Neutral Citation Number: [2024] EAT 177

Case No: EA-2022-001141-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 December 2024

Before:

SARAH CROWTHER KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

Ms M Bogdan

Appellant

- and -

The Cabinet Office - Government Digital Services

Respondent

- -
- -

Mr David Green for the **Appellant**
Mr James Chegwidden (instructed by Government Legal Department) for the **Respondent**

Hearing date: 30 October 2024

- -

JUDGMENT

SUMMARY

Race discrimination

The Tribunal either failed to address or failed to give adequate reasons as to why it rejected the Claimant's case that she had suffered direct race discrimination because she repeatedly made informal requests for her job grading to be re-evaluated which were not adequately addressed by the Respondent.

However, the Tribunal's reasons were adequate to explain its rejection of the Claimant's case that she had been discriminated against on grounds of race by failing to either to re-grade her role earlier or to back-date the ultimate re-grading of her role to the commencement of her employment.

The appeal succeeds in part and issues 6.1 and 6.2 of the list of issues will be remitted to a differently constituted tribunal for consideration.

SARAH CROWTHER KC, DEPUTY JUDGE OF THE HIGH COURT:

1. The Claimant appeals the decision of the Tribunal sitting at East London (EJ Lewis, sitting together with Ms M Legg and Mr M Rowe). The hearing took place over 6 days in May 2022 and the Tribunal met on 13 and 20 May and 16 June 2022 to consider its decision, which was sent in a reserved judgment to the parties on 12 September 2022. In that judgment, all the Claimant's claims were dismissed.

2. The issue in this appeal is whether the Tribunal erred in law by failing adequately to deal with the claims of direct race discrimination brought by the Claimant. The essence of the Claimant's concern is that there was material evidence to which no reference is made in the judgment and in respect of whose treatment no adequate reasons appear in the judgment.

3. The Claimant accordingly invites me to remit those issues which were not addressed to a different Tribunal for consideration. The Respondent seeks to uphold the judgment below as both adequately addressing all the material issues and giving adequate reasons. Alternatively, the Respondent suggests that I should engage the *Burns/Barke* procedure to invite the Tribunal to supplement its reasons, should it wish to do so.

FACTUAL BACKGROUND

4. In order to consider the issues raised by the appeal, it is necessary for me to address the relevant factual background in some detail. It should be noted, however, that this appeal concerns three allegations of race discrimination out of a total of 16 which were advanced by the Claimant, which themselves were heard by the Tribunal amongst other claims for victimisation, harassment, unlawful deduction from wages and others. This summary does not therefore cover the full range of the issues of fact which were before the Tribunal.

5. The Tribunal did not entirely separate out its findings from the disputed evidence in its judgment. I have therefore put together this summary from the Tribunal judgment and have supplemented it in some places by reference to the evidence in the appeal bundles.

6. The Claimant self-describes as Romany Gypsy. She joined the Civil Service in response to an advertisement, and following a formal applications process she was appointed through the Fast-Track Apprenticeship scheme as a Digital Engagement and Policy Business Administrator at Grade B1, equivalent to 'EO' (Executive Officer), on 14 September 2015. She subsequently secured a post within the Government Digital Service in the Standards Assurance Team from early December 2015, at the same salary and grade. Her initial performance management review in March 2016 was positive.

7. The Tribunal found that the two main roles of the Standards Assurance Team were to ensure that Government departments followed the correct digital strategy and to provide support, with the overall aim of achieving costs savings. Prior to the engagement of the Claimant, the task of gathering evidence and providing calculations of costs savings from departments had been given to individuals whose job title was 'Digital and Technology Advisor'. The Tribunal found, contrary to the Claimant's case, that the job description for the Digital Technology Advisor role was broader and more complex than the Claimant's.

8. The Tribunal found that the Claimant's role included gathering costs-savings information but also comprised general administrative tasks, such as keeping on top of emails

relating to technology and digital spend enquiries from government departments, providing administrative support to the assessment managers and supporting the GOV.UK role with administrative tasks and intermittent cover.

9. At the end of 2016, the Claimant completed her apprenticeship and was taken on as a substantive EO.

10. Her case before the Tribunal was that, starting in April 2017, her caseload had in effect doubled in the period up to February 2019, because the other apprentice who had been taken on at the same time as her left, but was not replaced. The Respondent's case was that there was some increase in the Claimant's duties as a result of headcount, but it disputed the suggestion that her workload had doubled. The Tribunal noted that there was contemporaneous documentation which was consistent with the Respondent accepting that the Claimant needed more support, especially in relation to the administrative tasks for the assessment managers.

11. It was also common ground before the Tribunal that one of the Digital Engagement Manager roles was vacant and that on occasion the Claimant also covered some aspects of the Service Assessment Manager role. However, the Tribunal found, again contrary to the Claimant's case, that at no point did the Claimant cover the full duties of the Digital Engagement Manager role. It accordingly rejected her contention that her work was comparable to the substantive Digital Engagement Managers (whose roles were graded at HEO level).

12. The Tribunal made a specific finding that the Claimant was unwilling to recognise that the fact of doing a task which is part of a job which is done by a higher grade is not, of itself, the same thing as doing a job at that higher grade. In respect of the specific higher-grade role in issue, it held that there remained a difference, because the higher-grade role 'include[d] numerous other functions that are at a higher level of responsibility'. In particular, the Tribunal made various findings that the fact that the Claimant was doing costs-savings work alongside others in a role which was graded higher than hers, did not mean that she was doing the same job overall (for example at paragraph 30 of its judgment).

13. In September 2018, the Claimant went home to Hungary to support her brother who had been significantly injured in an accident earlier that year. She relied on an email exchange with a colleague in support of a claim that she had requested and been denied special leave. The Tribunal, in rejecting this part of her case, found that the email exchange could not 'reasonably or credibly be relied upon as having authorised the Claimant's absence' and that there was no evidence that she had in fact applied for special leave.

14. In December 2018, the Claimant's line manager moved to another team, and it was common ground that she was effectively left without a line manager. The Claimant claimed that as a result she had to cover 'up to 60%' of her line manager's role in the period until March 2019. Again, there was some common ground, namely that there was some additional work (although the exact amount was disputed) and the additional work was recognised by the Respondent as being 'higher level work'. It was also common ground that it had been suggested by a manager in the Senior Leadership Team ('SLT') that the Claimant's additional work ought to be recognised by payment of a Temporary Duty Allowance ("TDA") and a request was sent to the 'People Team' to approve a business case for a TDA. This was never followed up and the Tribunal found that none of the three managers within the SLT took responsibility for the Claimant's TDA application.

15. Following the Claimant's absence from work, and in December 2018, an email was sent internally in the SLT considering that absence. It had given rise to concerns about the Claimant's welfare but also in respect of one aspect of cover for the administrative part of her role. It had been 'flagged that the Claimant's tasks were not being completed', including responses to the 'gdsapprovals' mailbox. One of the SLT wrote,

> "We…need to look into that, and figure out a bit of resilience, as she's a single point of failure as far as I can tell at the moment (I'm not sure if either of you also have access to that mailbox)."

16. The Tribunal accepted the evidence of the Respondent that this email was not, as the Claimant suggested, a personal insult or degrading comment, but a simple statement of fact that she was without back-up in respect of the 'gdsapprovals' mailbox, so that if she was absent or unable to deal with the mailbox for any reason, it would not get done.

17. The Claimant unsuccessfully applied for promotion to a Digital Engagement Manager vacancy in early 2019. She claimed to have done so again in May 2020. The Tribunal found that, contrary to the Claimant's case, she had not been excluded from the promotion in 2019. Rather, a colleague, to whom the Claimant had allocated the work supporting the assessment managers (because the Claimant was keen to continue doing the costs-savings work) had been invited to 'act up' in November 2019 because she was the only candidate doing the relevant assessment manager work. As to when the permanent role had become available in May 2020, the Tribunal found that the Claimant did not apply, and it was awarded to the colleague who had been acting up in the role.

18. In April 2019, the SLT met to discuss the end of year markings for performance. Concerns were raised about the Claimant and a marking was entered which was negative. It was common ground before the Tribunal that this had been done (contrary to policy) without any manager undertaking a 1:1 meeting with the Claimant. The Tribunal, however, accepted the evidence of the Respondent that this failure arose because the relevant line manager post was vacant and therefore, although by default the 'Grade 6' was effectively her line manager, he did not consider himself a suitable person to line manage the Claimant because he was not responsible for her day-to-day work. The Grade 6, Tim Marcus, did seek feedback from others in the SLT before filing the markings on the employee line management portal. During that exchange one of the other managers responded to say,

> "I'm ready to fire her out of a cannon after the week, so happy to provide some thoughts."

19. The Claimant's complaint was that this comment meant that the Respondent wished to dismiss her from her employment. The Tribunal expressly records in its judgment that the Claimant did not pursue any contention in evidence that this remark was a reference to her race. The Tribunal rejected the Claimant's interpretation of the email, finding instead that it was an expression of personal frustration, but that none of the SLT had ever intended to dismiss the Claimant from her employment.

20. Following the performance marking, the Claimant expressed her unhappiness with the process and as a result Tim Marcus emailed her to suggest a face-to-face meeting with a view to re-considering the performance marking. The Claimant responded by suggesting that she

wanted an 'objective third-party view' and therefore had invited a union representative to join her. The Respondent did not agree to this proposal. The Claimant complained that she had thereby been refused permission to be accompanied by her union representative.

21. The Tribunal, however, preferred the evidence of the Respondent and found that in fact the Claimant had been offered a second meeting with a union representative present if that was needed following the initial meeting. The initial meeting with Mr Marcus did take place on 24 June 2019.

22. On 3 October 2019, the Claimant raised a formal grievance about the end of year performance marking from March 2019. In that email, to which I was taken during the hearing before me, the Claimant complained about the fact that she had had no meetings with Tim Marcus from his (by default) becoming her line manager in December 2018 until the review in March 2019. She also raised the issue about her wanting a union representative to accompany her at the meeting which had taken place in June 2019. Her 'grounds of appeal' against her marking were (i) failure of process and (ii) failure to take account of relevant information. The Claimant says this regarding the information which she alleged ought to have been considered,

> "Within the past couple of years, I was delivering tasks that were above my grade including
>
> - Covering for Digital Engagement Managers (B2 (HEO)) at times of high demand
> - Calculating savings work made by my team across government
> - Covering for my line manager (Government Web Domain Manager – (B2), handling the gov.uk exemptions and naming process while he was on leave and after he left from December 2018 to end of February 2019 without any downtime
> - Due to a reduction of headcount, I had to cover for two positions for 2 years."

23. There followed email communications about handling of the complaint with Ms Susie Healey, who had become the Claimant's direct line manager in about June or July 2019, in particular concerning who was appropriate to be the investigation or decision managers for the grievance, because Ms Healey had in the meantime given a further negative performance review of the Claimant in September 2019. The Tribunal addressed the correspondence chain at paragraph 66 of its judgment. On 11 February 2020, amid that correspondence, the Claimant emailed Ms Healey to state,

> "As I have mentioned to you earlier, I would like my role to be evaluated. Cabinet Office policy can be found here (live link). Can you please confirm if you are happy to authorise?"

24. The Tribunal (as did I) had, within the documents before it, copies of the relevant job evaluation policies and procedures. The Tribunal judgment does not address specifically the Respondent's job evaluation procedures, but it was common ground before me that the relevant procedures were known to the Claimant and available on the intranet (indeed, she was the one who provided a link to them to her line manager).

25. The relevant policy documents provided that 'Job Evaluation and Grading Support' (JEGS) was available in one of four situations, namely on creation of a new post, when a manager considers that the requirements of an existing post had changed significantly, when internal restructuring has significantly altered a post and where a member of staff requests their post be evaluated because they feel it sits more appropriately in a different pay band. In the latter scenario, the policy states, 'the line manager must agree to this.' The process itself involves completion of a substantial form and provision of considerable amounts of information. As Mr Green, who was representing the Claimant on this appeal, submitted, by reference to evidence from a witness statement of Ms Hoskin, Head of Reward at Cabinet Office at the relevant time, such a request usually comes about after discussion with the line manager. I was also taken to the good practice guide and a handbook which are consistent with the policy.

26. Tim Marcus was interviewed as part of the process of investigation of the Claimant's grievance on 27 July 2020, and minutes of that meeting were in the Tribunal bundle (which ran to some 1,500 pages over 3 lever arch files). The Claimant relied on a comment recorded in the notes of that meeting,

> "She has tried with every line manager that her role should be at a higher grade. I took this to SLT, and it wasn't agreed."

27. The Claimant's case is that this is evidence that Tim Marcus (and others) knew that she had made repeated requests to have her job re-evaluated throughout the course of her employment.

28. Following the email correspondence with Ms Healey, the Claimant completed and submitted a JEGS request form in March 2020. It was addressed in July 2020 and, (apparently after 5 evaluations), was accepted on 29 July 2020.

29. On 28 August 2020, the Claimant started these proceedings in the employment tribunal.

30. As I have said, the Claimant's job was re-evaluated, and she was successful in securing an evaluation of her role at the HEO (B2) grade in July 2020. She remains currently employed in that role. She is dissatisfied with the outcome of the job evaluation process, because she considers that she ought to have been allocated an SEO role (one grade higher than HEO). She has also expressed unhappiness with the process itself, complaining that the guidance ought to have been more transparent as to what she needed to include to be successful. Additionally, since the re-grading, she has asserted that the evaluation ought to be retrospective, meaning that she would be owed 'back-pay' at the higher grade since the inception of her employment in 2015. Finally, she is also unhappy with the fact that she now needs to apply to be appointed substantively to her current HEO role because it was not the one she had originally been engaged to do. I was told that substantive recruitment to the role had not taken place since July 2020 due to a recruitment freeze and a more general review of staffing in the GDS with a view to a possible restructuring exercise. The Claimant maintains that had the job been advertised as an HEO role when she applied in 2015, she would not now need to re-apply for it. She raised complaint about the job evaluation process and outcome regarding these points in January 2021.

31. In February 2021, the Claimant was sent a letter detailing the outcome of her grievance regarding the performance management review. In that letter, the following observation was

made regarding the complaint about the job evaluation process and her associated claim that she is owed 'back-pay' from the start of her employment,

> "I note that a JEGS process has been completed, with the outcome that your role should be re-graded to a higher grade. However, I concur with the finding in Simon Dadd's [the investigating officer's] report that it is not possible to accurately determine at which point the role would have ceased to have been correctly graded, and I am therefore not able to make a determination on the aspect of your complaint where you request back-pay. However, I consider that the business unit would be well-placed to make this judgement, and I recommend that GDS managers investigate the point at which your job ceased to be correctly graded."

32. On 21 July 2021, the outcome of the complaint regarding the evaluation process was sent to the Claimant, in a letter from the Decision Maker, Leon Hubert. The Claimant relies on comments made in that letter, namely, that,

> "There is some evidence that your role was incorrectly graded when it was first advertised. This part of the complaint is upheld, and recommendations will be made below….
>
> The following actions will be taken to address concerns raised in your dispute: -
>
> A recommendation will be passed to Cabinet Office HR to review how your role was graded at the point at which you were recruited. The initial grading of your role should be taken into account by Cabinet Office HR when reviewing the requirement for you to apply through open competition for the uplifted HEO role."

33. The Claimant says that this comment is an acknowledgement or admission by the Respondent that when initially advertised, her role ought to have been graded as HEO.

THE PROCEEDINGS BEFORE THE TRIBUNAL

34. The Claimant began her claim on 28 August 2020, shortly after her job evaluation process had concluded, but before the investigations or outcomes of either her performance management grievance or her complaint into the job re-evaluation process had taken place.

35. Her particulars of claim specifically refer to the performance management grievance email of 3 October 2019. As regards what she intended by her performance management grievance, she simply states that, 'I raised a formal complaint against the end of year marking for 2018-2019' and goes on to address the concerns about the identity of the investigating and decision-making officers.

36. She does not assert in the particulars of claim that her email of 3 October 2019 was a request for a job evaluation.

37. The only reference to a request for job evaluation in the Particulars of Claim is one which she alleges she made during a meeting which took place on 16 December 2019 to discuss her performance management grievance.

38. Thereafter, the Claimant states that she was told by Ms Healey that she could submit a job evaluation request form in February 2020 and complains that Ms Healey's response was delayed 'on purpose'. The particulars of claim refer to a subject access request, which the Claimant made of the Respondent, which she says revealed documents that indicated Chad Bond, the Deputy Director, had 'acknowledged that the role I have been carrying out is higher than the grade I have been categorised at and paid for for 4 years and 9 months.' She also asserts that, 'On 22 May 2020 there was an email conversation with Chad Bond confirming that the role I do is above my grade.'

39. I was not, as far as I can tell, taken to any documents during the hearing before me regarding what Chad Bond considered the Claimant's appropriate grade to have been at any stage. On the other hand, what I was taken to in the hearing, is a reference to the comment of Thom Beckett made in the Claimant's performance review for the reporting year 2020/2021 in which he states,

> "The regrading of her job is a good reflection of the level of work she has done, and I wish her well as she has the opportunity to apply for that job permanently. Overall, I agree an 'achieved' marking at HEO grade, bearing in mind she's been formally at that grade for six months, and that there's recognition that the job was actually at that grade prior to that point."

40. Clearly, the Claimant was acting as a litigant in person at the time she issued her claim form, and it is important to read the documents fairly to identify the real substance of her complaint without regard to legal form or pleading niceties. However, even taking a broad and pragmatic view, there is no hint of any suggestion in the pleaded claim that the Claimant had 'made several requests' to management over time for her job to be re-evaluated, whether formally or informally. In her summary of claims she does not suggest that she has been subjected to race discrimination by having requests for re-evaluation of her role ignored, mishandled or refused. Nor does she allege that the response (or lack thereof) to her request for job evaluation made during the grievance meeting on 16 December 2019 was an act of discrimination.

41. The Respondent did not, to its credit, stand on pleading technicalities or take forensic points. The case was managed by the Tribunal and a list of issues produced. It also appears to have taken the approach of focussing on the substance, not the form.

42. EJ Dempsey, on 15 July 2021, conducted further case management which resulted in list of issues which stated (insofar as is relevant) as follows:

> "Allegations of Direct Race Discrimination
>
> 6.1 The Respondent refused to carry out the job evaluation for the Claimant several times which she has been requesting throughout her employment despite the fact it is her contractual right.

> 6.2 From the beginning of her employment she made several requests to her line manager as it has been admitted by Timothy Marcus on 27 July 2020 during the investigation: quote "she has tried with every line manager that her role should be a higher grade." He took this to SLT (Senior Leadership Team), and it wasn't agreed.
>
> She also made a request on 18th [November in the list of issues but October according to the evidence] for job evaluation in her email to her line manager Susie Healy at the time which was not agreed until April 2020. The content of the form was approved in July 2020…
>
> 6.13 On 29 July 2020, after job evaluation, it was identified that the Claimant had been wrongly graded. Samantha Helliar who was doing the same role as the Claimant, was graded one grade higher than the Claimant. Karen Stokes, who had the Claimant's role for three years before the Claimant, was paid at SEO grade (one grade higher than HEO). The Claimant states that the incorrect grading and the length of time it persisted for were acts of less favourable treatment. Other colleagues who were not Romany Gypsy were not wrongly graded and wrongly paid for 5 years."

43. It can be seen from the listed issues that the case as set down was now markedly different from the factual case which had been advanced by the Claimant in her particulars of claim. The thrust of her factual case was now that she had been repeatedly making requests for job evaluation 'throughout' her employment and there had been a failure to deal with those requests which had left her 'wrongly graded' for 5 years. She was alleging that these requests had not been addressed or accepted because she is a Romany Gypsy. It is far from clear to me that the Respondent, or the Tribunal, appreciated that this formulation represented a material change of case. Indeed, the Respondent produced an amended ET3 which did not specifically respond to the pleaded allegation that a job evaluation had been requested during the grievance meeting on 16 December 2019. Nor does the ET3 address the case that several requests were made prior to February 2020.

44. The Claimant later put in a written statement of her evidence to the Tribunal, dated 12 April 2022. It runs to some 48 pages, and I have considered it in full. Central to her evidence is her contention that the 'savings role' which was part of her job description was work which had previously been done by others at a higher grade. For example, at paragraph 3 she states that, 'it is clear that I was responsible for leading on savings work.'

45. The Claimant in that statement does advance the case identified in the list of issues that she had requested job evaluation throughout the course of her employment. The Claimant's evidence is broad and general but is to the effect that she had 'requested' a job evaluation. For example, she says, 'throughout my employment I asked my manager several times if my role could be evaluated, as I felt that the work I do is far above my pay grade. Unfortunately, these requests have been rejected, even though, according to the evaluation policy, I am within my contractual right to request a job evaluation. Apparently, the reason my request was rejected was that the managers did not agree that my role was supposed to be graded higher than EO.' Similarly, at paragraph 9, the Claimant states, 'After my request for a job evaluation, regarding the savings role, had been rejected so many times, suddenly the role was at a higher grade again.'

46. At paragraph 41 of her statement, she stated that the grievance email of 3 October 2019 was her requesting a job evaluation 'again'. She claimed that her email of February 2020 was her 'chasing the outcome' of the job evaluation request which she had made in October 2019.

47. On the other hand, at no point in her witness statement does the Claimant address the grievance investigation meeting on 16 December 2019. She gave no evidence in support of her actual pleaded allegation that she requested a job evaluation at that meeting.

48. I have not been taken to any documents which were said by the Claimant to contain a job evaluation request other than the email of 3 October 2019 to which I have referred above. The Claimant at no point gave any specific details of when she had made her job evaluation requests, to whom and in what manner she had made them. Nor does she say what the response, if any, had been. As I say, the change of case does not appear to have been appreciated by those representing the Respondent and none of its witnesses, as far as I can tell from the statements which I have been shown, appear to address the question of whether the Claimant made requests for job evaluation prior to the one which was made in early 2020.

THE FINDINGS OF THE TRIBUNAL

49. The Tribunal noted under the heading 'Findings of Fact' that it had set out findings of fact as far as they are relevant to the issues it had to decide.

50. In respect of issues 6.1, 6.2 and 6.13, the structure of the Tribunal's judgment recognises that these issues are linked, albeit raising slightly different considerations, and deals with them together and not in the chronological order (as it did the other allegations). At paragraphs 70 and 71 of its judgment, the Tribunal held in respect of issues 6.1 and 6.2 that,

> "70. We do not find that there was refusal to carry out a job evaluation. Nor do we find on the evidence that the Claimant made several requests to her line managers for a job evaluation or higher grading.
>
> 71. We find that under the Respondent's Job Evaluation policy a job evaluation request from a member of staff is subject to line manager approval (p1330). We are satisfied that the Claimant's first formal request for a job evaluation was made in February 2020 and she provided the completed written evaluation form in March 2020 (p195). The evaluation request was agreed by the Claimant's line manager in April 2020. On 29 July 2020, after five job evaluations, the Claimant's role is graded as HEO."

51. As for issue 6.13, the judgment continued at paragraphs 72 to 79 with various findings of fact regarding the alleged comparators. The heading identifies the issue as being that she was 'wrongly graded for 5 years. The Claimant alleges it is an incorrect grading, and it is persisting.' At paragraph 78 the Tribunal held that the evaluation in July 2020 at HEO level did not mean that the Claimant had been working in an HEO level role for 5 years. Indeed, it held, that, 'the role changed over time and by July 2020 the Claimant was able to demonstrate that the role's grading should be HEO.'

52. Finally, at paragraphs 108 and 109, the Tribunal held that there was 'no automatic contractual right for a job evaluation. The evaluation was subject to line manager approval. The formal request was made in February 2020 and from there the evaluation was progressed, the

claim is not made out.' It then held that there was no delay between the formal request in February 2020 and it being agreed in April 2020.

53. The Tribunal dismissed all the Claimant's claims. Many of those claims were dismissed on the basis that the Tribunal did not accept the Claimant's interpretation of events and therefore rejected her claim to have been subject of treatment which could be said to have been less favourable. Others were rejected because although the Tribunal accepted that the events in question occurred, it accepted the explanation of the Respondent through its witnesses that the reason for such treatment was not related to the Claimant's race.

THE RELEVANT LAW

54. The Claimant's grounds of appeal are based on the contention that the Tribunal failed to take material evidence into account and failed to give adequate reasons for its findings. This was primarily advanced by Mr Green as a serious procedural irregularity. He relied on the decision in *NHS Trust Development Authority v Saiger [2018] ICR 297, EAT,* in which Judge Hand QC, at paragraphs 99 to 102, analysed various situations which amount to serious procedural impropriety, particularly by reference to well-known case of *Browne v Dunn 6 R 67.* In the *Saiger* case it was held that it would not generally be fair procedure for a tribunal to reach conclusions about a factual scenario if that scenario had not been 'put' to a witness or party. Furthermore, where a tribunal was minded to reach a conclusion based on inference, then, unless the point was obvious, it needed to be raised in proceedings so that the parties had an opportunity to address it. However, Judge Hand QC, in his lucid judgment, also noted that where the context suggested that, looked at overall, the proceedings had been fair and the parties knew what was in issue, then no serious procedural irregularity would have taken place.

55. Mr Green further relied on the well-established principle that where a Tribunal has before it a case where there is a material question of fact to be decided, it must engage with the issue sufficiently to enable to the parties to see why they won or lost. He cited as an example of this principle in action, the decision in *Dutton v Governing Body of Woodslee Primary School and another UKEAT/0305/15/BA, unreported, HHJ Eady QC* at paragraph 22. As is noted in that case, this question is very often considered in the authorities as being part of the broad heading of failure to give reasons.

The Duty to Give Reasons

56. The scope of the duty to give reasons is set out in rules 62(4) and (5) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule (SI 2013/1237). They provide that,

> "…in the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues…"

57. Choudhury P in the case of *Kelly v PGA European Tour (UKEAT/0157/17/JOJ)* gave the following summary of the law in relation to rule 62(5) and the duty to give reasons:

"The scope of the Tribunal's duty in giving reasons is well-established. In *Meek v City of Birmingham District Council [1987] IRLR 250, (at page 251),* Bingham LJ stated that a Tribunal's reasons should:

> *"8. … contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; …"*

20. In his judgment, Bingham LJ relied on a dictum of Donaldson LJ in *Union of Construction, Allied Trades & Technicians v Brain* [1981] ICR 542 (page 551):

> *"[Employment] Tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law … their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which reasons are given."*

21. In *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, Lord Phillips MR found (at paragraphs 17 to 22) that the duty to give reasons was a duty to give sufficient reasons so that the parties could understand why they had won or lost and so that the Appellate Tribunal/Court could understand why the Judge had reached the decision which s/he had reached. Lord Philips said:

> *"16. We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.*
>
> *17. As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example Flannery's case [2000] 1 WLR 377, 382. In Eagle Trust Co Ltd v Pigott-Brown [1985] 3 All ER 119, 122 Griffiths LJ stated that there was no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case:*
>
> *"When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted … (see Sachs LJ in Knight v Clifton G [1971] Ch 700, 721)."*

> *18. In our judgment, these observations of Griffiths LJ apply to judgments of all descriptions. But when considering the extent to which reasons should be given it is necessary to have regard to the practical requirements of our appellate system. A judge cannot be said to have done his duty if it is only after permission to appeal has been given and the appeal has run its course that the court is able to conclude that the reasons for the decision are sufficiently apparent to enable the appeal court to uphold the judgment. An appeal is an expensive step in the judicial process and one that makes an exacting claim on judicial resources. For these reasons permission to appeal is now a nearly universal prerequisite to bringing an appeal. Permission to appeal will not normally be given unless the applicant can make out an arguable case that the judge was wrong. If the judgment does not make it clear why the judge has reached his decision, it may well be impossible within the summary procedure of an application for permission to appeal to form any view as to whether the judge was right or wrong. In that event permission to appeal may be given simply because justice requires that the decision be subjected to the full scrutiny of an appeal.*
>
> *19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon….*
>
> *21. When giving reasons a judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision."*

58. The task of the appellate court considering allegedly defective reasons was considered by Sedley LJ in *Anya v University of Oxford [2001] ICR 847:*

> *"26. … The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."*

59. Sedley LJ in another case, *Tran v Greenwich Vietnam Community [2002] EWCA Civ 553; [2002] ICR 1101,* regarding adequacy of reasons, pointed out that it is not sufficient for the Tribunal to set out findings of fact and conclusions, it is necessary for the Tribunal to explain how it got from its findings of fact to its conclusions.

60. In *Frame v The Governing Body of Llangiwg Primary School and another (UKEAT/0320/19/AT)*, Cavanagh J summarised the relevant principles as follows:

> *"(1) The duty to give reasons is a duty to give sufficient reasons so that the parties can understand why they had won or lost and so that the Appellate Tribunal/Court can understand why the Judge had reached the decision which s/he had reached;*
>
> *(2) The scope of the obligation to give reasons depends on the nature of the case;*
>
> *(3) There is no duty on a Judge, in giving his or her reasons, to deal with every argument presented by counsel in support of his case:*
>
> *(4) The Judge must identify and record those matters which were critical to his decision. It is not possible to provide a template for this process. It need not involve a lengthy judgment;*
>
> *(5) The judgment must have a coherent structure. The judgment must explain how the Judge got from his or her findings of fact to his or her conclusions;*
>
> *(6) When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which s/he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question; and*
>
> *(7) It is not acceptable to use a fine-tooth comb to comb through a set of reasons for hints of error or fragments of mistake and try to assemble them into a case for oversetting the decision. Nor is it appropriate to use a similar process to try to save a patently deficient decision."*

THE CLAIMANT'S APPEAL

61. Mr Green, who did not appear below, made concise and clear submissions on behalf of the Claimant. His argument was that issues 6.1 and 6.2 needed to be read together, as the Tribunal had done, with issue 6.2 effectively being seen as a particular in support of the general allegation in issue 6.1. He invited me to read issue 6.1 as not only encompassing requests made for job evaluation pursuant to the terms of the JEGS contractual policy but also her several requests which she alleged were made outside that process. He pointed to the fact that the Tribunal had referred to the email of 3 October 2019 as showing that the Tribunal was alive to the fact that informal as well as formal requests were in scope.

62. He submitted that in a discrimination case, where a Claimant brings a series of factual averments said to be instances of less favourable treatment, it gives rise to a factual question as to whether those factual events occurred. The Tribunal's role is to resolve those allegations which the Claimant says are facts which amount to less favourable treatment and it is

impermissible to re-write the factual allegations to cast them more narrowly, which is the error into which the Tribunal has fallen, because it has treated the issue as pertaining solely to whether the Claimant made formal request for job evaluation, when in fact she was complaining about informal requests made on several occasions over the nearly 5 years of her employment to the date of her claim. His argument therefore went further than a mere failure to adequately reason a decision, it was an omission to make the decision in the first place.

63. He submitted that in any event the reasons were deficient because they failed to address what had happened with respect to the requests: were they made, what did the Respondent do in response to them and were they in the circumstances less favourable treatment. The absence of reference in the reasons to Tim Marcus' comment in July 2020 that the Claimant 'had tried with every manager' to get a higher grade indicated that the Tribunal had overlooked this issue and failed to address its mind to the Claimant's case. It did not therefore deal with whether she had made requests for job evaluation and, if so, whether they reason they were not dealt with because she is a Romany Gypsy.

64. As a result, Mr Green submitted that the Tribunal ought to have appreciated that the issue of earlier requests for job evaluation was still in dispute and was a material question for it to determine. He indicated that the same issues and problems arose with the findings in respect of issue 6.13, bearing in mind the comments made in the performance management review of Mr Beckett and the evaluation grievance outcome letter of Mr Hubert both from 2021. Mr Green submitted that the case needed to be remitted to a different tribunal to consider the issues at 6.1, 6.2 and 6.13.

THE RESPONDENT'S ANSWER

65. Mr Chegwidden, on behalf of the Respondent, who, unlike Mr Green, had the benefit of having appeared below, reminded me that the Claimant had not taken issue with the JEGS procedure and policy at Tribunal but had accepted that only a formal request in writing for a job evaluation with the approval of line manager amounted to a request for the purposes of the Respondent's policy. He submitted that the Claimant's position regarding the alleged previous requests was noncommittal in that she did not seek in her evidence or submissions to articulate exactly what she had asked for and when. It was common ground before the Tribunal that the Claimant was aware of the policy and was also being supported by her union.

66. In an elegant and well-structured submission, he said that the performance management grievance email of 3 October 2019 could not on any sensible reading be said to have been a request for a job evaluation, whether formal or otherwise. He submitted that there was no deficiency in the reasoning that the Tribunal did not mention that specifically, because it was clear from the reference in paragraph 4 of the Judgment that the Tribunal had the exact terms of that email well in mind when it reached its decision.

67. Mr Chegwidden's case was that in paragraph 70 of its judgment, the Tribunal had reached a finding that the previous requests alleged by the Claimant prior to 2020 did not amount to 'requests', properly speaking: this was a finding that it was entitled to reach on the evidence because the quality of evidence advanced by the Claimant that she had requested a job evaluation prior to the formal 2020 request was poor.

68. He further submitted that, even if the Claimant was correct that the Tribunal ought to have separately considered whether there were earlier requests, the claim for race

discrimination was bound to fail, because the Claimant had not put forward any case for an actual or hypothetical comparator in respect of such informal requests and had not advanced any evidence which would have entitled the Tribunal to conclude that race was the operative reason for the treatment of those informal requests; in other words, there was no evidence that an actual or hypothetical comparator would have been treated any differently had it made the requests the Claimant had. Such requests would likewise have been bound to have failed, because they would not be raised in accordance with the procedure.

69. In respect of issue 6.13, he submitted that the finding at paragraph 78 of the judgment that the role had evolved to become something different to when she had been recruited was founded in the evidence to which the Tribunal had referred in its reasons at paragraphs 72-79 and was a finding which was open to it on the evidence and one which it was entitled to reach.

70. He further submitted that the claim advanced at issue 6.13 could not have worked as a matter of logic insofar as it was based on the advertisement for the role, because that was composed before the Claimant had even applied and therefore could not have been based on her race and the second sentence of paragraph 78 of the judgment showed that the Tribunal understood that. He also submitted that the reference to 'wrong grade' being applied in the decision of Mr Hubert in relation to the evaluation grievance could not have been evidence that supported the contention that the HEO grading ought to have been applied at an earlier point and certainly not 5 years' previously.

71. Mr Chegwidden submitted that this case was similar to the decision in *Bah v Berendsen UK Ltd (UKEAT/0256/19/AT)* in which Gavin Mansfield QC sitting as a Deputy Judge of the High Court held that a Tribunal was not in error where its reasons had not addressed all the issues because those which it had disregarded were not material to the outcome of the case in light of its other conclusions.

72. His alternative case was that if there was a defect in the reasons, then it was one which ought to be remedied by first using the *Burns/Barke* procedure, because that would be an opportunity for the Tribunal to supplement its reasons in respect of these issues.

CONCLUSIONS

73. I have considerable sympathy for the Tribunal in respect of its handling of this case. It was substantial, taking place as it did over 6 days of evidence and 2 and a half days of deliberation and involving 1,500 pages of evidence and requiring analysis of events spanning over a 5-year period between 2015 and 2020. As I have set out above, the Claimant's case underwent evolution, particularly once she had received documents pursuant to her subject access request and disclosure. It is apparent from the judgment that the Claimant was both withdrawing and seeking to add allegations throughout the course of the hearing itself.

74. Moreover, this does appear to have been a case where the development of the list of issues operated in practice as a back-door amendment to the Claimant's pleaded case. Langstaff P in *Chandhok v Tirkey [2015] IRLR 195* at paragraph 18 gave a well-known reminder that the employment tribunal should not lose sight of the pleaded cases and be diverted away from it by the list of issues. It is the pleaded cases which ought to set out the scope of the issues for the Tribunal to determine. They do not exist merely as a formality for starting proceedings.

75. Whilst the practice of using a list of issues to distil the pleadings into a manageable format so that the case can be sensibly conducted is useful, this does seem to me to have been a case where the issues as drafted at items 6.1, 6.2 and 6.13 effectively operated as substantial amendments to the originally pleaded claims in a way which, in my judgement, neither the Respondent nor the Tribunal fully appreciated. It appears to have led to the Respondent not addressing those claims fully in its pleadings or evidence, with the result that these issues are only now before this court being understood as central to the Claimant's case. With the benefit of hindsight, it may have been preferable for the case managing Judge to have required the Claimant to amend her pleaded case to formally adopt all the listed issues and factual allegations and to formally withdraw any pleaded facts upon which she no longer relied.

76. Notwithstanding the fact that the Claimant's case on requests for job evaluation as she presented it at the Tribunal and on appeal was not pleaded, I have concluded that nevertheless, in the circumstances, the issues at 6.1 and 6.2 were, as the Tribunal recognised, squarely before it to determine. However, the Tribunal has fundamentally omitted to deal with those issues, and it is not therefore apparent from the reasoning of the Tribunal why the Claimant was not successful on them. These failures, whichever label one attaches to them, amount in my judgment to a serious procedural irregularity.

77. I accept Mr Green's submission that issues 6.1 and 6.2 clearly go wider than merely alleging a failure to handle adequately or in time the formal request made in early 2020. Although that did form part of the Claimant's case, it was clearly not the whole of it. The specific references in issue 6.2 to the 3 October 2019 performance management grievance email and the comment of Tim Marcus that 'she had tried with every manager' make plain that part of the Claimant's concern was that she had been complaining that her role was wrongly graded for some time and that little or nothing was being done in response to her requests for it to be looked at. I cannot accept the submission of Mr Chegwidden that the Tribunal was entitled to limit its consideration to the 'contractual rights' of the Claimant, namely to make formal requests for re-grading to be considered under the JEGS policy. Read fairly and in context with issues 6.2 and 6.13, the Claimant was, at least by this stage, asserting that she had been discriminated against by a failure to acknowledge, deal with or accept her complaints about grading of her role and what she at least, considered to be requests to re-grade it.

78. The only finding made by the Tribunal which could be said to address that 'wider' issue is the second sentence of paragraph 70,

> 'Nor do we find on the evidence that the Claimant made several requests to her line managers for a job evaluation or higher grading.'

79. Mr Chegwidden did not seek to suggest that by this sentence, the Tribunal was resolving any question of fact as to whether the Claimant had indeed raised the prospect of her role being re-evaluated earlier in the course of her employment prior to the formal request in February 2020. Instead, he invited me to read it on the basis that the Tribunal had deliberately restricted its factual findings solely to the narrow case of 'formal' requests for job evaluation. He derived support for this reading from the later findings at paragraphs 108 and 109 of the judgment where the Tribunal talks about there being 'no automatic contractual right' to job evaluation and points to the formal process of JEGs.

80. For my part, I find the sentence ambiguous as to whether it refers to the Claimant's actual case or the Respondent's argument that only formal requests counted. Supposing,

however, that Mr Chegwidden's interpretation is the correct one, in my judgement, such an approach amounted to a re-writing of the issues and a failure on the part of the Tribunal to tackle the whole of the Claimant's case. Mr Chegwidden invited me to conclude that the Tribunal was entitled to take that course, because it was common ground that a job evaluation process would only actually take place if a formal request in writing on the appropriate form was made and approved by a line manager. As a matter of how the policy operates on its own terms, that is clearly correct. However, that misses the point: it was not the question which the Tribunal had to answer. It seems to me that Mr Green is right when he submits that the Tribunal was faced with a claim that the failure to deal, either properly or at all, with informal requests amounted to direct race discrimination. The first step in the analysis was therefore whether requests (under the policy or otherwise) had been made. The Tribunal therefore was bound to make a finding: either to accept the Claimant's case that she had made (informal) requests for job-re-evaluation prior to February 2020, or not accept her case and say why she had not, with reference to the evidence before it and setting out the findings of fact or inferences it drew to support that finding.

81. As I have set out above, this was not a case where all the evidence went one way on the question of whether the requests were made or not. It was not therefore open to the Tribunal to treat this issue as not in dispute. Rather, it needed to demonstrate some engagement with the question of why it was either accepting or rejecting the Claimant's witness evidence and the other documents set out above which supported her case.

82. Mr Chegwidden in his skilful submissions has been able to show that the Claimant's case faced challenges which would have entitled a Tribunal to conclude that her factual case that she had asked for job evaluation before February 2020, even informally, ought to be rejected. But the evidence was not conclusive or all one-way: the dispute of fact was still there and needed to be tackled. It would be wrong for me, as the appeal court, now to try to take up the challenge by seeking to plug any gaps. The only conclusion which is open to me is that the judgment does not provide adequate reasons to demonstrate why the Claimant's evidence on issues 6.1 or 6.2 were rejected.

83. Nor can I accept the submission that the claim was bound to fail in any event. It did not in my judgement necessarily follow that had the Tribunal grappled with the Claimant's case, that it was bound to conclude there no discrimination in the treatment she received. If the Tribunal had found that the requests or complaints had been made, it would have needed to give separate consideration to the treatment of any such request or complaint and whether such treatment of them was discriminatory. It did not conduct this exercise. It would have been open to the Tribunal to conclude that another employee, who was doing the same role as the Claimant, but was not Romany Gypsy, and who made requests for re-grading or complaints about failure to re-grade, would have been dealt with differently. It would have needed to consider whether the reason for any difference in treatment was indeed race. I cannot simply assume these matters would have been resolved in the Respondent's favour in circumstances where they were not considered at all.

84. On the other hand, I consider that the Tribunal's reasons in respect of issue 6.13 contained at paragraph 78 are adequate to address the Claimant's case. There were in effect two complaints under issue 6.13 (setting aside the information provided about putative comparators). The first issue under 6.13 was that she was 'wrongly graded'. The second issue was that the wrong grading 'persisted'. The substance of both complaints required the Tribunal to accept that the Claimant's post had in fact been under-graded for the duration of her

employment since 2015. To make that allegation good, the outcome of any putative earlier re-grading exercise would need to have been shown to have led to an allocation of a higher grade.

85. In this respect, the Tribunal clearly did address its mind to the Claimant's case and the evidence. First, it rejected as misconceived the central tenet of the Claimant's case, namely that because her job description included 'cost-savings work' that meant that it ought to have been graded at the same level as other posts which involved 'costs-savings work' (see the findings which I set out at paragraphs 7, 8, and 12 above).

86. I also accept the point made by Mr Chegwidden that the Tribunal was entitled to and did (at paragraph 78 of its judgment, as set out at paragraph 51 of this judgment above) find that the role of the Claimant had evolved over time, such that it would not have been graded as HEO at an earlier point in time. The Tribunal was obviously aware that the Claimant's post had been advertised at EO grade – indeed it made an express finding that she was appointed to the post in that grade – and it clearly was aware that she was arguing that it ought always to have been graded at HEO. It rejected that case, in reliance on the evidence of Chad Bond, to which it referred in its judgment at paragraph 78. That finding was clearly open to it on the evidence and the reasons set out why the Claimant's case was rejected. It did not, in my view, need specifically to address the comments made long after the re-grading, in the Claimant's 2020/21 performance management review or the outcome letter to the job evaluation process grievance by Mr Hubert. It was sufficient that they had identified that they preferred the evidence of Mr Bond as to what the Claimant's role actually entailed over time.

87. To my mind those findings fully answered the Claimant's complaint under 6.13 and were more than adequately reasoned.

DISPOSAL

88. I was invited by the Respondent to dispose of the appeal by use of the *Burns/Barke* procedure (*Barke v SEETEC Business Technology Centre Ltd [2005] EWCA Civ 578, [2005] IRLR 633*). As Mr Chegwidden pointed out, it would potentially be a way of saving considerable time and expense given the complexity of the facts of this case. I invited both parties to clarify what the alternative disposal would be, and it was common ground that remission to a tribunal limited to the outstanding issues would be necessary.

89. I have concluded that it would not be appropriate to invite the Tribunal to give further supplemental reasons at this point. Primarily, this is because it is possible that this was a situation where the Tribunal completely failed to give consideration to an issue, rather than merely failing adequately to explain its reasons for a point it had thought about. Even if I am wrong about that and the Tribunal did consider the Claimant's case but failed adequately to note its conclusions in the judgment, it is now over 2 years since the Tribunal heard the evidence and reached its determination and there is a degree of artificiality about the suggestion that they would be able now to recall their reasons. I fear the impression could reasonably arise that any reasons given at this stage would be a reconstruction rather than a genuine setting out of previously reached but unexpressed reasons.

90. It follows that Ground 1 of the appeal will be allowed and issues 6.1 and 6.2 of the List of Issues dated 15 July 2021 will be remitted to be heard by a differently constituted tribunal. Ground 2 of the appeal is dismissed.