the appointed job analyst, was due to write a report to recommend regrading to band 12 backdated to an appropriate date. Immediately after the call the claimant contacted Mr Speedie to express concern that those involved were not fully aware of her duties and responsibilities and in particular her financial responsibilities.
43. On 27 July 2017, in accordance with the procedure, Gordon Halliday, trade union representative and a trained job analyst, signed off the proposed re-evaluation having considered factors and compared previous, current and new jobs in the directorate (H95).
44. A JGR consistency meeting took place in the week prior to 14 August 2017. On 14 August 2017, Miss Taylor contacted Mr McLeod to seek clarification regarding a query which had been raised at that meeting regarding factor 10 about the claimant’s involvement in finance given she was not a budget holder. Later that day, following a telephone discussion with Mr McLeod, she asked whether the claimant best fits the category of “processing” ...or “accounting for” in regard to her involvement with financial budgets, and the relevant financial category (A43).

45. This is because the scheme distinguishes accounting for/auditing financial resources, (with definitions for small, considerable, large (which refers to amounts of £5m - £10 m per year); and very large (amounts of more than £10m per year)) from “budgetary responsibility” (which defines small, considerable, large (over £500,000 and up to £2.5m), very large (over £2.5m and up to £10 m) and extremely large (over £10 million)).
46. On 16 August 2017, Mr McLeod replied stating “Steven and I have discussed this. We think that Moria best fits the category of ‘accounting for’ and given the monthly invoice amounts that she monitors, audits, explains etc of £750K/month this would place that in the Large (£5-10M category). The review has thrown up the anomaly that Moira has the same authority under the waste PFI contract as Greig Blayney in that they are both Contract Representative. This may mean we need to revisit Moira’s responsibility for the budget” (A43).
47. On 16 August 2017, the job overview document produced by the gauge software for environment officer, post reference U384, and stated as created 22 February 2005 and last modified 16 August 2017 set out a summary of what is required for the job under the 13 factor headings (A 49).
48. Under responsibility for financial resources it stated that “the jobholder has indirect responsibility for financial resources...which is predominantly accounting for or auditingand the amounts involved are large, i.e. as per local definition” (A51). Responsibility for financial resources was stated to be level 3.
49. The factor levels listing also included the following levels: communication skills – 6; dealing with relationships – 1; responsibility for employees – 2; responsibility for services to others – 5; knowledge – 6 (A53).
50. By e-mail dated 30 August 2017 (A42), Miss Taylor asked Mr McLeod for written evidence to support the effective dates of change for: responsibility to employees – allocation of work to admin/clerical; responsibility for finance – accounting for a large budget; and knowledge – requirement of degree in

specific discipline and knowledge of the external environment and more than 5 years' experience required.

51. By e-mail dated 23 October 2017, the claimant was advised of the outcome of the job evaluation process. She was advised of a new job title (environment officer), new salary band (12) and new job evaluation reference (U384). The finalised job description and person specification, the job overview document, and the factor level listing report were attached. She was advised that the new salary band was with effect from 16 September 2017 backdated to 17 April 2012. That letter concluded, "Please note, this decision is final and you have no further right of appeal" (A47).
52. On 23 October 2017, the claimant contacted Miss Taylor to express concerns about the outcome and she was asked to contact Mr McLeod.
53. On 30 October 2017, the claimant received amended statement of conditions seeking a signed acceptance letter (G30). The claimant did not return that acceptance letter.
54. On 16 November 2017, the claimant wrote to Mr Speedie (A100 to A102) to advise that she believed the evaluation to be incorrect and asked him to "please treat this letter as a grievance or appeal against the process and the outcome."
55. Without further consultation with the claimant, but following intervention by Mr Speedie, a further job overview was created for the environment officer post on 23 January 2018 (A106). In that document (A109) under responsibility for financial resources, the reference to the amounts was "very large". In an summary document, under responsibility for financial resources (H97) then awarded level 4, it is stated "indirect, accounting for, very large, NB initial evaluation – large budget but changed following confirmation with AS". That change of level did not however change the band, which remained band 12.
56. Without further consultation with the claimant, in April 2018, Mr Herriot prepared a job description for the job of waste management strategy manager (WMSM), JE ref U384, ref no 5/698. That job description stated that the job holder was responsible to the head of infrastructure and transportation and

director EEI. Under job activities, that included the entry at point 13 as follows:
“ensure that the very large annual Waste Management contract budget, with
a spend in excess of £10 million, is controlled and managed”. A job overview
was produced using the guage software for that role, post number U384,
5 reference A9142, with date created 22 February 2005 and date last modified
31 May 2018 (A114).

57. In a summary document of the levels achieved for the post of WMSM these
included the following: responsibility for financial resources – 4;
communication skills – 6; dealing with relationships – 1; responsibility for
10 employees – 2; responsibility for services to others – 5; knowledge – 6. Only
the factor for mental skills increased from level 5 achieved by the environment
officer post to level 6. That change however meant that this re-evaluated post
resulted in band 13.

58. On 20 June 2018, John MacEachern, solicitor for the council, wrote to the
15 claimant’s then solicitor as follows (D39): “I am pleased to confirm that the
result of your client’s latest job re-evaluation has resulted in a Band 13
placement with a commencement date of 16 January 2017. I attach job
description for your information. I look forward to receiving confirmation that
this re-evaluation is acceptable to your client and that her ET application will
20 be withdrawn. In closing I have noted that, despite my requests, your client
has not chosen, to date, to specify the precise grievance(s) that she wishes
the Council to action. Accordingly I am hopeful, albeit it may prove to be the
case that my optimism is misplaced, that her ET claim can be settled she will
wish to withdraw her grievance(s). I also await hearing from you in that
25 regard”. The job description prepared by Mr Herriot in April 2018 was
enclosed.

59. On 19 December 2018, the claimant submitted a second grievance to Mr
Speedie, complaining that her grievance of 16 November 2017 had not been
addressed (G11). The claimant has to date not received the outcome of either
30 of these grievances.

Tribunal observations on the evidence and the witnesses

60. The Tribunal heard evidence from the claimant who gave her evidence in a straightforward manner.

5 61. The Tribunal also heard evidence from Mrs McWhinney who has been employed by the respondent since 2009 and now works in HR support. She is a trained job analyst and she worked on implementing the job evaluation scheme until 2021, and advised that she has assisted in the preparation of this case as a trained job analyst. She was able to talk about the application of the scheme and the procedure to be followed generally. She was not
10 however involved in the re-evaluations which are the subject of this claim, although she has extensive experience in re-evaluating jobs.

15 62. The Tribunal heard from Miss L Taylor who had undertaken the evaluation of the post which became environment officer. She could not recall whether she was involved in the evaluation of the waste management strategy manager post. It would appear however, given the dates when she left the employment of the council, which was June 2018 after a period of annual leave, that it was more likely that she was not involved. However, and in any event, Miss Taylor could remember very little of the job evaluation which she had undertaken, and indeed could apparently remember very little of how the scheme operated
20 at all, given that it is over five years since she has worked for the respondent. For these reasons, the Tribunal found her evidence to be unreliable and of little assistance in answering the question to be determined.

Relevant law and parties' submissions

25 63. Section 131 EqA applies "where a question arises in the proceedings as to whether the work on one person (A) is of equal value to the work of another (B) and A's work and B's work have been given different values by a job evaluation study" then "the tribunal must determine that A's work is not of equal value to B's work unless it has reasonable grounds for suspecting that the evaluation contained in the study (a) was based on a system that
30 discriminates because of sex or (b) is otherwise unreliable" (s.131(5) and (6)).

64. The claimant in this case does not argue that the job evaluation study discriminates because of sex, but she does argue that the evaluation contained in the study is “otherwise unreliable”.

5 65. It was apparent that there was no dispute about the relevant law. The claimant accepts that the onus of proof rests on her. That burden however must not be set too high nor too low, as Mr Miller submitted, using the analogy of a “Goldilocks” standard. Mr Miller submitted that there has to be a colourable distinction or step change between entertaining a suspicion and having reasonable grounds for entertaining a suspicion.

10 66. Mr Miller in submissions made reference to a number of the decisions of the employment tribunal, in *Hartley and others v Northumbria Healthcare NHS Foundation Trust*, *Brady and others v North Lanarkshire Council* (4101149/2016), *Allan and others v Fife Council* (4102824/2016), as well as the EAT in *Middlesbrough Council v Surtees and others* (No.2) 2007 IRLR 981 and *MacDonald and others v Glasgow City Council* UKEATS/0008/14.

15 67. Of particular relevance however, it being a decision of the Inner House, is the case of *Armstrong and others v Glasgow City Council* 2017 IRLR 993. Mr Miller relied on dicta of Lord Menzies which he quoted at some length but the key passages appear to be as follows:

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- “It was accepted that the onus in this regard was on the claimants to raise this issue, but it was for the tribunal to assess whether it had reasonable grounds for suspecting that the evaluation was unsuitable to be relied on. There is no requirement for ‘cogent evidence’ to show that the evaluation is definitely unsuitable to be relied upon – all that the tribunal requires is reasonable grounds to suspect this” [22].
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- “...what is required is sufficient evidence before the ET to raise such a reasonable suspicion” [58].
 - “the claimants are entitled to point to all the circumstances as disclosed in the evidence, from whatever source, and to argue that this gives rise to reasonable grounds for suspicion” [60].
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68. The burden of proof is thus on the claimant, but it is not a high one. I readily accepted Mr Miller's submission about the distinction between a suspicion and reasonable grounds for suspicion, that is the latter must be supported by evidence.

5 69. It is clear however from the dicta of Lord Menzies that the claimant does not require to show that the scheme is unreliable on the balance of probabilities, rather simply that there is some evidence, that is reasonable grounds, to support suspicions that the scheme is unreliable.

10 70. Mr Miller submitted that when the Tribunal in this case retires to consider the circumstances as disclosed in the evidence it will find nothing which might amount to reasonable grounds. The claimant submitted in contrast that when all the material before it is considered and matters which the claimant has pointed to are taken into account and considered cumulatively, the Tribunal will have reasonable grounds for suspecting that the respondent's job
15 evaluation study is otherwise unreliable.

Tribunal deliberations and decision

71. This case is about a challenge by the claimant to the way that her job role was evaluated using the council's job evaluation scheme. There was a disagreement about one issue which was relevant to the question to be
20 determined in regard to the challenge. The claimant had commenced employment as a waste prevention officer, and she insisted that was still her role. This was despite the fact that job had been re-evaluated in 2017 and the title changed to environment officer; and subsequently there had been what has been termed a re-evaluation and the job title changed again to waste
25 management strategy manager in 2018. The claimant did not accept the outcome of either re-evaluation but she argued that she was challenging both the evaluation of the job titled environment officer and the evaluation of the job titled waste management strategy manager.

30 72. Mr Miller's position was that she could only challenge the job that she was doing, which, by accepting a pay rise and backpay, was the environment officer role. Given she had refused to accept the waste management strategy

manager post either as a re-evaluation or a promotion (as it has also been described in these proceedings), the correct focus he submitted was on the challenge to the environment officer evaluation. Mr Miller also pointed out that was the only challenge, because the claimant was not challenging her comparator's evaluation.

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73. I agreed with Mr Miller that the claimant could only challenge the job which she was undertaking, and I agreed with him that the job evaluation being challenged was the environment officer role, which the claimant had accepted through her actions of accepting the salary and backpay. That is not however to say that I was of the view that the evidence relating to the WMSM role was irrelevant, as discussed later.

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74. The challenges to the evaluation of the claimant's role can be categorised in two ways. One was challenges to the process and procedure and the other was the job factor analysis and evaluation itself. Given Lord Menzies' conclusion that account could be taken of all the circumstances as disclosed by the evidence from whatever source, the challenges to the process and procedure could not be discounted. However the focus must be on the question whether the evaluation itself was unreliable. To a large extent there is an overlap, but some of the claimant's arguments were purely about the procedure which could not be said necessarily to impact on the evaluation of her job.

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75. Mr Miller understandably focused on the factor levels. In particular, he relied on the fact that the claimant did not challenge the evidence of the job analyst on level choices when she input the relevant job facts. I took account however of the fact that the claimant was representing herself. While I accept that the claimant did not cross examine Miss Taylor to any extent on the level choices based on the facts which she input, I deal with this as a question of weight. As noted above, I have adjudged Miss Taylor's evidence in any event to be unreliable, largely because she had a very poor recall of this evaluation, none of the WMSM role, and indeed little of the application of the scheme.

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The procedural aspects

- 5 76. The claimant relied in particular on the fact that there was no right to appeal the outcome of the evaluation, which she argued was required by the SJC job evaluation scheme, the ACAS code and the Council's own Job Evaluation Policy. This she argued deprived her of the right to challenge inaccuracies in substance and procedure. She argued that the respondent had treated the evaluation stage as the appeal stage which was a serious flaw.
- 10 77. I did note that the appeal procedure would have permitted the claimant to have challenged any failure to apply the local job evaluation procedure and I can understand the claimant's concerns about the absence of an appeal. Indeed, it may well be as she suggested that had she been entitled to appeal this matter would not have reached this stage. I understood from Mrs McWhinney's evidence that the respondent has now introduced such a right in similar circumstances. However, I took the view that the claimant's
- 15 complaint about the absence of an appeal could not be said, of itself, to indicate that the evaluation was unreliable.
78. Further the claimant complained that all of the guidance about the scheme was not available to employees, but again that would not be sufficient to raise suspicions about the reliability of the evaluation itself.
- 20 79. The claimant also raised general concerns about the lack of transparency in the way that the evaluation was undertaken. Again, I could not agree that a lack of transparency in itself was sufficient to support a conclusion that the evaluation in this case was unreliable. Mr Miller argued that "transparency as it is generally understood has little role to play in the resolution of this dispute.
- 25 In fact, there can be a virtue in secrecy in job evaluation: employees and managers should provide open and honest answers to the ingredients of each job and that objective can be defeated if individuals are privy to scheme definitions. The respondent compensates for this with its collaboration with trained trade union partners who can be expected to and do monitor
- 30 evaluations and re-evaluations for fairness and consistency".

80. While there may well be a potential virtue in secrecy in job evaluation, Mr Miller agreed that we should at this stage looking back to be able to see how decisions had been reached.
81. The claimant complained about particular irregularities in the procedure adopted to support her submission about lack of transparency. In particular, she references the period between August and October 2017 when changes were made to documentation and specifically to the responsibility for financial resources information supplied by Mr Speedie without the claimant's knowledge and the claimant was not sent job overview documents for sign off after changes were made. Further, the trade union representative was not involved in reviewing the documentation after changes to the job facts were made and the involvement of Mr McLeod and Mr Blayney, which was outwith procedure, hindered the proper evaluation of her post.
82. Although I accept that changes were made without the claimant or indeed the trade union representative being aware, and that there were procedural irregularities, again irregularities might not in themselves indicate that the evaluation itself was unreliable. However, the claimant's position was that as a result of these irregularities the evaluation was based on inaccurate facts. It is self-evident that if the wrong facts about a job are input, then one could not be confident that the outputs were accurate. Indeed, factual inaccuracy in inputs or outputs in the evaluation process is stated to justify an appeal.
83. The claimant relied in particular on the fact that a manager who was not familiar with her work or duties was consulted about the details of the job. Mr McLeod was consulted by the job analyst but was not certain of what her job involved. He used statements such as "we think" and changed his mind, for example in relation to the budget, specifically changing "authorising and monitoring" a budget from £2.5 m - £10m to "accounting for" a budget of £5-10m, neither of which the claimant believed to be correct. Further, the claimant relied on the reference to responsibilities for employees, shown as "allocation of work to admin/clerical", yet they were all technical staff who were listed on the application for re-evaluation form.

84. The claimant also argued that there was a deliberate underplaying of her job duties which indicated improper motive on the part of the respondent. In particular, her line manager made adjustments to her job role after her application had been approved by the head of service and he completed the job evaluation questionnaire which should have been completed by her.
85. The claimant argued that the background regarding the 2016 restructure contributed to the appearance of improper motive on the part of the respondent. In particular, she argued that scores were manipulated and the job evaluation undermined to avoid questions being raised as to how a member of staff went from having no financial responsibility to managing a £12m budget; and why the infrastructure manager and service manager environment, both with the Waste PFI project in their job description, were not undertaking this work.
86. She implies that this related to an attempt to cover up the fact that she was effectively doing her line manager's job. In particular, there was evidence that he was absent a good proportion of each week. While there may well have been a valid explanation for that, the Tribunal heard no evidence about the reason for her line manager's extensive daily absences. The claimant may well have been suspicious about why the evaluation was undertaken the way that it was, but there was no evidence to support a conclusion that this was based on improper motive.
87. I accept however that the evidence does indicate that changes were made to the scope of her job duties during the process and after her involvement and that of the trade union. It is apparent at least that there was a lack of certainty about the scope of her duties, which the claimant had no opportunity to influence. This does tend to indicate misgivings about whether the facts upon which the evaluation was based were after all accurate. These irregularities and the way that the evaluation was handled in this regard means that neither the claimant, nor the Tribunal, could not be confident about the facts upon which the evaluation was based.

Factor challenges

88. Turning to the challenges to factor levels, the Tribunal heard evidence in particular about the claimant's concerns about the factor which related to responsibility for finance. Specifically, the original application for re-grading, completed May 2017 by the claimant, under responsibility for financial resources, stated that "the employee has been responsible since 2012 for ensuring that the £12 million (16/17 figures) annual spend on the PFI is properly managed and accounted for throughout the year.....". That was supported by the head of service, who signed off the application and specifically stated that he was in agreement with the comprehensive statements made by the claimant.
89. The job description for the proposed environment officer post which was prepared by the claimant's line manager, included the entry "ensure that the very large annual waste PFI contract budget, with a spend in excess of £10 million is controlled and managed".
90. Further information was subsequently provided by Mr McLeod in consultation with Mr Herriot, who suggested the role "accounted for" a "large" budget. The claimant in submissions took issue with the fact that neither Mr McLeod nor Mr Herriot knew the detail of the job she undertook and at the use of language "we think", but also at their categorisation of "large" which she said was inaccurate. I have made findings in fact that, following an enquiry of Mr McLeod by HR in June, his reply about the scope of her financial duties included an element of doubt, referenced an "anomaly" and suggested that her responsibility for the budget may need to be revisited.
91. Notwithstanding these apparent reservations and different conclusions, without further recourse to the claimant, as at 16 August 2017, "responsibility for financial resources" was evaluated at level 3.
92. Subsequently, in or around January 2018, following unspecified intervention from Mr Speedie, the level was increased to 4. The claimant took issue with the fact that the change in the score for this factor was done without her knowledge and she was not notified of this change. She pointed out that the job descriptions refer to managing a budget over £10 million but this is not

reflected in the JOD. The claimant argued that given the very significant feature of validating spend from such a budget, and reconciliations and the long term nature of these, the claimant argues that the demands, effort and skills required in the role in this regard were not fully understood or recognised. Mr Miller submitted that the evidence from the claimant was sufficient to persuade the analyst to allocate level 4 instead of level 3, but that she could not however in her evidence show any grounds which would have justified level 5.

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93. The fact that the claimant could not produce evidence at this hearing to justify level five was beside the point. The question is whether there is evidence to raise a suspicion that the evaluation is unreliable. The evidence indicates that there is at the very least a lack of clarity about how the factor definitions were interpreted in this case. The evidence also confirms that the claimant's misgivings about Mr McLeod's input that she accounted for a large budget were not misplaced, given Mr Speedie changed that to "very large".

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94. This is coupled with the failings in regard to procedure described above. Whether that is because of some improper motive, in regard to not showing up differences between what the claimant was doing and what her managers were doing, or some other innocent explanation, the fact is that the vacillation and lack of certainty about the scope of the claimant's job duties to result in the level determined cast doubt on how this factor was interpreted.

95. I concluded that the evidence which cast doubt on whether this factor had been properly evaluated was sufficient to raise a suspicion about the reliability of the evaluation.

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96. The claimant had concerns about other factors which Mr Miller addressed in submissions, and in particular:

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- (i) Communication: the claimant argued that formal advocacy skills was not recognised in the JOD. Mr Miller pointed out that as the EO job attracted the highest level score for this factor this challenge must fail.
 - (ii) Dealing with relationships: the claimant argued that the evaluation did not recognise the demands placed on her in relation to dealing with relationships. The local guidance refers to contract variations as being

a “substantial” demand. Since she was placed at level one, and given all employees placed at least at level 1, she argued that this does not reflect the demands of dealing with relationships in a disputed Waste PFI contract, its termination and beyond. Mr Miller pointed out that the claimant accepted that her time estimates had included pre-meeting planning in the proportion of time she estimated for dealing with difficult people.

(iii) Responsibility for employees: the claimant pointed out that her line manager (her comparator) was out of the office 12-2 pm and 3 pm onwards each day, which is a substantial portion of the 9-5 working week. Mr Miller argued that to succeed on this factor the claimant would have to challenge successfully the JES protocol that tasks carried out while deputising do not count. She did not attempt the challenge.

(iv) Responsibility for services to others: the claimant relied on the fact that she had a more senior reporting line than the comparator (to the head of service and director) from 2017. The claimant attended external meetings (such as the PFI service delivery meeting, as well as the local government benchmark meetings) but she argued these are not recognised in the JOD. Mr Miller pointed out that the distinction between the claimant’s level 5 score for this and the comparator’s level 6 is that the comparator was the lead.

(v) Knowledge: the claimant relied on that fact that she chaired the PFI service delivery meetings which is an external working group, as well as attending other meetings such as with legal advisers, financial advisers and so on, and the LGBF meetings. The level of knowledge required for the role, including a post graduate qualification in contract management has not been acknowledged in the JOD. Mr Miller argued that once again the claimant was relying on a task (in this case participating in an external working group) which she carried out as her manager’s deputy.

97. The claimant’s concerns reflect the fact that she believes it was assumed others who had the PFI responsibilities written into their job descriptions were

undertaking duties that she was in fact undertaking, and that she was not recognised through the JES for the actual work she was doing.

- 5 98. The focus of Mr Miller's submissions in regard to these other factors which the claimant challenged was therefore that these were factors where she deputised for managers in respect of which points would not be awarded under the scheme.
- 10 99. Miss Taylor was clear in her evidence that tasks undertaken while deputising for managers would not be taken into account. As I understood it, Mr Miller's submission was that this would relate to the design of the scheme itself, and that was not something which the claimant was challenging.
- 15 100. That may well be right, however in this case there are two aspects to which it seemed would mean that the job role would potentially be relevant for an assessment of "effort, skill and decision". First, there was evidence that the claimant required to deputise for a significant amount of time during each week while her line manager was absent, and second the claimant's responsibilities increased to a more senior level when she deputised for the head of service and director, rather than for the service manager environment. It seemed to me that there was at least a lack of clarity about how these factors would be accounted for in an individual evaluation leaving aside
20 personal performance, given their significance in terms of time spent and level of responsibility undertaken, and the lack of certainty about what duties were being undertaken by the claimant's managers.
- 25 101. Whether or not it is correct to conclude that the claimant was deputising, and such duties were principally being undertaken by her managers, the lack of clarity and transparency in the way that the responsibility for financial resources was evaluated meant that I could not be confident that there was no substance to the misgivings expressed by the claimant about whether her duties were fully reflected in the evaluation of her role and in the factor levels identified.
- 30 102. In any event, I was of the view that concerns about how financial responsibilities had been evaluated was in itself sufficient evidence to support

the conclusion that there was reasonable grounds to suspect that that the evaluation of the environment officer post was unsuitable to be relied on, that is that it was “otherwise unreliable”.

WMSM post issues

- 5 103. I have decided that the focus must be on challenges to the evaluation of the environment officer post. However, I heard evidence about the WMSM evaluation which I considered to be highly relevant to the question I was to determine.
- 10 104. The claimant relied on the fact that the respondent produced two pay bands covering the same period, the overlap being between 16 January 2017 and October 2017. Specifically, the respondent stated in the email on 20 June 2018 that the “re-evaluation” which was for the claimant’s job, had a commencement date of some 18 months previous, to 16 January 2017. The claimant had already, according to the head of service, been undertaking that role between 2012 and October 2017.
- 15 105. The claimant stressed throughout the hearing that the evaluations all related to the same post, relying on the fact that the U384 “unique” post number referred to by Miss Taylor had been used for the WPO, EO and WMSM posts. She argued that rather than being “unique” the two evaluations (EO and WMSM) had all been updated on guage against the claimant’s post which she took when she commenced employment in 2005; and rather than the WMSM being a new post or a promotion, it was a re-evaluation of the claimant’s post with input from management only.
- 20 106. Mr Miller submitted that the WMSM post was offered in an attempt to end the litigation but not accepted. The claimant relied on the fact that Miss Taylor stated in evidence that this was the result of a restructure which she said happened just before she left in June 2018. I concluded that Miss Taylor must have been mistaken about that.
- 25 107. Mr Miller submitted that the e-mail correspondence sent from the council’s solicitor was a “without prejudice” offer. He pointed out that the fact that the
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e-mail did not contain the words “without prejudice” did not mean that it was not otherwise a privileged communication.

108. I had no difficulty accepting Mr Miller’s argument about the significance of the absence of the words “without prejudice”. However, even if the e-mail had included the words “without prejudice”, I would not have accepted the respondent’s submission that the e-mail simply contained an offer which could be accepted or otherwise not relied on, for the following reasons.
109. I took the view, based on the wording of the e-mail, but also the respondent’s subsequent actions in the course of this litigation, that these were not negotiating proposals, but rather confirmation that a further evaluation (called a re-evaluation) had been undertaken and resulted in a different outcome.
110. The e-mail confirmed that position, specifically, “I am pleased to confirm that the result of your client’s latest job re-evaluation has resulted in a Band 13 placement with a commencement date of 16 January 2017” and a job description was attached.
111. The e-mail was presented as confirmation of the outcome of the re-evaluation, the information in it presented as a clear and unequivocal admission or statement of fact. It was not in any way a hypothetical admission or concession for settlement purposes. It must, given the terms of the e-mail, constitute an admission that the claimant’s job role was at that time evaluated at band 13, that is one band above that which the same scheme had evaluated the claimant’s role of environment officer, namely band 12.
112. While that e-mail also stated, “I look forward to receiving confirmation that this re-evaluation is acceptable to your client and that her ET application will be withdrawn”, it is not stated to be without prejudice or to be an offer that might be the start of negotiations or be withdrawn if the ET application was not itself withdrawn.
113. Although I accept that it is not conclusive, the fact that the words without prejudice do not appear do tend to support the conclusion that this was not a settlement offer. But also the respondent’s actions in the course of this litigation do not support the suggestion that this was an offer made to end

litigation. In particular, there is no suggestion in the like work judgment to which I was referred of that being an offer in settlement. Rather it was presented as a “promotion” which was a particular cause for concern for the claimant.

- 5 114. This, if nothing else, supports the conclusion that the evaluation conducted by the respondent of the claimant’s environment officer post was unreliable. The clearest evidence of that was the fact that there was an overlap in the time frame of the evaluations. Specifically there were two evaluations, given different scores, levels and bands, for the period from January to October 10 2017. The re-evaluated post of WMSM in 2018, confirmed that it was to be backdated to January 2017. Miss Taylor’s evidence was that the conclusion about the starting date for the re-evaluation would be from the claimant’s managers. The claimant was however advised of the outcome of the original re-evaluation of the post of environment officer in October 2017 (with that 15 evaluation backdated to 2012). It cannot be the case if the job evaluation scheme was suitable to be relied on that it would result in two different scores for the same period of time from January to October 2017.

Conclusion

115. I therefore refuse the respondent’s application for strike out in terms of rule 20 3(1)(a) of schedule 3 of the 2013 Rules.
116. This case will now be listed for a further Stage 1 equal value hearing to consider whether the Tribunal can determine the equal value question or whether to require an independent expert to prepare a report.

M Robison

Employment Judge

17 January 2024

Date

19 January 2024

Date sent to parties