EMPLOYMENT TRIBUNALS

Claimant: Mrs Yvonne Slaven

Respondent: University Hospitals of South Manchester NHS Foundation Trust

Heard at: Manchester Employment Tribunal

On: 12, 13, 16, 17 and 31 October 2023 and 1 November 2023 (in chambers)

Before: Employment Judge G Tobin
Mr A Clarke
Mr S Carter

Representation:
Claimant: Mr S A Brochwicz-Lewinski (Counsel)
Respondent: Mr J Boyd (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is that the claimant did not undertake work of equal value when compared against her comparators, Mr N Clayton and Mr J Corder.

REASONS

Proceedings

1. The case proceeded as a Stage 3 equal value hearing to consider the report of the independent expert.

The hearing

2. The Employment Tribunal considered a joint Stage 3 hearing bundle consisting of 796 pages. We (i.e. the Tribunal) heard evidence from the ACAS appointed independent expert, Mr A S Flather, who provided a detailed report of 298 pages, including appendices. The hearing bundle also included Mr Flather's responses to questions from the claimant amounting to 21 pages.

3. We heard evidence from Mr Flather on day-3 of the hearing. Mr Flather had suffered from some health problem, and prior to the hearing it was resolved (by another Employment Judge) to proceed in his absence. The parties and Mr Brochwicz-Lewinski, in particular, said that they were in difficulties by Mr Flather's non-attendance. With the permission of both representatives the Employment Judge telephoned Mr Flather who said that he was able, and content, to participate in the hearing remotely, i.e. by video conference through HM Courts & Tribunal Service Cloud Video Platform. We are grateful to Mr Flather for assisting the Employment Tribunal in giving "live" evidence.

4. Mr Flather was cross-examined by both Mr Brochwicz-Lewinski and Mr Boyd and the Tribunal asked relevant questions. That part of the hearing proceeded on a wholly remote basis, and we are satisfied that Mr Flather's remote attendance did not impede the quality of his evidence. He had access to the hearing bundle and regular breaks were accommodated. Neither the witness nor the parties reported any difficulties. All other parts of the hearing proceeded with the attendance of all parties and their representatives in person at the Employment Tribunal hearing centre.

Witness evidence

5. No other witnesses were called, save as Mr Flather. The independent expert gave direct answers to the questions he was asked. His responses were clear and helpful. We regarded Mr Flather as a clear and compelling witness. Mr Brochwicz-Lewinski's contention was that the independent expert's report was flawed because of his methodology.

The law

6. The key relevant statutory provision is contained in s65 of the Equality Act 2010 ("EqA"):

> **Equal Work**
> (1) For the purposes of this Chapter, A's work is equal to that of B if it is –
> (a) like B's work,
> (b) rated as equivalent to B's work, or
> (c) of equal value to B's work.

7. The statutory provision goes on to say:

> (6) A's work is of equal value to B's work if it is –
> (a) neither like B's work nor rated as equivalent to B's work, but
> (b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision making.

8. The burden of proof in an equal value claim rests on the claimant: *Nelson v Carillion Services Limited [2003] IRLR 428.*

9. We note that the statutory language refers to "demands made" on the claimant and her comparator by reference to "factors such as effort, skill and decision making". So s131 EqA provides:

Assessment of whether work is of equal value

(1) This section applies to proceedings before an employment tribunal on –
  (a) a complaint relating to a breach of an equality clause or rule, or
  (b) a question referred to the tribunal by virtue of section 128(2).

(2) Where a question arises in the proceedings as to whether one person's work is of equal value to another's, the tribunal may, before determining the question, require a member of the panel of independent experts to prepare a report on the question.

(3) The Tribunal may withdraw a requirement that it makes under subsection (2); and, if it does so, it may –
  (a) request a panel member to provide it with specified documentation;
  (b) make some other request to that member as are connected with the withdrawal of the requirement.

(4) If the Tribunal requires the preparation of a report under subsection (2) (and does not withdraw the requirement), it must not determine the question unless it has received a report..

…

10. The Employment Tribunal (Equal Value) Rules of Procedure, Schedule 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Equal Value Rules") state as follows:

Application of Schedule 3

1. – (1) This schedule applies to proceedings involving an equal value claim and modifies the rules in Schedule 1 in relation to such proceedings.

(2) The definitions of rule 1 of Schedule 1 apply to terms in this Schedule and in this Schedule –

"comparator" means the person of the opposite sex to the claimant in relation to whom the claimant alleges that his or her work is of equal value;

"equal value claim" means a claim relating to a breach of a sex equality clause or rule within the meaning of the Equality Act in a case involving work within section 65(1)(c) of that Act;

"the facts relating to the question" has the meaning in rule 6(1)(a);

"independent expert" means a member of the panel of independent experts mentioned in section 131(8) of the Equality Act;

"the question" means whether the claimant's work is of equal value to that of the comparator; and

"report" means a report required by a Tribunal to be prepared in accordance with section 131(2) of the Equality Act.

(3) A reference in this Schedule to a rule, is a reference to a rule in this Schedule unless otherwise provided.

(4) A reference in this Schedule to "these rules" is a reference to the rules in Schedules 1 and 3 unless otherwise provided."

General power to manage proceedings

2. — (1) The Tribunal may (subject to rules 3(1) and 6(1)) order—

(a) that no new facts shall be admitted in evidence by the Tribunal unless they have been disclosed to all other parties in writing before a date specified by the Tribunal (unless it was not reasonably practicable for a party to have done so);

(b) the parties to send copies of documents or provide information to the independent expert;

(c) the respondent to grant the independent expert access to the respondent's premises during a period specified in the order to allow the independent expert to conduct interviews with persons identified as relevant by the independent expert;

(d) when more than one expert is to give evidence in the proceedings, that those experts present to the Tribunal a joint statement of matters which are agreed between them and matters on which they disagree.

(2) In managing the proceedings, the Tribunal shall have regard to the indicative timetable in the Annex to this Schedule.

…

Final hearing

8.— (1) Where an independent expert has prepared a report, unless the Tribunal determines that the report is not based on the facts relating to the question, the report of the independent expert shall be admitted in evidence.

(2) If the Tribunal does not admit the report of an independent expert in accordance with paragraph (1), it may determine the question itself or require another independent expert to prepare a report on the question.

(3) The Tribunal may refuse to admit evidence of facts or hear submissions on issues which have not been disclosed to the other party as required by these rules or any order (unless it was not reasonably practicable for a party to have done so).

Duties and powers of the independent expert

9.— (1) When a Tribunal makes an order under rule 3(1)(b) or 5, it shall inform that independent expert of the duties and powers under this rule.

(2) The independent expert shall have a duty to the Tribunal to —

(a) assist it in furthering the overriding objective set out in rule 2 of Schedule 1;

(b) comply with the requirements of these rules and any orders made by the Tribunal;

(c) keep the Tribunal informed of any delay in complying with any order (with the exception of minor or insignificant delays in compliance);

(d) comply with any timetable imposed by the Tribunal in so far as this is reasonably practicable;

(e) when requested, inform the Tribunal of progress in the preparation of the report;

(f) prepare a report on the question based on the facts relating to the question and (subject to rule 13) send it to the Tribunal and the parties; and

(g) attend hearings.

(3) The independent expert may make an application for any order or for a hearing to be held as if he were a party to the proceedings.

(4) At any stage of the proceedings the Tribunal may, after giving the independent expert the opportunity to make representations, withdraw the requirement on the independent expert to prepare a report. If it does so, the Tribunal may itself determine the question, or it may require a different independent expert to prepare the report.

(5) When paragraph (4) applies the independent expert who is no longer required to prepare the report shall provide the Tribunal with all documentation and work in progress relating to the proceedings by a specified date. Such documentation and work in progress must be in a form which the Tribunal is able to use and may be used in relation to those proceedings by the Tribunal or by another independent expert.

Use of expert evidence

10.— (1) The Tribunal shall restrict expert evidence to that which it considers is reasonably required to resolve the proceedings.

(2) An expert shall have a duty to assist the Tribunal on matters within the expert's expertise. This duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid.

(3) No party may call an expert or put in evidence an expert's report without the permission of the Tribunal. No expert report shall be put in evidence unless it has been disclosed to all other parties and any independent expert at least 28 days before the final hearing.

(4) In proceedings in which an independent expert has been required to prepare a report on the question, the Tribunal shall not admit evidence of another expert on the question unless such evidence is based on the facts relating to the question. Unless the Tribunal considers it inappropriate to do so, any such expert report shall

be disclosed to all parties and to the Tribunal on the same date on which the independent expert is required to send his report to the parties and to the Tribunal.

(5) If an expert (other than an independent expert) does not comply with these rules or an order made by the Tribunal, the Tribunal may order that the evidence of that expert shall not be admitted.

(6) Where two or more parties wish to submit expert evidence on a particular issue, the Tribunal may order that the evidence on that issue is to be given by one joint expert only and if the parties wishing to instruct the joint expert cannot agree an expert, the Tribunal may select an expert.

Written questions to experts (including independent experts)

11.— (1) When an expert has prepared a report, a party or any other expert involved in the proceedings may put written questions about the report to the expert who has prepared the report.

(2) Unless the Tribunal agrees otherwise, written questions under paragraph (1) —

(a) may be put once only;

(b) must be put within 28 days of the date on which the parties were sent the report;

(c) must be for the purpose only of clarifying the factual basis of the report; and

(d) must be copied to all other parties and experts involved in the proceedings at the same time as they are sent to the expert who prepared the report.

(3) An expert shall answer written questions within 28 days of receipt and the answers shall be treated as part of the expert's report.

(4) Where a party has put a written question to an expert instructed by another party and the expert does not answer that question within 28 days, the Tribunal may order that the party instructing that expert may not rely on the evidence of that expert.

Procedural matters

12.— (1) Where an independent expert has been required to prepare a report, the Tribunal shall send that expert notice of any hearing, application, order or judgment in the proceedings as if the independent expert were a party to those proceedings and when these rules or an order requires a party to provide information to another party, such information shall also be provided to the independent expert.

(2) There may be more than one stage 1 or stage 2 equal value hearing in any case.

(3) Any power conferred on an Employment Judge by Schedule 1 may (subject to the provisions of this Schedule) in an equal value claim be carried out by a full Tribunal or an Employment Judge.

11. So, rule 8(1) of Equal Value Rules contains a presumption that the report of the independent expert will be admitted in evidence at the Stage 3 hearing unless the Tribunal determines that it is not based on the facts relating to the question of the equal value that were determined at the Stage 2 hearing.

12. A party can present arguments to the Employment Tribunal on the question of equal value on which the independent expert had prepared the report. The scope for attack on the independent expert's report was limited as no evidence could be adduced in respect of any matter of fact on which the report's conclusions were based: rule 10(4) Equal Value Rules. Nevertheless, a party is entitled to challenge the independent expert's methodology in compiling the report – see *Middlesbrough Borough Council v Surtees & Others (No. 2) [2008] ICR 349 EAT*. Therefore, any party challenging an independent expert's report can only focus on the expert's methodology, it cannot seek to reopen facts which have been agreed or determined at stage 2.

13. Both the Equal Value Rules and the case law suggest that where the evidence of an independent expert is challenged the challenging party will adduce an alternative

expert report: see Equal Value Rules 10(6) for example, *and Dibro Ltd v Hore & Others [1989] IRLR 129.*

14. In *Hayward v Cammell Laird [1985] ICR 71* where an independent expert's report had been challenged by one of the parties, the Tribunal noted that: "Only if we consider that the expert had gone badly wrong would we feel justified in interfering…" (see page 79 paragraph (g)).

15. In *Tennants Textile Colours Limited v Todd [1989] IRLR 3* the Court of Appeal in Northern Ireland: "Reports obtain in circumstances created by the present Act and Rules must obviously carry considerable weight, as was clearly intended…" [Lowry LCJ].

16. In *Aldridge v British Telecommunications PLC [1990] IRLR 10* paragraph 13 of the Employment Appeal Tribunal's ("EAT") Judgment appeared to anticipate that if the independent expert's report was going to be challenge then it was likely to be by way of a further expert's report. Mr Justice Wood provided guidance as follows:

> Thus in approaching the process of equal value assessment the first step is the choice of factor. In doing so efforts should be made to ensure that all important aspects of both jobs should be represented [done]; that if possible there should be no duplication (or double counting) [done]; and no representations therein of matters outside the demands made by jobs or which relate only to some unimportant aspect of the work. One to seek to avoid matters of purely subjective judgment. Too few factors will not provide sufficient cover of contents; too many factors will tend to contain duplication. The EOC guide suggest 5-10 factors." [Paragraphs 22/23]

17. Crucially in terms of weighting, Mr Justice Wood made reference to EOC guide and quoted as follows:

> But where the two jobs differ in the aspects of work which were most important, it would become important to ensure that equal weighting was given to the most important dimensions of both jobs. This could become extremely complex and in such cases it might be better to avoid weighting the factors and to make a judicious choice of a more limited number of factors, bearing in mind the need to cover the most important aspects of both jobs. [Paragraph 24]

18. There are no detailed statutory rules dealing with the method an expert should adopt when preparing a report. The only specific requirements are that the expert must consider the issue of equal value "in terms of the demands made on [the employee] by reference to factors such as effort, skill and decision making" in accordance with s65(6)(b) EqA, and a report must be prepared only on the basis of the relevant facts agreed by the parties or determined by the Tribunal under rule 6(1)(a) Equal Value Rules.

19. Broadly, there are two main grounds to challenge the methodology of the expert's equal value report. This was considered in the case of *Fulwood & Another v East Sussex Hospital NHS Trust ET case no: 1100186/2006*. The first grounds were whether the factor headings under which the demands of the job are assessed should be weighted, and the second challenge to methodology tends to concern the number of factors by which the jobs are evaluated.

20. In respect to weighting, in *Fulwood & Another* the three experts all agreed that explicit weighting, such as applying a multiplier to factors deemed more important than

others, is inappropriate in an equal value assessment, although this is permissible under a Job Evaluation Scheme ("JES"). The experts were divided on whether implicit weighting was acceptable. This might arise because factors are split into groups – for example, responsibility or effort – and some grounds have more headings than others. Alternatively, some factors may be given more scoring levels than others, meaning that it is easier for individuals to distinguish themselves under some factors than others. For example, if some jobs are scored on a scale of 1-8, and others on a scale of 1-5, a high score under the former category will count for more than a high score under the latter. While one of the experts thought that no kind of weighting at all was permissible, the other two took the view that all equal value assessments include some *implicit weighting*, for example, having more than one factor under the same general heading, such as "knowledge", is weighting as it is scoring all factors on the same level.

21. The Tribunal noted that not only is implicit weighting permissible, it is also desirable. A "factor plan" designed to identify and classify each demand of the job under consideration would help the Tribunal compare the jobs in relation to each factor. The Tribunal observed that it must be wary of making subjective judgments or being influenced by what it knows to be the values of the particular organisation but felt that on any objective view there will be some demands that are more relevant than others to the question of equal value, for instance in comparing two managerial jobs, the demands under factors such as physical skill and physical effort would normally be less significant than demands on the heading such as responsibility for finances or supervision. The Tribunal went on to note that, if it were not satisfied that implicit weighting given by the breakdown of factors was appropriate to the job, it could commission another expert report or (in extreme circumstances) devise its own factor plan. Alternatively, it might multiply or divide points scored under certain factors to reflect their appropriate weight or combine or separate factors (although this would require re-scoring). Furthermore, it would feel justified in adding levels under factors into separate jobs that both score highly.

22. In respect of the numbers of factors by which jobs are evaluated, the Tribunal noted the concern that having too many factors would lead to a risk of "double counting". By contrast, too few factors might mean that factors that deserve to be scored independently are conflated. The Tribunal stated that it would feel entitled to make adjustments to the independent expert's scoring if it felt that unfairness had crept in.

Our findings of fact

23. We admitted the report of the independent expert, in accordance with paragraph 11 above.

24. In section 3.8 of his report, the independent expert provided significant detail in respect of the design and description of factors to be selected in his equal value assessment [Hearing Bundle: pages 184-194]. Mr Flather chose 14 factors as follows:

(1) knowledge and skill
(2) responsibility for care of patients
(3) responsibility for personal and people management
(4) responsibility for training, mentoring and teaching

(5) responsibility for resources
(6) responsibility for undertaking research and development
(7) decision making, impact of decisions and freedom to act
(8) mental demands – memory, concentration, accuracy, deadlines and interruptions
(9) verbal communications and relationships
(10) written communications, confidentiality and data demands
(11) emotional demands
(12) physical skills and manual dexterity
(13) physical efforts
(14) working conditions.

25. In his response the independent expert said that the factors used were similar to, but not identical to previous cases that he had undertaken. This was effectively the starting point. He said that all independent experts have their own preferred methodology and factor schemes which they use in each case, adapting the scheme and its contents to the jobs and demands of the relevant cases. Mr Flather said that he had developed an outline factor scheme over the years that had been modified to the jobs and type of organisation which he effectively adapted to the jobs under our scrutiny. The independent examiner said that he did not use a fixed template and he did not take into account any other jobs other than the jobs of the 3 comparators in question: [see HB785].

26. The requirement was for the independent expert to look at all of the salient factors for all of the sample jobs and we are satisfied that Mr Flather's assessment did that. Furthermore, in cross examination Mr Flather confirmed that he picked up factors important to the scheme and factors that he would expect to see in any assessment. Although 14-factors is more than the EOC guide suggested (as quoted in *Aldridge*), we are satisfied that there was no duplication or double-counting so that we feel any unfairness had crept in (see *Fulwood & Another*).

27. There were significant changes to the claimant's role following the opening of the North West Heart Centre in 2008. The independent expert divided his comparative exercise accordingly. There was no dispute about how the independent expert dealt with changes in the claimant's job over the relevant period as Mr Flather's report considered the factors prior to this event and after.

28. The results are similar both prior to and after the opening of the North West Heart Centre in 2008. The claimant scored higher than Mr Clayton on 3 factors: responsibility for personal and people management; responsibility for training mentoring and teaching; and responsibility for resources. She was equal to Mr Clayton on 2 factors: decision making, impact of decisions and freedom to act; and verbal communication, interpersonal skills and relationships. On the other 9 factors Mr Clayton was stronger and particularly, in terms of points, the 4 factors of: care of patients (especially after the opening of the North West Heart Centre); physical skills and manual dexterity, physical effort and working conditions although for the last 2 factors he did not score particular high, the claimant scored very low, although notably in the assessment of working conditions. Mr Clayton's points score was 242, although the claimant's points score decline from 211 pre-2008 event to 206 thereafter.

29. In respect of Mr Corder, the claimant "won" on 4 factors (1 more than Mr Clayton): responsibility for personal and people management; responsibility for training mentoring and teaching; responsibility for resources; and verbal communication, interpersonal skills and relationships. She was also equal to Mr Clayton on 2 factors, these being: decision making, impact of decisions and freedom to act; and, written communication, confidentiality and data demands. On the remaining 8 factors the claimant scores again reduced after the opening of the North West Heart Centre for care of patients. The scoring differentials were noticeable for: physical skills and manual dexterity, physical effort and working conditions. Mr Corder's scores were obviously higher than Mr Clayton for the last 2 factors of physical effort and working conditions. The points differential was hight at 211 and 206 for the claimant and 253 for Mr Corder.

Our determination

30. We determine the independent expert's report produced in good faith, avoided discrimination and was reasonable. Mr Brochwicz-Lewinski invited us to modify the independent expert's report but did not seek to adduce any evidence from an expert instructed by the claimant.

31. The claimant contended that she was effectively marked down because she was not a clinician or that her marking was disproportionately impacted because of her limited clinical work. Mr Flather disputed that the claimant was marked down because she was not in a largely clinical role; he said several times that he identified the demands placed on all 3 individuals throughout the whole of these exercises and his assessment was based on common important features across all 3 roles, not just those particularly relevant to the claimant. Mr Flather accepted that Mr Clayton and Mr Corder scored higher in some factors because certain aspects of their clinical work were significant factors that needed to be reflected in the assessment process and assessed accordingly, so we do not accept that the claimant was marked down because she was not a clinician. The claimant had identified 2 comparators who undertook a significant amount of clinical work. When it came to scoring her against the factors that reflected the demands on all 3 individuals, she scored less than they did on certain factors. This was not because Mr Flather got his methodology wrong – it was the inevitable consequences of who the claimant chose to compare herself with. The claimant chose her comparators and she compared herself with 2 co-workers in this exercise and ultimately the jobs of the 2 comparators were simply not of equal value to hers.

32. We reject Mr Brochwitz-Lewinski's argument that because the claimant was a senior manager of a multi-disciplinary department, she should have scored higher than her comparators and that the comparative exercise was flawed because it did not sufficiently recognise this. Mr Flather selected factors that covered the most salient aspects of all of the 3 roles: the fact that the claimant's expertise may be more concentrated than that of her comparators does not make Mr Flather's scheme flawed. We reject such a proposition.

33. Mr Brochwicz-Lewinski complained that the independent expert's decision to avoid weighting (or explicit weighting) was inconsistent and irrational. It was said to be inconsistent because if every factor adopted carried equal weight, then every factor

was worth 1/14 of the total marks available. So, the claimant contended that the decision not to apply weighting, in fact, meant keeping the equal weighting that already applied. Mr Flather dealt with weighting at point 3.7 of his report [HB184]. He said that the independent expert is required to give a neutral view of all of the factors and has no basis upon which to form a judgment on the relevant weight of any factor in a particular case. He said that there were no benchmarks that can be used to establish weightings. In evidence, he went a little further saying that to adopt such weighting the independent expert would need to make a judgment as to what aspects of the roles were more important or worthwhile or demanding or time-consuming and that would incorporate a subjective element into the assessment for which, he said, he was anxious to avoid. Mr Flather's report recognised that there was an implicit weighting of the factors selected – at 1/14 of the total; however, he was steadfast in maintaining that it was neither his role nor did he feel that he had the authority or expertise to identify which elements of the assessments required weighting. He regarded this element as being too subjective.

34. In terms of the number of factors, as stated above, in cross examination Mr Flather went to great lengths to explain that his role was to assess all major aspects of the 3 jobs and his equal value assessment assessed all jobs against all relevant factors. The claimant contended that that skewered the assessment as there were some factors that had no real relevance to her. Mr Brochwicz-Lewinski contended that the factors in which the claimant notably scored lower ought to be excluded from the assessment of the roles. Mr Flather rejected this proposition because he said that that would bias the scheme one way or another. He said his role was to assess all major aspects of all 3 jobs. In essence he rejected the proposition that because a factor may not appear so relevant in the claimant's job then this should be rejected, as he strove for what we perceive to be a matter of commonality. This means that if a significant and measurable factor appeared to run through the 3 jobs then it should be included in the assessment. He said it was the practice for independent experts to assess all jobs against all significant common factors. We accept Mr Boyd's contention that it would be entirely improper to remove factors because the claimant did not score highly in such particular features. We determine that if, as a matter of fact, the claimant's role did not involve a great deal of any 1 or 2 or more factors then this ought to be removed from the overall assessment it would, essentially, amount to inappropriately manipulating the exercise. The claimant chose her comparators. She chose to compare herself with senior managers who undertook a larger proportion of clinical work so if the comparative exercise did not favour her that was simply a consequence of who the claimant chose to compare herself with.

35. We reject Mr Brochwicz-Lewinski contention that the factors chose in respect of physical skills and manual dexterity, physical efforts and working conditions were irrational. They have relevance to the comparative exercise of all 3 roles. The fact that they had less prominence to the claimant than the other 2 did not negate this as an appropriate factor.

36. We could not detect any bias towards clinicians in the independent expert's choice of factors, if the scoring chosen by the independent expert indirectly favoured the clinicians then that reflected the claimant's choice of comparators.

37. Mr Brochwicz-Lewinski effectively argued 2-sides of the same coin; That we should either re-weight the factors in the claimant's favour or discount factors not so relevant or prominent for the claimant. In respect of weighting, the claimant contended that she lost out in Mr Flather's analysis because 65%-75% of her job was administrative/managerial and this preponderance of administrative managerial work/time meant that she scored worse across some other factors. We are persuaded that precisely the same point could be made in a different direction, for example, with Mr Corder and his greater percentage of clinical work [see HB684].

38. In our assessment the factors selected by the independent expert were rational and sufficiently well justified. Mr Flather did not accept Mr Brochwicz-Lewinski's arguments about weighting these factors. We were not persuaded to undertake an alternative weighting exercise that Mr Flather had rejected. In line with *Fulwood & Another* we were wary of making subjective judgments. In any event, we did not believe we had the expertise nor judgment to carry out an exercise that would have resulted in either rescoring or eliminating relevant factors where the claimant did not score particularly highly and still produce a fair and proportionate assessment. Only if we felt that the independent expert had got it wrong would we have interfered in Mr Flather's assessment: see *Hayward*.

39. If the claimant chose comparators who undertook significantly different aspects of the work that she did then comparing the best aspect of their job against the best aspect of the claimant's job would produce an equally contentious report. That was not Mr Flather's methodology, and it was not fair to say that the process was reduced to a simple box ticking exercise.

40. We accept that the claimant managed a multidisciplinary team consisting of coronary and percutaneous interventions team, an imaging team and a cardiac rhythm management team. We note that she managed a larger number of staff and had a very large operating budget to manage. In contrast, Mr Clayton managed less staff and a smaller budget, as did Mr Corder. The fact that the claimant spent more time managing more people at a higher level does not, we assess, mean that she ought to have received extra points. We have no doubt she did her job well and her job was demanding. However, the claimant won in 3 key factors: responsibility for personal and people management; responsibility for training, mentoring and teaching and responsibility for resources. She was equal with Mr Clayton in decision making, impact of decision and freedom to act and verbal communication, interpersonal skills and relationships. In respect of her comparison with Mr Corder, the claimant won on the assessment of verbal communication, interpersonal skills and relationship and was equal on written communication, confidentiality and data demands [see HB462-465].

41. The claimant scored sufficiently, and we do not think that she should have scored more points, and we accept Mr Flather's evidence in this regard. The claimant accepted that clinical duties were only a small part of her role, although Mr Brochwicz-Lewinski was keen to emphasise that this was at a very focussed and enhanced level, which we accept; but by re-scoring the claimant high that would inevitably result in re-weighting against her other two comparator, and Mr Flather undertook an exercise in which he explained his methodology, which we accept.

42. Mr Brochwicz-Lewinski analyses invited us to rescore with adjusted weighting. He provided us with a schedule. With respect to Mr Brochwicz-Lewinski his criticism of Mr Flather's report is no substitute for an alternative expert's report properly and coherently engaging and presenting an equal pay expert's alternative methodology. We accept Mr Boyd's submission that the claimant was fully aware of her rights to attempt to adduce alternative expert evidence and she elected not to take that step. So Mr Brochwicz-Lewinski analyses effectively boiled down to the claimant's proffer of an alternative assessment that favoured her position. The independent expert rejected this different methodology (for the reasons set out above) and the basis of his rejection appeared credible and convincing.

43. Mr Brochwicz-Lewinski raised a point in respect of Mr Flather possibly using a disability discriminatory criterion. We reject that argument as Mr Flather assessed the role descriptions and profiles rather that the claimant's performance in the individual factors. This issue had not been raised previously nor was it identified at stage 2. The claimant and her representatives had every opportunity to bring this to the independent expert's attention should further adjustments need to be made. She did not see this as a discriminatory factor at any stage previous and we do not see now how the independent expert's report could be contaminated with disability discrimination. That argument is rejected.

44. In summary there is no obvious flaw in the independent expert's report. Indeed, we accept Mr Flather's methodology, and we accept his report in full.

_____
Employment Judge Tobin
DATE: 14 January 2024

JUDGMENT SENT TO THE PARTIES ON
Date: 18 January 2024

.....
FOR THE TRIBUNAL OFFICE

Notes

Public access to Employment Tribunal decisions

Judgments and Written Reasons for the Judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/