



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103783/2018 (V)

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Held by remote hearing on 17 and 18 August 2020

**Employment Judge S MacLean
Tribunal Members H Boyd and J Burnett**

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Ms M Weatherup

**Claimant
In Person**

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Dumfries And Galloway Council

**Respondent
Represented by:
Mr S Miller -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant is not undertaking and has not undertaken like work as her comparator in terms of section 65(1)(a) of the Equality Act 2010; accordingly that part of the claim is dismissed.

REASONS

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Introduction

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1. The claimant brings an equal pay claim against the respondent. Her comparator is Greig Blayney. The claimant says her work was like Mr Blayney's work, failing which, that it was work of equal value to his.
2. The issue to be determined at this hearing was whether from September 2016 the claimant's work was like Mr Blayney's work as set out in section 65 of the Equality Act 2010 (the EqA).
3. At the hearing, the claimant gave evidence on her own account. She provided a witness statement which was treated as her evidence in chief. The claimant was cross examined and re-examined in the usual way. For the respondent, the Tribunal heard evidence from Steven Herriott, Head of Roads and

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Infrastructure within the Communities Directorate and Kirsty Shennan, HR Business Partner. They provided witness statements and were cross examined and re-examined in the usual way.

4. The parties provided a joint set of productions. The claimant also provided a supplementary set of productions.
5. The claimant represented herself at the hearing. Mr Miller, who was instructed by Mr MacEachern, Solicitor, represented the respondent. The claimant and Mr Miller gave oral submissions and provided written copies of their submissions for which the Tribunal was grateful.
- 10 6. The Tribunal read the submissions with care during its deliberations. It should not be taken that a point was overlooked, or a fact ignored because the fact or submission is not in the Reasons in the way that it was presented to the Tribunal by the party.
- 15 7. The Tribunal made findings in fact and considered the relevant statutory provisions and authorities.
8. The Tribunal's approach was to consider the issue that it had to determine at this hearing (set out at paragraph 2) by first asking if the work carried out by the claimant and Mr Blayney from September 2016 was in general terms of the same or broadly similar nature. If so, the Tribunal needed to consider the details of the claimant's job and Mr Blayney's job and ask whether any differences between them are of practical importance in relation to terms and conditions of employment.

Findings in Fact

The Claimant

9. The claimant commenced employment with the respondent on 16 May 2005. Her job title was Waste Prevention Officer which formed part of the Strategic Waste Policy and Assets Team in Planning and Environmental Services. She reported to Greig Blayney, then Principal Officer Waste Policy for whom she deputised as and when directed.
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10. In the course of normal working, the claimant had no direct responsibility for the work of other employees and she did not normally give advice, guidance or training to new employees. She required to have specialist knowledge to do the job: through vocational training or further education and relevant working experience from three to five years.
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11. Around 2005, the claimant became involved in the respondent's waste private finance initiative project (the PFI Project) which was the single largest project operated by Planning and Environmental Services. The claimant's initial involvement was limited to attending meetings with the private companies involved with the PFI Project which were chaired by Mr Blayney and undertaking visits to the PFI waste treatment facility.
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12. In 2009, the claimant's role was graded at salary level Band 11. She continued to be involved in the waste prevention programme and attending PFI Project meetings.
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13. From July 2011 Steven Herriott, Head of Infrastructure and Commissioning in Planning and Environmental Services was part of the senior management team responsible for the claimant and Mr Blayney.
14. In 2011 the claimant's involvement in the PFI Project increased. If Mr Blayney was not present, she was responsible for allocating tasks to the teams working on the PFI Project and making payments for the PFI Project.
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15. Around 2012 local authorities required by law to implement kerbside recycling. As a result, the respondent required to vary the PFI Project. The claimant and other senior managers and the waste team were involved in work/negotiations relating to the new legislation with along with legal, financial and technical advisors.
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16. In 2014, the claimant supervised one temporary member of staff.
17. There was a shift in the claimant's duties requiring her to focus most of her time on the PFI Project. The claimant was involved in checking and managing payments for monthly reports for unitary invoices and quarterly PFI landfill tax payments.
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18. The claimant was also delegated the landfill tax reconciliation for the PFI contract. The claimant identified an anomaly which resulted in the respondent becoming involved in a dispute with contractors.
19. Around December 2015, Alistair Speedie, Director in charge of the service by
10 then known as Economy, Environment and Infrastructure (EEI) instructed the PFI Project company to send all PFI correspondence to the claimant and for it to be copied to him, Mr Herriott and Mr Blayney.
20. In January 2016 Mr Blayney asked the claimant to review the proposed PFI insurance and consider the compliance with the PFI Agreement. The claimant
15 ensured that the insurance was correct and prepared relevant paperwork.
21. Around April 2016 Mr Blayney and Mr Herriott supported the claimant's request to attend a part time Contract Management Course in Public Private Partnerships/Private Finance Initiatives Advance Professional Diploma.
22. In September 2016, the claimant and Mr Blayney were appointed as the
20 respondent's representatives on the PFI Project. As Council Representatives they exercised the functions and powers of the respondent in relation to the project operations identified in the PFI Project Agreement. They shared responsibilities for developing strategies and plans for the PFI Project.
23. The claimant obtained an Advance Professional Diploma with Distinction in
25 Contract Management in Public Private Partnerships/Private Finance Initiatives from Leeds Beckett University in June 2017.
24. Given her involvement in working on the landfill tax reconciliations, between 2016 and 2018 the claimant worked with the respondent's external legal advisers to resolve the land tax reconciliation which had escalated. She was

then involved in preparing for the adjudication and attending the hearing at which the respondent was represented by external legal advisers.

25. Following her involvement in the review of the PFI insurance the claimant took the lead on a dispute that arose in 2017/2018.
- 5 26. The claimant also continued to be involved in some non-related PFI duties such as responding to information requests and attending area committee meetings and responding to customers.
- 10 27. In May 2017, the claimant applied for a re-evaluation of her role as she continued to be paid as a salary level Band 11 employee. Following a job grading submission in October 2017, the claimant was treated as having been working at an environmental officer level from April 2012 and received commensurate back pay. The Environmental Officer position held by the claimant was graded at salary level Band 12 which was an enhancement on her previous position (Waste Prevention Officer graded at salary level Band 11). The Environmental Officer's role assists and deputises for the Service Manager Environment. It has no direct reports. The jobholder does have responsibility for the work of employees or other people in an equivalent position through allocating work and checking results. This is supervisory.
- 15 28. The claimant felt that her role was undervalued and pursued her initial concerns with Mr Speedie who asked for a review on the Environmental Officer role. As a result of that review process, it was recognised that there were some aspects of the claimant's role which were not fully acknowledged in the Environmental Officer post. That did not impact on the salary level the position was graded (Band 12) although it resulted in a narrative change in the job overview document, particularly in relation to financial factors such as the financial activity for the PFI Project.
- 20 29. A further review was carried out to establish what requirements were needed moving forward. The claimant was offered a promoted post of Waste Management Strategy Manager on 26 January 2017. This post was graded at salary level Band 13. The Waste Management Strategy Manager's job
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description has no direct reports. The claimant declined the offer. She remained in the Environmental Officer post.

30. In mid 2018 as the PFI Project was to be terminated Mr Speedie appointed the claimant to the core team to work with him, Mr Herriott and the legal technical and financial advisors with a view to negotiating the termination of the PFI contract between June and September 2018. Mr Blayney was not directly involved in the core team. The claimant reported directly to Mr Herriott. The PFI Project was terminated by 11 September 2018.
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31. Between September and November 2018 there was a transition period where the claimant was involved in transferring the waste disposal services back in house with the core team. The claimant was involved in the TUPE transfer of 53 staff from the PFI service contractor to the respondent. This was completed on 11 November 2018. She was also involved in progressing matters relating to the settlement agreement and transition services agreement and integration work with the new service. Throughout this period, the claimant was reporting direct to Mr Herriott and continued to do so until spring 2020.
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The Comparator - Greig Blayney

32. In 2005, Mr Blayney held the position of Principal Officer Waste Policy in Planning and Environmental Services. The claimant was one of his direct reports.
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33. The post of Service Manager attracts a salary level of Band 14 to 17.
34. Around September 2012, Mr Blayney's post became Service Manager Environment. He reported to Mr Herriott, the Head of Infrastructure and Commissioning to whom Mr Blayney provided support and for whom he was required to deputise from time to time.
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35. Mr Blayney was the respondent's lead officer for the environment service ensuring that the respondent discharged its statutory and regulatory duties and enforcement powers. Although supported by team members Mr Blayney was accountable for the environment service as a whole.

36. He had responsibility for the environment service budget which involved being accountable for value for money through effective service delivery; responsibility for developing implementing and monitoring financial arrangements within the service and compliance within financial regulations.
- 5 Mr Blayney was accountable for external locations such as home Waste Recycling Centres and landfill sites. He required to represent the respondent by liaising with third parties.
37. Mr Blayney had responsibilities for amongst other things managing and directing staff and advisors within environment service function, projects and contracts. He had responsibility for staff in Waste Management and Contaminated Land. He had approximately ten direct reports.
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38. In terms of people management, Mr Blayney had responsibility for managing the work of employees or other people. He managed people rather than being a line supervisor. Mr Blayney was responsible for ensuring implementation of personnel procedures for his direct reports: staff development and review; staff supervision and direction for efficiency and effectiveness; staff performance management where appropriate; teamwork planning; staff resource management; general leadership and management participation in the service management team meetings; leading own team meetings and 15 staff one to one meetings
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39. The PFI Project was only one (albeit a significant) of the activities carried out by the environment service. From 2012 the claimant who was one of his direct reports took an increasing involvement in the PFI Project.
40. Mr Blayney's focus on PFI operational matters reduced as he was leading the 25 Change in Law dispute which involved an adjudication hearing followed by a dispute related to historic contract waste and the delivery of it into PFI waste facilities. He delegated the landfill tax reconciliation for the PFI contract and a review of PFI insurance proposed by the PFI Project company to the claimant.
41. On 9 September 2016, the claimant and Mr Blayney were appointed as the 30 respondent's representatives on the PFI Project. This resulted in them exercising the functions and powers of the respondent in relation to the project

operations identified in the PFI Project Agreement. The claimant's appointment only related to the PFI Project. Mr Blayney continued to have responsibility and accountability for other activities of the environment service.

42. Around September 2016, there was restructuring, as a result of which, a new post of Infrastructure Manager was created. It was intended that the post of Service Manager Environment would be subsumed into this role. It was intended that the Service Manager Environment would be deleted and the jobholder would be subject to the redeployment process.
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43. Mr Speedie determined that notwithstanding the restructuring of the resource of the post Service Manager Environment was still required, particularly given the ongoing issues with the PFI Project. While James McLeod was appointed Infrastructure Manager and had general oversight, most of the duties of Service Manager Environment remained with Mr Blayney until February 2019. In particular, Mr Blayney continued to work on the PFI Project; was responsible for contaminated land and the policy and strategy for the environment service; and managed those who reported directly to him.
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44. In 2017, one of Mr Blayney's direct reports left the department. As a result, Mr Blayney was to oversee an operational site in Stranraer in addition to carrying out his other duties.
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45. By mid 2018, Mr Blayney became less involved in the PFI Project. The claimant ceased to have a direct reporting line to him. Mr Blayney did however continue to have responsibility for management of all his other direct reports.
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46. Mr Blayney continued to manage contaminated land functions and had responsibility for strategic commissioning of the waste collection service and developing policy and strategy for the environmental service. He was accountable for the management of an entire service/department, including ensuring all personnel policies and procedures are implemented and adhered to as well as prioritising and reprioritising the service/department activities.

47. The position of Service Manager Environment was deleted in February 2019 at which point Mr Blayney was redeployed and ceased to be part of the environment service. Mr Speedie retired in March 2019.

Observations on the Witnesses and Evidence

- 5 48. In considering the evidence led at the hearing, the Tribunal assessed the written and oral evidence from the claimant, Mr Herriott and Ms Shennan along with the productions to which it had been referred.
- 10 49. The claimant's witness statement and supplementary statement were taken as read. Mr Miller cross examined the claimant in the usual way. The claimant was then given an opportunity to respond to the questions raised in cross examination where she felt that additional clarification was required. The claimant came across as a committed and highly competent employee who was genuinely aggrieved about the respondent's handling of her grievance. The Tribunal had no doubt that the claimant genuinely believes that the respondent has failed to acknowledge and recognise through the regrading process her effective management of the PFI Project.
- 15 50. The Tribunal considered in relation to her own work the claimant's evidence was consistent. The Tribunal was satisfied that she was giving a fair reflection of her job and duties. In relation to her evidence about Mr Blayney's job the claimant understandably focused on his involvement in the PFI Project from September 2016. The Tribunal considered that her evidence in this respect was credible. The claimant acknowledged that she had no involvement in the contaminated land and other aspects of Mr Blayney's role. Overall, the Tribunal found her to be a credible and reliable witness.
- 20 51. Mr Herriott's witness statement was taken as read. He was cross examined by the claimant and re-examined in the usual way. The Tribunal had no doubt about his evidence in relation to the claimant and Mr Blayney, both of whom he had worked with a number of years and had an opportunity to see their work first-hand. While Mr Herriott was a witness for the respondent, it was clear that he had no animosity towards the claimant. Indeed, he spoke highly of her competency and contribution in relation to her work on the PFI Project,
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which he had line managed from the summer of 2018. The Tribunal considered that his evidence was credible and reliable.

52. Ms Shennan also provided a witness statement which was taken as read. She candidly accepted in cross examination that her comparative exercise was undertaken on paper and that she did not have any direct knowledge of what the claimant and Mr Blayney did as part of their jobs. The Tribunal considered that while Ms Shennan did not know the claimant, Ms Shennan was clearly aware of the competent and diligence way which the claimant approached her work. However, Ms Shennan was mindful that the performance of the claimant and Mr Blayney in their respective roles was not relevant to the like work comparison that she was undertaking. She also acknowledged that the respondent's own job evaluation scheme outcomes were not directly relevant in relation to the like work comparison.
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53. In relation to the issues that the Tribunal was considering at this hearing, there was little in the way of material factual dispute. The Tribunal did however feel that it was appropriate to make the following observations on some of the evidence that it heard.
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54. It was agreed that when the claimant was appointed by the respondent in May 2005 and her job title was Waste Prevention Officer. After accepting the position, she received a job description and job overview.
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55. The claimant produced in her supplementary set of productions a copy of the job description which she received dated 10 February 2005. Whilst similar, it is not the same as the one produced by the respondent in the joint set of productions. The job description that the claimant received in 2005 states: "responsible for: strategic policy for waste prevention and recycling in accordance with the council's plan government policy and legislation." The version provided by the respondent in the joint set of productions is blank in the "responsible for" section. There were also differences in the wording in relation to the job description/activities listed in that they were not exhaustive.
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- Both job descriptions were issued by Mr Blayney. The Tribunal did not hear evidence from Mr Blayney. However, the evidence of Mr Herriott and Ms
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Shennan was the job description are proformas which over time have changed and have been amended. Mr Herriott who issued a number of job descriptions over the years confirmed that his understanding of "responsible for" related to direct reports rather than a general description of the jobholder's responsibilities.

5 The Tribunal considered that this explanation was plausible given that this preceded information about who the jobholder is responsible to which states the job post of their line manager.

56. It was agreed that in October 2017, following a job grading submission, the respondent issued the claimant with a job description for the position of Environmental Officer. It was also agreed that the claimant did not consider that her role was fully acknowledged in the Environmental Officer's post. The respondent accepted this to the extent that there was a narrative change in the job overview document. While the claimant did not accept the revised document reflected her job description, she nonetheless accepted the increase in salary that came with the Environmental Officer position which was graded at salary level Band 12 which was backdated to 2012. The claimant's position was that this did not reflect her contract of employment and suggested that the post of Waste Management Strategy Manager which was graded at salary level Band 13 more accurately reflected her job role.

10 However, the claimant was offered this position as a promotion in effect from 26 January 2017 which was graded at salary level Band 13 but declined the offer.

20 57. The Tribunal considered that as the offer of the post of Waste Management Strategy Manager was made but declined, this was not the contractual basis of the claimant's employment. The Tribunal also considered that while the claimant continued to refer to herself as a Waste Prevention Officer, she had at least from 23 October 2017 been enjoying the benefits of the upgraded post of Environmental Officer and had received backpay from 17 April 2012.

25 58. While there was evidence and discussion about the claimant's role in allocating and directing work to the PFI team, it was not disputed that the claimant was not permanently responsible for the management of employees

other than the oversight of a temporary member of staff who was externally funded and working in the waste prevention education in 2014.

- 5 59. The claimant referred to her role the TUPE transfer of 53 staff from the PFI service contractor to the respondent. The Tribunal had no doubt about the claimant's significant contribution in this respect but did not consider that the claimant was managing these employees. They did not directly report to her.
- 10 60. While the Tribunal appreciated that neither party said that that the claimant's job was Waste Management Strategy Officer it noted that although the job description referred to "managing and directing staff and advisors within the waste management function", the job overview of that role stated that the jobholder had responsibility for the work of employees through allocating work and checking results on a regular and ongoing but not daily basis, i.e. shift supervisor or supervisor or seasonal or temporary employees.

The Law

- 15 61. Section 65(2) of the EqA provides that A's work is like B's work if (a) A's work and B's work are the same or broadly similar; and (b) such differences as there are between their work are not of practical importance in relation to the terms of their work.
- 20 62. Section 65(3) of the EqA provides that on a comparison of one person's work with another's for the purposes of section 65(2), it is necessary to have regard to (a) the frequency with which the differences between their work occur in practice; and (b) the nature and extent of the differences.
63. This is a two-stage test. The stages must be considered separately: see *Waddington v Leicester Council for Voluntary Services* [1977] ICR 266.
- 25 64. At stage one, the question to be considered is: "Is the work carried out by the claimant and the comparator of the same or broadly similar nature?" Consideration of the work should be given in general terms, looking at the type of work involved, the types of skill and knowledge required to do it. The Tribunal should focus on the work actually done under the contract rather than

what might be theoretically done: see *Capper Pass Limited v Lawton* [1977] ICR 83 and *Dance v Dorothy Perkins Limited* [1978] ICR 760.

65. If at stage one, the answer is in the affirmative, a practical and evidential burden of showing differences passes to the respondent.
- 5 66. At stage two, bearing in mind section 65(3) of the EqA, the amount of time spent by a comparator on different tasks alleged to be of practical importance may be significant: see *Redland Roof Tiles Limited v Harper* 1977 ICR 349.
- 10 67. Kilner Brown Jay noted in *Dance* (above): "it is vitally important to reiterate... that it is no part of a tribunal's duty to get involved in fiddling detail or pernickety examination of differences which set against the broader picture fade into insignificance... if there is a realm of law in which practical common sense ought to apply, it is in this field."
- 15 68. In considering whether a woman's work is like a man's work, the focus should be on what each of them does and if there are any differences between what they do, the nature and extent of the differences and the frequency with which they occur. Things done by an employee may include the exercise of responsibility (see *Eaton Limited v Nuttall* [1977] ICR 272).
- 20 69. The tribunal should look at the work actually done under the contract by the claimant rather than what might be done theoretically. In a comparison exercise, the sex and the special personal skill or merit of the respective jobholders must be ignored (see *Shields v E Coomes (Holdings) Limited* [1978] ICR 1159).
- 25 70. In addition to considering the contract the tribunal is to have regard to what happens in practice (see *Electrolux Limited v Hutchinson & others* [1977] ICR 252) where the EAT gave guidance that the question to be posed was what happens in practice.
71. The comparison of jobs must take into account the whole job in any duties that a man and a woman do not have in common cannot generally be excluded from consideration (see *Maidment & Hardacre v Cooper & Co (Birmingham) Limited* [1978] ICR 1094), the EAT did however accept that

there could be special circumstances where it would be right to exclude a part of a job from comparison where it is "in effect separate and distinct".

Submissions for the respondent

72. The disputed issue in this part of the claimant's claim is whether her work was or is like the work carried out by her comparator in the role of Service Manager, Environment. That issue has been complicated by confusion about the job actually done by the claimant at the relevant times. It is the respondent's contention that the confusion exists solely on the claimant's part. She apparently maintains the view that she remains a Waste Prevention Officer, despite having enjoyed the benefits of the upgraded post of Environment Officer since at the latest 23 October 2017, when she took that position, and arguably from 17 April 2012, the date at which it was decided, for back pay purposes, she had been working at that level. That already complicated picture is aggravated by the claimant's attempt to rely on aspects of a job (Waste Management Strategy Manager) which she was offered but declined.
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73. The Tribunal was referred to section 65(2) of the EqA. Section 65(3) replaced section 1(4) of the Equal Pay Act 1970 which was quoted as all the cases relied upon by the respondent were decided long before the EqA came into force. The respondent submitted that the EqA definition, whilst simplified, presents the Tribunal with essentially the same test as was applied under the Equal Pay Act 1970.
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74. In considering whether a woman's work is like a man's work the focus should be on what each of them does and, if there are any differences between what they do, the nature and extent of the differences and the frequency with which they occur. The things done by an employee may include the exercise of responsibility. See *Eaton* above. From the examples considered by the EAT the factor of responsibility could be decisive in comparing jobs which are a great deal more similar than the jobs being compared in this claim.
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75. In the comparison exercise, the individual merits of the respective jobholders must be ignored completely as irrelevant in the necessary comparison. See
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Shields v E Coomes (Holdings) Limited [1978] ICR 1159 which described the tribunal's task as: "[a]n evaluation of each job as a job irrespective of the sex of the worker and of any special personal skill or merit that he or she may have".

- 5 76. It has also been recognised at appellate level that there are limitations to the like work claim type. The EAT in *Maidment* (above) captured the narrow nature of this route to equal pay in these terms: "the test of 'like work'... is a somewhat rough and ready instrument. If the claimant and her comparable (sic) are not employed on like work it is unfortunately irrelevant that – and it
10 may be the fact in the present case – the gap in remuneration between them is in no way commensurate with the difference in the work which they do." Phillips J in *Maidment* said, "(i)n short the Act does not enable us in a case such as the present where there are genuine differences between the work done by the man and the work done by the woman to narrow the gap in remuneration so that it truly reflects the difference in the *value* of the work
15 done by them respectively."
77. In Capper Pass (above) the EAT said that the "only differences which will prevent work which is of a broadly similar nature from being 'like work' are differences which in practice will be reflected in the terms and conditions of employment."
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78. The differences between the jobs and comparison in this claim are reflected in the job descriptions which in reality define the extent of the contractual tasks which an employee can be asked to take on.
79. In addition to considering what the contract states, the Tribunal is to have
25 regard to what happens in practice. In *Electrolux Ltd* (above), a claim involving a consideration of the timing of work respectively done by claimant and comparators, the EAT posed the question "what happens in practice?" One of the four main features which distinguishes the jobs being compared in this claim is the greater level of supervisory responsibility present in the comparator's role. That alone can deny a like work claim. In a passage which begins by acknowledging that not every contractual difference will be a real
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difference, the EAT also recognise that supervisory responsibilities cannot be ignored: "if men and women are employed doing work which is of a broadly similar nature, it is irrelevant in applying section 1(4) that the men unlike the women are under a contractual obligation to do some work unless they in fact do so... An obligation to supervise, to take responsibility or to control, if it is discharged, is something which in our judgment falls within the words 'the things she does and the things they do.' It is true that it is often difficult to pinpoint (sic) and to identify the manifestation of responsibility in particular acts, but they are nonetheless real for that, and properly to be taken into account in applying section 1(4)." This was re-emphasised in *Redland Roof Tiles Ltd* (above) in these terms: "[t]he primary matter is what is done in practice. An example of the importance of looking at the contract is to be found in the case where the work actually done is more or less identical, but where one of those employed does, and the others do not, accept a superior position of responsibility having the general oversight of the work. It may be very difficult in such cases to say what are the actual acts done which have to be considered under section 1(4) but we certainly do not mean to say that in such cases it is irrelevant that the man (or the woman as the case may be) has accepted some supervisory role, albeit that it is difficult to pinpoint actual acts done in performance of that obligation." The comparison in these cases are between jobs of a much greater similarity at first view than the jobs in comparison in this claim.

80. In *Dance* (above) the comparison was between a group of women working as warehouse selectors and their comparator male colleagues working as warehouse operators. The claim failed. Although it was recognised that between the two jobs there was "a central area of similarity", it was fatal to the claim that there was also "a much enlarged programme in the case of the men" In the present claim the "central area of similarity" is undoubtedly the Waste PFI project. Although that was huge in its own right, it by no means defined the full extent of the comparator's job.
81. A different division of the EAT (Phillips J presiding), took the same approach in *Maidment* (above). In that comparison, there was "very little difference"

between the nature of the packing done by the claimant and her comparator. But the Tribunal had been right to recognise that the comparator had additional, practically important features in his job. These duties could not be severed and ignored in the comparison exercise. As put by the EAT, "[a] different result could only be correct if it were permissible to exclude from consideration the duties of storeman undertaken by [the comparator] and not by [the claimant]." It was not so permissible concluded the EAT: "[a]t the end of the day, therefore, we are satisfied that in applying section 1(4), whereas it is usually right to disregard the time at which the work is done, it is not permissible in ordinary circumstances to disregard any part of the work actually done in practice."

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82. The claimant does not dwell on those differences – in fact she draws attention to them by the exiguous summary she gives in two short paragraphs in her witness statement (1.51 and 1.52) – but they nonetheless have to be considered and, once considered, decisively undermine the comparison which the claimant has attempted to set up.
 83. This part of the claimant's claim should be dismissed.

Submissions for the claimant

84. The Tribunal is asked to decide if the claimant's work was "like work" to that work carried out by Mr Blayney (the comparator) from September 2016.
85. The Tribunal was referred to sections 65(2) and 65(3) of the EqA.
86. The claimant (salary level Band 12) performs like work to Mr Blayney. The claimant was employed as Waste Prevention Officer in 2005. A regrade was undertaken in 2017 of her role, which the claimant felt did not reflect the duties she had been asked to undertake – duties which extended far beyond her original job description, so she did not sign the letter to accept the Environment Officer post. Despite not signing to accept this post, the respondent made a backdated payment for wages underpaid to the claimant between 2012 to 2017. In June 2018, the respondent produced a job description for a post called Waste Management Strategy Manager and

advised the claimant that they would apply it from 16 January 2017. The claimant submits that the respondent effectively admitted that the duties detailed in that job description had been the responsibility and been undertaken by the claimant for the previous 18 months. However, the claimant does not and did not accept that the offer reflects her all her duties or responsibilities.

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87. In particular, from September 2016, she was a Council Representative on the PFI Project. The only other Council Representative at this time on the PFI Project was Mr Blayney, who at all material times has been a Band 15 employee.
 88. The claimant and Mr Blayney's duties required them to spend a high portion of their time on the Waste PFI matters from September 2016. These included similar tasks such as project meetings, contract management, performance and delivering PFI disputes.
 89. Both roles were undertaking duties in relation to ensuring that the respondent's statutory functions associated with the service were carried out. The Tribunal was referred to the evidence that it heard.
 90. The claimant said that there may have been duties which Mr Blayney undertook prior to September 2016, but they are not relevant to the like work claim which applies from September 2016.
 91. The claimant submitted that she had responsibilities for managing staff, which were recognised by the respondent when it created the Waste Management Strategy Manager job description which it stated applied to the claimant from 16 January 2017. These responsibilities involved managing and directing staff which ensured that the performance management of a major PFI contract for the respondent was undertaken efficiently and robustly. Mr Blayney also had responsibilities for managing staff.
 92. Due to the disputed nature of the PFI contract and the effort and skills required to deliver these, resulted in the respondent appointing the claimant to the role of Council representative.

93. Standing the important of the PFI Project to the respondent and the levels of responsibilities associated with undertaking the Council Representative duties, there were no differences of practical importance between the work the claimant was doing and the work that Mr Blayney was doing.
- 5 94. The respondent did not carry out a reasonable evaluation in relation to the claimant and the comparator. At no point did the respondent ever investigate the roles which were actually being done. Any difference in the work of the claimant and Mr Blayney were of minimal importance.
- 10 95. The claimant also had responsibilities which were greater than those of Mr Blayney, such as to deputise of the Head of Service and the Director which Mr Blayney did not undertake.
96. At every stage the claimant followed due process to resolve this situation and to find a suitable solution but was unable to.
- 15 97. For these reasons the Tribunal is asked to find that the claimant was doing "Like Work" to her comparator Mr Blayney.

Deliberations

98. Having read the submissions and authorities, the Tribunal considered that the question of like work needs to be broken down into two distinct sub questions:
- 20 (i) Is the claimant's work and Mr Blayney's work of the same or broadly similar nature, and if so
- (ii) Are the differences between the things the claimant and Mr Blayney do of practical importance in relation to the terms and conditions of employment?
99. For the claimant to succeed on the like work question, the Tribunal appreciated that she must satisfy the Tribunal that the answer to both questions is in the affirmative.
- 25 100. The Tribunal asked if the work claimant's work and Mr Blayney's work of the same or broadly similar nature? At this point (stage 1), the Tribunal

considered the nature of the work of the claimant and Mr Blayney. This is a question of fact, so the Tribunal referred to the findings. The Tribunal was mindful that it was unnecessary for the two jobs to be identical; the work only need to be “broadly similar”. The Tribunal noted that the search at this stage is for the wood, not the trees. The Tribunal gave general consideration to the work done by the claimant and Mr Blayney and the knowledge and skill required to do it.

101. The claim of like work is from September 2016. The Tribunal found that from September 2016 the claimant and Mr Blayney had been appointed as Council Representatives in relation to the project operations identified in the PFI Project Agreement. Acting, either singly or jointly they exercised the functions and powers of the respondent and shared responsibilities for developing strategies and plans for the PFI Project.
102. While initially the claimant continued to report directly to Mr Blayney from mid 2018, they both reported to Mr Herriott.
103. From the information available to the Tribunal, the claimant and Mr Blayney had the skill, knowledge and decision making required to represent the respondent and provide instructions in relation to the PFI disputes in which they each took their lead.
- 20 104. However, in comparing the jobs the Tribunal required to take account of the whole job. While the claimant did not work exclusively on the PFI Project from September 2016 she increasingly spent most of her time on the PFI Project, its termination and the transition of the services in house to the respondent. While Mr Blayney was involved in the PFI Project throughout the period of the claim his work involved wider responsibilities for the environment service as a whole and a number of functions in addition to the waste PFI function. The Tribunal turned to consider these.
- 30 105. Mr Blayney’s job involved managing the respondent’s contaminated land functions and he had responsibility for strategic commissioning of the waste collection service. He developed and delivered waste management

infrastructure. He had accountability for external locations e.g. recycling centres and landfill sites.

106. The claimant and Mr Blayney attended external working groups however the claimant's role was restricted to the PFI Project whereas Mr Blayney's role required knowledge across the whole of his responsibility including contaminated land.
107. The work of claimant and Mr Blayney involved ensuring that the respondent discharged its statutory and regulatory duties. However, the claimant's involvement was related to the PFI Project whereas Mr Blayney was accountable for the service as a whole.
108. Significantly in the Tribunal's view Mr Blayney's work involved people management responsibilities for around ten direct reports which the claimant's work did not. His role required directing activities which was a higher responsibility than allocating work. He was also accountable for the management of the entire service/department including ensuring all personnel policy and procedures were implemented and adhered to as well as prioritising and reprioritising service and department activities. At most, the Tribunal considered that the claimant could be said to have a supervisory role rather than a managing role.
109. As a result of one of Mr Blayney's direct reports leaving Mr Blayney's work involved overseeing an operational site in Stranraer in addition to carrying out his other duties. The claimant suggested that Mr Blayney was deputising for colleague of a lower grade (salary level Band 11). The claimant was not involved in this aspect of Mr Blayney's work. The Tribunal considered that the responsibility for the operational site in Stranraer fell under Mr Blayney's job description. He required to manage his own work and that of his direct reports with it along with other aspects of his job. There was no evidence to suggest that the claimant had similar obligations as she had no permanent direct reports.
110. While the work of the claimant and Mr Blayney in relation to the PFI Project were broadly similar Mr Blayney's work had wider responsibilities and

additional work in relation to contaminated land and managing employees which beyond the PFI Project. They were additional and practically important features of his work. The Tribunal did not consider they were separate and distinct. Accordingly, in the Tribunal's view they could not be excluded from
5 the job comparison.

111. In the comparison exercise taking account of whole jobs the Tribunal was not satisfied that in general terms, the work of the claimant and Mr Blayney was broadly similar.
- 10 112. Having answered no to that question, the Tribunal did not consider that it needed to go onto answer the second question as to whether the differences between the things that the claimant and Mr Blayney did was of practical importance in relation to the terms and conditions of employment.
- 15 113. Accordingly, as the claimant did not satisfy the Tribunal's answer to the question was in the affirmative, the Tribunal concluded that the claimant has not undertaken like work as Mr Blayney in terms of section 65 (1)(a) of the Equality Act 2010.

20 Employment Judge: Shona MacLean
Date of Judgment: 02 October 2020
Entered in register: 05 October 2020
and copied to parties