SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 56
XA71/16
XA72/16

Lord Justice Clerk
Lady Paton
Lord Menzies

OPINION OF THE COURT

delivered by LORD MENZIES

in the Appeals

by

(FIRST) JULIE ARMSTRONG AND OTHERS ("THE HBJ CLAIMANTS")

Appellants

against

GLASGOW CITY COUNCIL

Respondent

and

(SECOND) JENNIFER McDONALD AND OTHERS ("THE UNISON CLAIMANTS")

Appellants

against

GLASGOW CITY COUNCIL

Respondent

For the HBJ Claimants: J J Mitchell QC; HBJ Gateley, Solicitors
For the Unison Claimants: Dalgleish; Unison Legal Services
Respondent: Napier QC, Miller (sol adv); Clyde & Co, Solicitors

18 August 2017

Introduction

[1] These are appeals against a decision of the Employment Appeal Tribunal ("EAT") dated 15 March 2016 in which the EAT upheld the decision of the Employment Tribunal ("ET") dated 9 December 2013. In that decision, the ET determined that the respondent's Job Evaluation Study ("JES") was valid in terms of the Equal Pay Act 1970 ("EQP") section 1(5), and that there were no reasonable grounds for suspecting that it was otherwise unsuitable to be relied upon in terms of section 2A(2A)(b) of EQP.

[2] These appeals arise out of the same factual background as that discussed in the earlier decision of this court in *Glasgow City Council* v *Unison Claimants and Others* [2017] CSIH 34. That appeal concerned the respondent's pay protection provisions, whereas these appeals are concerned with the validity of the respondent's JES, which was carried out as part of its Workforce Pay and Benefits Review ("WPBR"). This was designed to implement the move to single status for the respondent's employees so that, following the review, separate collective agreements would be replaced with one scheme which brought all Administrative, Professional, Technical and Clerical ("APT&C") staff and manual workers together under one pay scheme. To effect this, a JES required to be carried out in order that the respondent could implement a new, unified pay and grading structure. That involved creating job "families", developing role profiles, evaluating role profiles, and allocating role profiles to job families. Through that process, each job was given a grade score. The respondent then assessed Work Context Demand ("WCD") and each job was also given a score under that heading.

[3] The appellants brought claims in terms of EQP challenging the design, methodology and implementation of the JES. They were unsuccessful before the ET and the EAT. They now appeal to this court. Although the appeals were lodged separately, they were presented together and the same arguments applied in each case.

The statutory framework

[4] Sections 1 and 2A(2A) of EQP provide the statutory context for the exercise which required to be carried out by the ET and the EAT. The relevant passages are in the following terms:

> "1.-
>
> (1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.
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> (2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the 'woman's contract'), and has the effect that-
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> …
>
> (b) where the woman is employed on work rated as equivalent with that of a man in the same employment-
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> (i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and
>
> (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term.
>
> (c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment –
>
> (i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the

contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term.

…

(5) A woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value, in terms of the demand made on a worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value but for the evaluation being made on a system setting different values for men and women on the same demand under any heading.

...

2A.- Procedure before tribunal in certain cases

…

(2) Subsection (2A) below applies in a case where –

(a) a tribunal is required to determine whether any work is of equal value as mentioned in section 1(2)(c) above, and

(b) the work of the woman and that of the man in question have been given different values on a study such as is mentioned in section 1(5) above.

(2A) The tribunal shall determine that the work of the woman and that of the man are not of equal value unless the tribunal has reasonable grounds for suspecting that the evaluation contained in the study-

(a) was (within the meaning of subsection (3) below) made on a system which discriminates on grounds of sex, or

(b) is otherwise unsuitable to be relied upon".

It should be noted that EQP has now been subsumed into the Equality Act 2010.

The issues before this court

[5] There were numerous issues between the parties in the very lengthy proceedings before the ET, the hearings in which lasted intermittently from October 2012 until April 2014. Many of these issues were still live in the proceedings before the EAT in December

2014 and May 2015. However, by the time these appeals were argued before this court there were three principal issues which required to be determined, as follows:-

1. Does the burden of proving that the respondent's JES satisfied the requirements of section 1(5) of EQP rest with the respondent?

2. Did the ET err in law in its treatment of expert evidence (or the lack of it)?

3. Did the ET err in law in finding that although the JES was bespoke, novel and untested, and that it contained no mechanism to aggregate the two values it produced, no reasonable grounds arose for suspecting that it was unsuitable to be relied upon in terms of section 2A(2A) of EQP?

Glossary

APT&C	Administrative, professional, technical and clerical
ATK	Allocation Tool Kit
EDC	Employee Development Commitment by GCC
GCC	Glasgow City Council
Blue Book	Pre-single status national agreement on pay and conditions of service for APT&C workers
GLPC	Greater London Provincial Council (factor plan)
Green Book	Pre-single status national agreement on Pay and Conditions of Service for Manual Workers, including a job evaluation scheme rating all manual workers (NB references in English authorities to the Green Book are to a different agreement)
JES	Job evaluation study or scheme
MW	Manual workers
NSWP	Non-standard Working Pattern

PCS	People Care and Support
PES	Physical and Environmental Services
Red Book	1999, a framework implementation agreement merging pay and conditions for MW and APT&C workers and coming fully into effect on implementation by each local authority of a valid JES
SJC	Scottish Joint Council
Single Status Agreement	Collective Agreement effective April 1999 to wind up and merge the former MW and APT&C Scottish Councils to form the SJC
WCD	Working context and demands
WPBR	Workforce Pay and Benefits review

The proceedings before the ET

[6] The ET set out the issues before it for determination (as agreed by parties) at paragraph 3 of its decision letter dated 9 December 2013. These included whether the respondent's JES was a valid job evaluation as defined in section 1(5) of EQP, and if so, was the respondent entitled to rely upon it for the purposes of section 2A(2A) of EQP, and in particular: (i) are there reasonable grounds to suspect that it is based upon a system which discriminates on the grounds of sex? and (ii) are there reasonable grounds to suspect that it is otherwise unsuitable to be relied upon?

[7] The ET set out the witnesses who gave evidence on behalf of the claimants and the respondent at paragraphs 8 and 9 of its decision letter. These included Dr Stephen Watson, who designed the JES for the respondent; there was no independent expert witness for either the claimants or the respondent as to the suitability of the JES or its compliance with the requirements of section 1(5) of EQP.

[8] The decision letter dated 9 December 2013 is a lengthy document extending to 927 paragraphs. The ET held a continued hearing over two days in April 2014, and on 7 May 2014 issued additional reasons containing a further 45 paragraphs. We do not attempt to summarise these documents here, but the following passages were referred to frequently in the course of counsels' submissions to us, and we consider that it will assist in the understanding of the issues before us to set them out here. (There were many other paragraphs to which passing reference was made, but the following passages were of central importance):

> "372. The Tribunal accepts Mr Galbraith-Marten's submission as to the principle in *Springboard Sunderland*, however, the facts in that case are distinguishable from those before this Tribunal. The evaluation in *Springboard Sunderland* produced a single points value for each job and it was that points value that was to be fitted into the available ranges. Here, the Tribunal has to consider the position where each job is said to have to points values which on the Tribunal's findings, cannot properly be aggregated and where each of those points values fit into separate sets of points ranges and produce two distinct payments.
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> 373. The Tribunal concludes that the points arising from the application of the grade factor plan and the WCD factor plan cannot properly be aggregated for these reasons. Firstly, the WCD factor plan was expanded so that points were scored under five rather than the three headings in the GLPC factor plan with the result that more points are made available. Further, by the insertion of the points-scoring half-levels, points became available that were not available in the GLPC scheme. Had those factors been scored in the way they were under the WCD factor plan and then simply added back into the scores using the eight headings in the grade factor plan they would have tended to distort the evaluation by increasing the inherent weighting of the working context factors.
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> 374. More fundamentally, the grade boundaries were drawn with the points flowing from the application of the grade factor plan alone in mind. The points flowing from the application of the WCD factor plan could not be added to the points flowing from the application of the grade factor plan without redrawing the grade boundaries. ...
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> 375. In the Tribunal's judgment, the purpose of job evaluation is, firstly, to arrange jobs in rank order and then, where ranges of points are used to define pay grades, to bracket together sections of that rank order so that it can be seen which jobs are to be regarded as being rated as equivalent so that equal pay can be assigned. In effect, jobs attracting points values within each range are treated as ranking equally despite their points values being different.

376. The Tribunal has been shown no authority in which job evaluation leading to two separate points values has been considered. That took the Tribunal to consider whether it was legitimate to employ a methodology that resulted in two separate points values each determined by the use of job evaluation techniques.

377. In the Tribunal's judgment, the answer to the question lies within the technical expertise of an expert in job evaluation. None of the parties have called an independent expert who could provide the Tribunal with an opinion as to the legitimacy of using this technique. The absence of expert opinion evidence to assist the Tribunal and to provide a proper foundation for submissions by counsel was a frequently recurring issue in the Tribunal's deliberations as, indeed, it had been in questions from the bench during the course of the hearing.

378. The Tribunal takes this opportunity to set out its position in relation to expert evidence. As will be apparent from these Reasons, the Fox claimants and Thompsons claimants mounted an attack on the respondent's methodology that was, at least in part, a rather technical attack on the design and application of that methodology. The Tribunal has been shown first instance decisions made by Employment Tribunals in England considering the validity of differently designed methodologies and written guidance offered by EHRC and the English local government National Joint Council and the Greater London Provincial Council. None of those sources have considered the methodology employed by the respondent. Counsel's submissions do not amount to evidence. The members of the Tribunal have an acquaintance with the principles of job evaluation but none of the members would hold themselves out as experts in the field. The Tribunal can no more be expected to rely on its own knowledge to reach conclusions about technical matters within the professional competence of those qualified, trained or experienced in the practice of job evaluation than would a Court dealing with the nature, extent and consequences of a personal injury be expected to have sufficient knowledge of medical matters without the evidence of experts.

379. It is noted that the parties were specifically asked to consider whether they wished to rely on expert evidence in the course of a Case Management Discussion and eschewed the opportunity, even when the Employment Judge highlighted his concern that it may be that the Tribunal hearing the case finds itself facing the determination of technical matters of job evaluation practice without the assistance of expert evidence.

380. Dr Watson told the Tribunal of his career history and that he is a member of the ACAS panel of experts for the determination of equal value. He gave evidence as a witness of fact and not an independent expert entitled to express an opinion. One of the facts to which Dr Watson could speak was that Hay, by whom he had previously been employed, to his knowledge had used the techniques of considering demands under two separate evaluations. The Tribunal accepted that evidence. The Tribunal understands Hay to be an important player in the job evaluation world. The Tribunal regards as significant that Hay has employed the approach of taking out into a separate evaluation the consideration of working context demand factors such as those used by the respondent. In the absence of any evidence or authority to the contrary, the Tribunal drew the inference that the technique of using two points

scores to produce two elements in the pay package is a legitimate approach to job evaluation.

...

The parts of the methodology amounting to evaluation

397. The Tribunal asked itself where in the methodology the respondent carried out a job evaluation leading to the determination of grade pay and WCD pay.

398. In the Tribunal's judgment, evaluation consisted of the application of the grade factor plan to each of the role profiles so as to determine the number of points that would constitute the grade score and the subsequent translation of that grade score into a pay grade together with the application of the WCD factor plan so as to determine the WCD score and the subsequent translation of the WCD score into the WCD pay. Grade and WCD scores and pay represent the value of the job for the purposes of section 1(2)(b) EQP.

...

442. Having said that, the Tribunal was very conscious that Dr Watson's evidence as to what he did was based on his opinion as to the soundness of his judgments within the field of expertise of a person skilled, qualified and or experienced in the mysteries of job evaluation. The absence of independent experts able to express an opinion on Dr Watson's work left the Tribunal in some difficulty. Whilst the Tribunal could bring to bear the eye of interested lay people with some understanding of job evaluation, the Tribunal simply lacked the expertise to fully evaluate Dr Watson's judgments in the abstract.

...

470. The decision of the claimants' solicitors not to call an expert witness to speak to the evaluations of the role profiles left the Tribunal without cogent evidence to set against the judgment of those who carried out the evaluations. The Tribunal would have permitted unhesitatingly the claimants to call an expert witness on the point as the Tribunal can no more be expected to carry out its own evaluation armed only with a factor plan and a role profile than could a judge in the civil courts be expected to make an assessment of the nature and extent of some personal injury armed only with some x-ray plates and laboratory test results.

...

548. In the Tribunal's judgment, whether the information contained in the role profile is properly to be regarded as sufficient to enable an evaluation to be carried out is a technical matter in respect of which the evidence of an expert was required. On the one hand, the Tribunal is satisfied that the Evaluators carried out their evaluations and there was no evidence that any of them considered the information provided by a role profile to be inadequate for their task. On the other hand, the Tribunal has no more than the assertions of counsel that the role profile was not fit for the purpose to which it was put. There was simply no expert evidence called by the claimants to the effect that the Evaluators were unable to answer even some of the questions necessary to determine the appropriate factor level under even one of

the factor headings in respect of even one of the role profiles so as to cause the Tribunal to suspect the inadequacy of the information in the role profile in any particular case.

...

666. The assessment of WCD was an exercise in job evaluation. No expert evidence was led and so there was no one called on behalf of the claimants who was in a position to express an opinion as to whether any of the scores awarded under the headings in the WCD factor plan were inappropriate. Attempts were made in the cross-examination of those who spoke about the claimant jobs for the respondent to suggest that the scores were not as they should have been.

...

672. The Tribunal considered the question of the demands that were recognised in the WCD factor plan. In the Tribunal's judgment, any submission about the appropriateness of including particular factors in a factor plan or the weight to be given to such factors is a technical issue within the competence of a job evaluation practitioner. It is certainly a matter in respect of which the Tribunal would have permitted expert evidence. There was no such evidence and nothing in which the Tribunal using its in-expert eyes could find reasonable grounds for suspicion.

...

690. It was open to those acting for the claimants to select sample claimants and comparators and lead some expert evidence about them to show that those with equal levels of demand were given equal ratings or that the dividing line between the levels had been drawn so that an important predominantly female group fell just under the WCD grade boundary or an important predominantly male group fell just above it. The Tribunal was left without any such evidence.

...

701. 'Accurate' is a difficult word to use in respect of job evaluation. There is not a universally recognised way of measuring the value of work. There is not a recognised set of factors to be applied or of definitions of levels under a factor heading. There is not a recognised methodology. In a typical factor plan, a number of points is associated with a level; there is a step up in points to the next level; the points awarded are those associated with the level so that there is no scope to award a little more than the points for the level because the employee does a little more than the definition, whilst clearly falling short of the next higher level. In short, just as the definitions approximate to the demands, the scores also approximate to the value of the work. The final step is to place the job in the pay grade associated with the range of aggregate points in which falls the points scored by the job in question. Within the range of points associated with a grade, all jobs are regarded as equal, even though they have scored different numbers of points. The Tribunal has seen nothing to suggest that the evaluations were not accurate according to the respondent's methodology or that the respondent's methodology is not apt to achieve the degree of accuracy that can be expected in a points-based job evaluation.

...

> 713. The allocation toolkit lies at the heart of the evaluation of grade pay but not in the evaluation of WCD or the determination of NSWP payments. It is true that the allocation toolkit is novel and untested. It was put to the test in this hearing. Dr Watson told the Tribunal how the toolkit was designed and how it operated. Despite his obvious expertise, Dr Watson was not an 'expert' witness. The respondent did not call an expert to express the opinion that Dr Watson's design was sound. The claimants did not call an expert to express the opinion to say that the design was not sound and to show the Tribunal a matrix of fact upon which such an opinion was based. The urgings of counsel, no matter how skilfully and eloquently expressed do not amount to evidence.

[9] The following two paragraphs from the ET's additional reasons dated 7 May 2014 are also relevant:

> "37. The Tribunal accepts Mr Galbraith-Marten's submission that the respondent's methodology does not answer the question as to whether a high score in respect of the WCD factors would have resulted in a higher grade and higher overall pay had those factors been brought into account in assessing grade or if there was some defined mechanism for converting the separate scores under grade and WCD into a single combined score. That is not the way in which the respondents' methodology operates. There is, however, nothing before the Tribunal either by way of binding authority or an authoritative statement of job evaluation practice to say that a job evaluation is apt only if it results in a single value. It was urged upon the Tribunal that it was not to attempt to fill any lacunae in the respondent's methodology. We conclude, however, that the effect of the claimants' submissions is to seek to create a lacuna – the absence of a mechanism or rule for bringing the grade and WCD scores together – rather than to work with the methodology as it is. ...
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> ...
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> 40. In the Tribunal's judgment, it was open to the claimants during the course of evidence and submissions leading to the judgment promulgated on 9 December 2013 to seek to show that the absence of a mechanism for bringing together the evaluation leading to grade and the evaluation leading to WCD gave rise to reasonable grounds for suspicion that the respondent's methodology was unsuitable to be relied upon. The Tribunal was not satisfied, on the evidence before it, that, whether on this point or on the totality of the criticisms of the methodology, there were reasonable grounds for suspecting discrimination or unsuitability."

The proceedings before the EAT

[10] In its judgment dated 15 March 2016 the EAT gave the following summary:

> "Equal Pay: the claimants challenged the respondent's Job Evaluation Study. They argued it was invalid because it produced two separate scores for each job; further, it

> was not shown to be objective. They argued that the ET had inverted the onus of proof and erred in its treatment of expert evidence. Held: the ET had made findings it was entitled to make. There was no error of law in the ET's decision."

[11] In its discussion and decision on the JES, the EAT observed (at paragraph 97) that the ET was shown no authority in which job evaluation leading to two separate points values had been considered. It therefore asked itself whether it was legitimate to employ such a methodology. No expert witness was led on this matter. The EAT quoted the terms of paragraph 380 of the ET's decision and went on to observe:

> "98. Having decided that as a matter of fact Hay had used a scheme involving two separate evaluations, the ET considered the scheme used by the respondent in this case. It found that that the demands on the employee were not measured by the grade factor plan alone, at paragraph 383. It was necessary to take into account also the factors found in the WCD factor plan.
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> ...
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> 103. The way in which the two scores were to be dealt with was clearly an important part of the scheme and we find it strange that the ET did not have evidence before it in the first hearing setting out the method, which must have been known to Dr Watson and to the respondent. The ET having decided that this matter had not been covered to its satisfaction reconvened and gave parties an opportunity to address it, and then made its decision. It is a question of fact for the ET firstly as to how the evaluation is performed, and secondly if the method found to exist is one which is objective and which enables valuation of demands of work so as to enable jobs to be graded.
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> ...
>
> 105. We find that the ET was entitled to accept Dr Watson's evidence that his former employer, Hay, used a scheme with two values. We did not find the argument about the Interpretation Act 1978 helpful. There are two scores produced for each employee by this scheme. The ET found that both the grade score and the WCD score should be taken into account in showing that jobs had been evaluated, and if two jobs produced scores identical in each category, they were 'equal'. We find that the ET was entitled to come to that decision. We can find no error of law in the decision of the ET."

[12] The EAT summarised its conclusion on the challenges to the JES at paragraph 188 of its judgment as follows:

> "188. We find no error in law in the reasons of the ET. It directed itself appropriately on the onus of proof, and we do not accept that it failed to follow its own directions. It considered technical challenges to the JES of varying sorts. It was entitled to decide the validity or otherwise of the scheme in light of the evidence led before it. In expressing the view that expert evidence might have been helpful, the ET expressed an opinion it was entitled to hold. The claimants did not lead any expert evidence to show inadequacy of the JES. The respondent led the designer of the JES and the council official responsible for its implementation. The ET was entitled to find facts and draw inferences from that evidence. It was correct to note that assertions put to witnesses in cross examination did not amount to evidence, and it was entitled to find that the witnesses led by the respondent were not successfully challenged in cross examination. The claimants have had a judicial determination of their claim for equal pay by the ET adjudicating on the claims made about the scheme, in a pre-hearing review. Individual claims will require to be proved."

Submissions for the parties

Submissions for the appellants

[13] Counsel for the appellants suggested that there was little if any disagreement as to the law. The requirements of Article 119 of the EEC Treaty and the steps necessary to provide employees with an enforceable right to require the measures necessary to ensure that the principle of equal pay is applied were considered in *Commission of the European Communities* v *United Kingdom* [1982] ICR 578. The requirements of a valid JES were considered in *Eaton Ltd* v *Nuttall* [1977] ICR 272, particularly at 277H –

> "a study satisfying the test of being thorough in analysis and capable of impartial application. It should be possible by applying the study to arrive at the position of a particular employee at a particular point in a particular salary grade without taking other matters into account except those unconnected with the nature of the work".

In *Bromley* v *Quick Ltd* [1988] ICR 623 the Court of Appeal referred to the observations in *Eaton* v *Nuttall* with approval and emphasised the need for a JES to be objective and analytical. The court stated that it was for the employer to explain how any JES worked and what was taken into account at each stage. It was necessary to have regard to the full results of the JES in order to assess whether it complied with section 1(5) of EQP – *Springboard*

Sunderland Trust v *Robson* [1992] ICR 554. The importance of these cases was reiterated in *DEFRA* v *Robertson* [2004] ICR 1289.

[14] By way of background, the Green Book comprised a national agreement which included a JES, but this was confined only to manual workers. It was updated regularly during the 1970s, 1980s and 1990s. The Red Book was introduced in 1999 and was a framework implementation agreement merging pay and conditions for manual and non-manual workers. Many local authorities adopted the SJC scheme, but this was not mandatory. Others adopted the GLPC scheme. The respondent chose to develop its own bespoke scheme, which the ET described as "pioneering, novel and untested". It was designed by Dr Stephen Watson, it did not follow the advice of the Equal Opportunities Commission, it was not subject to peer review, and it was not tested or analysed to confirm that it met the requirements for a valid scheme before it was implemented. In short, there was nothing like the careful testing and development by agreement such as was described in *Hartley* v *Northumbria Healthcare NHS Foundation Trust* (ET unreported, April 2009).

[15] Dr Watson was not an expert in equal pay, although he had a background with Hays, a reputable consulting business which advises on pay and remuneration structures. The use of role profiles was not novel, but Dr Watson's allocations were untested. If a role profile does not properly capture the job it stands for, the JES will not be compliant with section 1(5). The appellants maintained that the jobs were not adequately and sufficiently captured in the role profiles because the design of the scheme was fundamentally flawed; there was a disconnect between the evaluation of particular jobs and the "ghost structure" which did not represent them sufficiently accurately to capture the jobs. There was a lack of recording of any allocation process, and no audit trail. There were no job descriptions, and no input from employees themselves.

[16] Dr Watson's scheme took eight grade factor plan points from the GLPC model. The remaining three factor plan points in that model were expanded into five and used in the WCD factor plan, but the methodology for assessing those five points was completely different from the methodology for assessing the other eight points. The grade boundaries in the WPBR were drawn "with the points flowing from the application of the grade factor plan alone in mind" – the WCD element was not taken into account in the setting of boundaries, despite the ET's finding (at para 384) that both grade and WCD have to be brought into account in determining the rating of the work and whether the work of one employee has been rated as equivalent to that of another. "Grade and WCD scores and pay represent the value of the job for the purposes of section 1(2)(b) EQP" – see paragraph 398 of the ET's decision. However, not only were grade boundaries set on the basis of grade factor plan points alone without taking account of the WCD component, there was no method of comparing or converting grade factor plan points into WCD points or *vice versa* – they were two currencies without any method of conversion. Grade points cannot be used to assess the WCD component.

[17] The ET were aware of the problems (a) that the two points values cannot properly be aggregated and (b) that the grade boundaries were drawn with the points flowing from the application of the grade factor plan alone, without the addition of the WCD factor plan – see paragraphs 372 and 374. The ET went on to seek and apply a solution to these problems, which was not provided within the JES itself and on which there was no evidence or submissions.

[18] As was observed in *Bromley* v *Quick*, it is for the employer to explain how the JES worked and what was taken into account at each stage. The burden of proving that the JES is valid for the purposes of section 1(5) rests with the respondent, as the party who would

fail if no evidence were adduced on either side – *Dickson on Evidence*, Title II, para 25; Walker & Walker, *The Law of Evidence in Scotland* (4th ed), para 2.1.1 and 2.2.4. Here the respondent developed two parallel schemes; the first was the WPBR, which involved a job family grouping and allocation process, which resulted in role profile factor plan points, and the second was the WCD scheme, which produced an annual payment. The WCD payment had no effect on the grade of the job, which was wholly determined and fixed by the WPBR allocation process. The respondent failed to discharge the burden of proving that its two schemes together produced a rating and constituted a valid JES that satisfied the requirements of section 1(5) of EQP.

[19] Time and again the ET appears to have erred in its approach to the burden of proof in this crucial matter. It observed (at para 548) that it had no more than the assertions of counsel that the role profile was not fit for the purpose to which it was put – "there was simply no expert evidence called by the claimants ...". At paragraph 666 it observed that "there was no one called on behalf of the claimants who was in a position to express an opinion as to whether any of the scores awarded under the headings in the WCD factor plan were inappropriate". The ET made similar observations about the lack of evidence on behalf of the claimants at paragraphs 672, 690, 701 and 713 of the principal decision, and at paragraphs 37 and 40 of the additional reasons. These passages suggest that the ET considered that there was a burden of proof on the claimants, and that they had failed to discharge this. They concluded (at para 37 of the additional reasons) that "the effect of the claimants' submissions is to seek to create a lacuna – the absence of a mechanism or rule for bringing the grade and WCD scores together – rather than to work with the methodology as it is". This passage highlights the point – the submissions for the claimants did not create a

lacuna, but merely pointed to the existence of a lacuna because of the respondent's failure to discharge the burden of proof.

[20] The issue of the absence of expert evidence, and the result of this absence, is linked to the issue of burden of proof. On several occasions the Tribunal complained that none of the parties had called an independent expert who could provide the Tribunal with an opinion as to the legitimacy of using a methodology that resulted in two separate points values each determined by the use of job evaluation techniques. Dr Watson gave evidence as a witness of fact and not an independent expert entitled to express an opinion. None of the members of the Tribunal would hold themselves out as experts in the field. (See in particular paras 375 – 380 and 442, 548, 666, 672 and 713 quoted above).

[21] However, the ET then fell into error. Having stated that it required expert evidence about the technical question as to the legitimacy of using this methodology, and that it could not be expected to rely on its own knowledge to reach a conclusion, it then answered the question and reached a conclusion. Although it made it clear that Dr Watson gave evidence as a witness of fact, and not as an expert, the ET "in the absence of any evidence or authority to the contrary" drew the inference that the technique of using two points scores to produce two elements in the pay package is a legitimate approach to job evaluation. It was not open to the ET to do this. The absence of expert evidence created a lacuna which the ET could not fill using its own inexpert acquaintance with the principles of job evaluation. This was so, particularly standing the fact that Dr Watson's evidence and the soundness of his judgment were central to the design and compliance of the scheme, and the scheme itself was pioneering, novel and unchartered. As the ET observed (at para 442):

> "the absence of independent experts able to express an opinion on Dr Watson's work left the Tribunal in some difficulty. Whilst the Tribunal could bring to bear the eye

> of interested lay people with some understanding of job evaluation, the Tribunal simply lacked the expertise to fully evaluate Dr Watson's judgments in the abstract."

Yet this is what the ET did. It was not for the claimants to fill the gap, nor for the ET itself to fill the gap. The last sentence of paragraph 380 throws this error into sharp focus; it was not for the claimants to lead evidence to the contrary, but for the respondent to lead positive evidence that the scheme is (not could be) compliant. This was central to the validity of the scheme; it was a technical matter in respect of which the evidence of an expert was required (para 548). It was for the respondent to lead this evidence, and in the absence of expert evidence the ET should not have found the JES to be compliant with section 1(5) of the EQP.

[22] With regard to the ground of appeal based on section 2A(2A) (which was presented as an alternative to the grounds based on section 1(5)), counsel for the appellants made it clear that it was not suggested that the respondents' JES deliberately discriminated on grounds of sex; their position was based on section 2A(2A)(b), namely reasonable grounds for suspecting that the evaluation contained in the study is otherwise unsuitable to be relied upon. It was accepted that the onus in this regard was on the claimants to raise this issue, but it was for the Tribunal to assess whether it had reasonable grounds for suspecting that the evaluation was unsuitable to be relied on. There is no requirement for "cogent evidence" to show that the evaluation is definitely unsuitable to be relied upon – all that the Tribunal requires is reasonable grounds to suspect this.

[23] Counsel for the appellants supported the approach adopted by the ET in *Hartley* v *Northumbria Healthcare NHS Foundation Trust* (at para 584), which was also adopted by the ET in *Russell and Others* v *South Lanarkshire Council* (unreported) ETS/107667/105 at paragraphs 301/302.

[24] The ET in the present case erred in requiring "cogent evidence" from the claimants to show reasonable grounds for suspicion (see eg paras 102, 353, 470 and 696). The ET placed a formal evidential burden upon the claimants to prove that the JES was not suitable to be relied upon, as a precondition of the ET considering whether there were any reasonable grounds. This set a threshold which was not required by EQP and was an error in law. Indeed, the ET appears to have required not just evidence from the claimants, but expert evidence on their behalf, to raise even a suspicion (see paras 621 and 718, and para 40 of the additional reasons).

[25] The ET found that there were no reasonable grounds to suspect that the JES was not suitable to be relied upon, despite a complete lack of the expert evidence it said it required to determine crucial validity issues. It was submitted that the ET erred in doing so, as the total lack of the evidence it said it required to be able to determine crucial technical issues was itself a reasonable ground for a suspicion that the JES was not suitable to be relied upon.

[26] The ET made the following three important findings:

(1) That the ATK at the heart of the JES was "novel and untested".

(2) That there was no expert evidence to support the design spoken to by Dr Watson.

(3) That there was no way to aggregate the two values from the two parallel schemes.

Each of these issues goes to the heart of the question before the ET, that of validity. It was submitted that each raised reasonable grounds for a suspicion of unsuitability and that the ET, properly directing itself, ought to have found that that was so.

[27] If the ET had not erred in law and if it had directed itself properly, it would have answered the third question in paragraph 3 of its decision letter in the negative, and the fourth question in the negative, because there are reasonable grounds to suspect that the JES is otherwise unsuitable to be relied upon.

[28] For all these reasons the court should allow these appeals, quash the decisions of the ET and EAT and remit to the ET to consider the question of equal value.

Submissions for the respondent

[29] In addition to the authorities referred to on behalf of the appellants, counsel for the respondent drew our attention to *Middlesbrough Borough Council* v *Surtees* [2008] ICR 349, *England* v *Bromley London Borough Council* [1978] ICR 1, *Dibro Ltd* v *Hore* [1990] ICR 370 and *Diageo plc* v *Thomson* (unreported) EATS/0064/03.

[30] Counsel for the respondent submitted that the ET was entitled to have regard to the large body of evidence placed before it and to reach the conclusion which it did, namely that the JES was valid and compliant with section 1(5) of EQP. The ET carefully analysed the application of the methodology leading to the determination of grade pay (particularly at paras 290-298), the ATK (particularly at 406 and 421) and whether the WPBR amounted to an evaluation as envisaged by section 1(5) EQP (particularly at paras 468, 471 and 473). The claimants had the opportunity to give evidence that an error had occurred, but did not do so; it can be inferred from this that the method of allocation by senior managers was an accurate way of proceeding. Looking at these groups of findings (and also paras 556 and 597) it was clear that the ET had worked through the various stages of the scheme and reached the conclusion that it satisfied the description of a JES for the purpose of section 1(5) of EQP. The ET also understood why the scheme did not replicate the GLPC scheme, and considered the effect of two separate evaluations, one under WPBR and one under WCD (see para 673 *et seq*).

[31] With regard to the burden of proof, counsel accepted that this rested on the employer to show the validity of the scheme in terms of section 1(5), but on the claimants in relation to section 2A(2A).

[32] What did the burden of proof in terms of section 1(5) require the respondent to prove? Before the ET, counsel for the claimants suggested (at para 697) that the respondent required to prove that the WPBR was (a) thorough in analysis, (b) objective, (c) transparent, (d) accurate, (e) internally sound and consistent, (f) sufficiently detailed and (g) fair. Counsel for the respondent did not take issue with these tests. The ET considered each of these at paragraphs 698-704 and was satisfied that they were met.

[33] Counsel for the respondent accepted that there was no "currency converter" or mechanism to enable comparison between WPBR grade points and WCD points, but there is no mention of this in the Act, and it is not a requirement. All that is required is a scheme which creates a mechanism for comparison between two jobs for evaluation purposes. The ET gave an example of how this might work at paragraphs 387/8. Senior counsel accepted that this might not be the best way of comparison, but it will satisfy the statute if it works. If it allows a comparison to be made, it is a working mechanism which meets the requirements of transparency and objectivity.

[34] So what is required to prove this? Counsel asked where does the "tipping point" come? This cannot be expressed in absolute terms. It was not suggested for the respondent that a *prima facie* case was sufficient, but it will vary according to the context of each case – it depends on the judgment of the ET in light of the evidence it has heard. The ET in the present case clearly decided that the tipping point had been reached, because it criticised the claimants for not having adduced evidence in support of their critique of the methodology of the scheme. This would not be a valid criticism if the onus still rested on the respondent.

Part of Dr Watson's evidence about the scheme was that it was compliant with the Hay standard. The Tribunal had a mountain of evidence before it and was entitled to decide that the respondent had discharged the onus.

[35] Turning to the lack of expert evidence, senior counsel accepted that the ET observed that it was deprived of an expert witness and this impacted on its ability to determine particular technical questions. The appellants pointed to paragraphs 376/7 and 547/8 and argued that once the ET had said that it lacked competence, that is the end of the matter – it cannot make the decision without expert evidence, and the onus of proof then results in failure for the respondent.

[36] There were good practical reasons for not accepting this argument. There will be technical considerations and issues in every case where an ET is considering whether a JES complies with section 1(5). Although the present scheme was novel and innovatory, and such input might have been helpful, such questions arise in every case, not just in novel cases. The consequence would be that in every case in which a JES is being tested, the employer would not be able to succeed without the evidence of an independent expert. If Parliament had intended that compliance with section 1(5) could only be established with the approval of an independent expert, it would have said so. Such a result should only arise from a Parliamentary decision, and not by judicial development.

[37] In the present case, the ET wrestled with the issue of whether it was legitimate to employ a methodology that resulted in two separate points values in the passage from paragraph 372 to 380. Although the ET indicated at paragraph 378 that none of its members would hold themselves out as experts in the field, the ET went on to decide the technical question itself without expert evidence. Although it was accepted that Dr Watson did not give evidence as an independent expert, he did have expertise in the field. The Tribunal had

his evidence before them, and they were entitled to reach the conclusion that the technique of using two points scores to produce two elements in the pay package was a legitimate approach to job evaluation, because an expert would not have been able to take the decision on this matter but could only have assisted the ET. If the ET did not have expert evidence before it, it had to do the best it could with the evidence it had. The absence of expert evidence was therefore not necessarily fatal to the ET's decision that the requirements of section 1(5) had been met. The ET made no error of law in dealing with the matter in the absence of expert evidence.

[38] With regard to the third ground of appeal, based on section 2A(2A) of EQP, the ET made no error of law. It was mindful that the burden of proof in this regard is on the claimants (para 90). The ET also had regard (at para 80) to the observations of the court in *Fox, Campbell & Hartley* v *UK* (1991) 13 EHRR 157 at para 32, that "reasonable grounds for suspicion" "presuppose the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence". On any view, the decision of the ET was a work of monumental proportions; the court should not go through it and pick out infelicities or even minor errors to invalidate it – a degree of indulgence is appropriate.

Discussion and decision

[39] It was not seriously in dispute before this court that the burden of proving that the JES was valid and compliant with section 1(5) of EQP rested on the respondent. We consider that this is correct in law (see *Bromley* v *Quick Ltd*; *Dickson on Evidence*; Walker & Walker, (*supra*)). Looking to the language of the statute, section 1(5) requires a study to be undertaken with a view to evaluating the jobs to be done by all or any of the employees in

an undertaking or group of undertakings, giving an equal value in terms of the demand made on a worker under various headings. Examples of the headings are effort, skill and decision, but this is not an exhaustive list. The study must not determine equal value by reference to settings giving different values for men and women on the same demand under any heading.

[40] Senior counsel for the respondent did not take issue with the factors which counsel for the claimants submitted to the ET required to be proved by the respondent (para 697). These factors were that the JES must be thorough in its analysis, objective, transparent, accurate, internally sound and consistent, sufficiently detailed, and fair. For our part we consider that parties' agreement that these were relevant factors for the ET to consider in this case was justified.

[41] However, it will not normally be sufficient for an employer, in order to discharge the burden of proof on it, merely to place a scheme before the ET and leave it to claimants to pick holes in it or find deficiencies in it. Discharging a burden of proof involves the positive obligation of leading evidence to justify the scheme against the relevant factors. Counsel for the respondent at one point submitted that while there was an initial onus on the employer, all that was required was to show that the JES was a system which *prima facie* met the requirements of section 1(5). We do not agree. The burden of proof on an employer is not satisfied merely by laying a scheme before the ET, nor is it satisfied by an assertion that it is *prima facie* compliant with section 1(5). In order for a JES to comply with section 1(5), it requires to be rigorously tested against the various factors listed above. It is only if, after rigorous analysis, the scheme is found to meet the requirements of section 1(5) and the factors listed above, that it will be able to provide the protection envisaged by the Equality Directive and by EQP for both employer and employee.

[42] The burden of proving that its JES was compliant with section 1(5) rested on the respondent throughout the proceedings before the ET. It was not part of the function of the ET to speculate as to whether aspects of the JES might be made to work in such a way as to render them compliant. If there was a lacuna in the methodology of the JES, it was not part of the ET's function to try to fill that lacuna. If the Tribunal could not be satisfied on the basis of the evidence led before it that the methodology of the JES was justified and its analysis thorough, the ET required to find that it was not a valid job evaluation as defined in section 1(5) of EQP.

[43] The above observations apply to all ETs, but in the context of the particular JES being considered in these appeals, they are especially important. The scheme which was being put forward by the respondent was a bespoke scheme; it did not follow the methodology of the SJC, nor that of the GLPC, nor the advice of the EOC. The respondent was of course entitled to commission its own bespoke design, and was not obliged to follow the methodology of other schemes. However, when the ET was considering what it described as a "bespoke, novel and untested" scheme, it must have evidence before it from the respondent to enable it to conclude that it was compliant. Where an employer is using a scheme which has already been used by others and has been considered, tested, analysed and found to be compliant, it may be that less evidence will be required to discharge the burden of proof of compliance. There was no suggestion that any scheme using the same or similar methodology to that of the scheme designed by Dr Watson had ever been considered before.

[44] Moreover, Dr Watson's scheme could not easily be compared with other schemes, because different headings were used for different job families, and the scoring of grade factor plan points was unique, and differed from, for example, the GLPC scheme.

[45] Another unusual feature of the scheme under consideration was that the WPBR grade factor plan points were measured on a different scale from the WCD points, and there was no method of conversion or comparison of the two. The ET observed (at para 398) that "grade and WCD scores and pay represent the value of the job for the purposes of section 1(2)(b) EQP", but "each job is said to have two points values which on the Tribunal's findings, cannot properly be aggregated and where each of those points values fit into separate sets of points ranges and produce two distinct payments." (para 372). Moreover, as the Tribunal was aware (para 376) there was no authority in which job evaluation leading to two separate points values has been considered.

[46] In these circumstances we consider that it was necessary for the ET to keep at the forefront of its mind where the burden of proof lay (namely, with regard to the issue of compliance with section 1(5), on the respondent) and only to reach a conclusion on the basis of the evidence presented to it.

[47] At several points in its decision and in its additional reasons the ET appears to criticise the claimants for not leading expert evidence (for example, paras 548, 666, 672, 690, 701 and 713 of the decision letter, and paras 37 and 40 of the additional reasons). The impression is created that there was an onus on the claimants to establish that the scheme was not compliant with section 1(5). We do not accept that there was any such onus. If the respondent did not lead sufficient, or sufficiently persuasive, evidence that the scheme met the relevant tests in order to comply with section 1(5), the ET required to find that the scheme was not a valid job evaluation as defined in section 1(5) of EQP.

[48] This takes us to the question of expert evidence, or the lack of it. At paragraph 376 the Tribunal observed that the lack of any authority in which job evaluation leading to two separate points values led the Tribunal to consider whether it was legitimate to employ a

methodology that resulted in two separate points values, each determined by the use of job evaluation techniques. The Tribunal went on to state that the answer to the question lies within the technical expertise of an expert in job evaluation and that none of the parties had called an independent expert who could provide the Tribunal with an opinion as to the legitimacy of using this technique (para 377). At paragraph 378 it is stated that "the members of the Tribunal have an acquaintance with the principles of job evaluation but none of the members would hold themselves out as experts in this field" and that the Tribunal can no more be expected to rely on its own knowledge to reach conclusions about technical matters within the professional competence of those qualified, trained or experienced in the practice of job evaluation than would a court dealing with the nature, extent and consequences of a personal injury be expected to have sufficient knowledge of medical matters without the evidence of experts.

[49] We pause to observe that these observations by the ET are entirely understandable and legitimate. The Tribunal clearly felt unable to answer this question, which lay within a particular field of professional expertise which they did not themselves possess, without the evidence of an independent expert. This was a perfectly proper view to take. The consequence of it, it seems to us, was that the Tribunal could not answer the question.

[50] Dr Watson (as counsel for the respondent accepted before this court) was not an independent expert. As the ET noted (at para 380) "he gave evidence as a witness of fact and not an independent expert entitled to express an opinion".

[51] Similar complaints about the lack of expert evidence were made by the ET later in the decision. At paragraph 442 the Tribunal stated that it was:

> "very conscious that Dr Watson's evidence as to what he did was based on his opinion as to the soundness of his judgments within the field of expertise of a person skilled, qualified and/or experienced in the mysteries of job evaluation. The absence

> of independent experts able to express an opinion on Dr Watson's work left the Tribunal in some difficulty. Whilst the Tribunal could bring to bear the eye of interested lay people with some understanding of job evaluation, the Tribunal simply lacked the expertise to fully evaluate Dr Watson's judgments in the abstract" (see also paras 548, 666, 672 and 713).

[52] However, having stated that the answer to the question lies within the technical expertise of an expert and that the Tribunal did not hold themselves out as experts, the Tribunal proceeded to answer the question. It may have done so on the basis that Dr Watson stated that to his knowledge his previous employers had used the technique of considering demands under two separate evaluations, and the Tribunal accepted that evidence. The Tribunal stated that it regarded this as significant, and in the absence of any evidence or authority to the contrary, the Tribunal drew the inference that the technique of using two points scores to produce two elements in the pay package is a legitimate approach to job evaluation. However, it does not appear that any information was placed before the ET as to the circumstances in which this technique was used, or whether it resulted in a JES which worked successfully, or how often the technique had been used by Dr Watson's former employers, or how familiar he was with the details of such a scheme or schemes (and whether he had been involved himself in the design of it or them), or whether or not such a scheme or schemes contained a method for converting or comparing point scores arising from the two separate evaluations. All that the ET had was Dr Watson's general statement, with no supporting detail.

[53] Having determined that the question lay within the technical expertise of an expert in job evaluation, which the ET itself did not possess, we do not consider that it was open to the ET to answer this question. There are many cases in which a specialist tribunal will be able to rely on its own expertise and experience when reaching a conclusion. However, on

the basis of the ET's own expressions that it did not possess the necessary expertise, this was not such a case. As the ET observed at paragraph 442, "the Tribunal simply lacked the expertise to fully evaluate Dr Watson's judgments in the abstract."

[54] In such a situation, it was not for the ET to decide the matter by "bringing to bear the eye of interested lay people". If there was no independent expert evidence on a technical question which could not be answered without such evidence, the ET should not have attempted to answer it. It should not have attempted to fill the lacuna. The ET was not entitled to answer the question on the basis of Dr Watson's evidence that his former employers had used the technique, nor to place any reliance on the absence of any evidence or authority to the contrary.

[55] The EAT considered this issue at paragraph 188 of its judgment. The EAT considered that the ET:

> "was entitled to decide the validity or otherwise of the scheme in light of the evidence led before it. In expressing the view that expert evidence might have been helpful, the ET expressed an opinion it was entitled to hold. The claimants did not lead any expert evidence to show inadequacy of the JES."

We consider that the EAT were in error in reaching this view. First, the ET did not express the view that "expert evidence might have been helpful", but rather that the answer to the question of legitimacy posed in paragraph 376 lay within the technical expertise of an expert, which the ET did not possess. The EAT also appeared to have attached weight to the fact that the claimants did not lead any expert evidence to show inadequacy of the JES – but this suggests that there was some onus on the claimants to do so. As we have indicated above, we do not consider that there was any such onus. This was not a case of a specialist tribunal asserting knowledge, but rather of a tribunal expressly disavowing expertise.

[56] With regard to the issue of the compliance of the JES with section 1(5), we conclude that the burden of proof rested throughout with the respondent. Having determined that it lacked the expertise to answer the issue which it identified in paragraph 376 without independent expert evidence, and there having been no independent expert evidence, the ET erred in law in proceeding to answer the question. The absence of such expert evidence meant that the respondent failed to discharge the burden of proving that its JES was compliant with section 1(5) of EQP. The decision of the ET in this regard displays an error of law, and the decision of the EAT to uphold that decision also amounts to an error of law.

[57] That is sufficient to dispose of these appeals. However, we turn briefly to consider the third (and alternative) ground of appeal, relating to section 2A(2A) of EQP. In this regard, the burden of proof rested with the claimants. However, there is no suggestion that this issue involved the technical expertise of an independent expert. All that the claimants required to do was to persuade the Tribunal, on the basis of all the material before it, that there were reasonable grounds for suspecting that the evaluation contained in the study was unsuitable to be relied upon. There is no requirement for particularly cogent evidence, nor indeed for evidence that an element of the study is actually unsuitable. All that is required is reasonable grounds for suspicion.

[58] The ET stated (at para 718) that:

> "the claimants have chosen not to lead expert evidence with a view to placing an admissible opinion before the court that shows or provides reasonable grounds to suspect that jobs have been scored in a way that the WCD factor plan cannot bear, or that, in some other way, things have gone awry with the result that the Tribunal should find the required grounds for suspicion, either in individual cases or in groups of cases or overall."

We agree with counsel for the appellants that this places too high a threshold on the claimants. Whilst claimants may choose to lead expert evidence in this regard, we do not

consider that this is necessary, given that the issue is whether there are reasonable grounds for a suspicion. Nor do we think that cogent evidence of reasonable grounds for suspicion is required. What is required is sufficient evidence before the ET to raise such a reasonable suspicion.

[59] There was in our view sufficient material before the ET to justify such a reasonable suspicion. In particular, the ATK at the heart of the JES was "novel and untested". It had never been considered anywhere. There was no independent expert evidence to support the design. There was no mechanism to aggregate the two values from the two parallel schemes, and no method of conversion or calculation. As the ET observed (at para 374) the grade boundaries were drawn with the points flowing from the application of the grade factor plan alone in mind, and without taking account of the WCD factor plan. There was therefore ample material on which a reasonable tribunal might reach the conclusion that it had reasonable grounds for suspecting that the evaluation contained in the study was otherwise unsuitable to be relied upon.

[60] We do not suggest that the ET was bound to reach such a conclusion. However, the ET appears to have required the claimants to provide "cogent evidence" of reasonable grounds for suspicion (see paras 102, 353 and 696), and also to have required the claimants to lead expert evidence to justify reasonable grounds for suspicion (see paras 621 and 718, and para 40 of the additional reasons). This, we consider, sets the bar too high. The claimants are entitled to point to all the circumstances as disclosed in the evidence, from whatever source, and to argue that this gives rise to reasonable grounds for suspicion. In this respect too, we consider that the ET erred in law, and the EAT erred in law in upholding the decision of the ET.

Disposal

[61] For the foregoing reasons we shall allow these appeals, quash the judgment of the Employment Tribunal dated 9 December 2013 and the judgment of the Employment Appeal Tribunal dated 15 March 2016, and remit to the Employment Tribunal to consider the question of equal value.