EMPLOYMENT TRIBUNALS

Claimant: Sarah Juillet

Respondent: City, University of London

Heard at: London Central (hybrid) (in public)

On: 26 – 29 February and 1, 5 and 6 March 2024

Before: Employment Judge E Burns
Mr S Godecharle
Mr S Pearlman

Representation

For the Claimant: Rebecca Thomas, Counsel
For the Respondent: Nigel Grundy, Counsel

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

(1) The Claimant's claim that the Respondent made an ongoing unauthorised deduction from her salary in June 2022 succeeds.

(2) The Respondent's material factor defence to the Claimant's equal pay claims succeeds in respect of both comparators. The Claimant's equal pay claim therefore fails and is dismissed, although this decision does not prevent her from presenting a fresh claim using the same comparators for the period from 11 May 2023 onwards.

REASONS

INTRODUCTION

1. The Claimant is employed by the Respondent as the Director of Postgraduate Careers in its Business School. She is a member of Professional Services Staff. Following a period of early conciliation between 30 June and 10 August 2022, the Claimant presented a claim to the employment tribunal on 6 September 2022.

2. The Claim arises out of the Respondent's decision to reduce the Claimant's salary. The Claimant brings claims for unauthorised deductions from wages and for equal pay citing two male comparators who also work for the Respondent in its Business School. The Claimant amended her claim on 11 May 2023 to add the equal pay comparators although she had alluded to this in her earlier pleadings.

THE ISSUES

3. The issues to be determined in their entirety are set out in the appendix to this judgment. The preliminary hearing was confined to liability in the unlawful deduction of wages claim i.e. issues 1 – 3 (but not 4) and to the Respondent's material factor defence in the equal pay claim i.e. issue 9. The Respondent withdrew its argument in relation to issue 3 and conceded for the purposes of issue 8 that the Claimant was paid less by way of basic salary that the Comparators.

THE PRELIMINARY HEARING

4. The Claimant gave evidence. In addition, we heard from the following on her behalf:

    - Professor Andrew Clare, Professor of Finance, former Associate Dean for Executive Education, Bayes Business School (2015 to June 2020) (gave evidence remotely)
    - Professor Richard Payne, Professor of Finance, former Deputy Dean (in 2021) Bayes Business School (gave evidence remotely)
    - Dr Sionade Robinson, Respondent's Vice President Enterprise, Engagement, Employability, former Associate Dean of the MBA programme in Bayes Business School (November 2012 – July 2018),
    - Damian Williams, Academic Operations Director Bayes Business School, former member of the Respondent's Job Evaluation Implementation Working Group (2018 – 2019)
    - Professor Costas Andriopoulos, Associate Dean for the MBA at Bayes Business School since September 2022
    - Helen Reynolds, Investment Director of the Bayes Entrepreneurship Fund (gave evidence remotely)
    - Paul Long, Chief Operating Officer, Bayes Business School

5. The Claimant also submitted a written witness statement for Andre Spicer, the current Dean of Bayes Business School. Mr Spicer did not attend the hearing to give evidence. Because his evidence was unable to be tested by way of cross examination, we have given it very limited weight and only relied on the parts of it that were not disputed.

6. For the Respondent Mary Luckiram, the Respondent's Director of Human Resources from 2011 to the current day gave evidence.

7. There was an agreed trial bundle of 1711 pages which included some additional documents that were admitted into evidence during the course of the hearing with the agreement of the parties. We read the evidence in the bundle to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision below.

8. We thank both parties for their helpful written submissions. Employment Judge E Burns apologises for the length of time it has taken to issue this reserved judgment.

FINDINGS OF FACT

9. Having considered all the evidence, we find the following facts on a balance of probabilities.

10. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

Background

11. The Respondent is a university. It became part of the University of London Federation in 2016.

12. This case focusses on the pay arrangements of the Claimant, who is employed in the Respondent's Business School. Formerly called the Cass Business School, but renamed the Bayes Business School from 6 September 2021, the Business School forms one of six schools in the university. We shall refer in this judgment to it simply as the "Business School" or the "Respondent's Business School" as required.

13. The Respondent employs a mixture of academic and non-academic staff. The non-academic staff are grouped together under the heading Professional Services Staff. Pay arrangements are different for academic and Professional Services Staff. The Claimant is member of Professional Services Staff. For the sake of convenience, in this judgment when we refer to Staff, we are referring to Professional Services Staff.

14. The Respondent has a Voluntary Recognition Agreement with three unions, University College Union (UCU), Unite and Unison (329 – 340). It has two joint committees with trade unions: the Joint Negotiation and Consultation Board (JNCB) where full time regional trade union representatives are

present and the Employee Relations Sub-Group (ERSG) which only staff trade union representatives attend.

Respondent's Pay Arrangements for Staff

15. The Respondent's pay and grading structure for Staff is made up of nine grades. The Claimant is employed in Grade 9. In order to understand how Grade 9 operates, some background information about Grades 1-8 and their creation is necessary.

The Creation of Grades 1-8

16. Grades 1 - 8 align with the pay and grading structure that was agreed as part of the National Framework Agreement for the Pay and Conditions of Service for Staff (the "Framework Agreement"). It was agreed as a result of national collective bargaining between higher education unions and employers in the sector.

17. The Framework Agreement required all higher education employers to implement a new pay spine made up of 51 spine points (SPs) each equating to a salary value (111).

18. Each higher education institution covered by the Framework Agreement was able to decide how to divide the pay spine into grades and how to assimilate staff to the new grades. They were encouraged to make arrangements for incremental progression up the pay spine pay within grades, on an annual basis. They were also encouraged to adopt job evaluation using a recognised scheme, but this was not compulsory. The two job evaluation schemes that were most widely used were HERA, a scheme developed a by a consortium of universities and the Hay Scheme, developed by a commercial provider. The Hay Group which developed the Hay Scheme was renamed the Korn Ferry Hay Group following a merger in 2015 and the scheme is now officially known as the Korn Ferry Hay (KFH) scheme, although often still referred to as the Hay Scheme.

19. Since the Framework Agreement was introduced increases to the SPs in the pay spine have been negotiated and agreed at national level. This has generally happened annually. Such increases are known as cost of living increases.

20. The Respondent implemented the Framework Agreement and adopted the new pay spine in August 2006. It divided the pay spine into eight grades. It also adopted annual incremental progression within the eight grades. The Respondent did not adopt job evaluation, but used some of the principles which underpinned the KFH scheme when assimilating employees to the new grades. It has applied the nationally negotiated cost of living pay increases to all employees in Grades 1-8.

The Creation of Grade 9

21. The Respondent's Grade 9 sits on top of the pay spine for Grades 1- 8 and applies to members of Staff earning salaries which are above the top pay

spine point in Grade 8. The Respondent's Grade 9 has 64 spines points and currently ranges from £68,892 to £191,211. There are no sub grades and no annual incremental progression through the spine points. Instead, Grade 9 Staff are employed on what are commonly known as spot salaries.

22. Grade 9 does not derive from the Framework Agreement nor any other national collective arrangements. It is a local creation. A relevant issue in this case was whether it was created as a result of local collective bargaining at the same time as the Respondent implemented the Framework Agreement.

23. The only evidence before us that the arrangements for Grade 9 were reached in agreement with the Respondent's recognised trade unions was Ms Luckiram's witness testimony.

24. It is relevant to note that Ms Luckiram commenced her employment as the Respondent's HR director in 2011. She was therefore not employed by the Respondent at the time the Framework Agreement was implemented. In addition, she had been able to locate very little by way of paper records either in relation to the arrangements for Grade 9 staff or Grade 1-8 staff. Instead, her understanding was based on what she had told by the one remaining member of HR staff that had been employed at the relevant time. That member of staff told her that the general pay arrangements for Grade 9 were agreed with the trade unions in 2006. By this she meant the adoption of Grade 9, the number of pay spines and the process of assimilation of staff from the previous pay arrangements to Grade 9.

25. Ms Luckiram explained to us she had no reason not to believe what she had been told as it reflected her experience in the HE institution where she was working in 2006. She added that in her experience there was a general tendency in the HR sector to want to be inclusive rather than exclusive when it came to engagement with the trade unions.

26. We do not doubt the sincerity with which Ms Luckiram gave her evidence, but our factual finding, based on the balance of probabilities test we are required to apply, is that the Respondent's Grade 9 was not collectively agreed, but was put in place by the Respondent.

27. In reaching this decision, we considered the language used in the Voluntary Recognition Agreement. Although undated, it refers to the new Grades 1-9, and therefore must post-date the implementation of the Framework Agreement in 2006. The Recognition Agreement records that it applies to all employees within Grades 1 – 9 (324). It has, however, a significant exclusion clause that says:

    "*The pay provisions for Grade 9 staff (e.g.* ***locally determined*** *pay points above spine 52) are not the subject of collective bargaining."* (emphasis added) (324)

28. We consider the use of the words "*locally determined*" rather than "*locally agreed*" demonstrates that the decision as to what pay points should exist

above point 51 was a matter solely for the University and not local collective bargaining. In addition, the fact that the pay points in Grade 9 are said to be outside the scope of the collective bargaining agreement within the Voluntary Recognition Agreement supports our finding. It would be surprising to find that they were created through collective bargaining and then excluded from future collective bargaining.

29. In addition, we have relied on the existence of the Pay Policy for Grade 9 employees that does not say it was collectively agreed and in fact makes no mention of having been formulated following consultation with the recognised trade unions. The existence of a separate pay policy that applied to Grade 9 staff alone, that was not a collective agreement with the recognised trade unions is at odds with the assertion that the Respondent opted to be inclusive and enter into a collective agreement with the trade unions when creating Grade 9.

30. To the extent it is relevant later, we note that Ms Luckiram told us that the policy was adopted in around 2008 and continued to apply until around 2017. We were invited by the Claimant to find that the Policy was still applicable. We do not. We accept Ms Luckiram's evidence that it was superseded by the new Remuneration Strategy for 2016-2021 even though it can still be found on some sections, of the Respondent's internet.

Cost of Living Increases for Grade 9

31. The cost of living pay increases agreed via the national collective bargaining machinery are applied by the Respondent to Grade 9 employees. We were told this was a change in 2009. It is referred to in an email sent to senior staff at the Respondent on 2 September 2009 (131).

32. The email suggests that the previous position was that salary increases for Grade 9 staff would "take into account" (rather than apply) the national cost of living increases, as well as outstanding performance (via a cash bonus) and market worth. However, for the academic year 2008/2009 the national cost of living increases would be applied and there would be no bonuses.

33. This change was then applied to Grade 9 every year thereafter. It appears that the original 2008 Pay Policy was amended to reflect this as the version we saw refers to it (1563).

34. Neither the email nor the Pay Policy refer to this change as having been negotiated with the recognised trade unions. Instead, the email says this change was a decision made by the Respondent's Remuneration Committee (Remco) and its Executive Committee (Exco). We therefore find as a matter of fact that it was not negotiated with the trade unions.

Respondent's Business School – Relevant Background Facts

35. We record to some background facts we were told about the Respondent's Business School, before considering the position of the Claimant. These form the context for what occurred later.

36. In many universities, a tension exists between business schools and the other schools which can have an impact on pay. The primary reason for this is because business schools can charge significantly higher fees for some of their courses, particularly their postgraduate courses, than can be charged by other schools. This was certainly true with the Respondent. We were told that the Respondent's Business School made the highest contribution to its overall financial position by some way.

37. Another reason is that the skill sets of business school employees are often highly sought after in the private sector. There is therefore a need to ensure pay levels are competitive when compared to the private sector to recruit and retain good quality employees.

38. In the Respondent, in 2018 a specific exercise focussing on pay for academics in the Business School was undertaken by Dr Duncan Brown of the of the Institute of Employment Studies to tackle this issue. He features later in this case.

39. In order for the Respondent's Business School to be able to attract students to its postgraduate courses, it aims to have a strong Financial Times (FT) ranking. The FT ranking is thought to be the most important key performance indicator for a business school, influencing the fees that can be charged and the number of applications. The Respondent's Business School competes for rankings and, therefore students, with stand-alone business schools and those that operate within universities from across the world.

40. The FT ranking system has different elements to it. There was some dispute before us as to the accurate way to describe the ranking of the Business School. In the most recently published global rankings for taught MBAs the Business School falls into Tier 3, but it holds higher rankings in other categories, for example being ranked 27 in the rankings for European Business Schools. On its website it describes itself as "2nd best in London, 5th in the UK and 27th in Europe. It positions itself strategically as a Tier 2 business school.

41. The careers offering for students undertaking courses in the Business School is a very important contributor to its rankings. The careers offering is ranked in its own right, but also influences performance against other key criteria measured by the ranking process.

The Claimant

42. The Claimant commenced employment with the Respondent on a fixed term contract on 6 August 2009 as Interim Careers Director within the Business School. She had been approached by the Dean and COO of the Business School to assist them with developing the careers support offered to its students in order to improve its FT ranking.

43. The Claimant's background is in the private sector. Prior to joining the Respondent, she had worked for over a decade in Investment Banks in the area of recruitment and personal development, including MBA,

programmes. She moved from there to working for a private outplacement consultancy where she specialised in working with senior displaced individuals.

44. The Claimant was offered and accepted a salary of £70,250 for a fixed term appointment for 12 months. The salary was individually negotiated with her. This was dealt with internally by the Business School. No documents exist recording what was taken into account when deciding the salary level.

45. The Claimant was issued with an appointment letter dated 31 July 2009 (128 – 130) which confirmed her Staff Category as "Senior Administrative" and her Grade as 9. We note that £70,250 is not referable to any of the spine points that existed within Grade 9 at the time. The nearest spine points are Spine Point (SP)10 which was £69,017 and SP11 which was £70,601.

46. The Claimant transferred onto a permanent contract as Director of Postgraduate Careers on 15 September 2010. She was issued with a letter dated 2 June 2010 confirming her change to a permanent position and job title and an increased salary of £92,759. The letter confirmed that, with the exception of the changes contained in it, her other terms and conditions remained unaltered. She was required to sign a copy of the letter to agree to the changes (144).

47. The Claimant's new salary was again negotiated with her personally and agreed within the Business School. We note that it was referable to Grade 9 SP25 at the value it had in June 2010 (1608). No documents exist recording what was taken into account when deciding the salary level.

48. On 1 February 2013, the Claimant moved into a new role of MBA Programme and Careers Director to which she had to apply. The circumstances leading to the change in role are recorded in a letter sent to her and dated 19 December 2012, but essentially the new role was an amalgamation of her old role, and another role which were to be disestablished (150 – 151).

49. The new post and its salary level had to be approved by the Respondent's Remuneration Committee (Remco). This is a committee made up of external council members whose role is to consider any pay related matters for employees (academic and professional services) earning above £100,000.

50. A copy of the proposal that went to Remco was included in the bundle. Approval was given to appoint someone into the role at Grade 9 at a salary of up to £110,000. The document records the following information which was taken into account when deciding the salary level:

"*There are few posts in existence within HE to head up a combined the MBA and Postgraduate Careers service. There is a post in the London Business School of this kind but it has not been possible to obtain any salary information.*

Whilst the role of Programme Director/Head of Internationalisation is not a direct comparator, it is similar enough to be relevant. The role is grade 9 and the incumbent is on a salary of £96,458.

The Director of the MBA programme (disestablished under this proposal) was a grade 8 on £51,025, whilst the Director of Postgraduate Careers (also now to be disestablished) is a grade 9 on £93,279. The new post with the wider remit and accountability should carry a salary commensurate with the responsibility in leading a new service within the framework of this very important element of the Cass proposition.

The 2011 UCEA salary survey suggests a median total pay of £62,760 (upper quartile £72,650 and upper decile £84,340) for a level 4B Senior Function Head. However it is recognised that similar roles within Business Schools pay a premium for such roles." (1335).

51. The note reveals that the Respondent considered external and internal relativities and the UCEA salary survey for salary benchmarking purposes for a Level 4B function Head. It opted, however, to pay a significantly higher salary because the role was a Business School role.

52. The Claimant was offered and accepted a salary of £110,262 for the new role. This was referable to Grade 9 SP35 (1608). She was issued with an appointment letter confirming the change but which also said that all terms and conditions would remain the same (153). The Claimant was required to sign and return a copy of the letter confirming her agreement to the change.

53. In 2014, the Respondent undertook a review of some professional services roles. This was the second review of its kind and so it was known internally as PSR2. The outcome of the review was that the Claimant's role was disestablished. The Claimant accepted an alternative role with her the job title of Director of Postgraduate Careers from 30 June 2015. This was effectively her former role.

54. The salary for the role of Director of Postgraduate Careers was £97,057. We do not know how this amount was decided, but it appears she simply reverted to her former salary. The salary she was offered is referable to Grade 9 SP25, although the letter dated confirming the change refers to her being on SP27. Our finding is that this was a typo and the letter should have referred to SP25.

55. The Claimant was also offered and accepted pay protection for 15 months to 30 November 2016. The letter dated 16 January 2015 confirming the change indicated that the Claimant's other terms and conditions remained unaltered. The Claimant was required to sign and return a copy of the letter confirming her agreement to the change (167 -168).

56. The final agreed change to the Claimant's terms and conditions occurred in April 2015. On this date the Respondent wrote to her to confirm a change to her working pattern with reduced hours and a consequent reduction in pay. For the purpose of this judgment, however, we continue to refer to her salary

as the FTE amount. The Claimant was required to sign and return a copy of the letter confirming her agreement to the change (169-170). As before the letter said that the remaining terms of the Claimant's contract remained unaltered.

57. The Claimant's FTE salary increased by reason of cost of living increases between then and the next material event. It stood at £104,658 as at 1 August 2019.

Claimant's Terms and Conditions of Employment

58. The Claimant's original appointment letter contains a key provision (clause 12) which is relevant to note in full as it is relied on in the list of issues. It has continued to form part of the Claimant's contract of employment despite the others changes described above.

"**Terms and conditions of employment**

The appointment will be subject to the conditions of employment of the City University. Enclosed is a copy of the terms and conditions relating to Senior Administrative, Senior Library and Computer Staff. These contain the written particulars of your employment with the University which together with this letter is deemed to be the principal statement in compliance with the University's obligations under Section 1-3 of the Employment Rights Act 1996.

These are specific to all members of your category of staff, except where modified in individual letters of employment, and should be read carefully before accepting this appointment.

The University may make alterations to the conditions of employment from time to time with changing circumstances. Such alterations with the exception of specific conditions of employment relating to individuals and to conditions of employment relating to pay which are negotiated nationally, will normally be made after consultation with staff or associations and trade unions recognised by the University. These conditions of employment with details of the University's salary scales currently in force, are available for perusal in the HR department and are available on the HR department internet home page which is regularly updated …

The normal notice requirements are detailed in the enclosed terms and conditions of employment, which apply to both fixed term and permanent staff." (129)

59. The appointment letter does not contain a clause expressly stating that the terms of any national or local collective agreements are incorporated into the Claimant's terms and conditions. The appointment letter makes no reference at all to any national or local collective bargaining machinery.

60. The terms and conditions relating to Senior Administrative, Senior Library and Computer Staff which are referred to in clause 12 of the appointment letter are the "Terms and Conditions of Employment Relating to Staff on

Senior Administrative, Senior Library & Computer Scales & Other Related Salary Scales" (referred to hereinafter as the " Standard Terms and Conditions"). A version dated August 2011 was included in the bundle (133 – 140). It was not in dispute that this version reflected the version that was provided to the Claimant in 2009 and continues to apply today with regard to all material clauses.

61. The Standard Terms and Conditions contain the Respondent's general terms and conditions for all employees in Grades 7, 8 and 9 in Professional Service roles. Having a single set of standard terms and conditions for employees in these three grades is confusing. The document does explain that some provisions apply just to Grades 7 and 8 and not Grade 9 but this is clearly the case. An example is found in clause 2 which refers to Salaries. Although some of the clauses under this heading contain information which is relevant to Grade 9 Staff, such as clause 2.3 which explains that salaries are paid monthly in arrears, there is also a reference to annual incremental progression which does not apply to Grade 9 Staff.

62. The Standard Terms and Conditions include the following provisions under the heading General, which are again relevant to set out in full as they are expressly referred to in the list of issues:

"1.3. The Council of the University may make any alteration to these Terms and Conditions after discussion and agreement with the City University Association of University Teachers or such other body as the employees concerned may elect to represent them. Any agreed changes in these Terms and Conditions of Employment will be notified to employees in a written statement before it becomes effective and will be recorded in the Human Resources Department.

1.4. All appointments are subject to the Terms and Conditions of employment set out in this document and the letter of appointment.

2.1 Employees are paid in accordance with salary scales recommended form time to by the Higher Education Funding Council for academic and analogous staff in Universities." (133)

63. The Standard Terms and Conditions refer to Collective Agreements in paragraph 23. The following is said there:

"23.1. *National collective bargaining machinery for academic and academic-related staff is arranged through Universities UK.*

23.2. A Joint Negotiating Committee (JNC) for Academic and Related Staff is organised with the University Authorities Panel (UAP) representing the Universities' Side and the Association of University Teachers (UCU) representing employees. The JNC has an independent chairman. The JNC is concerned only with pay and pay structures.

23.3. Signatories to the national agreements are the Universities UK Head of Salaries and Industrial Relations for the UAP and the UCU General Secretary for the UCU." (140-141).

64. Paragraph 24 of the Standard Terms and Conditions confirms that employees have the right to belong or not to belong to a trade union and explains that, "*The trade union which is recognised as representing the [Staff] is the University and College Union (UCU)*." (141)

65. Neither the appointment letter nor the Standard Terms and Conditions contain an express clause in which agreement is sought to the Respondent making deductions from salary.

The New Remuneration Strategy

66. A proposal that the Respondent adopt full job evaluation was first contained in the Remuneration Strategy for 2016 – 2012. The strategy was authored by Ms Luckiram to complement the main strategy adopted not long after the Respondent became a member of the University of London Federation. Although the document was prepared following consultations with stakeholders, it does not state that it is a collective agreement and we find that it was not.

67. Following joining the Respondent as HR Director in 2011, Ms Luckiram had identified that there was little consistency being applied to the salaries of Staff in Grade 9. The Pay Policy for Grade 9 specified that salaries on appointment should be based on three elements namely:

    - "market worth
    - relevant internal relativities
    - applying a job size comparison based on Hay evaluation for professional and administrative posts …." (1562)

    It also envisaged that Grade 9 salary increases would be considered on an annual basis "*only where job content has increased substantially, or evidence supports an adjustment due to equal pay or market forces considerations*." (1563)

68. Ms Luckiram told us that she observed that the sole element that appeared to be taken into account when determining salaries on appointment was market forces. This was because the overriding consideration was what the successful candidate was already earning. She also told us that the decision making in relation to salary levels was largely left to the discretion of the senior leadership teams within the relevant schools and there was very little effective oversight at a university level in relation to this. We have no reason not to accept Ms Luckiram's evidence on these points.

69. When developing the new Remuneration Strategy, which was to supersede the Grade 9 Pay Policy, Ms Luckiram identified this Grade 9 as an area of concern. She wanted to introducing job evaluation for Grade 9, based on the KFH job evaluation system and split Grade 9 into sub-grades that

reflected the KFH grades. She also wanted to replace the existing system of job matching for Grades 1-8 with full job evaluation. Both were specifically proposed as possible areas for review/reform in the new Remuneration Strategy.

70. We also note that the Remuneration Strategy identified the impact of a London effect on pay levels at the Respondent. The document contains an acknowledgement that the Respondent's location in London means that it is under pressure to pay salaries that match those that can be earned in other parts of London and/or are high enough to enable people to be able to afford either to live in London or to commute to it.

The 2018 – 2020 Pay Review Process

71. The pay review process which led to the reduction in the Claimant's salary took place between 2018 and 2020. Ms Luckiram as HR director had overall responsibility for its implementation, but in practice she delegated the bulk of the work to the Respondent's Reward manager, Alexandra Angus. It is relevant to note that Ms Angus left the Respondent's employment in late 2020. The Respondent therefore did not ask her to give evidence at the hearing.

72. At the time of the job evaluation process Ms Angus was undertaking a part time MBA and receiving support from members of the Claimant's team. The Claimant was concerned that this impacted on the ability of Ms Angus to be involved in anything to do with the Claimant's salary. We do not agree this had any impact on the decisions made about the Claimant's salary.

Initial Stage - up to May 2019

73. The initial proposals for a pay review process based on job elevation were made to the Respondent's Executive Team (ET) and Executive Committee (Exco) in April 2018. In papers presented to them (1468 – 1472 and 200 – 207), it was proposed that the Respondent should use the KFH Evaluation Scheme to evaluate all Professional Services Staff jobs in Grades 1-9, starting with Grade 9. At that time, it was envisaged that the evaluations would be undertaken in-house (by trained job evaluators working as a panel of three) and using software purchased from KFH. A business case was duly prepared (1338 – 1344).

74. As the job evaluation process was to cover Grade 9 it was necessary to keep Remco appraised of the proposal. An initial paper went to Remco in June 2018 (227 – 232).

75. The papers that went to Exco and Remco did not address the question of collective bargaining. To guide the implementation of the job evaluation scheme, the creation of a Job Evaluation Implementation Working Group was proposed. The papers stated that membership of the group would be drawn from members of the Executive Committee, Staff in Grades 9 and 8 and HR. In addition, the papers say that; "*Discussions will be held with the Trade Union Representatives to establish the optimal means of involvement, including the definition of areas for consultation*." (205).

76. At the first meeting of the JNCB (May 2018) the trade unions were offered training in job evaluation and invited to nominate representatives (one per union) for closer involvement in the project. This led to there being union representatives on the Job Evaluation Implementation Working Group (JEIWG) (214).

77. The Business School representative on the JEIWG was Damian Williams. At that time, he was employed in a Grade 8 role. He gave evidence at the hearing and told us that he was specifically approached by Ms Angus and asked to join for two reasons. The first was that he had experience in job matching and evaluation and the second reason was that he managed large groups of people who had the same role and therefore it was of interest to him how the job evaluation process would approach such roles. He did not consider his role was to represent more senior Grade 9 Staff from the Business School.

78. At the second meeting of the JNCB (October 2018) a paper was presented that set out some draft underlying principles that were to be applied to the job evaluation process. It was proposed that these be discussed in detail at the November 2018 meeting of the ERSG (341 - 342).

79. Concerns were raised that the job evaluation exercise would be very unsettling for staff and the unions questioned whether the proposed change was necessary given that it was not envisaged that there would be much impact. Ms Luckiram is recorded as having responded saying "*that it was timely for a thorough review, particularly at G9 to ensure internal consistency and competitiveness [but it was] possible that the roles on lower grades could receive a lighter touch (acknowledging that some people may find the process unsettling).*" This theme was picked up by Martin Chivers, Honorary Secretary of the UCU in email correspondence sent on 19 October 2018. He suggested that staff involved in the 2006 process had very negative memories of it and that the unions would prefer it if the wholesale approach of applying job evaluation to all Grades 1-8 could be paused while issues were worked through for Grade 9. He also commented on the proposed principles and requested that pay protection of 4 years be adopted to match the 2006 process (1504)

80. As a result of this intervention, and following consultation with directors within professional services (1506, 1508-1509, further meetings of the ERSG and JCNB and discussions at the JEIWG, the Respondent revised its plans. It decided that it would limit the full exercise to Grade 9 Staff and instead of buying the KFH software and training a team of in-house job evaluators, it would outsource the evaluations to the KFH Group. For Grades 1-8 a lighter touch was to be adopted. This was that full job evaluation would only be undertaken for new and vacant roles, but this would only happen after the Grade 9 exercise was completed. In fact, this part of the plan was never progressed and, at the time of the hearing, full job evaluation had not been applied to anyone in Grades 1-8 .

81. At around this time, at the end of March 2019, Ms Luckiram had asked Ms Angus to prepare a paper for the Chair of the Respondent's Reward Committee. She sent the paper to Ms Luckiram to be reviewed. Ms Angus set out the events that had taken place to date and also provided some context for them. She explained

"*Although Grade 9 staff are not formally represented by the Trade Unions and City is not obliged to consult on changes to Grade 9 Terms and Conditions of employment, City has presented these principles to the Trade Unions at the Employee Relations Subgroup Committee (ERSG) on 20th March 2019. City welcomes feedback from the Trade Unions, who have requested a further meeting to discuss these along with how these principles will be applied to Grades 1-8 roles, who are represented by the Trades Unions."* (1524)

82. When giving evidence, Ms Luckiram was asked about this paragraph. She said that she should have changed it so that it said that the Respondent was not obliged to consult on changes "to pay" for Grade 9 staff rather their "terms and conditions" as a whole.

83. As the approach to the process had changed so significantly, new principles were developed. These were presented to the ERSG meeting in April 2019 in a paper written by Ms Angus (the ERSG paper). The meeting was not invited to agree the principles. Instead, the paper requested comments be sent to Ms Angus with an update to the JNCB meeting to be held on 8 May 2019. The ERSG minutes describe that the paper was circulated and that comments were sought by 12 April 2019 *"so a final version can be drafted and brought back to JCNB for ratification."*

84. The proposed process set out in the ERSG paper was that there would be two stages whereby the base pay for Grade 9 Staff would be reviewed.

85. The first stage was the KFH job evaluation which the paper reported was already well underway. The outcome would be a 'Hay grade' for each role. The Hay grades had previously been mapped against the Respondent's grades with the outcome that only Hay Grades 19 and above were considered to fall within Grade 9.

86. The second stage was a salary benchmarking exercise described in the paper as follows:

"*To establish the appropriate salary level for each role, a salary benchmarking exercise for all Grade 9 roles using two salary surveys will be carried out. One of the surveys will be the UCEA salary survey, which is specific to Higher Education; the other will be a broader survey which draws on data from a range of employment sectors and which will provide data on the range of Professional Services functions at City.*

The purpose of using two surveys to establish the appropriate salary level is to provide assurance that the benchmarking exercise is fair, reliable, accurate and robust and is indicative of the HE sector while acknowledging

the importance of wider market considerations. This dual approach will enable City to make an informed decision on the appropriate remuneration for each role." (487)

87. The section of the ERSG paper headed Principles, set out three principles as follows:

"1) ***Pay Protection***

Roles that are 'evaluated' to a lower grade
While we anticipate the number of cases will be limited, some current Grade 9 roles maybe be evaluated to a lower grade e.g. Grade 8.

Where this is the case, an element of the employee's remuneration would become subject to salary protection for a time limited period from the implementation date (1st August 2019). This protection would cover the difference between the member of staff's current salary and the new salary at the top of the mapped Grade….. It is proposed that the period of pay protection is two years from the implementation date.

2) Salary benchmarking
While we anticipate the number of cases will be limited, the salary benchmarking process may find that City is either remunerating above or below the market rate for a particular position as informed by the benchmarking exercise.

Where this is the case, City will ***only*** *consider reducing or increasing a salary if the current salary falls outside a range which is 20% above or 20% below the market median position as indicated by relevant benchmarking data. …*

3) Right of Appeal

Staff have already had a full opportunity to contribute to their own job descriptions and prior to any formal appeal, all role-holders will be provided with a further opportunity to review the initial. This might include an opportunity to have a role re-considered by KFH if there are sufficient grounds for doing so.

If a role-holder remains unsatisfied, there will be a formal opportunity to appeal where it is demonstrated that an agreed material factor could have led to a different outcome.

Appeals might occur in the following circumstances;
a) Where a role is evaluated to be a lower grade e.g. grade 8
b) Where a role is evaluated at a lower spinal point within grade 9 based on internal relativities" (488)

88. We were not referred to any written response from the unions to the ERSG paper. We were told that a meeting was held with the unions on 1 May 2019 to go through the principles with them and according to Ms Luckiram's

witness testimony, "*the Trade Unions agreed in principle to the remuneration principles*" (paragraph 69) subject to wanting extended pay protection.

89. No notes exist of this meeting, but it was referred to in a paper presented by Ms Luckiram to an Executive Team meeting held on 7 May 2019 (481-489). In the executive summary at the start of the paper, Ms Luckiram indicated that the Executive team was being asked "*to endorse the Job Evaluation principles and to consider a request from the Trade Unions for an extended pay protection period*." (482)

90. She reported in her paper that "*Consultation with the recognised Trade Unions has been constructive and, with the exception of a recent proposal from the representatives in relation to the duration of the pay protection period, is considered to be at a final stage*" (482) and added "*The duration of the time limited period is currently subject to consultation with the Trade Unions*." (483)

91. The paper then has a further section saying:

"*City met with the Trade Unions on 1st May 2019, to discuss the full principles. The Unions have agreed in principle to the remuneration principles. However, they have requested that City further considers the duration of Pay Protection. The Unions are requesting that City considers a pay protection period of three years. Staff would receive pay protection in full for the first two years with a third year at 50%. At the end of the third year pay protection would cease.*

The Unions believe that this revised approach would be fairer and help to manage the implications of reductions in salary for staff, especially for Grade 9 staff whose roles did not form part of the Professional Services Review and where an ad hoc approach has been taken in the past to salary benchmarking particularly when setting starting salaries.

ET is asked to consider this recent request from the Trade Unions." (483)

92. The paper prepared for the Executive Team meeting also reported that initial job evaluation results had been collated with the outcome that although a majority of the roles had been evaluated as correctly being in Grade 9, seven roles, three of which were in the Business School, had been identified as not being Grade 9 roles (483).

93. With regard to next steps for Grade 9, the paper said:

"The President and Deputy President will meet with the HR Director and Reward Manager on 8th May to review the job evaluation and pay benchmarking outcomes.

Remuneration Committee will be asked to approve the outcomes of the job evaluation process (confirmation of grade and proposed salary level, based on benchmarking) for individual posts within the Committee's remit (Senior Staff and those employees whose remuneration is over £100k). Approval

will be in the context of a comprehensive report of the Grade 9 job evaluation exercise will be considered.

The Committee will also be asked to consider and approve the proposed approach to salary protection for any posts where the job evaluation exercise and pay benchmarking indicate that the current salary level is not appropriate.

Subject to approval by Remuneration Committee, Grade 9 staff will be informed of the outcome of both the grading and benchmarking exercise by the end of May 2019." (485)

It is striking that there is no reference to any further consultation with the trade unions. The minutes of the meeting record, however:

"ET APPROVED the principles for the Job Evaluation Exercise with regard to pay protection, salary benchmarking and right of appeal.

Council's Remuneration Committee on 16th May will be asked to approve key principles for the implementation of job evaluation and to consider recommendations concerning those members of Grade 9 staff within its remit. PC, DB and ML will meet to review the recommendations prior to the Remuneration Committee meeting.

The principles will be discussed at JCNB on 8th May." (1537)

94. The principles were not discussed at the JCNB on 8 May 2019. In fact, there was no further discussion about job evaluation at the meeting at all nor any future meetings. A final version of the principles was never created.

Communications with Staff

95. By this time, May 2019, several email communications had been sent to Staff in Grade 9, including the Claimant and her then line manager Paul Long to explain what was happening with job evaluation.

96. In the first email dated 8 August 2018 (238 – 239), Staff were informed that all jobs in Grade 1-9 would be evaluated, but that the process would start with Grade 9. They were invited to attend workshops delivered by KFH Group Staff explaining job evaluation and giving guidance on how to prepare job descriptions which could be used for the purpose. The workshops were held in August and September 2018 and the Claimant attended one of them.

97. The second email was sent in early September 2018. It reiterated the importance of attending the remaining KFH workshop. The email sent to the Claimant attached the Claimant's existing job description and a new job description template to be completed by a deadline by the Claimant with her line manager to be used for evaluation purposes.

98. The Claimant and her line manager followed the instructions in the email and returned the Claimant's job description well in advance of the deadline of 19 October 2019.

99. A third email had been sent on 15 March 2019 (453) from Ms Luckiram to the Grade 9 staff explaining that although the job evaluation process was well underway, it was taking longer than initially envisaged. The email told its recipients that their jobs were being evaluated by KFH at that time and informed them that there would be a quality assurance process as well, such that each role would be evaluated by a second KFH consultant. The email also identified that "*This may require, in some cases, further work on the job description. Should this be required, the HR Manager will work with the role holder and line manager to provide an updated job description*." (453)

100. In addition, the email explained that there would also be a salary benchmarking exercise as follows:

> *"**Salary benchmarking***
>
> *To establish the appropriate salary level for each role, we will conduct a salary benchmarking exercise for all Grade 9 roles using two salary surveys. One of the surveys will be the UCEA salary survey, which is specific to Higher Education; the other will be a broader survey which draws on data from a range of employment sectors and which will provide data on the range of Professional Services functions at City. The purpose of using two surveys to establish the appropriate salary level is to provide assurance that the benchmarking exercise is fair, reliable, accurate and robust and is indicative of the HE sector while acknowledging the importance of wider market considerations. This dual approach will enable City to make an informed decision on the appropriate remuneration for each role.*
>
> *Where the benchmarking exercise finds the current level of remuneration for a role does not align with market data, HR will discuss the outcome with the role holder and their line manager." (454).*

101. The Claimant had responded to the email raising concerns in relation to the proposed salary benchmarking exercise. She had asked for clarity regarding the extent to which the data being used would reflect the position in business schools which was often different from other university positions (463 – 460). The Respondent did not reply.

Initial Outcomes and Next Steps (May 2019 to October 2019)

102. The job evaluation process for Grade 9 and the initial outcomes were next discussed in detail at the Remco committee held on 16 May 2019, the minutes of which were included in the bundle at pages 1534 - 1538. A detailed paper was presented (492 – 511).

103. The paper confirms that 33 people in Grade 9 had their posts evaluated in total. We note here that not all of the Grade 9 posts that were originally identified as being in scope (207) for the salary review exercise were evaluated. Where there was no post holder in the role and either the post had been disestablished or consideration was being given to it being disestablished were not evaluated. The only exception to this was the Director of the Dubai Centre which we deal with further below.

104. The paper confirmed that there were seven roles where the indicated grade based on the job evaluation was Hay 18 which meant that it was a Grade 8 role in the Respondent's grading structure. Four of the roles were in the Business School. These were the Client Director role (held by three people), the Claimant's role, the role of Investment Director held by Helen Reynolds, who gave evidence to the tribunal and the role of Associate Dean - Education. Three other roles elsewhere in the university were also determined not to fall into Grade 9.

105. The paper proposed that further work would be undertaken with the Staff whose indicated grade had been evaluated as below Grade 9 to ensure that material factors had not been missed from their job descriptions. It was agreed that the positions of these individuals would be discussed after further re-evaluations were completed.

106. In addition, the paper identified that eleven post holders had been evaluated as being correctly in Grade 9, but when the salary benchmarking exercise had been undertaken in connection with them, the relevant post holders were being paid above the agreed pay benchmarking position. This included Paul Long, COO of the Business School, who also gave evidence to the tribunal. Full discussion of this issue and what action should be taken was deferred to a further meeting of Remco which was due to take place in June. Remco requested further information on salary benchmarking be collated for the June meeting (1532).

107. A communication was sent to staff to confirm that Grades 1-8 would not be subject to wholesale evaluation in May 2019 (1528 – 1529)

108. Grade 9 staff were sent an update email on 23 May 2019 by Ms Luckiram which confirmed that KFH had completed its work confirming the Grade and Hay level for each role evaluated. She explained that although most roles were falling into Grade 9, there were some that were not and in those cases the relevant holders and line managers had been informed and were being given an opportunity to review their job descriptions with a view to their roles being re-evaluated (1539).

109. In the Claimant's case, her job had been evaluated by KFH as having a total of 571 points and equating to a Hay Grade 18. This was considered to be a Grade 8 role within the Respondent's grading structure and she was therefore invited to work with Ms Angus to revise her job description so that it could be resubmitted for re-evaluation. Ms Reynolds was given the same opportunity.

110. A further meeting of Remco took place on 20 June 2019. A copy of the minutes were at pages 1570 – 1579 of the bundle. A detailed paper was presented to Remco which was similar to that presented in May, but with additional information about salary benchmarking (526 – 537) . The paper explained that:

"Further work has been completed by the Director of HR and Reward Manager to review the outcomes and consider a range of approaches which might mitigate the impact of some of the initial outcomes, without compromising the integrity of the comprehensive approach to all Grade 9 roles.

This included securing information and advice from Peter Smith from Korn Ferry Hay Group, advisor to Remuneration Committee, based extensive knowledge of the employment market and the implementation of job evaluation within Higher Education, Public Sector and the wider employment market." (526)

111. The recommendation by Mr Smith was that the median figures for the purposes of the salary benchmarking exercise should be increased by 11% to account for the 'London effect'. This reduced the number of individuals who were facing a salary reduction from eleven to eight and it was envisaged that for six of the individuals cost of living increases as well as pay protection would mitigate the personal impact on them over a three year period (528). Remco decided to adopt the recommendation by Mr Smith and proceed on that basis. There was no discussion with the recognised trade unions about this at all.

112. Mr Long continued to be one of the eight employees facing a pay drop. The effect of the decision by Remco was that his base salary of £133,184 was to drop to £122,487, but with pay protection making up the difference. We have not seen the pay benchmarking data sheet that was prepared for him, but based on what we saw in the Duncan Brown Report referred to below, we have found it impossible to understand how the figure for his base salary was reached.

113. The next meeting of the ERSG was held on 26 June 2019. Ms Luckiram fed back that the Grade 9 job evaluation exercise was continuing, but that was all she said about Grade 9 Staff (1541). There was no further engagement or consultation with the trade unions after this.

The Claimant's Job Evaluation

114. The Claimant's job description was re-evaluated by KFH in August 2019. It came out with a higher score of 611 points (560) but this was still considered to be a Hay Grade 18 and therefore fall within the Respondent's Grade 8.

115. The person at KFH responsible for undertaking the re-evaluation liaised with Ms Angus and asked her about various matters of detail she presumably considered to be relevant to the evaluation. Although taken through the evidence in some detail, we do not consider it necessary to recount the bulk of it, as ultimately, although not until January 2020, the Claimant's role was re-evaluated a third time such that it was determined to be a Hay Grade 19 and fall within the Respondent's Grade 9.

116. During the hearing, the Claimant made the point very strongly that her role was a unique specialist role that bore no resemblance to the ordinary careers function that is offered in universities to undergraduates and so the

internal relativities between the roles should not have been considered at all. She said that any attempt to compare them would be like comparing apples with oranges.

117. We accept that the Claimant's role was a unique role that was very different to the general careers function. We note that in the final job description that was evaluated, the role was described as such (811). In addition, we consider that the Claimant's fruit analogy is not relevant when it comes to job evaluation because the whole point of a factor-based job evaluation scheme is to take roles which are very different to each other and measure them in terms of "value". The purpose is to assess the relative values of a range of very different jobs and rank them accordingly. To extend the fruit analogy, the model should enable all kinds of fruit and vegetables and even some other foods to be compared and ranked.

Salary Benchmarking Exercise – Stage One

118. The fruit analogy put forward by the Claimant was relevant, however, when it came to the salary benchmarking exercise. As we understood it, the purpose of salary benchmarking exercise to look at the market for similar roles to the role being benchmarked and compare salaries. In other words, it did indeed require apples to be compared with apples.

119. As well as raising concerns about the evaluation part of the exercise, the Claimant continued to raise concerns about the salary benchmarking that would be undertaken for her role (522, 538 and 577 – 580, 584). The uniqueness of her role was a very significant concern for this question. The Claimant also tried to draw relevant data to the attention of Ms Angus to support her argument.

120. Ms Angus did not respond to the Claimant's detailed questions, about the salary benchmarking data to be used, nor engage with her attempt to point to relevant data. Instead, Ms Angus responded saying simply:

"*The salary benchmark data being used for this exercise was agreed by the Remuneration Committee (Remco) and the School leadership team at [the Business School]. The data is taken from a variety of sources including Higher Education, Business Schools and the private sector."* (588)

We note that she makes no mention of any agreement with the recognised trade unions.

121. Incidentally, Ms Luckiram was unable to tell us what was discussed with the Business School leadership team about the salary benchmarking data. We saw no documentary evidence of any such discussions having taken place. Mr Long told us he was not involved in any such discussions. The interim Dean of the Business School, Professor Volpin, who had by this time replaced the previous Dean, wrote to the Respondent's President on 14 October 2019 raising concerns about the Grade 9 review (674 - 675). He specifically states he was not privy to the salary benchmarking data used for the Claimant's role and that he would like to see it (6740). We find that the response from Ms Angus was disingenuous as there had been no

discussions with the Business School leadership team. Instead the reply was drafted as it was to seek to curtail the Claimant's queries and close them down.

122. After the first re-evaluation of the Claimant's post, but before the second, an initial salary benchmarking exercise was undertaken for the Claimant by Ms Angus. This led to a provisional outcome being shared with the Claimant.

123. We did not understand all of the figures used in the benchmarking report, and in particular the way in which it incorporated the 'London effect' agreed at Remco in June. Ms Luckiram was unable to help us with this.

124. The pay benchmarking data used was the UCEA data and the KFH pay benchmarking data (696). Specifically, the Claimant's role was benchmarked in the UCEA data set against a Grade 1 Manager with the comparable role being identified as Careers (022). The descriptor for this role says, "Provision of services to students concerning careers or work-experience for sandwich students." (644). For the purposes of the KFH data set, she was benchmarked against a Hay Grade 18 in the Human Resources and Executive Management Job Family.

125. The outcome of the benchmarking exercise was that the relevant salary range for the Claimant was determined to be 20% above and 20% below a combined median figure form the UCEA and KFH data of £63,524. The range was £50,818 - £76,228.

126. The Claimant was informed of the provisional outcome in a letter dated 30 September 2019. The letter explained that as she had been evaluated as a Hay Grade 18, she would be downgraded to Grade 8 and mapped to the highest spine point in Grade 8 – spine point 53D (£66,538). In addition, the letter informed her that she would be paid a market supplement of £9,690 in recognition of the specific salary market for post-graduate recruitment roles. The market supplement was the difference was the difference between the Claimant's new salary and the upper point of the salary range used for benchmarking purposes.

127. The Claimant was also informed that she would benefit from pay protection with two years at her current full salary and then a third year where she would receive 50% of the differential between her current salary and her new salary. The letter concluded saying that following the Remco meeting in October 2019, the Claimant would receive "*formal notice*" of the information it contained and "*resulting variation to [her contract of employment*" (610 – 612).

128. The Claimant was very unhappy with the outcome. She wrote a lengthy letter addressed to Remco on 14 October 2019 setting out her concerns (677 – 680).

129. In addition, she contacted XpertHR directly and spoke to someone there to try and obtain relevant salary benchmarking data for her role and roles in her team. The significance of her contacting XpertHR is that she was aware

that it collated the UCEA pay data which had been used by the Respondent and she wanted to test her assumption that it was not appropriate to use it to benchmark pay roles in the Business School.

130. At the tribunal hearing, the Respondent was critical of the Claimant's actions and suggested she deliberately misled the person she interacted with at XpertHR when trying to obtain data. We do not find this to be the case.

131. The Claimant had multiple reasons for exploring what XpertHR could provide which included helping the Respondent's Business School students and finding out information about her salaries for her team. We accept the Claimant's explanation that she made Professor Volpin aware that she was trying to find out if it would be possible to commission XpertHR to provide a data sample that was more appropriate for her role. We also accept that she was seeking data for her and her whole team because of concerns about the fact that if her job was going to be designated a Grade 8 role, this potentially would have a knock-on effect on her reports. The Claimant did not try and hide the fact that she had contacted XpertHR from the Respondent, but told them she had done this (724).

132. It is relevant to note that in the course of her interaction with XpertHR, the Xpert HR consultant confirmed that the senior roles the Claimant was seeking to obtain data for were niche and too senior for the UCEA survey data. The Claimant was also told that although the UCEA HE sector survey was helpful for roles at the lower level, relevant salary data for the more senior roles should probably sourced from the private sector and that this was something that comparable business schools were doing (671).

133. The Claimant also attempted to obtain a breakdown of how much Business Schools data is contained in the UCEA data (659) but unfortunately misunderstood the information she was provided. It was not as low as she calculated.

134. The Claimant obtained some sample benchmarking data from XpertHR in the course of her interaction. We have given this no weight when reaching our decision because it was simply a sample prepared by the consultant and never finalised (667 and 670).

135. Ultimately, however, we formed the view that the use of the UCEA data in relation to the Claimant's role was problematic because her role was unusual and because she was employed in a University Business School, but carrying out a role that was also important to stand alone Business Schools.

October 2019 to May 2020: Dr Brown's Report

136. Although the Claimant's letter of 14 October 2019, was not provided to the members of Remco, the fact that she had raised concerns and also that concerns had been raised by Professor Volpin was drawn to the committee's attention when it met on 17 October 2019.

137. Ms Luckiram and Ms Angus had prepared an update paper for the committee which focused on the position of the Grade 9 employees who had come out of the pay review exercise badly (693 – 695). This included the Claimant's role, Mr Reynold's role, Mr Long's role and the Client Director roles.

138. In light of the concerns raised by the Claimant and professor Volpin, Remco decided that additional external salary benchmarking should be undertaken in connection with her role, the role of Mr Long, COO and the Client Director role. At this time, the Claimant's role and the Client Director roles were continuing to be evaluated at below Grade 9. Ms Reynold's role was still in the process of being re-evaluated and so was not to be included in this exercise.

139. It was noted that the additional salary benchmarking exercise would pay specific attention to comparable business schools in UK universities, but nonetheless continue to consider internal relativities across the Respondent. It was envisaged that once this work was concluded the matter would return to Remco (701-702). The recognised trade unions were not involved in this process at all.

140. The Respondent decided to commission Dr Duncan Brown of the Institute of Employment Studies to undertake the additional salary benchmarking work. This was because he had completed a similar piece of work in relation to academic staff in the Business School and was considered by the Respondent to have the required expertise. Dr Brown was provided with a scoping document prepared by Ms Luckiram (756 - 758).

141. Dr Brown was asked to identify roles which were comparable to the three Business School roles he was investigating and find out much they were paid. He was provided with a list of comparator institutions, but also invited to include other schools if considered appropriate, subject to him providing a rationale for their inclusion. When evaluating the information from the institutions he was instructed to take account of the type of business school and its position in the ranking tables.

142. Dr Brown's task was to obtain information about directly comparable roles, together with the Hay Level/grade of the role. When assessing the pay benchmarking data, Dr Brown was instructed to include data from the Hay Level of the relevant role and the Hay level above. In the case of Mr Long, his role had been evaluated as a Hay Level 20 and so Dr Brown was to consider data from Hay Level 20 and 21 roles. For the Claimant, the relevant areas of consideration were Hay Level 18 (her current grading) and 19.

143. Dr Brown was also required to meet with the relevant role holders and the HR Director and Reward Manager as a starting point. The meeting with the Claimant took place on 8 January 2020. She was accompanied by Mr Long and Professor Volpin who both stressed to Dr Brown that the Claimant's role was considered to be critical to the Business School and expressed concerns that the salary benchmarking exercise should include reference to private sector salaries. The Claimant provided detailed written information

about the proposed comparator institutions and her view of the comparability of the roles found at each of them to her own role (843 – 850).

144. The Claimant ensured that she shared with Dr Brown information she believed to be relevant to his benchmarking exercise. This included the following:

- In 2016, the Claimant had, following an approach by the Associate Dean of the Imperial Business School, applied for her equivalent job there. A salary of £120,000 had been discussed with her at the time. Despite pursuing the opportunity and attending two interviews, the Claimant withdrew as Imperial was not able to agree the established flexible work arrangements she had in place.

- In November 2019, the Claimant had met with the Director of Careers at London Business School (LBS). LBS is a stand-alone business school and considered to be a Tier 1 School overall in the FT Rankings. LBS had recently undertaken a KFH job evaluation process. He provided the Claimant with document outlining LBS's approach to salary benchmarking (865 – 867) which shows that for the Careers Function the salary benchmarking data that had been used was XpertHR data for "Inner London HE Institutions Peer Group Level and function group" and KFH pay data in the categories of "Inner London private sector level only" and "HE institutions Inner London/Peer Group" (867). The paper also notes that "Full benchmarking data is shared with Heads of Department and People Managers for the roles in their areas." and "Benchmarking data for a specific role is shared with the individual in that role" (866). The Director of Careers at LBS had been evaluated at Hay Grade 21.

145. As a result of the meeting with the Claimant, Dr Brown added London Business School as a comparator institution, and it appears that the salary of the Director of Careers was taken into account by him, although this is not expressly stated in the report. In reaching this conclusion we rely on an email exchange between him and Ms Angus discussing how to approach the matter. He does not appear to have taken any of the other information she provided into account however.

146. The Claimant was also concerned that Dr Brown would be given an incorrect salary range for the vacant post of Director of Post Graduate Careers at Oxford Siad Business School. The role had been advertised at a salary range of £55,750 to £64,605 with a market pay supplement taking the salary up to £85,000 for an exceptional candidate (854). The Claimant gave evidence to the Tribunal that she had applied for this role and was made a verbal offer for it in early February 2020 of £105,000, subject to internal approval. However, as a result of the Covid pandemic, recruitment to the role was put on hold and did not proceed. She informed Dr Brown of this. We do not know what salary figure was used for the role by Dr Brown. In his report he merely says:

"*Two of the posts reported were currently vacant. For the one which had just left to join another university we entered the prior incumbent's actual salary. For the other job where the incumbent had left earlier last year we agreed to enter the mid-point of their salary range into the survey*" (1702 – 1703)

147. We note that the Claimant had specifically requested, in August 2019, that her role be benchmarked against specific roles in Said Business School, Judge Business School, Cambridge, Imperial Business School, Cranfield Business School, Warwick Business School and Cranfield as well as two French Business schools and one in Barcelona (584).

148. Dr Brown's final report (1689 – 1706) was based on information provided by the following institutions:

- Said Business School – University of Oxford
- University College London
- Kings Business School
- Warwick Business School
- London School of Economics
- London Business School

149. Four other institutions had been approached, but either did not consider they could provide relevant information or were unable to provide information in the required timeframe (1693 – 1694). One of these was Cranfield.

Final Re-evaluations

150. At around the same time as the research was being undertaken by Dr Brown, the Claimant's reporting line was changed so that she reported to the Dean of the Business School rather than to Mr Long and her job description as re-evaluated for a second time. Although the Claimant said the change in reporting line made little change in practice to her job and the way she worked, it did make a significant change to her job evaluation. Her final evaluation put her in Hay Grade 19, which meant that she fell within in the Respondent's Grade 9. It is relevant to note her final scores (799) were:

- Know How 350
- Problem Solving 152
- Accountability 200
- Total 702

151. Ms Reynolds' job was also re-evaluated and came out at a Hay Grade 19. In addition, Mr Long's job rating increased from a Hay Grade 20 to a Hay Grade 21 as a result of his evaluation. There was no change to the rating of the Client Director role.

152. Dr Brown was made aware of the change in grading for the Claimant and Mr Long and made a note in his report that:

"*During the course of the study, two of the [Business School] roles under review were re-considered, job descriptions redrafted and re-evaluations*

took place. IES adapted the survey material to take account of this, ensuring we offered alternative Hay levels for the various posts for example, in the survey documentation." (1694)

Benchmarking Reports for Remco

153. Dr Brown's report was finalised by the end of February 2020 and the matter returned to be considered by Remco at its meeting on 12 March 2020. An update report was prepared for Remco by Ms Angus and Ms Luckiram which attached the report in full and provided an updated benchmarking summaries for the outstanding roles (887 – 905 and 1707 – 1709).

154. We did our best at the hearing to try and understand the final decisions made by Remco about Ms Reynolds, Mr Long and the Claimant but found this very difficult. Ms Luckiram was unable to fully help us as Ms Angus had been responsible for preparing the final recommendations. This was because Ms Luckiram was directly impacted by the pay review herself and had wanted to avoid any suggestion of a conflict of interest.

155. In the case of Ms Reynolds, as noted above, her role had been re-evaluated as a Hay Grade 19. For benchmarking purposes, she was matched on the UCEA database against a Level 4B Senior function head which produced a median salary level of £77,098. Against the KFH pay data she was matched against roles in Asset Management at Hay level 19. This produced a KFH median figure of £155,000. The aggregated median figure was therefore £116,049. This resulted in a potential salary range between £92,839.20 and £139,258.80. As Ms Reynolds' salary fell within this range, the outcome was to confirm her current grade as Grade 9 and her current salary at SP 27. (1709).

156. We note that the benchmarking document includes a note against the UCEA data that "*This role is not typically found in higher education therefore generic UCEA data has been taken for the responsibility level. However this should be used with caution as this role typically sits within a financial institution.*" In fact, the UCEA data was used, but did not unduly depress the overall median as it was aggregated with a very high KFH data median figure.

157. There were two entries on the benchmarking document that we did not understand. The first was a reference to an HL Median figure of £88,420. The note against this said "10% premium applied to the HL general market figure. This is in line with KFH Regional comparison multiplier. It was not clear to what figure the 10% premium had been added or how this figure was factored into the calculations. Ms Luckiram was unable to explain this to us. In addition, the document notes that there was insufficient data to provide a KFH upper quartile figure which seemed a very odd statement to make, given that it had been possible to obtain a median figure.

158. There was a suggestion in the Claimant's evidence that pressure had been brought to bear on either HR or Remco regarding Ms Reynold's salary by Peter Cullum. He was the individual who was responsible for the donation that led to the establishment of the foundation for which Ms Reynolds was

the Investment Director. Mr Cullum did write a letter to the Respondent expressing concerns about the process after Ms Reynolds contacted him about the fact that her role had been downgraded to a Grade 8. However, our finding is that the final outcome of the exercise for Ms Reynolds was consistent with the methodology used for the other roles and nothing different or untoward appears to have occurred in her case.

159. So far as Mr Long was concerned, his role had been regraded at Hay level 21 and specific benchmarking had been undertaken for his role by Dr Brown. In a table n his report (1698) Dr Brown produced two median figures for Mr Long's role, one which excluded LBS and one which included LBS. The figures were £100,321 and £114,202. The table references Hay Level 20 against the numbers. The table also shows the upper quartile figures for these samples as £107,314 and £137,953. There are also different figures for base pay and total cash which we understood reflected the fact that some roles used for benchmarking purposes were paid bonuses or similar on top of base pay.

160. In the benchmarking document produced for Remco (1707) it appears that Mr Long's role was matched on the UCEA database against a Level 3B Senior function head which produced a median salary level of £100,606. Against the KFH pay data he was matched against roles in Executive Management. The Hay level is not specified, but the median salary is shown as £113,349. This produces an aggregate of £106,977.50. This figure was not used to establish his salary range, however.

161. The document incorrectly transposes the figure for Median Base Pay based on the full sample at HL as £122,487. This was the amount of Mr Long's base pay as determined by the earlier Remco decision about his pay before the re-evaluation and further benchmarking work. The document also uses the upper quartile figure for the full sample for total cash as the median figure. There is a note explaining this which says; "*It is noted that the IES was unable to disclose specific data relating to Hay 21 COO roles. There it is assumed that the [upper quartile] of [Hay] 20 roles is a reflection of the median market for HL 21 roles.*" The document also references an HL median figure with the same note as shown on Ms Reynolds's document but again does not explain how this is taken into account.

162. The decision of Remco was to reinstate Mr Long's original salary of £133,184 at Grade 9, SP 41.

163. Turning now to the Claimant, her benchmarking document shows that her role was matched on the UCEA database against a Level 4B Senior function head which produced a median salary level of £74,257. This is a lower figure than was produced for Helen Reynolds. Against the Match Description for Helen Reynolds the note is:

"Responsible for a complete function or activity below Senior Management Team level but will be part of the management team for the overall function. Have responsibility for budget setting and management within the function

and has responsibility for staff within the function or activity. Reports to level 2 or 3" (1709)

whereas for the Claimant the note says:

"*Student Support and Administration: Includes registry, student admissions, student records, student welfare, counselling and advisory services, careers advice. Example job titles: Academic Registrar, Dean of Enrolment, Head of Student Compliance and Responsibilities, Head of Student Affairs, Head of Academic Admin Services, Director of Admissions, Head of Student and Course Information, Director of Student Services and Admin, Director of Student and Academic Services, Disability Services Manager, Director of Careers, Student Services Manager, Director of Student Employability, Director of Students, Head of Counselling and Supervision, Director Student Welfare Services*" (1708)

164. We do not understand the rationale for this difference. In addition, given the Claimant's role, we consider the description applied for Helen Reynolds is far better suited to the Claimant's role.

165. Against the KFH pay data the Claimant was matched at Hay Level 19 against Human Resources – Learning and development roles producing a median of £75,237. The job match description states:

"*Proficiency in a specialist field or discipline gained through deep and broad experience built on concepts and principles. Typically manages broadly similar sub-functions and integrates and coordinates relationships with other parts of the organization over a one year horizon, with a significant impact on tactical results. Interaction with others requires highly developed skills to motivate, inspire and persuade. Decision-making involves the use of judgment and there is an emphasis on the development of new/improved procedures and on the translation of policy into operational plans. The focus is on the delivery of medium term results within functional policy*."

We do not find this description very helpful.

166. The two figures gave an aggregate figure of £74,747, but as with Mr Long, this figure was not used for benchmarking purposes. Instead, the figures produced by Dr Brown were used instead.

167. In his report, Dr Brown described the job matching he had undertaken as follows:

"All of these institutions had a single director/head of careers role for the business school or equivalent which is what was entered into the survey. In two cases this was the top careers role for the entire institution. Generally this role reported to the COO role in this survey, with one case being a reporting line into the overall head of careers for the wider university. Almost all had the title of some variant of director/deputy director of careers/career centre/career development; with the one exception being called their Head of Engagement.

But more variety was evident here in terms of job sizes and exact job specifications; and in the relationship to other careers' roles within the wider institution (where this was not a stand-alone business school). No other institution bar [the Respondent's Business School] defined their title in terms of post-graduate careers.

The larger and higher paying roles still head up the traditional student careers support and advice activity for the business school. But they also play a key external school representation and client engagement role, positioning the school and its students with major employers. The lower level roles were typically one of a number of deputy director roles playing a reasonably similar/standard careers advice service role for a school within the university, in this case the business school.

The range of Hay levels for the role in the schools using KFH varied from 18 to 21. The numbers of staff managed by the six job holders ranges from under 10 to almost 50." (1701)

168. We take from this that Dr Brown obtained data about six quite different posts. He did not confirm which of the roles were included in his final sample, other than to say it was based on figures at Hay Level 19, excluding LBS and for a full sample including LBS and for base pay and total cash. We do not know how many of the six roles this is, or if he also included the Hay Grade 18 role in his calculation. The report does not indicate which of the roles Dr Brown considered was the closest to the Claimant's role or explain how the London effect is taken into account.

169. The figure used to work out the salary range for benchmarking purposes was the median for total cash for the full sample, namely £76,081. This gave a salary range of £60,864.80 to £91,297.20 (20% below and 20% above).

170. As with the reports for Ms Reynolds and Mr Long the benchmarking document for the Claimant includes an HL Median figure. In her case it is £88,420, but there is no evidence it was factored into any of the calculations.

Outcome Decision

171. The decision of Remco, which was subsequently communicated to the Claimant in a letter dated 18 March 2020, was that the Claimant's salary was to be reduced from £104,658 (Grade 9, SP 25) to £90,393 (Grade 9, SP 17) with effect from 1 June 2020 (906 – 908).

172. The letter informed the Claimant that she was eligible for pay protection, but that following a recommendation from the Interim Dean of the Business School Remco had agreed that she should receive a Retention Payment of £14,265. The retention payment is the difference between her new and old salary as at that date.

173. The letter said that the retention payment was non-pensionable and not subject to any cost of living increases. It added that the Dean of the Business School would be asked on an annual basis to confirm that the basis for the

original recommendation continued to prevail and that it was expected that it would cease at the end of the three year period to 31 May 2023.

174. The letter did not offer the Claimant a right of appeal against the decision that had been taken. It informed her that in all other respects the terms and conditions of her appointment would remain unchanged. The Claimant was not invited to confirm whether or not she accepted the change.

175. Subsequently, the retention payment was converted into pay protection following correspondence between the Claimant's solicitors and the Respondent's HR team in 2021 (1045 and 1066). We note that the Claimant waived no legal rights in in that correspondence, but sought to preserve them in full.

Subsequent Events

176. The Claimant wrote to the Interim Dean of the Business School on 3 April 2020 expressing her concerns about the decision and asking if she could speak to him further (924). She also wrote on 9 April 2020 to Ms Luckiram saying she wished to dispute the outcome and appeal (932).

177. Ms Luckiram replied to the Claimant on 21 April 2020 to explain that normally there are two options available to someone who as unhappy with the outcome of a job evaluation exercise. These were a re-evaluation where it can be demonstrated that a material factor had been omitted from the job evaluation or a grievance. Ms Luckiram said that in the Claimant's case, as her role had already been re-evaluated, Remco would not "be revisiting the process or position in relation to the outcome of the job evaluation and pay benchmarking exercises for your role." She was therefore assuming that the Claimant would want to pursue a grievance and therefore she would nominate someone in her team to manage the Grievance Procedure and liaise with the Claimant over the process to be followed (938).

178. The Claimant replied on 3 May 2020 to explain that she had decided not to pursue a grievance. Ultimately her reason was that "*After two years of attempting to engage HR in the key matters, [she had] now lost trust in [the Respondent's procedures]."* Her email added that she intended to raise the matter with ACAS as the first step to pursuing a claim *(637)* When giving evidence she explained that as far as she was concerned, her grievance was about a matter that Ms Luckiram, the Director of HR had led on. She felt that it was not appropriate for HR to deal with a grievance about the Director of HR. We find that this was her genuine reason for not pursing a grievance.

179. Although the Claimant did not pursue a claim between May 2020 and September 2022, she continued to make it known that she was unhappy with the salary review process.

180. From around September 2022 onwards, the Claimant sought assistance from HR in relation to paying a market supplement for roles in her team that reported to her. This was because there had been a steady stream of resignations from her team, post the Covid pandemic, by people leaving to

secure more highly paid positions. This subsequently led to agreement (over a year later) to offer to pay a market supplement of £15,000 to recruit to the roles. The Claimant provided the senior leadership team and HR with salary benchmarking data collated by the MBA Careers Service and Employer Alliance for 2019 and 2021 to support this (1139).

181. At the same time as the Claimant raised concerns about the salaries being offered to members of her team, she also indicated that she remained unhappy with her own salary. By this time, she had also taken on additional responsibilities. No action was taken by the Business School to seek to address her concern by proposing an equivalent market supplement be applied to her role. She was however offered the opportunity to pursue the issue as a grievance in January 2023 (1173) by the Respondent's Chief Operating Officer. We find that the Claimant declined to follow this option for the same reasons as set out above.

182. The Claimant contacted Acas again in June 2022. The early conciliation certificate confirms that conciliation began on 30 June 2022 and ended on 10 August 2022. The Claimant issued her claim on 6 September 2022.

183. This tied in with the timing of when her pay was actually reduced. As a result of retention payment/pay protection the Claimant's salary was not reduced until her June 2022 monthly salary. Between 1 June 2022 she received 50% of her old salary until 31 May 2023. From 1 June 2023 she reverted to the then current salary for an employee on Grade 9 SP 17 of £96,392.

Comparator Roles

The Director of the Dubai Centre,

184. Kevin Dunseath, a man was commenced employment with the Respondent in the role of the Director of the Dubai |Centre on 10 January 2017. His starting salary was £125,000. This did not correspond to a spine point in Grade 9.

185. The starting salary was approved by Remco on 18 November 2018 (195). Initially Remco had approved a salary range for the role of between £85,599 and £100,796 (SP 17 – 26) with the possibility of increasing the range to £110,000 for an exceptional candidate (189). The decision of Remco was that there should be a single salary incorporating additional sums for accommodation and travel between the candidate's home country and Dubai and other unique expenditure associated with the role.

186. Following a search by an executive recruitment agency, three candidates were identified for the role, all of whom had salary expectations above the top of the range. Two of the candidates were seeking between £180,000 and £200,000. Mr Dunseath had indicated he would accept £125,000. He was considered to be an exceptional candidate.

187. Although the role of Director of the Dubai Centre was a non-vacant Grade 9 position in 2018, it was not included in the job evaluation exercise undertaken. The Respondent told us that the reason for this was twofold:

- it considered that the role of Director of the Dubai Centre operated in a unique environment which resulted in a distinct reward structure; and

- Mr Dunseath had serious health issues which impacted on his ability to participate in the job evaluation process.

188. We accepted the evidence of the Respondent that Mr Dunseath was unwell at the time of the job evaluation exercise. We note, however, that his illness has not prevented the Respondent from undertaking a review into the viability of the Dubai Centre, the outcome of which has been a decision to close it, albeit that at the time of the hearing, this decision has not yet been implemented.

Director of Executive Education

189. Mark Carberry, a man, commenced employment with the Respondent as the Director of Executive Education in the Business School on 15 May 2023 on a starting salary of £110,000. This was shortly before the Claimant reverted to the salary of £96,392.

190. Although the role of Director of Executive Education had existed previously, no-one had held the post since 2015. Instead, the role as assigned to others who held academic roles. At some point in 2022, the decision was taken to reinstate the role as a Professional Services role and to recruit to it.

191. A job description was prepared for the role and in October 2022, this was used to compete a job evaluation template. This was sent to KFH to be evaluated. The evaluation report assessed the role as being a Hay Grade 19 and therefore fitting into the Respondent's Grade 9 (1110). The breakdown of points for the role was exactly the same as the Claimant's breakdown as set out above at paragraph 150.

192. In addition, a salary benchmarking exercise was also undertaken. By this time, Ms Angus had left the Respondent and the new Reward Manager, Maggie Reid was tasked with undertaking this exercise. The email dated that she sent Ms Luckiram with the benchmarking results was included in the bundle (1125).

193. We can see from the email that Ms Ried undertook the benchmarking exercise using an incorrect job title for the role, describing it as CEO, Executive Education. This was not picked up by Ms Luckiram who did not question the data provided.

194. We note, as confirmed in the report prepared by Minerva referred to below and Remco's own minutes (1136), comparable roles to the role of Director of Executive Education did exist, although we accept that pay data for such roles may not have been easily available. There was the possibility of taking into account the data available in the UCEA pay data for a generic Level 4B role however.

195. In the email, Ms Reid explained that she was unable to find any "*directly comparable HE sector data*" for the role so she used sales data from the KFH pay data for a Hay grade 19. This produced a median of £88,953 and an upper quartile figure of £108,000. She added that, "[*The Business School] are anticipating a competitive market for this role and would like to advertise at the upper quartile for base pay*."

196. As a result, a proposal went to Remco to approve a salary range for the recruitment exercise of between £100,000 and £110,000 (1148 – 1149). Remco approved this on 22 November 2022 (1137). Although this was the approved salary range for the role it was advertised at a minimum salary of £65,611 and a maximum salary of "Competitive" (1143).

197. At the same time as approving the base salary range for the role, Remco also approved a bonus for the new Director of Executive Education and the Business School Client Director roles who were to report into the new role. The bonus arrangement gave the employees the opportunity to earn a percentage of income they generated on top of base pay (1136)

198. We note that at the time these decisions were made, the identity, and in particular the sex, of the new Executive Director for Education was not known.

199. At the same time as the salary approval process was being undertaken, steps were being take to recruit to the post. The first step was to appoint an Executive Search Agency to assist the Respondent. A pitch meeting was held on 9 November 2022 and Minerva was confirmed in place on 10 November 2022. Materials prepared by Minerva outlining the search process undertaken was included in the bundle (1681 – 1686). It is relevant to note that Minerva found that there were a number of comparable roles to the role of Director of Executive Education and in addition commented that one challenge it had faced in recruiting for the role was that, "*the number of women and diverse candidates in appropriate roles is limited, perhaps reflecting the industry as a whole*" (1681). Notwithstanding this, Minerva was able to find female candidates and of the six candidates short listed for final interview, half were women.

200. The interviewing panel's preferred candidate was Mr Carberry and he was made an offer of £110,000 on 18 January 2023 which he accepted. The decision to offer Mr Carberry the maximum permitted under the authorised salary range was made by members of the senior leadership team at the Business School, including Mr Long. He told us that the reason Mr Carberry was offered the maximum amount was because it was thought that he would not join them for less, in light of his current earnings. We note that he came from within the education sector rather than from the private sector. We were not told how much he was earning in his previous role.

201. Ms Luckiram was unable to explain why Mr Carberry's starting salary was permitted by HR to be exactly £110,000 and not have to correspond to any of the spine points in Grade 9. It fell between SP 24 and 25. We note that

his salary increased on 1 August 2023, but not so that it corresponded to a spine point in Grade 9.

THE LAW

Unlawful Deduction from Wages

The Statutory Position

202. Section 23(1)(a) of the Employment Rights Act 1996 allows a worker to make a complaint to an Employment Tribunal that her employer has made a deduction from her wages in contravention of section 13 of the same Act.

203. Section 13 is headed "Right not to suffer unauthorised deductions" and says:

> *(1) "An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
>
> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
>
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

Variations to Contract Terms

204. The standard position is that the terms of a contract of employment cannot be unilaterally varied by either party. However there are exceptions to this where (a) variations are agreed by way of collective bargaining; and (b) where the contract has a variation clause.

Collective Negotiation

205. Terms that are collectively negotiated with recognised trade unions are incorporated into the contracts of the employees who are in the bargaining units that are covered by the collective negotiation providing there is a legal mechanism for such incorporation.

206. The most straightforward mechanism is an express clause in the employee's contract that says that the employee agrees to be bound by relevant terms contained in any collective agreements reached between the recognised trade union and the employer. Only terms which have been agreed and are capable of incorporation will be incorporated. The terms of a collective agreement need not be in writing and so unwritten terms capable of incorporation can be incorporated into individual contracts of employment.

207. In the absence of an express incorporation clause, it may be possible to infer an agreement to incorporate the terms of collective agreements, but this will depend on the facts and circumstances. In **Henry v London General Transport Services Ltd [2002] IRLR 472, CA**, it was held that a framework agreement that had been negotiated on behalf of bus staff by the TGWU was a collective agreement binding all the relevant staff and incorporated into their contracts employment by "custom and practice". This was because the history of collective bargaining was sufficiently "reasonable, certain and notorious" on the facts.

208. If there is an agreement, express or implied, to incorporate terms from a collective agreement into an individual's contract of employment, it is immaterial whether the employee is or is not a member of the relevant union (**Young v Canadian Northern Rly Co [1931] AC 83, PC**).

209. Section 1(j) of the Employment Rights Act requires an employer to include details of any collective agreements which directly affect the terms and conditions of the employment in the written statement of particulars of employment which must be given to employee. However, inclusion of a reference to a collective agreement in written particulars is evidence only and not proof of the contractual terms.

Variation Clauses in Contracts of Employment

210. A variation clause is effectively a clause whereby an employee gives advance consent to changes the employer may make subsequently.

211. Case law tells us that we should approach such clauses with caution, even though they are express and on the face of it, have been agreed by the employee in question. This includes applying the *contra proferentem* rule of contractual interpretation to them (i.e. interpreting any ambiguity in favour of the employee rather than the employer who drafted the clause)

212. The unequal bargaining positions of employer and employee will impact on the enforceability of such a clause. In **Birmingham City Council v Wetherill and ors 2007 IRLR 781**, CA, for example, it was held that a clause in the employees' contracts allowing the Council to unilaterally alter the

terms of a car-user allowance was subject to an implied term that it '*could not be exercised for an improper purpose, capriciously or arbitrarily, or in a way in which no reasonable employer, acting reasonably, would exercise it'*.

Implied Terms Generally

213. The general rule is that a term will be implied into a contract if it is so obvious that both parties would have regarded it as a term even though they had not expressly stated it as a term or if it is necessary to imply the term in order to give the contract business efficacy (*Liverpool City Council v Irwin* [1977] AC 239; *Scally v Southern Health and Social Services Board* [1991] ICR 771 at 781).

214. Terms may also be implied by reason of "*custom and practice*". As explained above, such a custom or practice must be *'reasonable, certain and notorious*' (**Bond v CAV Ltd [1983] IRLR 360; Henry v London General Transport Services Ltd [2002] ICR 910, [2002] IRLR 472**). In order to become an implied term, a custom must be followed with regularity such that it becomes legitimate to infer that the parties follow the practice because they regard it as a legal obligation rather than that the practice is followed as a matter of policy (**Solectron Scotland Ltd v Roper [2004] IRLR 4)**.

Equal Pay

Material Factor Defence

215. If a claimant is able to establish that she is doing "like work" or "work of equal value" to any of her comparators, the default position is that a sex equality clause will apply to her terms and conditions unless her employer can establish what is known as a material factor defence.

216. Section 69 of the Equality Act 2010 provides:

"69(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 (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."

217. The first stage when dealing with a material factor defence is for the tribunal to make findings as to what the real reasons are for the difference in pay between the claimant and her comparators. The tribunal's processes allow

for this exercise to be undertaken prior to establishing if there is like work or work of equal value.

218. If the real reason for a different in pay is one which is directly discriminatory against women because of sex, the respondent's defence will fail.

219. If the real reason is one that is indirectly discriminatory because of sex, the respondent's defence may not fail. Instead it will be open to the respondent to seek to justify its reason as a proportionate means of achieving a legitimate aim.

220. The burden of proof is on the employer to prove the material factor defence. The shifting burden of proof found in section 136 of the Equality Act 2010 applies.

ANALYSIS AND CONCLUSIONS

Unlawful Deduction of Wages

Was There a Deduction From the Claimant's Wages?

221. There was no dispute between the parties that there was a deduction from the Claimant's wages.

Was it unlawful?

Introduction

222. It was also not in dispute that the Claimant did not agree to the deduction from her salary, either expressly or by acquiescing to it.

223. This is in conflict with the normal position that changes to an employment contract can only be made with the agreement of both parties. The Claimant says that absent her agreement, the deduction from her salary was unlawful and it was made in breach of contract.

224. The Respondent relies on three arguments that it was legally entitled to reduce the Claimant's salary without her agreement. These were set out in the Respondent's written closing submissions as follows:

"The Respondent's primary case is that it undertook collective negotiation with its recognised Unions in respect of the Job Evaluation exercise including the question of regrading and pay protection and was entitled to vary the Claimant's contract on that basis (Issue 2(c).

Alternatively the clauses gave the Respondent the right to unilaterally vary the Claimant's contract (Issue 2(a)). The Respondent further relies in the alternative that there was an implied term through custom and practice as a result of the Claimant benefitting from pay awards which were agreed with the trade unions (Issue 2(b)).

To the extent that the right to unilaterally vary the Claimant's contract was subject to an implied term that the variation would not be exercised for an improper purpose, capriciously or arbitrarily or in a way which no reasonable employer, acting reasonably, would exercise it the Respondent will argue that it had a proper purpose for undertaking the job evaluation exercise which it undertook on agreed principles, taking expert advice and taking steps to mitigate the impact on the Claimant eg. by protecting her pay."

225. We understood the Respondent's primary submission (Issue 2(c)) to be an argument that the reduction to the Claimant's salary did not need to be agreed with her because it had been collectively agreed between the Respondent and its recognised trade unions and was incorporated into her contract as a result. In other words, the consent to the variation was given by the trade unions and so was not required to be given by the Claimant.

226. We understood the Respondent's alternative argument (Issue 2(a)) to be that the change was within the scope of variation clauses that were contained in the Claimant's contract. In other words, the Claimant had given advance consent to the reduction when agreeing to the variation clause.

227. We understood the Respondent's third argument (Issue 2(b)) to be an additional alternative to Issue 2(c). Our understanding was that, if we did not find that the express provisions in the Claimant's contract were sufficient to incorporate a collectively agreed variation into her contract we should consider implying a term into the Claimant's contract because of custom and practice.

228. We did not understand the Respondent to be arguing that we should imply the existence of a variation clause that covered reductions to the Claimant's salary by reason of custom and practice. However, in case our understanding was incorrect, for the sake of completeness we considered this briefly.

Issue 2(c)

229. In our judgment, there were a number of difficulties with the Respondent's argument that the reduction to the Claimant's salary did not need her agreement because it was collectively agreed. Issues 2 (d) – (f) helpfully guided us in identifying the matters that need to be considered when determining Issue 2(c). Having considered each of those issues below, we decided to reject the Respondent's argument. The Respondent's primary submission therefore failed.

Which trade unions, if any, were recognised for collective bargaining purposes in respect of pay for Grade 9 employees? (Issue 2(d))

230. Our answer to this question was that there were none. Although the Voluntary Recognition Agreement covers Grade 9 employees, and cites UCU as the relevant recognised union for the Claimant's category of employee, it contains an express exclusion in relation to "the pay provisions for Grade 9 staff".

231. The Respondent invited us to interpret this exclusion in an extremely limited way, such that the exclusion from collective bargaining applied only to the ability for Grade 9 staff to have their salary varied following a nomination by their line manager. It said that all other aspects of the pay arrangements for Grade 9 employees i.e. "the overall structure of the grade 9 pay spine and associated pay and grading arrangements" were the subject of negotiations with the trade unions.

232. We did not agree with this interpretation. We decided the exclusion in the Voluntary Recognition Agreement applies to all aspects of the pay arrangements for employees in Grade 9 for a number of reasons.

233. The first reason was the wording of the agreement itself. If the intention had been for the exclusion to be limited, we considered this would have been expressly stated in the Local Recognition Agreement. The fact that it was not points to a broader exclusion.

234. Our interpretation is consistent with the note that was prepared for the Chair of the Respondent's Reward Committee. That note expressly stated that Grade 9 staff were not formally represented by the trade unions and that the Respondent was not obliged to consult the unions on changes to Grade 9 terms and conditions.

235. In addition, we found as matter of fact, contrary to the testimony of Ms Luckiram, that there has never been a practice of collective bargaining with the unions in respect of the pay arrangements for grade 9 employees.

236. We found that the overall structure of Grade 9 and associated pay and grading arrangements for Grade 9 were not collectively agreed with the trade unions in 2006, but that instead the Respondent developed a specific Grade 9 Pay Policy independent of the unions. Although we accepted that the Grade 9 Pay Policy was superseded by the Remuneration Strategy, there was no evidence before us that it was a collectively agreed document and therefore changed anything.

237. Significantly, as set out below, we found that although the trade unions were consulted in relation to the pay review exercise that led to the Claimant's salary reduction, there was no collective agreement reached. This was because once the exercise had moved to focus on the Grade 9 Staff rather than all the Staff, the Respondent did not seek the further involvement of the trade unions.

238. The final reason for our decision was the fact that on all other occasions when the Respondent made changes to the Claimant's job title and salary, even when those changes arose as result of a review which involved the trade unions (PSR2) her express consent to the changes was sought and obtained before the change was made. This would not have been necessary if the collective bargaining agreement covered Grade 9 pay.

When and in what circumstances did the trade unions agree in collective consultation to a reduction in pay for Grade 9 employees? (Issue 2(e))

239. The Respondent acknowledges that a written collective agreement was not entered into between it and the trade unions in respect of the Grade 9 pay review. It therefore follows that it relies on there having been an unwritten agreement that was incorporated into the Claimant's contract of employment.

240. The chronology of the implementation of the Grade 9 pay review exercise is set out in detail in our findings of fact section. We did not reach a conclusion in that section on this point, however, but reserved it for this section of our judgment, albeit that we consider our conclusion is most likely a finding of fact rather than a matter of law.

241. Our conclusion is that there was an unwritten collective agreement reached between the respondent and the unions regarding the three principles set out in paragraph [ ] above. However, the agreement did not cover Grade 9 employees. Instead it only applied to the extent that the pay review exercise would be expanded to cover employees in Grades 1-8. In addition the agreement was not specific enough that it could have entitled the Respondent to reduce the Claimant's salary.

242. The short answer to issue 2(e) is therefore that there was no agreement by the trade unions to a reduction in pay for Grade 9 employees.

243. In reaching this conclusion we noted that the papers that were presented to Exco and Remco in April 2019 did not envisage the need for a negotiated collective agreement with the recognised unions at all. Instead they referred only to the need to have discussions with the unions to define areas for consultation.

244. We did not treat this as determinative of this however. The reason is because we recognised that imprecise language is often used when speaking about trade unions that fails to distinguish between negotiation (where the aim is to reach agreement) and consultation (where all that is required is discussion of proposals, but not actual agreement). This confusion of language is, for example, reflected in the language used in Issue 2(d) itself which refers to consultation rather than negotiation. We were open to the possibility that the reference in the Respondent's papers to the need to define areas for consultation could be a reference to identifying areas where union agreement would need to be sought and was therefore intended to refer to negotiation.

245. Rather than rely on the papers, therefore, we instead focussed on what actually happened. There was certainly consultation with the unions via the Respondent's local collective bargaining machinery. The job evaluation proposals were discussed as an agenda item at a meetings of the JNCB on 17 May and 11 October 2018 and 13 February 2019 and the ERSG on 12 July, 22 November 2018 and 20 March 2019. There was also additional email correspondence in October 2019 and an informal meeting on 1 May 2019.

246. As a result of the initial consultations, the Respondent completely changed its initial proposal and decided to limit the pay review exercise to Grade 9. This did not bring the consultations to an end, however, and there continued to be discussion on the revised principles.

247. The Respondent's position was that the fact that there continued to be ongoing consultations with the trade unions about the principles should be treated by us as significant because agreement was sought with the unions regarding the pay framework to be applied to Grade 9 employees.

248. We do not accept this argument. We find that the ongoing need to agree the principles with the trade unions only arose because, although job evaluation would be applied to Grade 9 employees first, there was an ongoing plan to roll it out for new and vacant roles in Grades 1 – 8. The intention was therefore that the principles would apply to those Grades 1-8 so whatever was done for Grade 9 was setting a precedent for the lower grades.

249. This finding is again consistent with the note prepared for the Chair of the Respondent's Reward Committee which explained that the union had requested a further meeting to discuss the principles to be applied to be Grade 9 employees, along with the principles that will be applied to Grades 1-8 roles who were said to be represented by the unions in the note.

250. In addition, we consider it was significant that the Respondent decided to proceed with job evaluation for Grade 9 despite the trade unions expressing reservations about it. Although we accepted what Ms Luckiram told us, that there were particular concerns about consistency in pay levels in Grade 9, we do not consider this was the only factor driving what occurred next. Instead, the reason why the Respondent was able to proceed with job evaluation for Grade 9, despite the trade unions' general hesitation, was because the Grade 9 pay arrangements fell outside the scope of the local Voluntary Recognition Agreement. The Respondent did not need the trade unions to agree to the proposals. However because there would be a knock-on effect on Grades 1-8, it made sense to agree some broad principles with them that would be applied to Grade 9.

251. This is exactly what happened in practice.

252. Once the decision to focus on Grade 9 had been taken, new principles were developed that were presented to the trade unions as the broad principes that would apply to all grades. It is significant that the principles were never discussed in detail with the unions at a formal meeting and no final version was ever presented for formal ratification at a JCNB or ERSG meeting. This was not a necessary step until job evaluation was to be introduced for roles in Grades 1-8.

253. Although not documented, agreement between the trade unions and the Respondent was reached on the principles as a result of the discussions that took place at the informal meeting on 1 May 2019. The informal meeting was attended by trade union representatives capable of reaching a

collective agreement with the Respondent. The agreement that was reached was that the principles were acceptable, subject to the Respondent agreeing to extend pay protection, which it did by the decision making at Executive Team meeting on 7 May 2019.

254. After the agreement was reached on the broad principles, there was then no further involvement with the trade unions after this despite the fact that the Grade 9 exercise was ongoing until March 2020. The unions were not even presented with the outcome of the job evaluation exercise for the Grade 9 employees, never mind being invited to agree it. Nor were they invited to have any input into the salary benchmarking exercises that were undertaken or any decision making regarding exceptional retention payments that were to be offered. The decision making body that dealt with what occurred from May 2019 onwards, was Remco. In our judgment, this demonstrates that the Respondent did not consider it needed to involve the unions any further and this was because of the exclusion of Grade 9 Staff from local pay-related collective bargaining.

255. In addition and in the alternative, if the agreement that was reached did cover Grade 9, the agreement was not specific enough that the Respondent was entitled to reduce the salary of Grade 9 employee's without individual consent. This was because it was too generalised and only covered the general principles.

256. In the Claimant's case, once her role had been evaluated as a Hay Grade 19, any changes to her salary were dependant on (a) the specific salary benchmarking exercise that was undertaken, and (b) the application of the second principle, that the Respondent would only consider reducing or increasing her salary it fell outside a range which is 20% above or below the market median position. While the second principle had been agreed with the unions, they were not consulted about the actual salary benchmarking exercise that was undertaken and there was no negotiation with them in relation to it.

257. The trade unions had been told, in the paper presented to the ERSG in April 2019, that two salary surveys would be used, namely the UCEA survey and another broader one, but in our judgment this was minimal information provided in anticipation of what would happen. We consider that their lack of involvement thereafter, as the detail of the bench marking exercise was developed, is significant. Because there was no collective agreement that dealt with the detail of the salary bench marking exercise, there was no unwritten collective agreement in which the trade unions provided their consent to the reduction to the Claimant's salary.

How and in what circumstances was the agreement with the trade union in collective consultation incorporated into the Claimant's contract of employment? (Issue 2(f))

258. Finally, as guided by Issue 2 (f) we considered the mechanism for how any collective agreement covering the Claimant might have been incorporated into her contract of employment.

259. According to the Respondent's written submissions the Respondent relies on clause 1.3 of the Standard Terms and Conditions and not clause 12 of the offer letter. It notes that clause 1.3 is consistent with clause 12 of the offer letter, presumably making the point that clause 12 of the offer letter does not override clause 1.3 of the Standard Terms and Conditions.

260. We agree with the Respondent that clause 1.3 of the Standard Terms and Conditions must be the relevant clause through which any collectively agreed changes to individuals' contracts of employment are incorporated into them. Clause 12 refers to the need for consultation to take place before does it operates as a variation clause, but this, in our judgment is insufficient for it to operate as a clause that incorporates collectively agreed terms into an individual contract.

261. The only other possible clauses that might be relied upon are clauses 2.1, 23 and 24 of the Standard Terms and Conditions, but in our judgment, none of these deal with the point. Clause 2.1 refers to salary scales recommend by the HE Funding Council rather than ones that are nationally collectively agreed between employers and employees and therefore is not relevant; clause 23 explains that national collective machinery exists, but says nothing about any outcomes from that machinery being incorporated into the Standard Terms and Conditions; and although clause 24 confirms that UCU is a recognised unions it does not deal with what this means in practice.

262. Our decision was that clause 1.3 of the Standard Terms and Conditions was capable of operating to incorporating terms that are collectively agreed into the contracts of individual employees, but only in relation to changes being made to the Standard Terms and Conditions rather than all terms and conditions of employment. The reason for this narrow interpretation was because the clause specifically refers to changes in "***these*** *Terms and Conditions"* (emphasis added) rather than to all terms and conditions.

263. The Respondent suggested to us that clause 1.3 should be read with clause 1.4 in which the capitalised phrase, "Terms and Conditions" captures both the terms in the Standard Terms and Conditions and the terms in offer letters. Although we understood the point, we do not accept it as we considered the correct interpretation of clause 1.4 to include a comma between the words 'document' and 'and' so that what it is actually saying is that all appointments are subject to (a) the Terms and Conditions in the Standard Terms and Conditions; and in addition, (b) the contents of the offer letter. Even if this is wrong, we do not consider it overcomes the use of the word 'these' in reference to the Standard Terms and Conditions in clause 1.3 in any event.

264. We therefore concluded that the Respondent could not, in any event, rely on clause 1.3 of the Standard Terms and Conditions to incorporate any change to the Claimant's pay, made by way of collective agreement (had there been one), into her contract of employment.

Issue 2(a)

265. The Respondent's secondary argument relied on clause 12 of the offer letter and clause 1.3 of the Standard Terms and Conditions being express variation clauses that gave it the power to make adverse changes to her pay. We deal with this separately first and then on a combined basis.

Clause 12 of the Offer Letter

266. Clause 12 of the offer first explains that, unless modified by Claimant's offer letter, the Standard Terms and Conditions apply to her. We reminded ourselves that the Standard Terms and Conditions applied not just to employees in Grade 9, but also to employees in Grades 7 and 8.

267. This is exactly what we would expect to see written into a document provided by an employer that chooses to use standard documents as a constituent part of an employee's contract of employment. It is eminently sensible to use the standard document as a starting point document, which is then varied on a case-by-case basis in an individualised document. In such circumstances, when interpreting which provisions apply, the standard document will apply except where it is contradicted by the individualised document.

268. In addition, the working assumption is that the terms in the individualised document are terms that are unique to that individual in contrast to the standard terms that apply generically. This will not always be the case though. Many offer letters contain what might best be described as key basic terms, rather than individualised terms, i.e. the terms that the employee is most interested in such as working hours, place of work, salary and holiday entitlement which may be unique to their role, but not necessarily.

269. In this case, Clause 12 of the offer letter then goes on to explain that the Respondent reserves the right to make changes to terms and conditions of employment. It is therefore an express variation clause, but subject to some express limiting parameters to its scope as well as implied protections for the employee.

270. We first considered the express limiting parameters and what they meant. These were:

- The scope of the clause and to which terms and conditions it applied
- The two exceptions
- What the clause said about what the Respondent needed to do in order to rely on the clause

271. It was open to read the clause as limiting its scope to the contents of the Standard Terms and Conditions rather than all of the Claimant's terms and conditions. Indeed, the Claimant invited us to adopt this interpretation saying that this was because the clause says it applies to "***the*** *conditions of employment"* (emphasis added) in a paragraph talking mainly about the Standard Terms and Conditions.

272. We disagreed with that interpretation and found instead that the clause allowed variations to be made to all terms and conditions of employment, wherever they were found. The reason for our decision was that the need for the exceptions which followed would not have made sense otherwise.

273. Those exceptions were stated as follows. They were:

- "*specific conditions of employment relating to individuals*"; and
- "*conditions of employment relating to pay which are negotiated nationally."*

274. We decided it was clear that the second exception covered everything relating to the Respondent's employees pay which was negotiated nationally and that it was not relevant to this case as the national pay bargaining machinery only applied to employees of the Respondent within Grades 1-8. Although the Respondent applied the nationally agreed annual pay increases to its Grade 9 employees, as indicated in our findings of facts, this was an internal decision it made rather something it agreed.

275. It was less clear which terms and conditions fell into the first exception and specifically whether the Claimant's salary amount constituted a specific condition of employment relating to her as an individual. This was the interpretation that the Claimant invited us to apply to the clause. We agreed, with the result that as we interpreted the clause adverse changes to the Claimant's salary fell outside the scope of the variation clause.

276. The reason we found that the Claimant's salary was a specific condition of her employment relating to her as an individual was not because it was included in her offer letter. Instead it was because of the difference in the way Grade 9 Staff were treated when determining their pay compared to Grades 1-8. We do not consider employees in Grades 1-8 would be able to argue their salaries were specific conditions of employment relating to them as individuals even though they would also be set out in their offer letters.

277. For the Grade 1 - 8 employees, on appointment, they would be informed that their role fell into a specific grade with a narrow range of SPS. They would expect to start employment on the lowest SPS and gradually move up the scale on an annually basis. They would also expect to be paid the same as others doing the same role. In contrast, the Grade 9 employees would expect to negotiate their salary on appointment which could be anywhere within the huge grade range. This would then be their salary with no incremental progression. Most of them would also be the sole person doing their particularly role.

278. As sated above, the consequence of our decision that the Claimant's salary was an individual term was that it fell outside the scope of the variations allowed by clause 1.3. Our decision was therefore that the Respondent could not rely on it to reduce the amount of the Claimant's salary without her agreement.

279. In case our reasoning was incorrect however, we also considered the alternative position.

280. The requirement that any changes "will normally be made after consultation with staff or associations and trade unions recognised by the University." was met in part in our judgement. This was because there was consultation with both staff, in the form of the working party, and with recognised trade unions about the adoption of job evaluation for grade 9 staff and the need for salary benchmarking. However, neither the members of the working party nor the recognised trade unions were consulted about the salary benchmarking exercise in any detail. They were also not given any information about the salary changes that REM committee was asked to approve. In our view, the consultation requirement in built into clause 12 was also not fulfilled.

281. The final matter we considered were the implied provisions relevant to the application of variation clauses. It was not in dispute between the parties that an implied term exists such that that a variation clause '*could not be exercised for an improper purpose, capriciously or arbitrarily, or in a way in which no reasonable employer, acting reasonably, would exercise it'*.

282. We were satisfied that the Respondent's reasons for reducing the Claimant's salary were not improper and that it did not seek to make the change for any capricious or arbitrary reason. We find that there was a genuine desire by the Respondent to address potential anomalies in Grade 9. In addition, the desire to introduce a well-established method of measuring the size of jobs, namely job evaluation, using an established scheme was done with the best of intentions and therefore something a reasonable employer would undertake.

283. The problem was that the Respondent did not stay true to its original intention, to construct sub-grades within Grade 9 based on job size by reference to the Hay Grades. Instead, the only way it ended up using the job evaluation scheme was to determine whether roles fell within grade 9 or not. Once this was established, the significance of the job evaluation grade fell away and its decisions on salary were made purely on marketing position through the salary bench marking exercise. In our judgment, that exercise, which was fine in theory, was implemented so badly and in such an opaque way in relation to the Claimant, that it fell outside what a reasonable employer would do.

284. We appreciate that Dr Brown's report was based on confidential data provided to him, and therefore he was required to be opaque. The problem with that approach, however, was that it was impossible for us to establish with any certainty that the exercise he undertook in relation to the Claimant's role was a reasonable one. A key concern is that the Claimant was not given the opportunity to understand the work that had been carried out challenge it.

285. It was also unclear to us how the report's recommendations were used. In the case of Mr Long, the recommendations were adapted, but not in the case of the Claimant. There was also no reference to the London effect and how or whether this was taken into account.

286. If we are wrong about the reduction to the Claimant's salary falling outside the scope of clause 12 on its express terms, our final decision is that the Respondent cannot rely on clause 12 to reduce the Claimant's salary in the circumstances in any event. In our judgment, the Respondent has failed to demonstrate that its exercise of clause 12 as the basis for reducing the Claimant's salary was undertaken in a way in which a reasonable employer, acting reasonably, would exercise it.

Clause 1.3 of the Standard Terms and Conditions

287. We turn now to whether the Respondent can rely on clause 1.3 of the Standard Terms and Conditions as the lawful basis for reducing the Claimant's salary without her consent.

288. We agree with the Respondent that clause 1.3 is an express variation clause.

289. We explained above that we interpret clause 1.3 of the Standard Terms and Conditions as only being applicable to changes that are made to the Standard Terms and Conditions themselves and not to all terms of the Claimant's employment. The Respondent cannot therefore rely on clause 1.3 to vary the Claimant's salary because, being a Grade 9 employee, her salary is a specific provision that relates solely to her. We provided our reasoning for this above.

290. As above, we considered the alternative position in case we are wrong about this. Clause 1.3 has other limiting conditions to its scope as a variation clause. These are the requirements that any change:

- can only be made *"after discussion <u>and agreement</u> with the City University Association of University Teachers or such other body as the employees concerned may elect to represent them" and*

- before being made*, "must be notified to employees in a written statement before it becomes effective"*

291. The Respondent did write to the Claimant before reducing her salary and therefore the second of these was met. However, the first condition, the requirement for a collective agreement to have been reached, in order for a variation to be effective was not satisfied. We refer to the conclusion we reached in relation to Issue 2(e) on this point.

292. Finally, for the sake of completeness, we add that the conclusion we reached in connection with the operation of clause 12, about the implied protections that apply when a Respondent is exercising a variation clause applies equally here. In our judgment, the Respondent has failed to

demonstrate that its exercise of clause 1.3, as the basis for reducing the Claimant's salary was done in a way in which a reasonable employer, acting reasonably, would exercise it for the same reasons.

Combining the Clauses

293. Finally, in this section, we considered whether our answer to Issue 2(c) would be different if rather than treat clause 12 of the offer letter and clause 1.3 of the Standard Terms and Conditions as separate induvial clauses, we treated them as having some cumulative effect. Our conclusion was that it would not.

Issue (2b)

294. Finally, in relation to the unlawful deductions claim, we turned to the question of whether the Respondent can rely on an implied term based on custom and practice.

295. The Respondent's case is that the implied term in question arises because members of Grade 9 staff benefit from the cost of living increases negotiated nationally.

296. It was not disputed that Grade 9 staff have had the nationally agreed cost of living increases applied to them since 2009. As at today's date, this is coming up to 15 years that this has been in place. At the time the Respondent made its decision to reduce the Claimant's salary, the period was nearly eleven years.

297. We have found, as a matter of fact, that the decision to pay Grade 9 staff the cost of living increases was not a matter that was negotiated and agreed locally with trade unions on behalf of Grade 9 Staff. Instead, it was decided upon by the Respondent.

298. In our judgment, the payment of the cost of living expenses to Grade 9 Staff is a custom or practice which meets the legal test deriving form case law to have become an implied term in the contracts of Grade 9 Staff. It is a reasonable, certain and notorious thing that has been happening for many years.

299. It does not, however, follow that any broader implied term arises that there is a practice of collective bargaining, however, or that the Respondent can unilaterally reduce salaries. Having not been a matter of negotiation, the fact that cost of living pay increases are paid does not lend any support to there having been a history of collective bargaining in relation to the pay of Grade 9 Staff which is reasonable, certain and notorious. It also provides no basis for implying a wider variation clause exists in the contracts of Grade 9 staff by reason of custom and practice. To imply such a clause would require evidence of such variations having been made and we were simply not presented with that evidence.

300. We add finally, that it appeared to us that implying a broader variation clause that enabled the Respondent to make such a fundamental change, i.e. the

reduction of salaries without consent would be contrary to the case law about variation clauses which we have summarised in the legal section. We do not consider that it can never be possible, but it is likely to arise only in exceptional circumstances which is not this case.

Equal Pay: Material Factor Defence

301. We turn next to the material factor defences put forward by the Respondent in defence of the Claimant's equal pay claims. The list of issues notes that the Respondent relies on the following:

9(a) that the differential in salary is based upon a credible job evaluation exercise or exercises; and/or
9(b) personal circumstances of the Comparators which are in no way related to their sex; and/or
9(c) location; and/or
9(d) market forces.

Job Evaluation Argument (9(a))

302. The job evaluation exercise cannot be relied upon by the Respondent in relation to either comparator.

303. Mr Dunseath's role, Director of the Dubai Centre, has never been measured by the Respondent using any job evaluation scheme and so this factor cannot be the reason why he was paid more than the Claimant. It is possible that were his job to be measured, it may prove to be larger job, in job evaluation terms than the Claimant's job. We cannot take this into account, however, as when considering a material factor defence before equal work and equal value are determined, we must assume that the Claimant can show this and make our decision on that basis.

304. In contrast Mr Carberry's role, Director of Executive Education was assessed under the same job evaluation scheme as the Claimant's job. It was not evaluated at the same grade as her role, but was awarded the exact same number of points. It is therefore surprising that the Respondent is suggesting the job evaluation exercise as an explanation for why Mr Carberry is paid significantly more that the Claimant.

The Other Factors (9 (b), (c) and (d))

Mr Dunseath, Director of the Dubai Centre

305. We were provided with an explanation of the decision making process that led to Mr Dunseath being appointed to this role on a salary of £125,000 in 2017. We were therefore satisfied that the decision was driven by a combination of the uniqueness of the role given its location in Dubai and the market forces that operated at the time. Neither of these were factors that arose because of Mr Dunseath's sex.

306. The Respondent has not reviewed Mr Dunseath salary since his appointment. It is therefore unable to prove that such a stark difference

between the pay of Mr Dunseath and that of the Claimant continued to be justified based on his location and market forces throughout the period of comparison. Under the Equality Act 2010, however, the Respondent does not have to prove that the entire gap is justified. Instead it simply ahs to show that the difference is not because of sex.

307. The Respondent had an opportunity to consider Mr Dunseath's role as part of the salary review exercise that was applied to the Claimant. This would have provided the ideal opportunity to try and determine if his salary level was still justified. He was, however, not included in the pay review exercise for two reasons. The first was because he was unwell and the second was because the very existence of his role was being reviewed. Although we may not have agreed with the Respondent's rationale for these decisions, we were satisfied that they were not because of his sex.

308. The Respondent's material factor defence in respect of Mr Dunseath therefore succeeds.

Mr Carberry, Director of Executive Education

309. The Respondent provided an explanation for why Mr Carberry was paid more than the Claimant after he started his employment.

310. This was because, despite being graded at exactly the level as the Claimant, it undertook an entirely different salary benchmarking exercise for his post that produced a higher possible salary range. A decision was then taken to offer him the highest salary in that range due based on market forces because it was believed that he would not accept the role for less.

311. We found it astonishing that the Respondent proceeded as it did, using only pay data from the private sector for Mr Carberry's role and took market forces into account for him, having been so closed to the Claimant's representations about the problems with her own salary benchmarking exercise. The different considerations applied in his case are very striking.

312. At the time the salary range for the role, including the upper point, was agreed, it was not known that a man would be appointed. The salary range was approved on 22 November 2022. At this time, the recruitment agents had been appointed, but had begun the search for candidates.

313. We considered the possibility that it was obvious at the time the salary range was approved that the Respondent would have known that a man would be appointed and possibly had Mr Carberry in mind. There was no evidence of the latter at all. Although some of the evidence we saw suggested that the role is in an area dominated by men, we did not consider this to be sufficient for us to conclude the salary range was approved knowing a man would be appointed. We therefore reached the conclusion that the initial reason for the higher salary was not because of sex.

314. We have chosen our words carefully when saying that that the **initial** reason for the higher salary was not because of sex. This is because we do not consider the current position to be sustainable. The Respondent has now

been presented with evidence that a stark pay difference exists between the Claimant and Mr Carberry that lacks little if any rational basis. Whilst is may have arisen without any reference to the sex of either party, it is now aware that the Director of Executive Education is a man being paid more that the Claimant. In addition, new market related information has been collated that suggests that the Claimant's salary needs an adjustment.

315. We have therefore made it very clear in our judgment, that our decision does not prevent the Claimant from bringing a fresh equal pay claim citing Mr Carberry as a comparator over a different comparison period. We have given the date of 11 May 2023 onwards because this was the date the Claimant sought to amend her claim to add the particulars comparators. We therefore consider our decision applies to the period up to that date but not beyond it.

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Employment Judge E Burns
1 July 2024

Sent to the parties on: 2 July 2024

For the Tribunals Office

Appendix

List of Issues

Unlawful deduction of wages

1. Has the Respondent made a deduction or deductions from the Claimant's wages by paying the Claimant less than the amount she is entitled to under her contract of employment on any occasion?

2. Did the Respondent have the right to unilaterally vary the Claimant's contract of employment relating to pay? This may give rise to the following questions:

   (a) Upon their true construction, did paragraph 12 of the Claimant's contract of employment and/or paragraph 1.3 and/or paragraph 2.1 of the terms and conditions relating to Senior Administrative, Senior library and Computer Staff set out at paragraphs 13,14 and 15 of the Grounds of Resistance ["the Clauses"], give the Respondent the right to unilaterally vary the Claimant's contract of employment relating to pay at all?

   (b) Was there an implied term through custom and practice as a result of the Claimant benefitting from pay awards which were agreed with the trade unions recognised by the University as set out at paragraph 16 of the Grounds of Resistance ["the Implied Terms"] that gave the Respondent the right to unilaterally vary the Claimant's contract of employment relating to pay at all?

   (c) Did the Clauses and/or the Implied Terms give the Respondent the right to unilaterally vary the Claimant's contract of employment relating to pay, *"through the process of collective consultation with its trade unions"* [paragraph 17 of the Grounds of Resistance]?

   (d) If so, which trade unions, if any, were recognised for collective bargaining purposes in respect of pay for Grade 9 employees?

   (e) When and in what circumstances did the trade union agree in collective consultation to a reduction in pay for Grade 9 employees?

   (f) How and in what circumstances was the agreement with the trade union in collective consultation incorporated into the Claimant's contract of employment?

   (g) Were the Clauses subject to the implied term that any right to unilaterally vary the Claimant's contract of employment relating to pay could," *not be exercised for an improper purpose, capriciously or arbitrarily or in a way in which no reasonable employer, acting reasonably, would exercise it"*. If so, did the Respondent act in breach of the implied term?

3. Did the Claimant agree to the reduction in her pay? Has the Claimant accepted the variation of contract due to her conduct in that, following the

Remuneration Committee's final determination of the Claimant's salary in March 2020, the Claimant did not appeal this decision or indicate that she was working under protest in respect of the new terms?

4. If the Respondent has made unlawful deduction(s) what is the amount of the deduction(s)?

Equal Pay

Comparators:

(i) The Director of Dubai Centre, Kevin Dunseath.

(ii) The Director of Executive Education, Mark Carberry.

Like Work / Work of Equal Value

5. Was the Claimant's work the same as the Comparators? If not the same, was the Claimant's work broadly similar to that of the Comparator? (section 65(2(a)) Equality Act 2010)?

6. Were there any differences between the claimant's work and the Comparators' work? If so, were they of any practical importance in relation to the terms and conditions of employment? (sections 65(2)(b) and 65(3) Equality Act 2010)

7. If the Claimant's work was not like work, was it nevertheless equal to the Comparators' work in terms of the demands made on the Claimant by reference to factors such as effort, skill and decision making?

Pay Difference

8. If like work or work of equivalent value is established between the Claimant and the Comparators, did the Comparators enjoy more favourable terms than the Claimant? The Claimant alleges that the Comparators enjoyed the following more favourable terms:

(a) the Claimant is paid less than both Comparators.

Material Factor Defence

9. If the Comparators did enjoy more favourable terms than the Claimant whilst doing like work or work of equal value, was this because of a material factor that was not directly or indirectly discriminatory? (section 69 Equality Act 2010) The Respondent will rely on the following material factors:

(a) that the differential in salary is based upon a credible job evaluation exercise or exercises; and/or

(b) personal circumstances of the Comparators which are in no way related to their sex; and/or

(c) location; and/or

(d) market forces.