Neutral Citation Number: [2024] EAT 32

Case No: EA-2023-SCO-000023-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 06 March 2024

Before :

THE HONOURABLE LORD FAIRLEY

- -

Between :

SCOTTISH WATER	**Appellant**
- and -	
LYNNE EDGAR	**Respondent**

- -
- -

Mr Michael McLaughlin (Shoosmiths LLP) for the **Appellant**
Mr Ronald Clarke (Thompsons Solicitors) for the **Respondent**

Hearing date: 20 February 2024

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JUDGMENT

SUMMARY

EQUAL PAY; material factor defence

The claimant brought an equal pay claim under the **Equality Act, 2010**. Her comparator was a male employee with the same job title and within the same pay band who had been appointed after her. The appellant raised a material factor defence that the difference in pay was due to the comparator's superior skills, experience and potential. The appellant led evidence about discussions within its organisation about those matters and about the resultant level of salary ultimately offered to the comparator at the time of his appointment. It also sought to lead comparative evidence of the claimant's skills, experience and potential both at the time of and after his appointment. The Employment Tribunal directed itself that the appellant required to prove the identity of the pay decision-maker at the point in time when the comparator was engaged. It concluded that the appellant had not done so, and that the material factor defence accordingly failed. It also directed itself that comparative evidence of the respective skills, experience and potential of the claimant and the comparator in a period of time after the comparator's appointment was irrelevant.

Held: (1) The Tribunal's self-direction that the appellant needed to prove the identity of the decision-maker was a material misdirection of law, as was its conclusion that an absence of proof of the identity of the decision maker inevitably led to a failure to prove the material factor defence; and

(2) The Tribunal further erred in determining that comparative evidence of the respective skills and abilities of the claimant and the comparator from a period in time after the comparator's appointment was irrelevant.

The Tribunal's Judgment was set aside and the preliminary issue was remitted to a differently constituted Tribunal.

Observed: The primary purpose of the reasons section of any decision of an Employment Tribunal should be to explain to the parties clearly and concisely why the Tribunal reached its decision.

THE HONOURABLE LORD FAIRLEY:

Introduction and overview

1. This is an appeal against a judgment dated 8 February 2023 of a full Employment Tribunal sitting at Glasgow and chaired by Employment Judge Ian McPherson. The judgment followed an open preliminary hearing in an equal pay claim.

2. Within her claim form (ET1) The claimant identified a male comparator ("Mr B"). The claimant and the comparator each had the job title of Corporate Affairs Officer. That role fell within the appellant's pay band C. The claimant and Mr B were paid at different levels within band C.

3. The appellant defended the claim on the basis that the comparator and the claimant did not carry out like work or work of equal value. Separately, the appellant also advanced a defence under section 69 of the **Equality Act, 2010** that the difference in pay between the claimant and the comparator was due to a "material factor" that was not tainted by sex discrimination.

4. The issue of whether or not the work of the claimant was like work or work of equal value to that of the comparator was held over until evidence and submissions had been heard on the material factor defence. Having heard evidence and submissions on that issue over 4 days in November 2022, the Tribunal concluded that the material factor defence had not been established by the appellant on the evidence.

5. There are two parts to the appeal. The first is that the Tribunal erred in law in its self-direction as to what required to be proved to establish the material factor defence. The second is that the Tribunal, in its conduct of the preliminary hearing, showed actual and / or apparent bias against the appellant.

6. In relation to the bias ground, the usual order for affidavits was made in terms of the Practice Direction. The members of the Tribunal were also invited to comment on the bias allegations. In due course, affidavits and comments were lodged. By the date of the appeal hearing before me it had become clear that there were a number of material factual disputes about what had happened at the hearing before the Employment Tribunal. The affidavits and comments were also incomplete in some important respects.

7. In these circumstances, and after discussion with parties, I decided to hear submissions only on the first part of the appeal, relating to the material factor defence, with the bias ground being held over for a further hearing at a later date. Splitting the hearing in that way allowed time for further focus to be brought to the areas of factual dispute in the bias ground which I would need to resolve, potentially by hearing evidence, in the event that the first ground of appeal did not result in a remit of the preliminary issue to a different Tribunal.

The appellant's material factor defence

8. Four factors were ultimately relied upon by the appellant as an explanation for the difference in pay between the claimant and her comparator. These were:

    - skills-related or other relevant supplements;
    - experience;
    - responsibility and potential; and
    - where applicable, in conjunction with one or more of the above factors, cost.

9. The appellant led evidence before the Tribunal from two of its Corporate Affairs Managers, Ms Georgie Reid and Mr Scott Fraser. Ms Reid was the line manager of both the claimant and the comparator. The claimant also gave evidence.

10. On the basis of that evidence, the Tribunal made extensive findings in fact within paragraph 37 of its reasons. It did so over 28 pages and 112 separately numbered sub-paragraphs. In the interests of brevity, I will refer only to those findings in fact which bear upon this appeal. Numbers in brackets are references to the Tribunal's sub-paragraph numbering within paragraph 37 of its reasons.

Relevant facts

11. The claimant commenced employment with the appellant in 2003 as an Administrator / Personal Assistant (4 and 5). She thereafter held various roles including Business Analyst, Developer Services Administrator, Training Advisor, Commercial Analyst and Communications Advisor (6). In 2017, she was promoted to the role of Corporate Affairs Officer within the appellant's pay band C (7).

12. In the period 1 July 2021 to 31 March 2022, the range of pay band C was £30,605 to £42,575 (59). In the period from 1 April 2022 the range of band C was £31,380 to £43,350 (60).

13. In her role as Corporate Affairs Officer, the claimant received training and positive feedback (100 to 102). By mid-2021, she was experienced and proficient in that role (104).

14. In May 2021, the claimant applied for a promoted (band B) role as a Corporate Affairs Specialist (16). Her comparator, Mr B, also applied for that role (40). In contrast to the claimant, Mr B was not already employed by the appellant and was accordingly an external applicant (40). A total of ten applicants, including the claimant and Mr B, were interviewed for the Corporate Affairs Specialist role during June 2021 (34 and 38).

15. The interview panel was made up of Ms Reid, Mr Fraser and a third Corporate Affairs Manager, Mr Steel (17). The panel scored all of the applicants and appointed the applicant with the highest score (43 to 46). The claimant and Mr B were each unsuccessful in their applications (42). The claimant's interview score was 13. Mr B's interview score was 23 (39 and 41).

16. The successful candidate had the same skills as Mr B, but had the advantage of being an internal applicant with significant experience of the appellant's business. That was regarded by the appellant as a "huge bonus" (46). The successful applicant's score was one point more than that of Mr B (43).

17. The interview panel's comments on the claimant included the observations that, "she is experienced and proficient in her current area of expertise" but that she would "benefit from further developing her technical skills and experience in a broader range of the activities that Corporate Affairs carries out" (104). The panel also recorded that it "would have liked to see more evidence of ability and willingness to operate at a senior level" (105).

18. Mr B was regarded by the appellant as having come very close to appointment to the band B position (47). He was seen by Ms Reid as "having a huge set of skills to enhance my team." (48)

19. In these circumstances, Ms Reid sought and received permission from the appellant's Head of Corporate Relations, Alan Thomson, to approach Mr B to see if he would be interested in being considered for appointment to a role within band C as a Corporate Affairs Officer (47 and 50). Ms Reid was aware that Mr B did not have a regular income and so might be interested in the band C role albeit that his skills and experience clearly fell within the higher band B (49). She was also conscious that the salary offered to Mr B within band C would need to be one that commensurate with the role and level of responsibility that he had held with his previous employer (49).

20. Ms Reid spoke to Mr B who indicated that he would accept a position as Corporate Affairs Officer within band C if he was paid within that band at the same rate as his last full-time salary of £35,000 per year (50).

21. In June 2021, the claimant had more relevant experience than Mr B in the role of Corporate Affairs Officer within the appellant's organisation (106). In relation to Mr B, however, Ms Reid considered it to be "a no brainer to get band B talent for a band C salary" and noted that if the ultimate appointee to the band B role had not performed so well at interview, Mr B would have been appointed to that position instead (51). She took into account his skills, experience and ability as well as his former salary (110). Ms Reid considered that taking account of increments which Mr B would have received in his last full-time post, a salary of £36,500 would be appropriate for him. A salary at that level was in the middle of the band C range (51) and an offer of that level of salary to Mr B was "signed-off" by the appellant's Head of Corporate Relations, Mr Alan Thomson (111).

22. On 1 July 2021, Mr Steel wrote an internal e mail to a member of the appellant's HR team in which he requested that Mr B's application for the band B position be "transferred in" for consideration of appointment to the band C role of Corporate Affairs Officer without further interview because Mr B had recently been interviewed for the band B post (53 to 55).

23. On 15 July 2021, Mr Steel wrote a further internal e mail in which he stated *inter alia* that "Georgie [Reid] confirmed her decision to offer her C role to [Mr B]".

24. In a second e mail on that same date, Mr Steel noted that salary had been discussed with Mr B "who indicated that he would wish to be considered for the C role as long as we were at least able to match his previous salary…which was £35k…so I think the offer was on this basis. Georgie [Reid] may be able to confirm."

25. Mr B commenced employment with the appellant as a Corporate Affairs Officer on 23 August 2021 at a band C annual salary of £36,500. At that time, the claimant's band C salary was £30,605. At the date of the hearing in November 2022, the claimant and Mr Bingham had each received 5.5% increases to their salaries, resulting in Mr B being paid £38,143 per year and the claimant £32,289.

The Tribunal's reasons

26. The Tribunal directed itself that the first two issues for it to determine were:

> "(1) To what extent, if at all, were the alleged material factors operating on the mind of the respondent's decision-maker in June / July 2021? and
>
> (2) If one or more of the alleged material factors were operating on the mind of the respondent's decision-maker, to what extent were they significant and relevant at that time?

27. The Tribunal accordingly directed itself that the first matter for it to decide was "who was the [appellant's] decision-maker at the relevant time of deciding a starting salary for [Mr B] on

him joining the [appellant's] employment?" At paragraph 111, of its reasons, the Tribunal expressed the view that: "without identifying the decision maker, it is not appropriate for us as the fact-finding industrial jury to speculate on what might have been in the decision maker's mind at the relevant time."

28. The Tribunal took the view, however, that there was a lack of clarity in the evidence as to the identity of the decision maker. It considered, but ultimately rejected, the possibility that it might have been Ms Reid. It also considered but again was unable to accept a submission made on behalf of the claimant that the evidence showed that the decision-maker was Mr Alan Thomson (paras. 116, 117, 120, 128 and 133).

29. At paragraph 120 the Tribunal concluded:

> "We find that the respondent has failed to discharge its burden of proof, as there is no clear and cogent evidence available to us from whomsoever was the respondent's decision-maker."

30. Developing that conclusion, at paragraphs 128 and 129 of its reasons the Tribunal stated:

> "128. The respondent has sought, by leading evidence only from Ms Reid and Mr Fraser, to discharge the burden of proof placed upon them, but they have failed to establish the pled material factor defences, because they have failed to establish, clearly and cogently, who was the decision-maker, and what factors did they take into account in settling upon a specific figure for [Mr B's] starting salary at the material time. On the evidence before us, there is no certainty as to when date-wise that decision was taken nor by whom it was taken.
>
> 129. At best the tribunal has been presented from the respondent, with an incomplete picture of what happened, and no clear and cogent evidence in answer to ***Kipling's six honest men*** - who, what, where, when, how, and why."

31. Three particular points about the Tribunal's reasons call for comment.

32. First, at paragraph 37 (112), and within its findings in fact, it stated:

> "This tribunal heard no evidence from Mr Thomson, and so it had no evidence directly from him as to the factors that he took into account when deciding upon the starting salary to be paid by the respondent to [Mr B] at £36,500."

This sub-paragraph is impossible to reconcile with (a) the absence of any factual finding by the Tribunal that Mr Thomson *was* the relevant decision maker; and (b) what was said later by the Tribunal at paragraphs 120, 128 and 133 about the appellant having failed to prove the identity of the decision maker.

33. Secondly, paragraph 136 of the Tribunal's reasons records:

> "Even if the tribunal had been satisfied that the starting salary for [Mr B], as the claimant's chosen comparator, was related to his skills and experience (which we have no reason to doubt, based on the evidence we heard at this Hearing), it was not suggested to us by the claimant's solicitor that that factor would not have been relevant or material for the decision maker, the simple fact of the matter is that we do not know for the respondent has not clearly and transparently explained to us, by way of clear and cogent evidence, whether the pay difference between the claimant and Mr B is in whole or in part explained by his previous skills and experience."

Whilst the syntax of paragraph 136 is very difficult to follow, the Tribunal's apparent acceptance that, on the evidence that it heard, it had "no reason to doubt" that the starting salary of Mr B was "related to his skills and experience" is consistent with its observations within paragraph 123 that:

> "We can also ready (*sic*) understand, and accept as sound business sense Ms Reid's genuine belief that she needed to offer [Mr B] a salary that was attractive, and not demeaning, so as not to lose him, whom she clearly thought then was a great candidate, and so she took steps, through Mr Thomson's sign-off to offer a salary that did not allow [Mr B] to slip through the net and not be recruited for the benefit of the organization."

Paragraphs 123 and 136 are also consistent with the Tribunal's finding in fact at paragraph

37(110) that Ms Reid, in her telephone discussion with Mr B about the level of band C salary for the role, "appears to have taken into account his skills, experience and ability, and his former salary."

34. Thirdly, within paragraphs 118 and 119 of its reasons, the Tribunal emphatically refused to take into account any evidence upon which the appellant sought to rely which related to Mr B's actual performance in the role after his appointment as compared to that of the claimant in the same time period. It declared such evidence to be "completely irrelevant".

Submissions

Appellant

35. For the appellant, Mr McLaughlin submitted that the Tribunal had failed to appreciate that the only relevant question for it was "why was the comparator paid more than the claimant?" It had fallen into error by wrongly defining the issues it had to determine. Consequently, it had become pre-occupied by an unnecessary search for the identity of "the decision-maker" and for evidence of precisely when and by what process the salary of Mr B was determined. In short, it was submitted, the Tribunal had erroneously "focused almost exclusively on the *who* and the *when* of Kipling's six honest men" to the exclusion of the "why".

36. Had the Tribunal asked itself the correct question, it would have recognised that the evidence and its findings in fact contained ample material about the reason for the difference between the claimant's salary and that of Mr B. This included the evidence and findings about Ms Reid's assessment of their relative skills and experience, and her assessment of Mr B's potential value to the business. Reference was made in particular to the findings in fact at paragraph 37(47) to (57), and (110) and to paragraphs 123 and 136 of the Tribunal's reasons. Having concluded, however, that it could not identify "the decision-maker", the Tribunal had simply closed its eyes to that evidence and to its own relevant findings in fact.

37. Finally, the Tribunal had erred in refusing to consider evidence of the comparative skills and abilities of the claimant and Mr B following Mr B's appointment..

38. Within paragraph 38 of its reasons, however, (for example at 38(ff), (jj) and (kk), the Tribunal had unjustly criticised the appellant for seeking to lead comparative evidence of that kind. Such evidence was plainly relevant to prove the factors of skill and experience which caused the pay difference at the time of Mr B's appointment, as well as being relevant to proof of why the pay difference was thereafter maintained (**Bury Metropolitan Borough Council v. Hamilton and others** [2011] ICR 655 at paragraphs 31 and 34).

Claimant

39. For the claimant, Mr Clarke submitted that the essence of the Tribunal's reasons could be found at paragraphs 128 and 129, where it had correctly applied the law. Decisions by corporate bodies are taken by individuals (or "decision-makers"). Thus, for an employer to rely upon a material factor defence it must lead evidence of the thought process of that decision-maker. This was "the whole foundation of employment and discrimination law". Causation for the purposes of proof of the material factor defence was subjective and therefore required evidence – directly or indirectly – of the thought process of the decision-maker.

40. Mr Clarke accordingly submitted that if, in a "recruitment case", an employer does not adduce evidence from the person who made the pay decision, it will never be able to prove that the reason for the difference in pay was a material factor. A respondent must therefore lead evidence from the relevant decision-maker who must give evidence as to what was operating on their minds at the material time. If the Tribunal is unable to identify the decision-maker, a material factor defence cannot succeed.

41. In this case, the Tribunal had reached a permissible decision that the appellant had failed to discharge the burden of proof of showing who was the decision-maker and thus had failed to prove that any of the pleaded reasons was the actual reason for the difference in pay between the claimant and Mr B. The conclusions reached at paragraphs 128, 129 and 138 were faultless.

42. Since this was correctly classified as a "recruitment" case, the Tribunal was also correct to look only into at evidence of matters known to and considered by the appellant at the time when Mr B was appointed into post.

Relevant law

43. In terms of sections 65 and 66 of the **Equality Act 2010**, where A is employed to do equal work to that performed by a person of the opposite sex (B) and any term of A's work is less favourable than a corresponding term of B's, the relevant term in A's contract is modified so as not to be less favourable. This is described in the Act as a "sex equality clause". It is, however, open to the employer to show that the difference in the term (usually but not always pay) is explained by something that has nothing to do with sex.

44. Specifically, section 69 of the Act states:

> **"Defence of material factor**
>
> (1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—
>
> (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
>
> (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.
>
> (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's…
>
> (6) For the purposes of this section, a factor is not material unless it is a material

> difference between A's case and B's."

In relation to an employee, the "responsible person" is the employer (section 80).

45. An employer faced with an equal pay claim will, therefore, have a defence if it can show that the variation between the claimant's pay and that of the comparator had nothing to do with the difference of sex between them and, if the claimant is able to show apparent indirect discrimination, that it is justified in relying on the factor as a proportionate means of achieving a legitimate aim.

46. In **Glasgow City Council v Marshall** [2000] IRLR 272, Lord Nicholls of Birkenhead explained the structure of the predecessor provision of the Equal Pay Act, 1970:

> "The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than a man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The fact relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a 'material' factor, that is, a significant and relevant factor. Third, that the reason is not 'the difference of sex'. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is, or, in a case within s.1(2)(c) , may be a 'material' difference, that is, a significant and relevant difference between the woman's case and the man's case."

47. As was noted by Lady Smith in **Skills Development Scotland Co Ltd v Buchanan** UKEATS/0042/10/BI, however, the issue of causation in a material factor defence is assessed objectively. In **Buchanan**, a pay differential between the female claimants and their male comparator arose from a TUPE transfer. Some years later and following across the board pay increases, the pay differential remained. The Tribunal considered that TUPE could be relied upon as a material factor only if, in the mind of the employer at the time of challenge, it was the reason for the ongoing pay differential. The EAT disagreed:

> "If the employer establishes a subsisting causal link between a non gender-related explanation and the difference in pay complained of, the defence is made out. Normal principles of causation apply…" (para. 22)
>
> "Insofar as the Tribunal appeared to suggest that an originating cause would cease to have effect if the employer did not continue to have it in mind, they were wrong. Causation is an objective matter, not a subjective one." (para 28).

48. The significance of **Buchanan**, is that it demonstrates that evidence of the subjective thought processes of an employer (or of any particular decision-maker) is not essential to proof of a material factor defence as long as a sufficient causal link can be established between the difference in pay on the one hand and a genuine factor unrelated to the difference in sex between the claimant and the comparator on the other.

49. Where a pay disparity arises for examination, the statute requires an explanation for the difference, which inevitably involves considering why the claimant(s) are paid as they are, on the one hand, and, separately, why the comparator is paid as he is on the other (**CalMac Ferries Ltd v Wallace** [2014] ICR 453at para. 16 per Langstaff P).

50. An explanation for a difference in pay may or may not be time-limited. Where it is time-limited in a causative sense then, once the factor that explains the variation no longer operates, the explanation falls away (**Benveniste v University of Southampton** [1989] ICR 617).

Analysis and decision

51. The Tribunal's self-direction that the appellant needed to prove the identity of the decision-maker was a material misdirection. Having invested that question with the importance it did, the Tribunal further erred in law in concluding that its inability to find an answer to it in the evidence inevitably meant that the appellant had failed to prove the material factor defence.

52. I agree with the submission for the appellant that the correct first question for the Tribunal to have asked itself was whether or not the respondent had proved the cause of the difference in pay between the claimant and the comparator. Clearly, there may be cases in which evidence of what was in the mind of a person who took a pay decision may be useful to the tribunal in considering that question. The subjective view of a decision-maker might well be helpful evidence to a tribunal in making an assessment, on an objective basis, as to what was the cause of the pay disparity. It was, however, an error of law for this Tribunal to conclude that identification of the decision-maker was essential. In many cases - **Buchanan** being an example – a difference in pay will have arisen not from an identifiable decision of anyone about pay but from a prior event such as a TUPE transfer.

53. Nor is it the law that evidence to explain the difference in pay must always be direct evidence. It could be circumstantial or, subject always to considerations of weight, could be taken at second hand from a person who was suitably knowledgeable about to the factors that were regarded as important and which, objectively, are later relied upon by the employer to explain the difference.

54. Causation in the context of a material factor defence is not, therefore, assessed only by reference to what was in the mind of any person or body at any point in time, however helpful such evidence might be as part of the whole evidence. This is consistent with what was said in **Marshall** and in **Buchanan**.

55. In this case, the Tribunal became fixated on identifying the identity of the "decision-maker" at a particular moment in time. As a result, it ignored a substantial body of evidence and findings in fact (principally in the evidence of Ms Reid) which bore directly upon the relevant issue of causation.

56. Mr Clarke sought to distinguish **Buchanan** on the basis that this case was a "recruitment case" whereas **Buchanan** was not. Even assuming that it might be possible clearly to define what is meant by a "recruitment case", I see no force in that argument. What is required to prove causation in a material factor defence ought not to depend upon classification of what "type" of equal pay case is in issue. The correct question is simply, "what is the cause of the difference in pay?"

57. The Tribunal also erred in determining that comparative evidence of the respective skills and abilities of the claimant and Mr B from a period in time after Mr B's appointment was irrelevant. Such evidence was plainly relevant to proof of a material factor defence to the extent that it showed the difference in skills and abilities between the claimant and Mr B both at the date of Mr B's appointment and thereafter. The burden of proving those things was on the appellant, and it was a material error of law on the part of the Tribunal to hinder the appellant in seeking to discharge that burden.

Disposal

58. For these reasons, I will set aside paragraphs (2) and (3) of the Tribunal's judgment of 8 February 2023. The issue of whether or not the appellant has proved all of the elements of a material factor defence is not one that I am able to determine on the basis of the Tribunal's findings in fact. A remit of the preliminary issue is accordingly inevitable. Parties were agreed that any remit should be to a different tribunal. I agree with that assessment.

59. Parties were also agreed that if the judgment of 8 February 2023 was set aside and all issues relative to the material factor defence were remitted to a different tribunal, the ground of appeal relative to bias would fall away. Again, I agree with that assessment. It is not therefore necessary for me to hear evidence upon the bias ground. I would note simply that some of the bias grounds – for example that the judge repeatedly interrupted the appellant's solicitor and

prevented her from leading certain evidence – appear to have arisen from the judge's erroneous approach to the law to which I have made reference at paragraphs 51 to 57 above.

60. Mr Clarke submitted that, in the event of a remit to a different tribunal, the factual findings made by the Tribunal whose decision had been set aside would be persuasive but not binding. That is not correct. The new tribunal will start with a clean slate. In the absence of agreement of evidence it will require to hear evidence from witnesses of new and thereafter make its own independent findings in fact based upon that evidence.

Postscript

61. Apart from the errors of law which the Tribunal made, its reasons were disproportionately lengthy and, in places, muddled and confused.

62. The length of the reasons was largely due to the inclusion of a substantial amount of unnecessary material. More seriously, it is plain that the reasons were not properly proof-read or checked for clarity. I have already made reference to the inconsistency between paragraph 37(112) and paragraphs 120, 128 and 133. Paragraph 136 – which was clearly intended to be an important part of the Tribunal's explanation of its reasoning – does not make sense when read as a whole. So far as is possible to understand what may have been meant by paragraph 136, it appears to undermine rather than support the Tribunal's ultimate decision.

63. The primary purpose of the reasons section of any decision of any Tribunal should be to explain to the parties clearly and concisely why it reached its decision. Online guidance is now available to all Employment Judges on effective judgment writing. The reasons produced in this case illustrate the problems that can arise when that guidance is not followed.