THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondents
Ms SC Hartley and Others	AND	(1) Northumbria Healthcare NHS Foundation Trust
		(2) UNISON and other Unions
(3) The Secretary of State for Health		
		(4) NHS Confederation (Employers) Company Ltd
		(5) The GMB

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Newcastle upon Tyne ON: 6-7 October 2008

(opening submissions), 8-10 October (reading days), 13 October, 14-15 October (reading days), 21, 23, 24 October, 27-31 October, 3-7

November, 10-14 November,

17-21 November 2008; 1 and 4 December (reading days); 9-11 February 2009 (closing

submissions); 16, 19, 24 and 27 February and 2 and 24 March 2009 (deliberations)

EMPLOYMENT JUDGE: MD Malone MEMBERS: Dr M Race

Mrs LE Sutton

Appearances

For Claimants: Ms D Romney (now Ms D Romney QC) and

Ms A Beale, of Counsel

For the 1st Respondent: Mr J Bowers QC and Mr S Sweeney, of Counsel and Mr G Bredenkamp, Solicitor

For the 2nd and 5th Respondents: Mr A White QC

For the 3rd and 4th Respondents: Mr A Lynch QC and Mr J Milford, of Counsel

RESERVED JUDGMENT ON PRE-HEARING REVIEW

The unanimous Judgment of the Tribunal is that :

1 In this judgment the following expressions have the following meanings:

1.1 "The collective agreement" means the agreement for Agenda for Change ("AFC") which was signed on 23 November 2004 and published in December 2004.

1.2 "The JES" means the job evaluation study which is described in the collective agreement and in the NHS Job Evaluation Handbook (Second Edition) which was published in October 2004.

1.3 “The national JES” means such provisions of the JES as have been agreed or adopted at national level, including the terms of the collective agreement, the contents of the above mentioned job evaluation handbook, the national profiles which have been published and the arrangements made at national level for training and monitoring. Any allegations relating to the implementation of the JES at local level by the first respondent and other NHS employers lie outside the scope of this judgment.

1.4 “The 1970 Act” means the Equal Pay Act 1970.

1.5 “GMF defence” means a defence under subsection 1(3) of the 1970 Act.

2 The claimants have failed to show that there was systemic sex discrimination in the pay systems in place in the NHS before the date of the collective agreement.

3 It would not have been practicable for any of the respondents to quantify or identify any unlawful sex discrimination in the NHS pay systems prior to the date of the collective agreement.

4 The claimants have failed to show that any of the arrangements under the collective agreement for explicit or implied pay protection and for payment of recruitment and retention premia amount to perpetuation of historic sex discrimination. Recruitment and retention premia were not used with the explicit or implicit aim of protecting and/or continuing the pre-existing salaries of comparator or potential comparator job groups.

5 The Tribunal does not have reasonable grounds for suspecting that any evaluation which has been arrived at by use of the national JES has (within the meaning of subsection 2A(3) of the 1970 Act) been made on a system which discriminates on grounds of sex.

6 The Tribunal does not have reasonable grounds for suspecting that any evaluation which has been arrived at by use of the national JES is (within the meaning of subsection 2A(3) of the 1970 Act) otherwise unsuitable to be relied upon.

7 The national JES is an analytical job evaluation study which satisfies the requirements of subsection 1(5) of the 1970 Act.

8 In any case where the jobs of one of the claimants and of her (or his) nominated comparator(s) have been evaluated by use of the national JES and have been given an equal value, the date on which their jobs shall be deemed to have been given an equal value for the purposes of subsection 1(5) of the 1970 Act is 1 October 2004, being the date agreed in the collective agreement.

9 In any case where the jobs of one of the claimants and of her (or his) nominated comparator(s) have been evaluated by use of the national JES and have been given different values, the date on which their jobs shall be deemed to have been given different values for the purposes of subsection 2A(2) of the 1970 Act is 1 October 2004, being the date agreed in the collective agreement.

10 Furthermore, where the jobs of one of the claimants and of her (or his) nominated comparator(s) have been evaluated by use of the national JES and have been given different values, the first respondent may rely on those evaluations (subject to any challenge to the JES at local level) as a GMF defence to any claim by the claimant under section 1(2)(c) of the 1970 Act, insofar as that claim relates to a period since 1 October 2004.

11 The first respondent may rely as a GMF defence to every claim, insofar as that claim relates to a period since 1 October 2004, (whether the claim is under subsection 1(2)(b) or subsection 1(2)(c) of the 1970 Act of both) on the express provisions contained in the collective agreement for pay protection (paragraphs 9.18-9.28 of the collective agreement). These provisions do not require objective justification. We do, however, find them to be objectively justified.

12 The first respondent may rely as a GMF defence to every claim, insofar as that claim relates to a period since 1 October 2004, (whether the claim is under subsection 1(2)(b) or subsection 1(2)(c) of the 1970 Act or both) on the rules for assimilation contained in the collective agreement (paragraphs 9.1-9.17) notwithstanding that those rules give implied or indirect pay protection to certain employees. Those rules do not require objective justification. We do, however, find them to be objectively justified.

13 In any case in which one of the claimants relies on a comparator who receives a recruitment and retention premium in accordance with any provision of the collective agreement other than paragraph H13 or paragraph H15 of annex H of the collective agreement, the first respondent may rely on such provision as a GMF defence to the claim, insofar as the claim relates to a period since 1 October 2004.Objective justification is not required for such provision. In any event, such provision is objectively justified insofar as it relates to the period from 1 October 2004 to 31 March 2011.

14 In any case in which one of the claimants relies on a comparator who requires full electrical, plumbing or mechanical crafts qualifications and who receives a recruitment and retention premium (whether the claim is under subsection 1(2)(b) or subsection 1(2)(c) of the 1970 Act or both), the first respondent may rely as a GMF defence to the claim on all the provisions of the collective agreement relating to recruitment or retention premia, including paragraph H13 of annex H, insofar as the claim relates to the period from 1 October 2004 to 31 March 2011. Objective justification is required for payments which are made under paragraph H13 (uplifted in accordance with paragraph H17) and which exceed the “no loss” amount which would have been payable under paragraph H7. We find that payment of that increased amount under paragraph H13 (uplifted in accordance with paragraph H17) is objectively justified for the limited period specified above.

15 In any case in which one of the claimants relies on a comparator who is a chaplain and who receives a recruitment and retention premium (whether the claim is under subsection 1(2)(b) or subsection 1(2)(c) of the 1970 Act or both) the first respondent may rely as a GMF defence to the claim on all the provisions of the collective agreement relating to recruitment and retention premia, including paragraph H15 of the collective agreement, insofar as the claim relates to a period since 1 October

2004. The provisions of paragraph H15 do not require objective justification. Furthermore, we find that those provisions are objectively justified insofar as they relate to the period from 1 October 2004 to 31 March 2011, even if the amount of premium paid is greater than the amount which would have been payable under the "no loss" provisions contained in paragraph H7.

16 The Tribunal has jurisdiction to amend the collective agreement if any term of the collective agreement is void within the meaning of subsection 77(1) of the Sex Discrimination Act 1975 (as amended). It is on that basis and that basis only that we make the declarations contained in paragraphs 17 and 18 below.

17 Paragraph H13 of annex H of the collective agreement is void but only to the extent that it provides for the payments described below to be made after 31 March 2011 without further evidence having been first obtained to show such payments to be objectively justified. Those payments are payments which are made to men whose pay is governed by the collective agreement and who require the qualifications referred to in paragraph 13 above but which are not made to women whose pay is governed by the collective agreement, where the payments made exceed the amounts which would have been payable to the men under the "no loss" provisions contained in paragraph H7 of annex H to the collective agreement.

18 The collective agreement shall be amended with immediate effect by adding to annex H the following new paragraph H13A:

"Paragraph H13 above shall be reviewed by the NHS Staff Council before 1 April 2011 and if not so reviewed shall cease to have effect on that date. Further research shall be undertaken and considered for the purpose of the review. The Pay Review Body shall be consulted and the review shall be subject to any necessary consent by the Pay Review Body. Having carried out that review, the NHS Staff Council may retain paragraph H13 or it may (with effect from such date as it shall determine) replace or amend it or remove it from this agreement without replacing it. Any new or amended provisions may (but need not) differentiate between existing employees and new employees (at the date of the review or at such other date as the NHS Staff Council shall determine) and may also differentiate as between relevant employees in different pay bands. If the premium is removed or reduced for any existing staff, the NHS Staff Council may adopt rules for the premium formerly payable to those staff to be protected for a transitional period. The NHS Staff Council must have regard to the need to be able to show objective justification for all new, retained or amended provisions (including any provisions for protection)."

19 No term of the collective agreement is void except as stated above.

REASONS

1. In this case, the claimants challenge a job evaluation study which covers more than one million jobs in the National Health Service ("the NHS"). In order for the grounds of challenge to be understood, it is necessary to state briefly at this stage some of the key facts relating to the development of the study. This will also be an opportunity to introduce some of the terms and organisations which will be encountered frequently in these reasons.

2. In February 1999, the Government published a paper entitled "Agenda for Change: Modernising the NHS Pay System." Agenda for Change ("AFC") is about the modernisation of pay and terms and conditions in the NHS. There are three strands to AFC , the job evaluation study ("JES") , new and standardised terms and conditions and a knowledge and skills framework to raise the skills of the staff and give greater opportunities for career development. We are concerned mainly with the JES. The intention was that the JES should be developed in partnership by the Government, the NHS employers and the unions.

3. A central negotiating committee ("the CNG") was set up towards the end of 1999. This was the body which had the overall responsibility for the development and implementation of the JES. After the Final Agreement was entered into, in November 2004, it became the NHS Staff Council. All the UK Health Departments were represented on the CNG, since the JES was to apply not only to England but also to Wales, Scotland and Northern Ireland. We of course have jurisdiction only insofar as the JES applies to employees in England and Wales. The JES was to apply to all employees except doctors, dentists, some senior managers and staff directly employed by GPs.

4. The executive arm of the CNG was the joint secretaries group ("the JSG"). Initially, this was simply an ad hoc body which prepared papers for the CNG. When the CNG became the Staff Council, this body became the Executive. Since June 2003 it had been known as the Shadow Executive.

5. There were then technical groups which reported to the JSG and the CNG. The group with which we are most concerned is the job evaluation working party. This body was known as JEWP II, because there had been an earlier working partly, known as JEWP I, which was set up by the Department of Health in 1997 to review and evaluate several existing job evaluation schemes in the NHS.

6. All these bodies, the CNG, the JSG and the technical groups, contained representatives of both management and unions and there were from time to time changes in the membership . There was, however, one constant feature in the membership of JEWP II. There were two experts on job evaluation and equal pay, Mrs Hastings and Ms Fearn, who were both independent of management and unions. They remained as members of JEWP II from the date of its establishment up to and after the date of the collective agreement which was signed in November 2004.

7. The JES was developed during the period 1999 to 2002, including the following stages:

7.1 A factor plan was developed by JEWP II and approved by the JSG and the CNG. This work took a considerable time, the plan being tested and re-tested against a number of benchmark job profiles. In its final form, the factor plan had 16 factor headings, with weightings ranging from a

maximum of 25 points for each of four factors to 240 points for one factor, that of knowledge, training and experience.

7.2 The JSG and CNG, having taken advice from Mrs Hastings, decided on a grading system. There were initially to be 11 broad pay bands, numbered from 1-7 and then with band 8 split into 4.

7.3 It was decided to prepare national profiles of some jobs, mainly the more commonly occurring jobs. There were to be three permissible ways of evaluating particular jobs. Where a job could be matched against a suitable national profile, that was to be the preferred method. If the matching was unsuccessful or there was no suitable national profile, the job was to be evaluated at local level in accordance with detailed guidance. There was also a hybrid procedure for exceptional cases where the matching was a "near miss" (our expression). Training was to be provided to the managers, union representatives and other employees who would be involved at local level, whether as members of matching panels or as evaluators or otherwise.

8. Agreement in principle on AFC was reached on 28 November 2002. During the months leading up to that date there were intensive discussions and negotiations to resolve the outstanding matters. The agreement included arrangements for pay protection and for payment of recruitment and retention premia ("RRP"). Part of the discussions about RRP had not been concluded by 28 November and the discussions continued after that date. In summary, the arrangements set out in the draft agreement were as set out in 8.1, 8.2,8.3 and 8.4 below (although the latter includes matters agreed subsequently :

8.1 Employees (both men and women) whose pay would fall, because the maximum pay under their new pay band was lower than their previous pay, were to receive pay protection for a total of six and a half years, with one pay increase and the remainder of the protection on a "mark time" basis.

8.2 Employees (both men and women) whose existing pay fell within the pay points for their new pay band were to assimilate at the pay point which was next above their existing total pay, which meant that some existing relativities would be preserved until those on lower pay points in the band caught up, usually on reaching the highest pay point in the band. This has been variously referred to as implied or indirect protection.

8.3 There was provision for RRP to be agreed either nationally or locally and on either a long term or short term basis, subject to specified criteria. In addition, a list was drawn up of jobs for which RRP were to be paid under the AFC agreement itself in order to protect the NHS during the "transitional period." There were 15 jobs on the list. The standard premium was to be the amount required to ensure no loss of pay.

8.4 There were additional RRP provisions for the holders of two of the jobs on the list. Chaplains were currently entitled to an accommodation allowance. They were to receive an equivalent amount as an RRP, even if this exceeded the amount payable under the "no loss" provisions. The other group consisted of maintenance crafts persons who required full electrical, plumbing or mechanical crafts qualifications. They were to receive an RRP of a fixed amount. As with the chaplains, the agreed amount would be payable even if that exceeded the amount which would have been payable under the "no loss" provisions. There were more men than women amongst the chaplains. Virtually all the maintenance crafts persons were men.

9. The agreement reached in November 2002 was provisional and conditional. It would be implemented only if there was a positive vote in union ballots to be held in 2003.It was also agreed that before the JES was " rolled out" generally it would be tested at twelve "early implementer" sites. This test would be the real thing, not a mock exercise, for the staff at those sites.

10. The overall vote of union members was positive and the JES was applied at the early implementer sites in the period 2003 -2004. The date from which the new pay bands were to operate, for the staff at those sites, was 1 June 2003.The results from the early implementer sites, however, gave rise to one major concern. The proportion of employees requiring pay protection was far higher than had been anticipated. The harmonisation of terms and conditions under AFC included the standardisation of the working week and of the terms for paying staff for working unsocial hours. There were protection arrangements for these changes also. The new basis of payment for unsocial hours had a much greater impact than had been anticipated.

11. The target date for the Final Agreement to be signed and for the new pay bands to be effective throughout the NHS was 1 October 2004.Indeed this date had been stated in the draft agreement reached in November 2002. This date could not be met, partly because of the protection problem and partly because the votes by the members of three of the unions had been on the basis that there would be a second ballot before the Final Agreement was signed. It was not possible to arrange for all these ballots to be conducted in time. Two of the three unions, the largest two, voted in favour of AFC. It was decided to resolve the protection problem by "decoupling" the arrangements for unsocial hours payments and retaining the current arrangements, the issue to be revisited at a later date.

12. This cleared the way for the parties to enter into the Final Agreement, which was signed on 23 November 2004 and published in the following month. The unions had been told that 1 October 2004 would be the effective date for the JES and it was decided to honour that agreement. Accordingly that was the effective date specified in the agreement. There are several differences between the Final Agreement and the 2002 document. One obvious difference is the removal of the proposed new terms for unsocial hours payments.. Another is the addition of a new pay band 9, to cater for the small number of staff whose jobs came out with points exceeding the maximum for band 8d.

13. Jobs were matched or evaluated during 2005 and 2006. The first edition of the Job Evaluation Handbook, published in March 2003, had been replaced by a second edition, published in October 2004. Changes had been made in the light of the experiences of the early implementer sites. The most important of these changes had been additional guidance on matching as a response to concerns that the original guidance could lead to the undervaluing of non-healthcare jobs.

14. In addition, many new national profiles were produced in response to requests, including requests from the early implementer sites. The number rose from about 100 to more than 400. The original profiles had been included in the first edition of the Handbook, but because of the greatly increased number the profiles now appeared on the AFC website.

15. In practice, the matching or evaluation of jobs at local level did not necessarily involve the matching or evaluation of each employee's job individually. We had detailed evidence about arrangements made by the first respondent under which employees doing the same job agreed that the

job of one of their number should be treated as a representative job and signed the job description to show their agreement to it. Arrangements of this kind were referred to during the hearing as "clustering." The Handbook contains detailed guidance on how clustering should be arranged where a job is to be evaluated locally, but not where a job is to be matched against a national profile or where the hybrid method is to be used.

16. Those employees who were on Whitley Council terms, incorporating collective agreements, were required to assimilate to the new pay system. Staff on local terms had a choice (except where those terms also incorporated the relevant collective agreements), but the great majority did choose to assimilate. By 13 September 2005, 80% of the relevant jobs had been matched (or locally evaluated) and by 3 June 2006 assimilation was almost complete, at 98.7%

17. Any hopes that AFC and the JES would be an alternative to litigation were quickly dashed. Indeed there were some current equal pay claims at the date of the Final Agreement in November 2004, including the Morecambe Bay claims referred to later in these reasons. Other claims followed in 2005 and the succeeding years. The total number of claims in England and Wales is approximately 16,000. Because of the large number of claims an equal pay unit was set up in Newcastle, where there was already substantial experience of dealing with multiple equal pay claims, local authorities in the North East having been the respondents to many of the largest local authority equal pay claims in recent years. Equal pay litigation has become the staple diet of salaried Employment Judges in Newcastle.

18. The claimants in nearly all the NHS equal pay claims are represented either by Messrs Thompsons ("the Thompsons cases") or by Mr Cross("the Cross cases"). The approaches in the two groups of cases have been very different. In the Thompsons cases, the claimants do not challenge the AFC JES. On the contrary, they embrace it. They bring section 1(2)(b) claims for the period since 1 October 2004, relying on the JES; they bring equal value, section 1(2)(c), claims for the period prior to that date and in many cases seek to rely on the JES as compelling, indeed sufficient, evidence of equal value for that earlier period.

19. In the Cross claims, on the other hand, AFC and the JES are challenged in a way that may fairly be described as comprehensive. Needless to say, Ms Hartley and the other claimants in this case are Cross claimants. It is unnecessary to set out in detail the grounds of complaint in the Cross claims, which are all in substantially the same terms, or the responses to those complaints, because the matters in contention are apparent from the agreed list of issues, but some of the main contentions in the claims will be briefly identified.

20. Ms Hartley's claim was presented on 3 June 2007.She is described as a nurse lecturer G and a nurse practitioner (and previously as a specialist nurse F and staff nurse E). The claim was presented under both section 1(2)(b) and section 1(2)(c). Ms Hartley claims back pay for the period commencing six years before the date of presentation. Her comparators are identified not by name but by reference to a large number of job groups, including maintenance craftsmen, technicians and supervisors. (It is the exception, not the rule, in these multiple equal pay claims, for comparators to be identified by name at the outset. Indeed, for a number of reasons, it can take parties a very long time to identify suitable comparators).

21. The grounds of complaint included the following features:

21.1 It was contended that the JES was invalid, discriminatory and unsuitable to be relied upon, a challenge which, if upheld, would enable the claimant to pursue, in respect of the period since 1 October 2004, equal value claims on the basis of comparison with comparators whose jobs have been given a higher rating under the JES. One of the most serious allegations was that the national scheme had been altered to benefit male roles and was therefore tainted.

21.2 It was contended that the national agreement was discriminatory because the terms relating to RRP, pay protection and assimilation (indirect pay protection) gave benefits to comparators which were not enjoyed by the claimant. She was stated to be entitled to the same benefits, because her equal value claim arose before 1 October 2004.

21.3 It was claimed that AFC "simply consolidates and magnifies pre-existing inequalities."

21.4 There was a technical challenge, on the ground that even if the JES was valid it could not become binding until the local implementation and assimilation processes had been completed and the jobs of the claimant and her comparators had been evaluated.

21.5 The claimant also sought, under section 77 of the Sex Discrimination Act 1975 ("the SDA 1975"), a declaration that certain terms of the Final Agreement (not defined in the Final Agreement but presumably including those relating to pay protection and RRP) were a nullity.

22. In view of the section 77 claim, all the parties to the Final Agreement were named as respondents to the claim. That is why the Department of Health, the employers' organisation and the main NHS Unions (other than the BMA and the BDA, which are not affected), have been represented at this pre hearing review.

23. Claims with grounds of complaint which were identical to those in Ms Hartley's case were presented against a number of NHS Trusts. All those claims included section 77 applications. At a case management discussion on 10 September 2007 the claims of Ms Hartley and others against the Northumbria Healthcare NHS Foundation Trust were selected as the test case. The pre-hearing review in that test case was at that stage listed for April and May 2008, but in the event it proved to be impossible to complete the extensive disclosure required by the claimants in time for that hearing to proceed. The main difficulty was in relation to the request by the claimants for disclosure of documents relating to a number of national profiles. The claimants very considerably reduced the number of profiles requested, but they required all the draft versions of each remaining profile, so as to be able to track any changes. This material was plainly relevant to the allegation that profiles had been manipulated, but the work involved in putting together the audit trails requested was very considerable. Only one person, Mrs Hastings, had the detailed knowledge required to carry out that work.

24. In response to orders made at CMDs, the claimants gave further particulars of their claim in relation to national issues, the second respondents gave a response to that document and the third and fourth respondents gave their response to the claimants' allegations of historical sex discrimination. It is unnecessary to refer further to those documents, in view of the agreed and detailed list of issues to which we shall now turn.

THE ISSUES

25. Mr Lynch, QC prepared a first list of issues for the September 2007 CMD. That document has been substantially expanded in subsequent discussions. Indeed the discussions continued during the hearing, with a great deal of fine tuning of the issues. Agreement was finally reached in November 2008, after all the evidence had been heard, but before the closing submissions. The agreed document began with the issues identified at the CMD on 10 September 2007 and further issues agreed at subsequent CMDs, as follows:

(1) Are there reasonable grounds for suspecting that the JES in AFC was invalid for the Equal Pay Act ("the Act") because it was not an analytical scheme within section 1(5) of the Act?

(2) Are there reasonable grounds for suspecting that the JES in AFC was invalid for the Act because the JES and the processing of it were tainted by sex discrimination?

(3) If the JES in AFC was otherwise valid, when did it apply to the claimants and can the effect of the JES be backdated?

(4) Did AFC continue or introduce sexually discriminatory considerations into NHS pay and grades?

(5) In the above circumstances, can respondents rely on a GMF defence within section 1(3) of the Act or are any such purported defences ineffective because of sex discrimination?

(6) Are claimants entitled to pay protection and recruitment and retention payments("RRP") on the basis that the same cannot amount to a genuine material factor defence in cases where claimants and comparators are engaged on like work or work of equal value or work which has been given equality under a job evaluation scheme?

(7) Is either of the AFC agreements a collective agreement and, if it is, is the agreement or any term of it void because of sex discrimination within section 77 of the SDA 1975(read with section 6(4A) of the SDA 1986?

It was agreed at the CMD on 12 November 2007 that the following further issues should be added:

(8) The issue of sex discrimination in the pay systems which were in place before AFC.

(9) The issue of the extent of knowledge of any such discrimination.

It was agreed at the case management discussion on 29th July 2008 that a national issue was raised in paragraph 54 of the particulars of claim dated 8 October 2007. This further issue is as follows:

(10) It is suggested that because some jobs were not matched to national profiles at all, but were the subject of local job evaluation, it follows that the ratings are governed by two separate methods of assessment and the job evaluation scheme is therefore void.

26. It was agreed that the Pre Hearing Review is concerned only with national issues. The extent to which local matters in Northumbria are to be considered in relation to national issues is the subject of a separate agreement between Mr. Bowers and Ms Romney.

27. There followed a note of specific questions which, it appeared from the opening submissions made on behalf of the parties and the cross examination, arose under each of the identified issues. All references to paragraph numbers were to paragraphs in the written opening submissions on behalf of the claimant.

ISSUE 1

1.1 Does the principle of matching local jobs against national profiles, instead of requiring them to be specifically evaluated locally, comply with the requirements of s. 1(5) EqPA 1975 and/or are there reasonable grounds for suspecting that it renders an evaluation arrived at by use of the JES "unsuitable to be relied upon" under s. 2A(2A)?

1.2 Is it a defect in the scheme (such that it fails to comply with the requirements of s. 1(5) and/or such that there are reasonable grounds to suspect that an evaluation arrived at by use of the JES is "unsuitable to be relied upon" under s. 2A(2A)) that there was a lack of consistency of approach because of the ways in which national profiles were changed and new profiles were introduced after some matching at local level had taken place?

1.3 Can a JES comply with s.1(5) and/or are there reasonable grounds to suspect that an evaluation arrived at by the use of the JES is "unsuitable to be relied upon" under s. 2A(2A) where it provides for the jobs of individual claimants and comparators to be "evaluated" in different ways (as defined by the procedures applicable within AFC), namely:

1.3.1 job matching;

1.3.2 'hybrid' matching/evaluation;

1.3.3 local evaluation;

1.4 Does the use of clusters for the purposes of job evaluation and development of a job description comply with the requirements of section 1(5) of the Equal Pay Act 1970 and/or are there reasonable grounds to suspect that it renders an evaluation arrived at by use of the JES unsuitable to be relied upon within the meaning of s. 2A(2A) given that the use of such clusters is not an evaluation of a woman's actual job. For example, if a "family" job description may be constructed for nurses in a particular ward based on the "average" or approximate content of all of the nurses in the ward regardless of actual grade duties or function, so that no one nurse is evaluated in accordance with section 1(5); rather an average of their diverse roles is evaluated. This also applies where e.g. all oncology nurses are grouped together regardless of whether they work in an adult or a paediatric ward

1.5 Where does the burden of proof lie in respect of the above allegations?

ISSUE 2

2. Are there reasonable grounds to suspect that the AfC JES was made on a system which discriminates on grounds of sex or that an evaluation arrived at by the use of the JES is otherwise unsuitable to be relied upon within the meaning of s. 2A(2A) EqPA 1970? The following specific issues arise:

2.1 Were national profiles amended, blocked or withdrawn as a result of political and economic considerations; were national profiles designed so as to benefit employees in male dominated job groups and were national profiles inflated to preserve the previous salaries of the male job holders (paras. 6.4, 6.5 and 6.6)? For the avoidance of doubt the Claimants contend that such actions, whether sex tainted or not, would be sufficient to render the job evaluation scheme unsuitable to be relied upon.

2.2 Did the following Trade Unions exercise influence which achieved an inappropriately higher banding for predominantly male job groups:

2.2.1 Amicus concerning Maintenance Assistants, Maintenance Craftworkers, Maintenance Supervisors, Maintenance Technicians and Estates Officers

2.2.2.1.1 Amicus concerning Building Craftworkers

2.2.3 Amicus concerning Chaplains

2.2.4 Amicus concerning Senior Clinical Scientists

2.2.5 Unison concerning Ambulance Staff?[1] .

2.3 Did the Department of Health intervene in the proceedings of or exercise influence over JEWP in order to achieve inappropriately higher banding for predominantly male job groups?

2.4 As part of the introduction of Agenda for Change at national level were low-ranking maintenance jobs (a predominantly male job group) bolstered prior to the job evaluation process such as to achieve inappropriately higher bands through training or agreement between employers and Trade Unions?

2.5 Were the JES factor plan and guidance altered following early implementation so as to benefit predominantly male groups?

2.6 If any or all of paras 2.1 – 2.5 are established, do they provide reasonable grounds to suspect that the AfC JES was made on a system which discriminates on grounds of sex (within the meaning of s. 2A(2A)(a) and 2A(3) of the EqPA 1970 or that an evaluation arrived at by the use of the JES is otherwise unsuitable to be relied upon within the meaning of s. 2A(2A)(b) EqPA 1970?

2.7 Where does the burden of proof lie in respect of the above allegations?.

The Claimants do not suggest that the factor plan itself involved any direct or indirect sex discrimination. It is also not part of the Claimants' case that the omission to deal with back pay is a ground for declaring the agreement to be invalid. The arrangements for payment for working in unsocial hours and the "decoupling' of those arrangements are not now challenged.

ISSUE 3

If the JES can be relied upon at what point can it be said in relation to the claimants and their comparators that "her job and their job have been given an equal value" or "the work of the woman and that of the man in question have been given different values" under a job evaluation study as set out in section 1(5) and 2A(2) of the Equal Pay Act 1970 respectively (the "backdating" issue) and/or that the JES is "complete"

3.1. Is the date when the claimant's job was evaluated?

3.2. Is it the date when the claimant's job was assimilated?

3.3. Is it the date when any appeal by the claimant has been dealt with?

3.4. Is it the date when both the claimant's job and her comparator's job were evaluated?

3.5. Is it the date when the both claimant's job and her comparator's job were assimilated?

3.6. Is it the date when any appeals by the claimant and her comparator have been dealt with?

3.7. Is it 1 October 2004 as the effective date agreed between the parties to AFC?

3.8. Is it some other date and if so, which date?

3.9. Insofar as any comparator receives greater pay than the claimants after 1 October 2004 is the same caused by a genuine material factor other than sex?

ISSUE 4

4.1 Does the use of the claimants' and comparators' pre-AfC pay, including accumulated capitalized leads and allowances, to determine the spine point to which they are assimilated within their AfC band, amount to a perpetuation of historic sex discrimination?[2]

4.2 Does the explicit protection of comparators' pay at a level higher than the claimants' pay amount to a perpetuation of historic sex discrimination?

4.3 Were recruitment and retention premia used with the explicit or implicit aim of protecting and/or continuing the pre-existing salaries of comparator job groups? Is such an aim necessary?

4.4 If so did this amount to a perpetuation of historic sex discrimination?

4.5 What is the correct standard of proof in relation to the allegations of historic sex discrimination contained within 4.1 to 4.4 above?

ISSUE 5

We are unable to reach agreement on this and have set out the rival formulations:

RESPONDENTS

A. Were the arrangements as to pay protection (both explicit and implicit) and/or RRP and/or the confining of pay protection to those who would otherwise have suffered actual loss of remuneration the result of direct discrimination, having regard to the findings under issues 7 and 8 below?

B. As to indirect discrimination (given the shared and correct view that both pay protection and RRP are capable of constituting GMF defences) the issues are:

5.1 Do any or all of the provisions in the Final Agreement for pay protection, both explicit and implicit (i.e. arising from the determination of the pay point in the relevant band by reference to existing salary), and/or the confining of pay protection to those who would otherwise have suffered actual loss of remuneration, have a disparate impact in favour of male employees?

5..2 If so, on the facts of the present claims, is the First Respondent obliged to show that the pay protection arrangements were objectively justified?

5.3 If so, can the First Respondent (with the assistance of the Third and Fourth Respondents) show those arrangements to be objectively justified?

5.4 Do any or all of the provisions of the Final Agreement relating to RRP have a disparate impact in favour of male employees?

5.5 If so, is the First Respondent obliged to show that the RRP provisions were objectively justified?

5.6 If so, can the First Respondent (with the assistance of the Third and Fourth Respondents) show those provisions to be objectively justified?

5.7 What is the burden of proof on the Claimants in relation to the matters at 5.1,5.2, 5.4, and5.5?

CLAIMANTS'

5.1 Do any or all of the provisions of the Final Agreement relating to pay protection, both explicit and implicit (i.e. arising from the determination of the pay point in the relevant band by reference to existing salary) and including the provisions confining pay protection to those who would otherwise have suffered actual loss of remuneration as opposed to those who should have received higher pay but did not so in breach of the equality clause, discriminate directly in favour of male employees?

5.2 Do any or all the provisions in the Final Agreement for pay protection, both explicit and implicit, and including the provisions confining pay protection to those who would otherwise have suffered actual loss of remuneration, as opposed to those who should have received higher pay but did not so in breach of the equality clause discriminate indirectly in favour of male employees?

5.3 If any discrimination is indirect,

(a) is the First Respondent obliged to show those provisions to be objectively justified?

(b) can the First Respondent (with the assistance of the Third/Fourth respondents) show those provisions to be objectively justified?

5.4 Do any or all of the provisions of the Final Agreement relating to RRP discriminate directly in favour of male employees?

5.5 Do any or all of the provisions of the Final Agreement relating to RRP discriminate indirectly in favour of male employees?

5.6. If any discrimination is indirect,

(a) is the first respondent obliged to show those provisions to be objectively justified?

(b) can the first respondent (with the assistance of the third/fourth respondents) show those provisions to be objectively justified?

5.7 Where does the burden of proof lie, and what is the nature of that burden of proof, in relation to the above allegations?

ISSUE 6

6. Assuming (as is agreed) that AfC is a collective agreement:

6.1 Does any term, or any part of any term, of the agreement fall foul of s. 6(1) and/or (3) of the Sex Discrimination Act 1986, read with s. 77 of the Sex Discrimination Act 1975;

6.2 If so,

6.2.1Must that term be declared void under s. 77(1) SDA 1975; or

6.2.2 Is the disadvantaged party entitled to rely on the discriminatory term insofar as it causes her contract to be modified such that it is no less favourable than that of her comparator, in accordance with s. 6(5) SDA 1986? or

6.2.3 Is some other remedy possible?

ISSUE 7

Subject to issues relating to the nature of the burden of proof (namely whether this issue relates to the JES, meaning that the burden falls on the Respondents to prove that there are no grounds to suspect historic sex discrimination, or whether the Claimants have to prove historic sex discrimination on the balance of probabilities):

7.1 Was it the case before AFC that groups of predominantly female employees were paid less than groups of predominantly male employees for doing work which was of equal value? The Respondents contend that the Claimants must identify any female group/male group and difference in pay/terms relied on. The Claimants rely on paragraph 18 of their Opening Submissions and also the following:

a. Some A grade Healthcare Assistants have matched to band 3 Clinical Support Worker Higher Level post owing to the divide between HCAs in hospitals and communities referred to in evidence. Prior to AfC they earned between £10,375 and £13,025 on N&M scale A, in comparison with maintenance and building craftworkers subsequently matched to band 3 who would previously have been earning £17,768.40 and £15,620.28 respectively.

b. Domestic Team Leaders on ASC grade 4 were paid between £11,631.36 and £12,081.68 under Whitley terms as of 1st April 2004. Maintenance assistants were paid £13,242.84. Under AfC, the domestic team leader profile has been evaluated at band 2; former maintenance assistants should now fall within the band 1 Maintenance Support Worker profile, or the band 2 Maintenance Support Worker Higher Level profile.[3]

7.2 If so, were there potential GMF defences to claims based on such disparities as identified by the First Third and Fourth Respondents in their Further Particulars to be served in December 2008?:

7.3 Having regard to the answers to the above questions, what if any findings can the Tribunal make about the existence and extent of unlawful sex discrimination in the NHS pay systems pre AFC and can it conclude from the evidence presented in the PHR that there was systemic sex discrimination in the pay systems in place before AfC such that pay protection ("explicit" and "implicit") can be said to perpetuate it by virtue of the design and implementation of AfC at a national level. Subject to any defences put forward by the Respondents is AfC therefore void?

ISSUE 8

For the purposes of issues 4.2,4.4 and 7.3 above

8.1 Did the parties to the Final Agreement know the extent of any such disparities as are mentioned in 7.1?

8.2 If not, should they have known or should they have taken steps to investigate?

8.3 Did the parties to the Final Agreement know the extent and the strengths and weaknesses of any GMF defences?

8.4 If not, should they have known or should they have taken steps to investigate?

8.5 Having regard to the answers to the above questions, what if any findings can the tribunal make as to the extent to which the parties to the Final Agreement knew or should have known about any unlawful sex discrimination in the NHS pay systems pre AFC?

For the avoidance of doubt it is understood that all parties are agreed that the only issue the Tribunal is asked to (and is able to) determine in relation to historic discrimination – both generally and insofar as it impacts on the pay protection and RRP issues - is whether there was 'systemic' discrimination within the NHS. Any finding on this point will not prevent individual Claimants from alleging historic discrimination at a local level.

28. It will be noted that there are two formulations of issue 5. This was the one issue where the wording could not be agreed. In issue 7, the term "historic" does not bear any connotation of ancient history. It is a central part of the claimants' case that there was systemic discrimination up to and beyond the date of the Final Agreement for AFC.

29. It was agreed at a CMD on 12 November 2007 that the test case would deal only with national issues. There was discussion at later CMDs of the practical implications of this agreement. To what extent would documents and evidence about the position in Northumbria be relevant to the national issues?

30. Ms Romney and Mr Bowers QC reached an agreement on this question on 22 October 2008. There were five and only five issues of Trust implementation which were illustrative of the national issues. They were clusters, assimilation, local evaluation, use of former scales and RRP. They were illustrative only insofar as they related to the implementation of AFC "on the ground" and only insofar as AFC had been so applied in accordance with the design specification.

31. It was agreed that :

31.1 Detailed statistics and other information about the local position were not relevant insofar as they were or might be at variance with the overall national position.

31.2 The hearing would not concern itself with evidence relating to the accuracy or otherwise of job descriptions or the correctness of the marking or banding in individual cases.

32. Reverting to the agreed list of issues, we propose to deal with the issues in a different order from that in the agreed list. In particular, Mr Lynch QC and Mr Milford, in their closing submissions, began with issues 7 and 8 and that is an example which we shall follow. This is because several other issues, i.e. 2,4and 5, will be affected to a greater or lesser extent by our conclusions on issues 7 and 8.We shall also take issues 7and 8 together because of the close links between them. We propose to take the issues in the following order after we have recorded our findings of fact:

* Issues 7 (historic discrimination) and 8 (knowledge and investigation)
* Issue 1 (validity of the JES)
* Issue 2 (reasonable grounds for suspicion)
* Issue 5 (protection, assimilation and RRP – the GMF issues).
* Issue 4 (perpetuation of discrimination).
* Issue 3 (the relevant date).
* Issue 6 (section 77).

33. It may be helpful if, having identified the issues, we define precisely some of the main terms which we shall use throughout these reasons, as follows:

* We shall use the term AFC to refer to the whole of the agreement for a new pay system, as concluded in November 2004, including the provisions for such matters as pay protection and RRP.
* The JES describes the job evaluation study which underpins AFC and which is described in the Final Agreement and the Job Evaluation Handbook.
* The terms job evaluation study and job evaluation scheme, in lower case, will be used interchangeably to refer to any earlier jes or to studies/schemes in general. Conveniently the two terms share the same initials.
* We shall refer to JEWP II simply as JEWP for all periods after June 1999.
* We shall continue to use the terms CNG and JSG for the period of 18 months or so when those bodies had become the Staff Council and the Executive respectively in shadow form.

THE HEARING

34. All the parties were represented by Counsel, who were:

* Ms Daphne Romney and Ms Anna Beale for the claimants. We are pleased to be able to record that Ms Romney has since been appointed Queen's Counsel.
* Mr John Bowers QC and Mr Seamus Sweeney for the first respondent, the NHS Trust. In

addition, Mr Guy Bredenkamp, Solicitor, represented the first respondent on days when Counsel were not required to attend and was also a signatory to written submissions on behalf of the first respondent.
* Mr Antony White QC for the second and fifth respondents, being the several NHS unions which had been joined and remained as respondents.
* Mr Adrian Lynch QC and Mr Julian Milford for the third respondent, the Secretary of State, and the fourth respondent, the NHS employers' organisation.

35. We had two days of opening submissions (supplementing written submissions which had been provided), followed by three reading days. We heard evidence over 24 days in October and November 2008 from nine witnesses, all of whom gave their evidence in chief partly by reference to witness statements. An unusual feature of the case was that all the witnesses gave evidence for the respondents, four for the third and fourth respondents, one for the first respondent and four for the second and fifth respondents. We were referred to 46 ring binders of documents, several of which contained thousands of pages of audit trails relating to various national profiles. There was an unavoidable break early in the hearing, but we took two more reading days during that time and a further two days after we had heard all the evidence. It was useful to us to have this time to read in full some of the key documents and authorities to which we had been referred.

36. We returned in February 2009 to hear closing submissions over three days. We had also had substantial written closing submissions on behalf of all parties. In addition, Mr Lynch and Mr Milford gave a written reply to questions about RRP which had been put to them by the tribunal on the first of the three days.

37. We are greatly indebted to all the Counsel, and to those instructing them, for their industry and expertise. The advocacy throughout was of the highest order. Special mention must be made of Ms Beale and Mr Milford, both of whom took an almost verbatim note of the proceedings and kindly supplied copies to the tribunal. There have been only three instances where we have been referred to material differences between the two notes, to be resolved by reference to our own notes.

38. There were during the hearing two unsuccessful applications which should be recorded. The first was by Ms Romney and was made on the second day, during the opening submissions. Reference is made later in these reasons to the Wilson litigation. This was a multiple equal pay claim by employees at a hospital in Cumbria. Ms Romney sought disclosure of some ten thousand pages of reports by independent experts on the ground that they were relevant to the issue of historic discrimination. The application was opposed by all the respondents. We unanimously agreed to refuse the application, mainly on the ground that the documents, if disclosed, were unlikely to lead anywhere. Although there had been a hearing at which a challenge to the methodology of the experts was successfully resisted, the claims were settled without the tribunal having been called on to consider the actual scores or any GMF defence. Ms Romney would not have been able to prove her case on the basis of these documents without asking us to consider what the likely outcome would have been if the case had not been settled. There was a risk that we should spend more time on Wilson than on Hartley.

39. The second application was by Mr Bredenkamp on behalf of the first respondent. Ms Romney and Ms Beale, in their written opening submissions, had made some comments about the matching and assimilation process in the Trust and had drawn certain conclusions. Mr Bredenkamp sought leave to put in a second statement, in rebuttal, by the Trust's witness Mrs Harwood, who would shortly be giving evidence. The application was opposed by the claimants. Leave was refused on the ground that the evidence would not be relevant, since the evidence about the position in Northumbria was to be for purposes of illustration only.

40. There was also a successful application by the claimants which resulted in a consent order after all the evidence had been heard.. This was for the first, third and fourth respondents to give further particulars of GMF defences for the pre-AFC period. These particulars were provided on 5 December 2008, although the document stated that the particulars were inevitably non-exhaustive because they were provided in response to allegations which were not specific.

THE WITNESSES

41. We were invited by Mr White to make specific findings about the credibility of each of the respondents' witnesses. We think that it is right for us to accept that invitation. The claimants make serious allegations that the national profiles and other aspects of the JES and its implementation were manipulated in order to preserve existing inequalities. Several of the witnesses from whom we have heard had central roles during at least a significant part pf the period with which we are concerned. Their credibility and indeed their good faith and integrity are certainly relevant matters for us to consider, even though they are not necessarily conclusive.

Mrs Hastings

42. Mrs Hastings was a key witness, because she and Ms Fearn were the two outside experts who carried the main responsibility of ensuring that the JES was equality proofed. She attended meetings of JEWP I and she was a member of JEWP II up to and beyond the date of the final agreement, indeed until April 2007. She had the main responsibility for the development of the national profiles, whilst Ms Fearn was responsible mainly for training and monitoring, although there was some overlap. Mrs Hastings was involved in the adoption of all the national profiles. In preparation for the Pre Hearing Review she spent a great amount of time preparing audit trails requested by the claimants.

43. From the early 1980s until 1995, Mrs Hastings had provided advice on job evaluation and pay issues, mainly for trade unions, as a research officer at the Trade Union Research Unit, based at Ruskin College in Oxford. Since 1995 she had been a self-employed independent adviser on grading and pay structures. She made a substantial contribution in the 1980s to the preparation of the Equal Opportunity Commission's Equal Pay Review Model and she has also contributed to the recent review of this document.

44. In 1984-5, Mrs Hastings was the trade union nominated member of an arbitration panel which reviewed and re-evaluated the job of the Ford sewing machinists. Since then she has acted as an adviser and provided expert evidence in a number of equal pay cases, mainly but not entirely on behalf of claimants. The cases in which she has been involved on behalf of claimants have included the Enderby litigation and the Carlisle cases referred to later in these reasons.

45. In the period 1987-88 Mrs Hastings drafted the staff side guidance on the implementation of the Clinical Grading Structure for nurses and midwives. Subsequently she acted as the trade union side technical adviser to an equality review of the job evaluation scheme for ancillary staff in the NHS. She has also given advice to Unison and the Royal College of Nursing on job evaluation schemes which were introduced into various local NHS trusts during the 1990s.

46. We were able to study Mrs Hastings during a cross - examination which lasted for several days. The way in which she gave her evidence, as well as her experience as outlined above, demonstrated beyond question her integrity, honesty, commitment to equal opportunities and expertise. She would not have been a knowing party to any manipulation of the JES. Indeed she was totally uncompromising in her unwillingness to countenance any deviation from or dilution of the scheme. Furthermore, in view of her great knowledge and experience of equal pay issues, it would have been difficult if not impossible for anyone to manipulate the scheme without her knowledge.

Mr Evershed

47. Mr Evershed was also a key witness. He became a career civil servant in 1975. In October 2000 he moved from the Treasury to the Department of Health. One of his responsibilities at the Treasury had been to advise Treasury Ministers on the development of the government paper Agenda for Change: Modernising the NHS pay system, which was published in February 1999, as mentioned earlier in these reasons. From October 2000 until February 2003 he managed the AFC negotiations on behalf of the Department of Health and was one of the joint secretaries to the talks. For the next year, from April 2003, he was seconded to the employers' organisation to manage the establishment of a review of the NHS Pension Scheme. He returned to the Department of Health on promotion to the senior civil service in April 2004 as head of the NHS pay policy branch. In that role he led the review of the new pay system following the experience of the early implementer sites and led the negotiation of the final agreement. He signed that agreement on behalf of the UK Health Departments. Mr Evershed retired from the civil service on 1 September 2007, but he had a contract under which he continued to provide some advice on pay issues.

48. The importance of Mr Evershed's evidence is that he was managing the negotiations on behalf of the Department of Health during the period up to and beyond the initial agreement in November 2002 and he was again in charge of the negotiations during the period leading up to the final agreement in November 2004.

49. Mr Lynch submitted that Mr Evershed, having been retired for two years, displayed an extraordinary level of recollection and also a high degree of care and balance in dealing with the allegations made by the claimants. That submission was supported by Mr White, who suggested to us that Mr Evershed was a witness of great experience and obvious integrity, with an impressive command of the complex economic and political issues involved in the introduction of AFC and that his evidence was considered and thoughtful.

50. We agree with those comments. Mr Evershed had the difficult task of negotiating a complex agreement over a long period not only with the management and union sides in the NHS but also with his former colleagues at the Treasury, to secure the necessary funding for AFC. His task was to achieve the objectives set out in the 1999 Government paper. These included a fair pay system. Mr Evershed knew that the modernisation agenda could not be achieved unless equal pay criteria were satisfied. Indeed he pointed out to us that one of the principles set out in the document was that attempts should be made to improve all aspects of equal opportunity and diversity. We are satisfied from his evidence to us that the need to satisfy equal pay criteria was very much in his mind during the long and difficult negotiations which he conducted. We are also satisfied that he answered the many questions put to him about those negotiations carefully and honestly.

Mr Smith

51. Mr Smith was a central and important witness, because he was closely involved in AFC at both the technical level and the negotiating level. He was a member of JEWP II from 1999 to April 2002 and indeed was the chair of JEWP II for the last year or so of that period. He was then a management side member of the CNG and the JSG and their successor bodies until his retirement in September 2006. His specific responsibility in the latter role was in relation to the testing and implementation of the JES, for which he recruited and led a small team of staff.

52. Mr Smith described himself to us as a JE specialist and we find that to be an accurate description. Initially he had been employed as a nurse. He then moved into HR. In the mid 1990s, when employed by an NHS Trust, he developed and implemented a system of local pay using job evaluation, a common pay spine and common conditions of service. He subsequently acted as an external consultant to four hospital Trusts, helping them to develop and implement local pay. He had detailed knowledge of two of the job evaluation schemes which were to be found in the NHS prior to the AFC JES.

53. His evidence was considered and thoughtful. We found him to be a truthful and impressive witness. We are satisfied of his commitment to equal pay and of his unwillingness to compromise on the fundamental principles of job evaluation.

Mr Marks

54. The other witness who had a key role in the development of the JES was

Mr Marks. He was the Nalgo National Officer for Health from 1989 to 1993 and, following the merger which led to the formation of Unison, he was the Unison deputy Head of health from July 1990 until the year 2000. In that year he became the Unison National Officer for Health. In these various roles, he was staff side secretary to various Whitley Councils. In 2002 he became National Secretary, working exclusively on AFC. He headed the staff side on the CNG and its successor body until he retired towards the end of 2004. He was one of the signatories of the final agreement.

55. We found Mr Marks to be a truthful, astute and politically aware witness. He had over the years demonstrated his commitment to equal pay and we do not doubt that commitment. He was very frank in his evidence about his lack of interest in the details of the recruitment and retention premium for the maintenance crafts persons and about blocking a particular profile for the ambulance workers because it would have been untimely in terms of the forthcoming vote on AFC.

56. One reason why his evidence is of great importance is that he was not only the chief negotiator on the staff side, but also a senior officer of a union, Unison, which represented a large number of potential female claimants in the NHS, particularly nurses, HCAs and administrative and clerical workers. Mr Marks was very alert not only to the importance of achieving equal pay but also to the

importance of protecting and advancing the interests of his union members. He (rightly in our view) saw no conflict between those two concerns.

Mr Whitlow

57. Mr Whitlow was a national officer of the AEEU, which merged in or about 2002 (we were given conflicting dates) with the MSF to form Amicus. His evidence was a little vague on dates, but he appears to have joined the JSG in 2002 and remained a member until March 2004, when he took early retirement. Following his retirement, he went to work for the Department of Health to assist with the implementation of AFC, but his work during that later period is not relevant to the issues in this case. He represented a membership in the AEEU which included electricians, engineers, fitters and plumbers.

58. Mr Lynch said that Mr Whitlow's evidence should effectively be disregarded, except on one matter. His evidence on the general labour market for maintenance and estates workers reflected considerable relevant experience and his evidence on that matter should be given significant weight.

59. Ms Romney, on the other hand, suggested that he was a truthful witness. His evidence had been disparaged, she suggested, because it was in certain respects inconvenient to the respondents.

60. We do not agree with Mr Lynch that Mr Whitlow's evidence should be largely disregarded. We do, however, approach his evidence with caution. His answers on many occasions displayed a lack of engagement with the question which he had been asked, even when the question was a friendly one. He had a tendency to answer a question without thinking and then amplify his answer in a somewhat random and repetitive way. He was described by Mr White as chirpy, which is not wholly inapposite.

61. He was, however, the only witness who was able to give evidence to us about the pay of maintenance crafts persons outside the NHS, including those in local government. He also gave important evidence about his negotiation of the recruitment and retention premium with Mr Evershed and also his aspiration to raise the standards of the maintenance team in the NHS and encourage crafts persons to enter the NHS at a younger age with a view to spending the whole of their careers in the NHS.

62. We carefully considered his evidence on these matters and found it to be truthful, although his reference to the current labour force as a Dad's Army was, we felt, somewhat exaggerated. He was also commendably frank about the lack of engagement of the officials who reported to him in representing the interests of the members when discussions about job analysis for the purpose of AFC were taking place.

Ms Cartmail and Mr Jackson

63. Ms Cartmail and Mr Jackson both became involved with AFC at an advanced stage of the negotiations, but they were both able to give important evidence about specific issues.

64. Mr Jackson was employed by Unison from 1978. In 2004, he became the senior national officer and lead negotiator for health in succession to Mr Marks. He also took over from Mr Marks as the head of the staff side negotiating team for AFC. There was some overlap between them. He became a member of the Shadow Executive in July 2004.

65. Ms Cartmail is the assistant general secretary of Unite the Union, following the merger of Amicus and the TGWU in 2007. She has been a trade union officer since 1990. In the year 2000 she was appointed by the MSF as National Officer for Equality and Diversity. In 2003 she was appointed National Officer of the health section of Amicus with responsibility for MSF members. She joined the CNG at that time.

66. We are satisfied that both Ms Cartmail and Mr Jackson, in their work on AFC at national level, attached a high priority to ensuring that AFC was agreed and implemented in accordance with the principles of equal pay. We found them both to be truthful witnesses.

Ms Urry and Mrs Harwood

67. Ms Urry and Mrs Harwood were not involved at all with the development of the JES at national level.

68. Ms Urry was the deputy Head of the NHS Pay Branch in the Department of Health from February 1997 until 2002. She gave evidence about the pre AFC pay arrangements and in particular about the Enderby litigation.

69. Mrs Harwood was the AFC Project Manager for the first respondent from 1 June 2004 to 31 October 2006. It has been agreed between the parties that evidence relating to the implementation of the JES by the first respondent is relevant only for illustrative purposes.

70. We found both these witnesses to be truthful and credible.

General comment on witnesses

71. We are of course well aware that a general finding that the evidence given by a particular witness is credible and truthful does not mean that we should accept the whole of that evidence uncritically. In making our findings of fact, we have considered very carefully all the suggestions made on behalf of the claimants of inconsistencies in the evidence and of conflicts between what the

witnesses have said and what is revealed by the documents which have been disclosed. There are also issues of judgment and interpretation which do not turn on the honesty of the witnesses.

OUR FINDINGS OF FACT

72. These findings will inevitably be lengthy. We have heard a great deal of evidence and read thousands of pages of documents. We shall, however, try to deal concisely, or in some cases not at all, with matters which are neither directly relevant to the issues which we have to decide nor necessary to put those issues in context.

73. Because of our findings as to the credibility of the witnesses, and because much of their evidence was unchallenged, it is to be assumed when we refer to the evidence of a witness that we are making a finding of fact in accordance with that evidence, unless the contrary is stated. We do not in general propose to give document reference numbers. It is to be assumed that few readers of this judgment will have the 46 ring binders of documents in front of them.

The pay system before AFC

74. In 1997 (and throughout the period with which we are concerned) the NHS had more than one million employees. Most of them were women – approximately 81%. There were many female dominated groups, the largest being nurses, midwives and healthcare assistants (HCAs) and smaller male dominated groups, but we heard no evidence to suggest that the de facto job segregation had arisen through direct or indirect sex discrimination.

75. Since the establishment of the NHS in 1948 collective pay bargaining had been conducted by management and union representatives through the Whitley Councils. There were a general Whitley Council and several functional Whitley Councils. The former set terms and conditions which were of general application, whilst the functional Councils negotiated pay and other terms for particular job groups. It is recorded in the introduction to the Job Evaluation Handbook that there were more than 20 individual joint committees and sub-committees for the different occupational groups, each with responsibility for its own grading and pay structures.

76. The functional Councils included those for nurses and midwives, professions allied to medicine (such as physiotherapists and radiographers), professional and technical staff (including dental nurses and estates officers), administrative and clerical staff, ancillary workers (such as porters, cleaners and cooks), ambulance staff and scientific and professional staff. In some cases the staff side included several unions, for example six for the nurses and midwives and seven for the professions allied to medicine (PAMs).

77. In 1984, a pay review body was established for Nursing Staff, Midwives, Health Visitors, and Professions Allied to Medicine. The PRB replaced the traditional collective bargaining approach. It took evidence from unions and others and recommended pay increases. It had no remit to compare pay from one group to another. Comparisons were made instead with other professional groups outside the NHS.

78. Staff groups not covered by the PRB continued to use collective bargaining through the Whitley Councils, but these increasingly tended to follow the PRB settlements. There was however a perception that they lagged behind the PRB settlements and that the staff covered by the PRB tended to do rather better than those outside.

79. There were hundreds of different pay grades. In the late 1980s and early 1990s there were reviews of some individual grading structures in an attempt to simplify the system. The groups covered by the reviews included Estates Officers, Speech and Language Therapists and Pharmacists. The largest review was the introduction of the Clinical Grading Structure for Nurses and Midwives, from April 1988. This review, which brought in the grades A to I, generated a very high number of appeals and took many years to complete. It was not an encouraging precedent for reviews of the unreformed parts of the system.

80. There were separate arrangements for maintenance and building workers. There was a panel known as the MAP panel which set the rates. A total of five unions represented these workers. The AEEU was the main union for maintenance craft workers. Most building workers had traditionally been represented by UCATT, but the AEEU was increasing its membership in this sector as well.

81. There were national agreements for pay rates in the electrical and plumbing trades. We were told by Mr Whitlow that these were established in 1968 for the former and in 1972 for the latter, as a reaction to the "anarchy "in the construction industry caused by strikes over wages. The separate rates later came together as the JIB rate. There had been a formal link between the JIB rate and the MAP rate, but this link was broken in 1987 and the MAP rate ceased to track the JIB rate.

82. In the 1960s a comprehensive job evaluation study for the ancillary staff was carried out. The study was accepted by the Ancillary Staffs' Council in 1968 and applied in the whole of Great Britain (but not in Northern Ireland).

83. The pay structure of the NHS was further complicated in the early 1990s by the creation of NHS Trusts, under the National Health Service and Community Care Act 1990. We were told by Mr Evershed that there are about 700 NHS employers in England alone(nearly 900 when Wales, Scotland and Northern Ireland are also taken into account).These range from large hospital trusts, primary care trusts, ambulance trusts and mental health trusts to strategic health authorities and specialist organisations like National Blood. The number of employers has varied from time to time because of frequent mergers and demergers.

84. The trusts were given considerable management freedom, including the power to determine the pay and conditions of service of their own staff. Existing employees could, however, choose to retain their Whitley terms. Approximately one quarter of NHS staff went on to wholly local terms, another quarter remained on wholly Whitley terms and the remaining half became subject to hybrid terms, a mixture of local and Whitley terms.

85. A small number of trusts introduced totally new pay and grading structures and other terms and

conditions. These were based on job evaluation studies, but there were several different schemes in use.

Market forces payments

86. Not all employees in the NHS received only the appropriate amount of pay on the basis of their job and their grade. There were also many arrangements for making additional payments to reflect market forces. Some of these arrangements were official. Others were not.

87. Ms Urry told us that some of the Whitley Council groups had the benefit of enabling agreements which gave the flexibility for local employers to use recruitment and retention premia to increase pay by up to 20 per cent (or 30 per cent in London). She thought that the groups covered by this kind of agreement were groups like the scientific or professional groups. She did not think that there was a provision of this kind for nurses and midwives.

88. Ms Urry could not remember whether there was any arrangement of this kind for the maintenance groups. Mr Smith thought that there may well have been, but we think that this is unlikely, because if there had been any such arrangement then surely Mr Whitlow would have mentioned it. We find therefore on the balance of probability that there was no official national arrangement for paying a recruitment and retention premium to maintenance craft persons.

89. Following the 1990 Act, it was possible for local employers, who had adopted arrangements for local terms and conditions, to agree to pay a recruitment and retention premium to this group and to other groups as well. In addition, even without the flexibility given by the 1990 Act, there were numerous ways in which local employers did in fact contrive to make additional payments. It was, for example, common for maintenance craft persons to receive bad weather payments and there were also many beneficial arrangements for on-call payments.

90. Such arrangements were not peculiar to the maintenance group. We had evidence from more than one witness about grade drift, which could be either positive or negative. Mr Evershed told us that the classic situation in the NHS, and one which was pretty widespread before AFC, was that employers paid more than the set rate by advertising a post at a higher grade. He told us the Treasury joke that a nurse doing the same job in Orkney, Birmingham and London would be on grade D in Orkney, grade E in Birmingham and grade F in London.

91. Mr Marks gave evidence to similar effect. He gave the example of advertisements for a medical secretary on the appropriate grade which did not elicit the right sort of applications, with the consequence that the post would not be filled. In order to get the post filled, the Trust would advertise it at a higher grade.

92. Mr Evershed and Mr Marks also told us about negative grade drift. Posts in low wage areas of the country were on occasion filled at rates which were lower than the proper Whitley rate, because the low wage rates in the local economy meant that it was not difficult to fill the post at that low grade.

Equal pay claims before 1997 - Enderby

93. We had evidence about very few equal pay claims in the NHS before 1997. The most important claims were the equal value claims brought by about 1500 speech and language therapists, who named male clinical psychologists and male pharmacists as their comparators. The first claims were presented as test cases in 1986. The claims were supported by the MSF union.

94. Two of the test cases were heard by an Industrial Tribunal in London on various dates in October, November and December 1988. The claims were dismissed. The Tribunal found that the difference in pay rates was not caused by direct discrimination and that the three professions were all open equally to men and women. The Tribunal also concluded that the claims failed because the difference in pay was caused mainly by the non- discriminatory structure of separate bargaining arrangements and, for the rest of the difference, market forces. Both these were held to be genuine material factors.

95. The Tribunal also pointed out that the market forces payments to pharmacists which had been identified benefited far more women than men. This was said to be indicative of the lack of sexual discrimination in the pay structure and policy of the respondents.

96. The claimants appealed unsuccessfully to the EAT, but there was then a further appeal and the Court of Appeal referred the case to the ECJ. In June 1993 the ECJ gave a judgment in which the answers to the questions of law which had been referred were favourable to the claimants. That was by no means the end of the litigation. It remained unresolved in 1997 and we shall return to it later in these reasons.

97. In 1991 the Northern Ireland Court of Appeal heard an appeal in a case which involved the job evaluation study for ancillary workers, to which reference has already been made. The case is reported as McCauley and others v Eastern Health and Social Services Board [1991] IRLR 467. The claim was an equal value claim by four domestic assistants at the Royal Victoria Hospital, Belfast. The employers relied on the above study. The Industrial Tribunal rejected a challenge to the merits of the study, but found for the claimants on their main submission, which was that their jobs and other jobs in Northern Ireland had not been evaluated as part of the study. The appeal was unsuccessful.

98. The Carlisle claims which have already been referred to, the Wilson litigation, were presented in 1997 or 1998. We shall return to these claims later in these reasons.

99. We heard no evidence to the effect that any other multiple equal pay claims in the NHS were pending in 1997 or that any such claims had been decided or settled before 1997. Indeed we did not have any evidence about the outcome of individual cases. There may well have been such cases. Indeed it would be surprising if an organisation of the size of the NHS did not receive a number of claims, but the parties to these proceedings have not suggested that there were any other cases prior to 1997 which were significant enough to be taken into consideration.

The Unions

100. We did, however, have evidence that the unions, particularly Unison, were by the mid 1990s alert to the possibility of inequalities of pay in situations similar to that in the Enderby case. We were referred to reports which Mr Marks presented to the Health Group Conferences of the union in both 1996 and 1997. Both reports stated that the NHS was characterised by unequal pay as between men and women (and also unequal pay as between staff covered by the Pay Review Body and those whose pay was set in the functional Whitley Councils). Both reports also called for a new national bargaining system which would, amongst other objectives, give "fair pay for all staff within the NHS in terms of equal pay for work of equal value and the correction of the inequalities which have arisen in the last 15 years".

Developments in 1997, 1998 and early 1999

101. In November 1997 a Job Evaluation Working Party (later to be known as

JEWP I) was set up by the Department of Health. Its purpose was to examine and test job evaluation studies which were currently in use in the NHS, in order to advise whether any of them could be accredited for general use. JEWP I included both management and union representatives. In addition, three outside technical advisers were invited to attend the meetings. They were Mrs Hastings, Mr Tony Iddison, who was on the Acas panel of independent experts, and Ms Kay Gilbert, who was subsequently appointed to that panel.

102. The first respondent was established on 1 April 1998, by a merger of three existing Trusts (mergers and demergers of NHS Trusts have been frequent, which has been a complicating factor in much of the equal pay litigation). The Trust covers a larger geographical area than any other Trust in England. It operates three main hospitals and several smaller community hospitals. It has approximately 6,500 staff.

103. In January 1999 Ms Elizabeth Jones reported on the work of JEWP I. A list of criteria for a fair and non-discriminatory job evaluation study had been drawn up. Six schemes which were in use in parts of the NHS were used for the assessment of a number of sample jobs. There were considerable variations in the results. The recommendation was that none of the schemes fully met the agreed criteria. We were told by Mrs Hastings that either one or two of the schemes, which had been developed for use in the NHS, came close to meeting the criteria. Others were commercial schemes which did not appear to have been appropriately designed for use in the NHS. Accordingly the recommendation was that a single scheme for use in the NHS should be developed from scratch.

104. Although this preliminary work had been done, there was at this stage no formal pay modernisation scheme on the table. There had, however, been informal discussions involving civil servants, the NHS unions and senior NHS managers. Those discussions had proceeded in parallel with the work of JEWP I. A decision to proceed with the development of a new pay scheme was now announced, with the publication of a Government paper.

Agenda for Change – the Government paper.

105. This paper was entitled "Agenda for Change: Modernising the NHS pay system." It was published in February 1999 by the four UK Health Departments.

106. The document stated the aim of a new NHS pay system which:

* enables staff to give their best for patients, working in new ways and breaking down traditional barriers
* pays fairly and equitably for work done, with career progression based on responsibility, competence and satisfactory performance
* simplifies and modernises conditions of service, with national core conditions and considerable local flexibility

107. As Mr Evershed pointed out, the document was open about the avoidance of unnecessary litigation on equal pay as part of the motivation for the proposed reforms. The relevant passage was:

There can be wide variation in the rewards people get for doing very similar work. This creates a sense of grievance and can lead to litigation on equal pay for work of equal value. Money spent on lawyers would be better spent on services.

108. The paper stated that talks would be opened with NHS professional and staff organisations "on the basis of this agenda for change. Our aim is to make progress in social partnership."

109. A draft negotiating brief for the Pay Modernisation Unit dated 23 April 1999 stated that:

"A realistic estimate should be made of the duration of red circling: if likely to be more than 3 years, pay protection may need to be limited with pay reducing over time [there is relevant equal opportunities commission guidance on this]".

110. An internal briefing document dated 3 June 1999 referred to the risk of not proceeding with job evaluation. The risk was one of "a multiplicity of equal value claims resulting in high costs to NHS and substantial effort for pay branch staff".

JEWP II is established

111. The first meeting of JEWP II was held in Leeds on 7 June 1999. There were four management side representatives from various Hospital Trusts (additional management side representatives had been invited but sent apologies), eight union officials, including Mr Marks from Unison, the two independent experts, Mrs Hastings and Ms Fearn, and two officials from the NHS Executive. The CNG

and the JSG had not yet been established. They became the adoptive parent bodies of JEWP when they were set up later in the year.

112. It was agreed at that first meeting of JEWP to set up a technical group to design a factor plan for the new JES. This would be a smaller group than JEWP, which would also continue to meet. The starting point for the factor plan would be to look at the list of factors which had been drawn up by JEWP I.

113. Mrs Hastings explained how JEWP and its sub-groups operated and their relationship with the CNG and the JSG. JEWP and its sub-groups operated through consensus. There was no voting mechanism. There was a high level of partnership and joint working. A problem solving approach was adopted. JEWP's work was essentially technical work and differences of view between management and staff sides were rare. When differences did occur, they were nearly always resolved.

114. A common pattern, after preliminary discussion of an issue, was for Mrs Hastings or Ms Fearn to prepare a paper for the next meeting. That paper would then be discussed. If necessary it would then be discussed at further meetings until agreement was reached.

115. The CNG and the JSG were the decision making bodies, but they also operated through consensus. If the JSG disagreed with a proposal by JEWP, the matter would be referred back for further consideration and if necessary joint discussion between members of the two groups. They were , however, more political and less technical groups than JEWP.

The factor plan is developed

116. Mrs Hastings told us that there were more rounds of testing during the development of the JES than in any other job evaluation scheme she had been involved with. Since the factor headings and weightings have not been challenged in these proceedings, it is unnecessary for us to refer to each separate meeting in the process. In outline, there were the following stages in the development of the factor plan between June 1999 and April 2001:

* Factor definitions went through several drafts and were agreed in principle by September 1999.
* The technical group decided on a test exercise to check the factors and develop factor levels. Initially, questionnaires were sent out to obtain information about 119 sample jobs. Only 50 were returned and there were concerns about the quality of the information.
* There were two workshops in February and March 2000, each for two days, to develop the factor level definitions, further completed questionnaires having been received. It was agreed to test the factor plan on a sample of jobs, using a specially designed questionnaire, job analysts to assist in the completion of the questionnaires and joint panels of evaluators. .
* Job analysts and evaluators were trained and in June 2000 joint panels of evaluators tested the draft factor plan on about 100 jobs in Britain and 30 in Northern Ireland. The independent advisers prepared reports and the scheme and the guidance notes were amended in the light of the test results.
* There was a two day meeting of JEWP to discuss further revisions to the factor plan in September 2000.
* There was a further round of testing, similar to the June exercise, in November 2000, followed by further revisions to the factor plan. It was decided that still further testing was required. The factor plan

was to be evaluated against a set of national benchmark jobs. Work was done over the next few months to select the organisations to take part and the jobs to be included, to prepare a more detailed questionnaire and guidance notes for job holders and to develop a training programme for job analysts.

* There were three day training sessions for job analysts in February and March 2001. The training included sessions on equality issues and the avoidance of bias.
* The trained analysts then worked in pairs, interviewing job holders and completing questionnaires, which were then vetted at meetings of JEWP.
* Over a three day period in April 2001, joint evaluation panels (about 40 people in total) were trained and then asked to evaluate completed questionnaires. Members of JEWP were available for consultation.

Mr McIlwain's estimate

117. On 20 September 1999 Mr Colin McIlwain of the Department of Health sent a letter to Mr Evershed, who was then still at the Treasury. In that letter he said that when assessing the benefits of pay reform " it is probably worth bearing in mind the possibility that an unreformed system will leave the NHS open to an increasing number of claims for equal pay." He added that he thought that some analysis had been shared with Mr Evershed in 1998 and that this "showed that the costs from 2000/01 to 2003/04 would be in the order of £210/610/1330/2740m. One of the main drivers of Agenda for Change is to introduce a system that reduces, if not eliminates, the scope for successful challenges on equal pay grounds."

The "private understanding"

118. On 29 September 1999 Ms Aileen Simkins sent a note to the Minister of State with which she enclosed a draft letter to the Prime Minister. In the draft she referred to a "private understanding with UNISON."

119. Mr Evershed satisfied us that these words had no sinister connotation. At that time the Government were proposing that under AFC there would be separate pay spines for the staff covered by the PRB and those not covered.. UNISON were unhappy about this proposal. The private understanding was that the two pay spines would be separate but identical and that if at any time the Treasury were to propose different pay awards that difference would have to be clearly justified and the reasons spelt out. In the event that was the position as set out in the AFC agreement.

120. Mr Evershed's evidence on this issue was entirely consistent with that given from the "other side of the fence "as it were by Mr Marks. We accept their evidence.

Mr Mailly's note

121. In March 2000, Mr Ray Mailly, who was then the Head of Pay Modernisation Implementation, sent a paper to the Minister of State, who had asked for a note on the contribution of pay modernisation to delivering service improvements. In the appendix to this paper, Mr Mailly identified seven direct and measurable benefits planned from pay reform. These included a "fairer, more transparent pay

system that will withstand challenges on equal pay grounds."

122. A later page gave five examples of disadvantages of not proceeding with pay reform. These included:

"There would be significant recurring costs to the pay bill of losing Equal Value claims from differing staff groups (cases comparing Midwives against Doctors are pending in Liverpool)."

123. We did not hear any evidence about these Liverpool cases. We suspect that we should have been told if they were taken to a successful conclusion.

The "equal payish "document

124. A draft negotiating brief which was prepared within the Department of Health in March 2000 suggested a job evaluation approach "which allows multiple national grades to be abolished and replaced by [local] paybands which encourage flexible job design and pay based on responsibility and competence. Ensure system is "equal pay ish "not a bureaucratic nightmare."

125. Mrs Hastings was cross – examined about this document. She said that she had been unaware of it. If anyone had told her that the system should be equal pay ish, she would have replied that the system should deliver equal pay for work of equal value. There was a quite common concern, not just in the NHS, that job evaluation is immensely bureaucratic, but it need not be so. She did not recall any discussion in JEWP about local pay structures. If there were any such discussions, they came and went.

126. In March 2000, an internal briefing document referred to the issue of pay protection. The document referred to guidance from the Equal Opportunities Commission and said that a realistic estimate should be made of the duration of any pay protection. If it was likely to be more than 3 years, then it may be necessary for the protection to be limited with pay reducing over time.

127. In April 2000 Mrs Hastings prepared a note on the weighting of demand factors. This note was discussed at meetings of JEWP and revised in the course of that year.

128. In May 2000 Mrs Hastings prepared a note on possible equality checks. This was discussed at a meeting of JEWP on 18 May 2000. A note which was sent out with the agenda for the next meeting recorded various items which had been discussed, including the need to carry out statistical checks, consult with the EOC and CRE and check against JEWP's own list of essential criteria.

Concerns about funding

129. Mrs Hastings was cross – examined about a paper prepared by Ms Rosamond Roughton dated 2 June 2000. Ms Roughton was at that time the Head of NHS Pay. In the paper, Ms Roughton said that she was not at all convinced that there would be sufficient funds for pay modernisation. She said that one suggestion was "that we simply set ourselves a target – say of £800 million, and see what we can deliver for that. This might be a better way of approaching it – as I doubt we are ever going to put a business case together that justifies substantially more investment in a new pay system than our current estimates of equal pay claims (£720 million"). She went on to refer to the need to "start managing expectations downwards" in discussions with the unions.

130. In answer to Ms Romney, Mrs Hastings said that no one ever talked to her about claims, comparators and figures. She was never approached to give an estimate of chances of success or failure in equal pay claims or to say how common the position in Carlisle was. We totally accept that evidence. Indeed we were told by both Mrs Hastings and Mr Smith that they had a discussion, when Mr Smith was the project manager of JEWP, and very properly agreed not to discuss the Carlisle cases, in view of Mrs Hastings' role as an expert witness for the claimants in those cases.

131. Ms Roughton, in her above mentioned paper, went on to speculate about possible alternatives to AFC, in view of her concerns about funding. She said that "it sometimes appears as though Agenda for Change is the only game in town. I think we need to have a clear walk – away position, so that our hand is strengthened in negotiations."

132. A note which was prepared on 16 August 2000 by the NHS Equal Pay Team referred to various objectives of the NHS Job Evaluation Scheme, in the following terms:

* Address equal pay by comparing job demand across the whole range of NHS jobs
* Ensure consistency of measuring job demands across the whole NHS
* Incorporate the same, agreed values across the NHS as a means of valuing jobs
* Identify where the current hierarchy gets pay wrong, which need remedying
* Demonstrate where the current hierarchy gets pay right, despite misconceptions
* Avoid the likelihood of damaging, protracted and expensive equal pay claims

Weighting

133. There was a meeting of the JSG on 12 December 2000. A note of the meeting shows that those attending included Mr Evershed and Mr Smith on the management side and Mr Marks (referred to as PM) and Mr Humphreys of the RCN on the union side.

134. The note included the following passages:

"Overall, the degree of correlation between unweighted JE scores and the Whitley rankings were much better than in the first exercise… PM nevertheless expressed some concern about the quality of the data. There appeared to be some significant differences between old and new scores for some jobs, and others appeared significantly out of line with their Whitley rankings."

135. In their written closing submissions, Ms Romney and Ms Beale suggest that this is a clear example of a desire on both sides to ensure that the JES stuck as far as possible to the status quo. We do not agree that the document as a whole bears this interpretation. Various options for weighting were being tested and one obvious way of testing the options was to see if they threw up any strange results in terms of existing rankings. The note refers to "outliers and other "sore thumbs"". An example given of a strange result was that between the rankings of nurses and GPs (the latter were not covered by the JES, but there is no reason why they should not be included in the exercise for testing purposes).

136. In January 2001 there was a joint meeting of the JSG and JEWP to discuss weighting, the factor plan and the forthcoming benchmark exercise. The JSG itself had an extended meeting on 27 February 2001 to discuss weighting and other matters. One of the conclusions recorded was that it was important that the benchmark data should be analysed for potential bias on the basis of gender or ethnicity.

137. In May 2001 there was a second joint meeting between the JSG and JEWP to discuss weighting. The meeting also discussed progress to date on the factor plan. Mrs Hastings also gave a presentation on the principles of drawing grade boundaries.

138. It was for the JSG, and ultimately the CNG, to make the final decision on weighting, but they had the benefit both of the guidance notes by Mrs Hastings and also the further advice which she gave at the joint meetings in January and May 2001 and also in informal discussions, particularly with Mr Smith. The paper prepared by Mrs Hastings included specific advice on the equality aspects of weighting decisions.

139. Mrs Hastings had prepared the first draft of her paper on weighting the previous April. She defined implicit and explicit weighting. The former is the term given to the weighting which follows from different numbers of either factors or factor levels. For example one study may have four factor headings for various kinds of responsibility and only two for knowledge and skill factors; another study may reverse those numbers.

140. Mrs Hastings pointed out that Independent Experts in individual equal pay cases have usually either adopted implicit weighting or treated all factors as being equally weighted. She explained that the justification is that, with only a small number (often only two) of jobs to evaluate, they lack an organisational framework from which to determine values. Equal weighting, however, can make people feel uncomfortable, for example where it treats working conditions demands as being as important as knowledge or responsibility demands.

141. Mrs Hastings went on to deal with guidance from the EOC. This was specific guidance, not just

general guidance. Letters had been sent to the EOC and the other Commissions seeking comments on the draft factor plan. Mrs Hastings then set out various options.

142. It was agreed by the JSG that the Knowledge and Skills factor should carry the highest weighting, because the NHS is a knowledge based organisation. Mr Smith and Mrs Hastings were well aware that there was potential for discrimination, because historically men were more likely to have had access to higher education and therefore the opportunity to gain qualifications, but they were satisfied that the detailed design of the scheme took account of this concern. This was because the scheme allowed for knowledge to be gained in ways other than through qualifications.

143. It was also agreed that each of various responsibility factors should be equally weighted and that there should be a maximum possible point score of 1000. The provisional weightings were then tested and re-tested on the outcomes of the national benchmark evaluations which had been carried out in April 2001.In carrying out these tests, Mr Smith and Mrs Hastings gave particular consideration to the need not to apply different weights to predominantly male jobs as opposed to predominantly female jobs.

144. We were told by Mrs Hastings that because of the relatively large number of factors(16), there was not a great deal of scope for varying the weighting pattern or the actual weightings. The options which were tested had very little impact on most jobs, but some impact on administrative and clerical jobs (which we note to be a female dominated group). The option chosen was the one which was most favourable to these jobs, to ensure that they would not be disadvantaged relative to healthcare jobs.

Internal documents – June and July 2001

145. On 29 June 2001, Mr Evershed sent a note to the Minister of State. The issue was whether officials should be given a remit to enter final negotiations to try and close a deal. One of the attachments to the note stated that the threat of equal pay claims was one of the "original drivers" underpinning the AFC proposals. Reference was made to the two review bodies and the several different Whitley Councils, "each focusing mainly on pay increases and not on differentials". Because of these arrangements the NHS pay system was clearly ripe for equal pay problems, made worse by its gender mix (i.e. its preponderance of female workers in relatively low paid posts).

146. Reference was then made to a number of "local claims". These were:

* Carlisle – 500 cases lodged by Unison and the GMB covering a range of staff groups

* Newcastle – more than 200 cases registered and up to 300 cases expected, all involving ancillary workers (mostly female domestic staff with male porters as comparators)

* Liverpool and neighbouring Trusts – around 20 claims lodged by midwives against comparators as yet unspecified but likely to be doctors in training

* Hartlepool and Durham – 200 ancillary staff who had lodged claims against the operation of the bonus scheme – settled out of Court.

147. We have not been told the outcome of the Newcastle and Liverpool cases.

148. Mr Evershed then went on to state that he was "not aware of any features in these Trusts in particular which make the cases unique". In his evidence to us, he said that he subsequently changed this view, having been given more information about the Carlisle cases, and we accept that evidence. He said that taking account of the actual costs which had been faced by NHS employees to date and projecting those costs across all English employees in the NHS, "the risk would seem to range from a low of £180m pounds to over £650m pounds including legal costs". He stated that costs could arise faster if it were necessary to take pre-emptive action following the first few successful cases and they could rise higher still if new types of case succeeded (for example the Liverpool cases) and no allowance had been made for retrospective costs.

149. We were referred by Ms Romney to a note sent to the Secretary of State on 23 July 2001 by Mr Hutton, who was then the Minister of State. The passage relied on by Ms Romney read as follows:

Decision on funding awaited

" I am satisfied that we cannot continue indefinitely with the present NHS pay system, which is a mess and leaves us wide open to legal challenges on equal pay grounds. I am also satisfied that we need to make progress on pay modernisation for non-medical staff in parallel with reform of doctors pay, and that the proposed reforms could help us with our wider modernisation agenda. But I am also extremely concerned about the risks:

* Of cost overruns;
* Of managerial overload;
* Of spending large sums without securing the intended benefits."

150. Mrs Hastings said, in answer to Ms Romney, that profiles were first drafted in the second half of 2001, after the first rounds of national panel evaluations of benchmark jobs. The suggestion was made to JEWP that it would be possible to write up the evaluations in a one page format which would be useful to other people. Mrs Hastings was not sure who first made this suggestion, but the reasoning behind it was that there was a lot of commonality in the evaluations that were coming out.

151. Mrs Hastings drafted the first profiles in August 2001. The profile group was then set up as a sub-group of JEWP and other JEWP members became involved in the drafting of profiles.

152. Almost all the profiles were based on JAQs (job analysis questionnaires), but there were a few exceptions. In particular, one or two profiles were based on local evaluations at early implementer sites, those evaluations being themselves based on JAQs In addition, some of the higher grade HCS (healthcare science) profiles were based on a combination of existing profiles and of additional information from members of the group chaired by Dr Sue Hill working on a career development programme.

153. Mrs Hastings explained that some of the very early profiles were based on a single JAQ and its evaluation, but that increasingly profiles were then based on two or more JAQs when it became apparent that JAQs were coming out almost as duplicates of each other. This was done only if there was sufficient similarity. If, for example, there were three JAQs for a job and one had some significant difference, that JAQ would not be used or would become a different profile.

154. Mrs Hastings was asked if any form of Whitley grading had been used to determine the similarity of jobs for the purpose of compiling profiles. She explained that the original benchmark samples had been partly constructed on the basis of jobs at the various levels of the Whitley structures, but Whitley grades had no effect on the way the information was subsequently treated.

155. The original concept was that matching jobs against profiles would be particularly useful when evaluating the jobs in the big job groups. These were the numerically large groups, such as nurses, midwives and physiotherapists. The initial concentration was on these groups, but the system of developing national profiles for use in matching was then applied more generally.

156. Mrs Hastings told us that the two advantages of the matching process were speed and consistency. In answer to a question from the Tribunal she said that the main round of evaluations would still be taking place, in late 2008, if the system had relied wholly on local evaluations.

Matching to national profiles

157. Further consideration will be given to national profiles when we come to deal with the first edition of the Job Evaluation Handbook and also with the changes which were made following early implementation.

Band Boundaries

158. We shall deal briefly with the way in which the pay bands were decided and what consideration was given to the boundaries between bands. This has not been raised as a controversial issue.

159. The JSG was responsible for the detailed work on the design of the pay bands, but with the benefit of advice from Mrs Hastings. Mr Smith took the lead on this issue. In addition to the formal advice which was given by Mrs Hastings, she and Mr Smith had informal discussions as to what in broad terms the new grading structure might look like. They envisaged a 7 or 8 grade structure focusing on a grade for professional practitioners, in both health care and non-health care areas. This would be the grade for jobs which required a Degree or Degree equivalent, the grade which later became band 5. There would be various support grades below and specialist and managerial jobs above. Subsequently the JSG decided to divide pay band 8 into 4 separate bands. Band 9 came very much later when it became apparent that some jobs were scoring above the maximum for band 8d.

160. Mr Smith told us that consideration was given to the length of the pay bands in terms of their impact both on equal pay and on career progression. The advice from Mrs Hastings was particularly relevant to the former. Attention was paid to jobs which fell near band boundaries, to ensure that, for example, boundaries had not unconsciously been drawn putting female dominated job groups just under a boundary and putting male dominated job groups just over. The JSG also looked for potential anomalies, such as supervisors and those being supervised ending up on the same pay band. It was recognised, however, that potential anomalies such as this could not entirely be designed out of the system. In some instances, the application of the JES would indicate poor job design and a poor fit between jobs.

161. We are satisfied on the evidence which we heard that the banding system was designed carefully and thoroughly and with proper regard to equal pay principles.

162. In November 2001 the third joint statement of progress was issued. The document stated that considerable progress had been made in developing the JES. However, in view of the scale of investment required for pay reform, the Government had decided to leave final decisions on funding and implementation until after the 2002 Spending Review had been announced. All parties had agreed that the JES and models of a new pay structure should continue to be developed in the meantime.

163. Early in 2002, the Department of Health submitted a document to the Treasury in support of the claim for funding for AFC. The document stated that the current NHS pay arrangements "are inequitable and seen as having failed to keep pace with changes in NHS practice". It referred to several problems, including distortion of working patterns, lack of flexibility, artificial career ceilings and a growing number of equal pay cases brought against Trusts. Part of the rationale for the claim was a saving of £614m pounds on equal pay claims, although the suggested productivity gains and savings from reducing drift and pay awards were several times greater.

164. The spending review was completed in April 2002 and the Department of Health received its allocation from the Treasury. We were told by Mr Evershed that each spending review would normally give three years of funding allocation, but in the light of the report by Mr Wanless the Government had taken a view on the funding for the NHS for a five year period. Although the bid which the Department had made to the Treasury set out the justification for the separate amounts which the Department was seeking for particular programmes, including Agenda For Change, the allocation was of an overall amount. It was then for the Department to draw up its spending plans.

165. The amount to be allocated to Agenda for Change, to pay generally and to other demands, such as the drugs bill, was decided by the Secretary of State in consultation with his senior finance team and other senior advisers. Mr Evershed was not yet a member of the senior civil service. Accordingly, although he was the project manager for AFC, he was not party to these discussions. It was another two months or so after the Chancellor's announcement before he was told the allocation for AFC.

166. On 13 May 2002, Mr Liversuch prepared a briefing for Lord MacKenzie in relation to a Parliamentary Question. The briefing document referred to the Enderby cases and went on:

"The NHS is susceptible to such claims because the current pay structures have tended to develop in isolation from each other with no reference across the piece to determine if pay rates across staff

groups offer are fair and defensible.

We are committed to ensuring the new pay system complies with the legislation. Agenda for Change will be underpinned by a Job Evaluation System – jointly developed and ultimately to be agreed with NHS staff representatives and Trade Unions."

Mr Milburn's note

167. On 11 June 2002, the Secretary of State, Mr Milburn, sent a note to the Prime Minister. The note stated that the final phase of negotiations had been deferred the previous autumn, "to allow prior decisions to be made on health spending." Mr Milburn went on to refer to the benefits to the NHS of the package that had been worked up with the unions. These included a radically simplified pay system, "underpinned by a new NHS job evaluation system which will pay people for what they do, rather than their job title;" and a new system of competency-based pay progression." After referring to the advantages for patients, the Secretary of State said that the advantages for staff would include, as well as modest pay increases for most staff:

"greater opportunities for career progression for staff who are willing to take on new responsibilities, skills and knowledge

a new form of linkage between pay increases for Review Body staff and non-Review Body staff, with greater onus to ensure that differential awards for staff with similar job weights can be justified against equal pay criteria."

168. A paper which was enclosed with the above note stated that:

"The key problems with the existing national or "Whitley" system are fragmentation, inflexibility and vulnerability to equal pay claims. There are dozens of separate pay scales for different occupations, each usually split into narrow pay bands and with widely differing conditions of service. This fragmentation reinforces occupational boundaries and can make team working harder. The inflexibility arises from the fact that new roles cannot easily be fitted in without national negotiations, and from various detailed rules which can restrict how staff are used. The present system also damages recruitment by putting resources into various leads and allowances rather than a decent base salary."

The financial envelope

169. It was in that month, June 2002, that Mr Evershed was told the amount available for AFC. The figures for the year on year allocation were set out in a document handed by Mr Evershed to the chair (Mr Marks) and secretary of the union negotiating team.

170. The document showed a total cost rising to a cumulative figure of £1770 million in 2007-8, representing 9.6% of the then current pay bill of £18.5 billion. Several key assumptions of the overall deal were stated. These included the abolition of existing leads and allowances, flexibility on job role/design and pay progression linked to competence and satisfactory performance.

171. It was indicated that on these assumptions the financial envelope should allow some room for manoeuvre to address issues arising in discussion. The document ended, however, with a comment that there was no "remit to consider a higher overall envelope, or to exclude any of the key elements listed above."

172. The amount allocated was much less than Mr Evershed had hoped for. He said that if the Treasury had given him a sum closer to the amount he had asked for, he might have been tempted to give the unions a lower figure. This would obviously have given him more room for negotiation. He did not think, however, that he could credibly claim that a lower figure would have been sufficient to pay for the various elements of AFC. Accordingly, he gave them the actual figures, except for rounding down the numbers. That did not give him a sensible negotiating margin. A lot of trust had been built up during the negotiations, however, and the unions accepted that there was an absolute limit beyond which he could not go.

173. Mr Evershed was cross-examined about the possibility of increasing the financial envelope, in particular so as to extend pay protection to potentially successful claimants in equal pay cases. The argument was that if, for example, a man and a woman are employed on work of equal value, he is paid £220 per week and she is paid £180 and following job evaluation the rate for both jobs becomes £200, it should not be only the man who benefits from pay protection. If his pay remains at £220 for a period, then her pay should also be £220 for that period.

174. Mr Evershed explained that there was absolutely no possibility that the Treasury would have increased the Department's allocation to pay for increased spending on AFC. The Treasury had always been very sceptical of the business case that pay reform would lead to service benefits.

175. Mr Evershed was equally emphatic about the suggestion that the Secretary of State might have been asked to take money from some other part of the Departmental budget. Mr Milburn would certainly have said no if he had been asked to find more money by, for example, scaling back the national programme on cancer or scaling back the maintenance of buildings. The Government had "An aggressive agenda" for expanding the NHS. The main justification for AFC, so far as the Secretary of State was concerned, was service modernisation as a contribution to the overall agenda. There was a risk that he would have reviewed the whole policy if he had been told that AFC could not be delivered within the cost envelope.

176. Mr Evershed explained what would happen if there was an unplanned overrun on spending in spite of the negotiations having remained within the cost envelope. Once the Secretary of State had decided on the allocation of the Department's money under the various headings, the finance team would then translate those decisions into the machinery for allocating the money round the NHS. If a Trust or other NHS employer overspent on pay, it would have to take the money from other areas of its local budget. Mr Evershed said that most Trusts did in the event overspend, at least initially, during the national roll-out of AFC. This meant that they had less money for services, either immediately or in the future, because it was necessary for the deficit to be recovered.

"Beefing up" jobs

177. On 29 August 2002 Mr Evershed submitted to the Minister of State a progress report which included the following passage:

In line with the agreed strategy, we are now working on targeted solutions to reduce further the 18 per cent of staff who remain potential losers. The options here include:

some pragmatic steps to ensure that Job Evaluation scores do not go the wrong way for key groups (for example by publishing an evaluation of a more heavily loaded job which would end up in the right pay band - thus encouraging employers to ensure that the jobs are beefed up rather than pay held down);

paying a recruitment and retention premium from the outset where the problem is market related rather than structural;

sensible transitional measures (including pay protection) where job evaluation has uncovered a problem which should be dealt with by restructuring.

178. Mr Evershed was not cross-examined about the above passage, but he did give evidence about it in chief. He identified two problems. One was that there were predictions of more losers than the acceptable number. The other was that there were some jobs which were either straddling pay band boundaries or very close to a boundary. The type of solution to which he was referring was to describe a more heavily loaded job in order to give employers and staff the opportunity to review the content of the job to allow a match with that profile. He also pointed out that the objective of AFC was to support service modernisation. It was consistent with that objective for the content of jobs to be increased, and for staff to take more responsibility, acquiring more skills and being able to do more for patients, but it had to be real modernisation. He also said that this would be a possible solution only if JEWP agreed that it was appropriate on the evidence.

179. Although Mr Evershed was not cross-examined on the above document, Mrs Hastings was cross-examined about it.. She said that the concept of key groups had formed no part of her thinking. She did not know what was meant by the expression - possibly a large group, such as nurses, or possibly those seen as key in terms of getting the deal done. She said that none of these matters meant anything to JEWP. We accept that evidence.

180. So far as the "beefing up" point is concerned, Mrs Hastings said that the idea of having profiles at different levels was a perfectly reasonable one from the perspective of both job evaluation and career development and JEWP tried to develop families of profiles where the profile at each band level was justified on the evidence. She said that there were cases where it was necessary to review the profile of a new job, because when the job was first evaluated for the initial profile it was not fully developed. The post of nurse consultant was an example.

181. There were, however, two important principles. The first was that the profile for any job should be based on the evidence of that job actually being done. The second was that the jobs to be matched against the profile should be jobs which actually existed and not jobs which it was intended should be done at some later date.

182. The expression “beefing up“ is not a well chosen one. We doubt if Mr Evershed would have used those words if he had known that his progress report would be dissected in the Tribunal. We believe his explanation, however, and accept that it was not his intention that profiles should be exaggerated in order to value a job at more than its true weight. More importantly, we are absolutely satisfied that Mrs Hastings would have had no truck with “beefing up“ in any inappropriate sense.

Carlisle

183. In September 2002, reports were received from the independent experts in the Carlisle cases. Mrs Hastings was closely involved in those cases as an expert witness instructed on behalf of the claimants.

184. In answer to questions put by Ms Romney, Mrs Hastings told us that the claimants in the Carlisle cases included lower grade nurses, ancillary workers, administrative and clerical workers, a clerical officer in the catering department and some scientific support workers. The comparators included a works officer, a maintenance supervisor, a maintenance assistant employed as a wall washer and also a maintenance assistant doing rather more demanding work than that, a plumber and a carpenter. She told us that the claimants had each named more than one comparator and that with two exceptions they all succeeded against at least one of the comparators. The exceptions were an assistant in the Central Sterilising Supplies Department and a Cytoscreener.

185. We propose at this stage to depart from the strictly chronological approach, in order to deal with the outcome of the Carlisle cases. There was a challenge by the respondent to the methodology of the independent experts. That challenge was unsuccessful. The case never went to a further hearing for a challenge to the points given to the various claimants and comparators. Mrs Hastings told us that if the case had not been settled, the unsuccessful claimants would have challenged the outcome and she accepted that there would also have been challenges from the respondent to those findings by the independent experts which were in favour of the claimants. We do not know whether GMF defences were raised, but certainly there was no hearing to deal with GMF defences. In the event, the case was settled on 14 February 2005. We were told by Mrs Hastings that the settlement included the two claimants in respect of whom the independent experts had not found equal value.

186. Mrs Hastings was asked if the jobs which were under consideration in the Carlisle case were typical of jobs throughout the NHS. Mrs Hastings expressed the view that they were “pretty much” typical, with a couple of exceptions. Some of the nurses were in a lower grade than she would have expected (D when they should have been E). She also thought that the job of Clerical Officer in the Catering Department was untypical. She said that, discounting the nursing areas, it seemed to her on the basis of the Carlisle cases that, “there must be at least some similar claims elsewhere”. She also said that when she saw the results coming through from the testing of benchmark jobs for the development of the JES factor plan that there was a high level of consistency between the two outcomes. She mentioned this to colleagues in JEWP, but we find as a fact that she did not mention it to Mr Evershed (with whom she had little contact) or Mr Smith.

Negotiating the proposed agreement for AFC

187. Once Mr Evershed and the unions had the financial envelope, the next few months saw intensive discussions, both within the JSG and the CNG and in separate meetings and informal discussions with individual unions. Indeed the Secretary of State had had meetings with the RCN and Amicus in May, even before the financial envelope had been settled. He had further meetings with Amicus and other unions in the October/November period. These were short meetings at which views on issues of principle were exchanged. They were not in any sense negotiations.

188. There were no minutes of the JSG or the CNG during the few months leading up to the draft agreement in November 2002. The people attending these meetings had a running draft of the agreement itself, which went through various editions. Mr Evershed had his list of outstanding points, which was displayed at the meetings. When agreement was reached on a point, it was crossed off the list, any consequent changes to the draft agreement were agreed and a revised document was produced at the next meeting.

189. Most of the unions had individual concerns, which were raised both in the formal meetings and outside. For example, Unison had particular concerns about low pay, because many of their members were likely to be at the bottom of the pay structure. They were prepared to recommend a deal on AFC to their members only if concessions were made on the lowest band 1 pay point. They insisted that the minimum wage level should be increased to £10,100 at 2002 prices. This increase was eventually agreed.

190. The RCN had a key requirement as well. They insisted that the maximum pay for experienced qualified nurses (at what was then grade E or above) should be increased to £22,000. This meant increasing the top pay point at band 5. The increase was agreed in principle, but there was then detailed work to be done on the number and level of pay points between the current maximum figure for grade E nurses and the maximum band 5 pay point.

191. Amicus and other unions were also still concerned about the separate pay spines which were proposed for staff covered by the PRB and those not so covered. This was the matter which had been the subject of the "private understanding" with Unison referred to earlier in these reasons. This concern was met as well. The document which was agreed in November extended the coverage of the PRB and also provided for linkage between the two spines.

192. Mr Evershed had a remarkably difficult task, in the autumn of 2002, as project manager for AFC. He had to take on board the different interests and concerns of a large number of unions, reconcile them where they conflicted and bring the negotiations to a successful conclusion within the financial envelope which he had been given. Furthermore, he had to keep in mind that the bottom line for the Secretary of State was that he must make no concessions which would compromise the modernising agenda for service delivery. Its contribution to that agenda was the main rationale for AFC so far as the Government was concerned.

193. Many of the matters which were discussed and agreed are uncontroversial so far as these proceedings are concerned. The matters which are controversial are RRP, particularly for maintenance craft persons and chaplains, assimilation and pay protection. There is also the question whether there was any agreement or understanding regarding back pay claims. Each of those matters will be considered in turn.

194. First, however, this would be a convenient point to make findings about the role played by Amicus in the negotiations and the perception of Amicus by Mr Evershed and his colleagues. It is a central part of the claimants' case that important principles were sacrificed in response to pressure from Amicus.

Amicus

195. Amicus was formed when the MSF joined with the AEEU and EESA. We were told that the merger took place at the beginning of 2003, but plainly it happened earlier, because the documents mentioned below referred to the merged union. It does appear, however, that following the merger the constituent parts of Amicus continued to function separately until about the beginning of 2004.

196. A briefing document was prepared on 28 October 2002 for the Secretary of State, who was due shortly to meet representatives of Amicus MSF. The document pointed out that most members of Amicus MSF were skilled and professional staff, including pharmacists, clinical scientists, laboratory technicians and speech and language therapists. Reference was made at the end of the document to the merger with the AEEU and EESA, representing skilled crafts people working in NHS estates departments, including electricians, plumbers and gas fitters. That paragraph apart, the document was concerned entirely with Amicus MSF. It included the following general comment;

"The union has a loose organisational structure with national officers tending to plough their own furrow rather than work under the direction of a central control in the UNISON mode. It has promoted the aspirations of individual staff groups regardless of the consequences for equal pay."

197. There was a comment about "some concerns on the Management Side about the level of commitment to pay modernisation within Amicus MSF and some concerns that it may be deliberately distancing itself from the talks in order to challenge the system through the courts at a later date."

198. There was also a comment that Mr Roger Spillar, the Head of Health, and Mr Colin Adkins, the Research and Policy Officer , had not been present at key negotiating meetings. Indeed we had evidence from Mr Marks that in his view Mr Spillar had deliberately absented himself from meetings in order to come along at the last minute to win concessions. Mr Marks told us emphatically that he took a dim view of this tactic, which was very different from the collective approach adopted by other unions.

199. On 4 October 2002, Mr Evershed sent a note to the Secretary of State. This note was mainly about ways of finding extra money within the overall financial envelope and about ways of using this money to satisfy concerns of individual unions. In the introductory paragraph, Mr Evershed referred to a forthcoming meeting which the Minister of State was to have with Unison and the RCN. It was hoped that the deal would be closed in principle with those unions the week after the meeting, leaving a fortnight to complete the details and prepare for the launch of AFC. The note also contained the following paragraph in relation to Amicus:

"We would also like to look at the possibility of reserving a sum within any room for manoeuvre that is created to help some of the Amicus groups where there are specific market related recruitment problems. [Note: as you may be aware, several, estates, technical and laboratory staff covered by Amicus have done relatively badly on job evaluation. This result was not unexpected - these are the groups that are often cited as comparators in equal pay cases - but the high relative pay rates often reflect real market recruitment issues. We have currently offered to pay recruitment premia at least at a level to ensure no loss - but it would be good to ensure employers could do better than this in some key areas.]"

200. On 26 November 2002, only two days before it was planned to announce the deal on AFC, Mr Evershed sent to a colleague a note about a telephone call from Mr Brown of Amicus MSF. Mr Brown reported "great unhappiness with some of the grading outcomes for Clinical Scientists, Chaplains, Pharmacists and Speech and Language Therapists and has asked for a further official meeting tomorrow to try and make further progress."

201. The reference to grading would have been to the national profiles, because no actual matching and banding of jobs had taken place yet. Mr Evershed commented that the reaction was not unexpected, because the union covered most of the job evaluation loser groups. He suggested that the Minister of State should speak to Mr Spillar and that there were several points worth making.

Mr Evershed's points included the following:

* The Department also had a concern that there was not a sufficient range of clinical science jobs to give a fair impression of where staff would assimilate and in particular not enough of the more heavily weighted jobs.
* The Department recognised the importance to the NHS of chaplains and pharmacists and was disappointed that they had not scored more highly. A long term recruitment and retention premium was to be paid at least sufficient to ensure no loss. In the medium term "we want to work with Amicus (MSF) to improve Pharmacy and Chaplaincy careers so that the underlying problems are dealt with and staff have a realistic opportunity to move into higher grades."
* "There is undoubtedly a problem with SLT jobs - very few people have been surprised that, when we look at a wider range of comparators, they appear to have done very well out of the Enderby case. But once again we are prepared to work constructively with Amicus (MSF) to review careers for SLTs with the aim of minimising any impact."
* "I recognise that there will be a difficult transition for Amicus (MSF) in particular, but believe if we work together we can make the new system a success - using RRPs in future to improve pay in groups facing market competition, and building new modern careers."
* "I would particularly stress that we will need in due course to discuss with you the guidance to employers on the use of the RRPs, and the cases in which they should consider premia above the neutral level, and I am assuming that the funding we provide will need to allow this to happen on a modest scale (NB current assumption is £15m pa)."

202. On 27 November 2002, there was a meeting of Ministers and civil servants to discuss the arrangements for the agreement to be signed the next day and the announcement to be made in the House of Commons by the Secretary of State. The note of the meeting referred to an issue regarding Mr Spillar and equal pay claims. Apparently Mr Spillar had made a proposal (not specified in the note) which was totally unacceptable. The Minister of State was to speak to Mr Spillar "making reassuring noises on finding a structural solution within the confines of the deal to help their members, in return

for agreement on equal pay claims. S of S was very clear that without the commitment on equal pay we could not do the deal with them."

203. After the meeting it was discovered that Amicus had issued a statement, to the effect that although the Secretary of State was to announce the deal the next day, there was in fact work still to be done. Mr Spillar had been spoken to and had given an assurance that the next day he would be "toe-ing the line in terms of saying that the deal has been done."

204. Mr Evershed forwarded the note to a colleague the following May, at the time of his temporary secondment away from AFC. He commented as follows:

"As you will see, Amicus (MSF) were told that if they toed the line on the deal, we would be helpful over matters of detail. That situation has held while Roger Spillar was around, but you will need to watch his successor."

205. Signing the deal on 28 November was only one stage in the overall process, even though it was a very important one. The achievement of AFC was still dependent on positive votes in the ballots which were to be held by all the NHS unions. On 19 December 2002, Mr Evershed sent a note to the Minister of State, commenting on feedback from the unions. The note included the following important passage about Amicus:

"Amicus appear to enjoy being courted alongside Unison and RCN, and show no sign at present of opposing the deal although some individual sections (notably the Speech and Language Therapists) may do so. A great deal depends however on resolving a number of key issues about the application of the new system to Amicus big battalions in healthcare science and maintenance. The main ones are:

* Better analysis of current career structures in the healthcare sciences, with some further (and more modern) types of job being evaluated to demonstrate more clearly what needs to be done locally by way of building up roles to avoid losers;

* An understanding on longer term work needed to break down career barriers between the different occupational groups in science

(notably biomedical scientists and clinical scientists);

* Satisfactory guidance on the use of recruitment and retention premia for groups where we need to pay market supplements both to avoid loss and to improve recruitment and retention.

* A review of whether the agreement on extending review body coverage might apply to some specific Amicus groups not so far listed.

None of these issues involve re-opening the agreement reached in November, and work is in progress on all of them (in the case of science careers as part of some wider modernisation work led by the Chief Scientific Officer, Sue Hill). With the exception of the fourth item on review body coverage, all of the work is supportive of modernisation and illustrates the leverage the new system is already exerting towards change."

206. Ironically, the expression “the big battalions“ was used by Mr Spillar, presumably with reference to Unison and the RCN, in a note which he submitted to the Secretary of State before their meeting.

207. The main focus in all the documents referred to above has been on Amicus MSF rather than Amicus AEEU. The main issue for the latter at this stage was RRP.

208. It is right to add that neither Mr Evershed nor any other witness expressed any criticism of any individual officer of Amicus, in terms of seeking any improper advantage for the union, except the comments about Mr Spillar hanging back until the last minute. When asked about the phone call from Mr Brown, Mr Evershed said that Mr Brown was a very gentle and laid back chap, who was clearly worried that outcomes of profiles were coming out lower than had been hoped and that this could cause the ballot to be lost. It was also clear to us from the evidence that there was a high degree of trust between Mr Evershed and Mr Whitlow of the AEEU.

209. Furthermore, we have seen a large number of documents in which Amicus MSF or Amicus AEEU put forward a case on behalf of the union members or gave advice to union members. We cannot recall seeing any such document which could fairly be described as improper. Amicus was not behaving differently from any other union in seeking to advance what it saw as the legitimate interests of its members.

210. Mr Evershed did say that he regarded Amicus MSF as hard work at the time, but that was largely because of their organisational structure. In other unions, like Unison and the GMB, the national officers would filter out any proposals which seemed unreasonable. In Amicus MSF, individual groups represented by the union tended to be able to get their own narrow sectional interests on to the agenda. This meant that the management side had to spend time “batting off unreasonable ideas.” Amicus MSF were also very aggressive in trying to get higher graded profiles published, so that the management side and the other unions had to spend a lot of time examining the evidence. Mr Evershed acknowledged however that the union had the right to raise these matters. It was the volume of the proposals that made the union hard work.

211. Apart from the comments about Mr Spillar, the only tactic adopted by Amicus which can fairly be described as improper or illegitimate is that of exploiting the unanimity rule in the JSG and the CNG to block a change which was plainly justifiable but which was not in the interests of Amicus members. We shall come to that matter later in these reasons.

212. For the present, the key findings of fact which we need to make are about the attitude of Mr Evershed and his colleagues. How far were they prepared to go to keep Amicus on board and to win the ballot? Understandably Ms Romney cross- examined Mr Evershed and other witnesses at some length about this question and the documents which have been referred to, because the question goes to the heart of the allegations of undue influence and manipulation.

213. When asked about the phrase “the big battalions”, Mr Evershed told us that following the

merger Amicus became one of the larger unions in the NHS, albeit not as large as Unison or the RCN. Because of the size of their membership, they were in some ways entitled to be given the same status as these other unions. The big battalions in this context were the numerically larger groups. The union officials were concerned about how the big groups were going to vote.

214. Mr Evershed gave examples of what he meant by "matters of detail". One of the key things which Amicus wanted was complete job families of national profiles. They wanted some of their job families filled in. No new profile could be drawn up unless JEWP was satisfied that the profile was appropriate and accurate, but JSG could influence the priority list for new profiles to be considered and, for example, cause the Amicus jobs to go to the front of the queue. That would be a matter of detail.

215. Mr Evershed also expanded on his comment, in the note of 26 November, about working to improve the careers of pharmacists and chaplains. He spoke about the former group, to which he had given more thought at the time. He believed that some profiles were coming out relatively badly because the move to pre-packaged medicines had made the traditional job less demanding. In some hospitals, however, assistants were now doing the traditional work and the pharmacists were focusing on more demanding work. He hoped that AFC would lead to the modernisation of the careers and job structures in pharmacy, by making employers focus on what people were actually doing. This was "an honourable agenda and not in any way a back room deal."

216. Having considered very carefully the documents and the whole of the evidence from Mr Evershed and others, we make the following findings of fact;

216.1 Mr Evershed talked to other unions as well as Amicus, but he was prepared to give particular attention to the Amicus concerns because Amicus was a large union and there was a real risk that the vote would go the wrong way.

216.2 In order to keep Amicus on board, Mr Evershed was prepared to be helpful on matters of detail, but not to compromise on points of principle.

216.3 Asking JEWP to give priority to considering requests from Amicus for new profiles was a matter of detail. Mr Evershed was prepared to help in this way whether the request related to one of the few male dominated job groups represented by Amicus or to one of their more numerous and larger female dominated job groups.

216.4 Considering ways of developing jobs and career structures was also something that Mr Evershed was prepared to be helpful with, irrespective of the gender of the staff mainly affected. This was more than a matter of detail, because it was a key element of the modernising agenda.

216.5 Causing a profile to be placed in a higher band than the job weight would justify would not have been a matter of detail. It is not something which Mr Evershed would have been prepared to do, even if it had been within his power to do it.

RRP, Protection and Assimilation – general comments

217. By 28 November 2002, there was detailed agreement on all these matters, RRP, pay protection and assimilation, except that the specific figure for the maintenance craft persons had not yet been agreed. That figure was agreed shortly afterwards and appeared in the Proposed Agreement which was published in March 2003.

218. In virtually every respect, the provisions on these matters which appeared in the 2003 document were identical to those in the Final Agreement which was published in December 2004. We deal with these matters at this point in the reasons, because this was the time when the provisions were agreed, but we shall do so by reference to the chapters and appendices of the 2004 document, which is the current document.

219. The two independent advisers, Mrs Hastings and Ms Fearn, were not involved in the discussions about these matters. The witnesses who were involved were Mr Evershed and Mr Smith from the management side, Mr Marks from the staff side and Mr Whitlow on the one issue of the RRP for the maintenance craft persons.

RRP – the specified groups.

220. Chapter 4 of the Final Agreement contains provisions relating to RRPs, which may be applied locally or awarded nationally. The conditions for applying a premium locally are set out in Annex D. For example, before a premium is offered to fill a vacancy, the post must first be advertised without a premium. If there are no suitable applicants, the reason must be considered, alternatives to a premium must be explored and the employer must consult with staff representatives and others. All this is uncontroversial.

221. Chapter 4 states that a premium may be short-term or long-term. The latter, but not the former, is pensionable and counts for the purposes of overtime, unsocial hours payments and any other payments linked to basic pay. Annex D provides that RRPs should be reviewed annually. Paragraph D12, however, distinguishes between short-term and long-term premia. The latter are to be adjusted or withdrawn only where a qualifying post is offered after the decision to reduce or withdraw the premium has been made.

222. The issues in this case relate not to these standard provisions, but to special provisions as set out in Annex H for certain job groups. It is stated in paragraph H6 that the negotiators of the agreement have agreed a list of jobs for which there is prima facie evidence that a premium is necessary to maintain the position of the NHS “during the transitional period.” The following jobs are listed:

* Chaplains

* Clinical Coding Officers

* Cytology Screeners

* Dental Nurses, Hygienists, Technicians and Therapists

* Estates Officers/ Works Officers

* Financial Accountants

* Invoice Clerks

* Biomedical Scientists

* Payroll Team Leaders

* Pharmacists

* Qualified Maintenance Craftspersons

* Qualified Maintenance Technicians

* Qualified Medical Technical Officers

* Qualified Midwives (new entrant)

* Qualified Perfusionists

223. The list in the proposed agreement published in 2003 was identical, except that Medical Laboratory Scientific Officers were named in that document and have been replaced by Biomedical Scientists. It is not clear to us whether the change is only one of terminology, but nothing turns on this.

224. There are specific provisions in Annex H for staff who require full electrical, plumbing or mechanical crafts qualifications and for chaplains. These provisions will be considered shortly. The general principle for other groups was that the level of premium should be set locally on assimilation in cash terms at a level at least sufficient to ensure that an existing member of staff would be no worse off on assimilation. Employers were, however, permitted to award larger premia, up to 30% (presumably of basic pay), without going through the Annex D procedure.

225. The agreement itself outlines the rationale for these special arrangements. We had more detailed evidence from Mr Evershed. The following were the main relevant factors:

* A major expansion of NHS staff was planned, to drive down waiting times.

* The uncertainty caused by the introduction of the new pay system could cause staff to leave, particularly (we would add) if they saw that their pay was likely to fall. This would run counter to the planned expansion.

* It was likely to be particularly difficult to retain staff or recruit replacement staff if there was a

significant external market for their skills.

* Existing pay rates for some staff would have incorporated allowances for market forces.

* It would not be practicable (at least within the available time), to identify those allowances, having regard to the hundreds of different employers, the variety of different contracts and the hundreds of different occupations and grades.

226. It was agreed therefore that an initial list of jobs to attract RRP should be adopted on a transitional basis, subject to review at a later date. It was possible to identify the main likely "loser" groups from the benchmark testing of the JES and the national profiles which had been prepared. The JSG included experienced union officials and, on the management side, experienced HR professionals. At meetings in September 2002, the JSG reviewed the list of "loser" groups to identify those where there appeared to be a significant external market and a real risk of recruitment or retention problems if no premium were to be paid. The final list was then drawn up.

227. It is absolutely plain to us, in our role as an industrial jury, that chaplains and maintenance craft persons are job groups for which there is an external market. Indeed the latter are the most obvious such job group. It was most certainly the case in November 2002, and was still the case in November 2004, that maintenance craft persons were widely employed throughout industry and that the NHS would have to compete with the private sector for their skills, which were in high demand.

228. Mr Evershed pointed out to us that crafts persons and estates officers usually work on the maintenance of NHS buildings, which usually tend to be very complex structures, with an unusual combination of critical systems, including piped oxygen, piped vacuum and standby generators. Mr Whitlow gave evidence to similar effect, about the importance and complexity of the work.

229. Mr Marks, whose union represents many of the potential claimant groups in equal pay cases, gave important and realistic evidence about the payment of RRP to maintenance crafts persons and other groups. He did not question the principle of a no loss payment to them, although he did have reservations about the proposal to pay a fixed sum. He said that under the old system a response to external market pressures had been to cheat by grading people above the true level for their jobs. Under AFC that was not tolerable, but there was no objection to an overt system of paying RRP where the need was established. In purist terms he would have preferred to have no RRP, but if you do not have it then people cheat the system.

230. Mr Marks was an experienced, astute and politically aware trade union official. We have no doubt that if he had thought for one moment that the maintenance and estates group should not receive even the no loss RRP, he would have said so, both at the JSG meetings and to us.

231. Mr Evershed explained that two of the groups who were to receive the RRP (in addition to the chaplains, who are considered below) were special cases. There was no obvious external market for perfusionists. They are a very small group of highly specialist staff, who operate the equipment which takes over the function of the patient's heart and lungs during open heart and similar surgery. The

NHS managers involved in the negotiations were adamant that the pay of these key staff (normally determined locally) already reflected a significant retention premium. They also insisted that great care must be taken to avoid any losses of this critical staff group.

232. The other special case was that of newly qualified midwives who were assimilated on band 5. Without the RRP, there would be no incentive for them to become midwives. As qualified nurses they would already be on band 5. Mr Smith explained that there was a national recruitment drive for more midwives and under Whitley there had been an agreement guaranteeing higher entry pay for midwives. The purpose of the RRP was in effect to replicate that arrangement. After completing their preceptorship the midwives would move up to a higher band and would no longer need the RRP.

233. Mr Evershed and Mr Smith were cross-examined about other groups who, it was suggested, could have qualified for the nationally awarded RRP, particularly radiographers and speech and language therapists. Mr Smith explained the distinction between problems caused by external competition and those caused by a lack of supply. The main problem with these two professional groups was not that the NHS was competing in an external market. The NHS was by far the main market for their skills. The problem was that insufficient numbers had been trained. Paying a premium would not address that problem, at least in the short term.

234. We accept that explanation. We find that there is no credible documentary or other evidence that any job group consisting mainly of women was unjustifiably omitted from the RRP job groups or that any job group consisting mainly of men was unjustifiably included.

235. It is to be noted that the speech and language therapists were represented by Amicus MSF. A large number of the building craft workers were represented by Amicus AEEU. They did not receive an RRP either, even though in our view a case could have been made at least for the existence of an external market for their skills. The evidence of Mr Whitlow, which we accept, was that he tried to negotiate an RRP for the building craft workers, but there was no labour market evidence and Mr Evershed did not “buy” the argument.

236. We find as a fact that Mr Evershed supported, and the JSG and CNG accepted, the case for paying RRP to Amicus groups where it was believed that the case had been made out; and rejected the idea of paying RRP to Amicus groups when not satisfied that the payment was justified. Qualification for RRP was not treated as a matter of detail.

237. We also find that most of the employees who became entitled to at least the no loss RRP were women. Mr White QC has helpfully included in his closing submissions a table showing the numbers of men and women in all but six of the relevant job groups. We reproduce that table below:

Total number of employees

Female employees

Job

Male employees

617

164

Chaplains

452

Clinical Coding Officers

544

527

Cytology screeners

17

Dental nurses

Dental hygienists

2681

2364

Dental technicians

317

177

173

Dental therapists

4

1537

33

Estates officers/works officers

1504

Financial accountants

Invoice clerks

13,636

8791

Biomedical scientists

4845

Payroll team leaders

5984

4363

Pharmacists

1617

3263

8

Qualified maintenance crafts persons/technicians

3255

155

51

Qualified medical technical officers

104

631

585

Qualified midwives (new entrant)

4

155

51

Qualified perfusionists

104

40,022

23,401

Totals

16,574

238. The table is accurately based on one which was given and accepted in evidence, but it is in a rather clearer format. The table given in evidence has a note that the number of men and women shown do not add up to the total given in all cases, because of missing gender information, particularly in relation to midwives.

239. We do not have the figures for the remaining six groups. We find as a fact, however, that they were all predominantly female groups.

240. We turn now to the views on the question whether the RRP can be removed from staff currently receiving it, or at least reduced on review. There was a division of opinion on this issue. Mr Marks, Ms Cartmail and Mr Jackson were clear that the premium can be removed. Mr Smith was broadly of the same view, although he accepted that it is more difficult to reduce or remove a long-term premium than a short-term premium. Mr Evershed, however, contemplated that if a craft worker has an RRP, he will continue to receive it until he retires, provided that he remains in the job requiring the use of the relevant craft skill.

241. The construction of the relevant provisions of the Final Agreement is a question of law. We shall consider that question when we come to the legal issues arising under issue 5, the GMF issue.

RRP – Chaplains

242. By the time of the Final Agreement, there were 617 chaplains, of whom 452 (73%) were men and 164 (27%) were women. Of these 617, 56 were assistant chaplains who were banded at band 5. We do not have the gender breakdown of the 56. The remainder were banded at band 6 or, in the case of the team leaders, band 7.

243. Their 1 April 2004 basic pay under Whitley was in the range £24,902 to £29,134. In addition, they were entitled to accommodation allowances of £3,500 per annum. The Whitley pay was very close to the band 6 pay, which at 1 October 2004 was £21,630 to £29,302. In terms of basic pay, all the chaplains would assimilate at band 6 without the need for protection. The range for band 5 was £18,114 to £23,442. Accordingly the assistant chaplains would require protection.

244. We did not have evidence from any one who had first hand knowledge of the origin of the accommodation allowance – either when it was first paid or the reason for paying it. We find on the balance of probability that it was introduced because most of the chaplains were Church of England and the NHS was competing for chaplains in an external market in which the provision of accommodation was the norm. That was Mr Evershed's understanding and it seems to us to be a reasonable assumption.

245. We were told that some chaplains were part – time and were entitled to a pro rata accommodation allowance. We do not know the number or the gender breakdown. We were also told that there are chaplains from other faiths, but not how many. We do not know whether any of these other chaplains would have been entitled to accommodation, or an accommodation allowance, in the external market.

246. We also had no information about pay in the external market, whether for Church of England

clergy or for those of other faiths. Ms Romney referred Mr Evershed to a document in which he commented that on the original band 5 rating for chaplains (which was still the proposed rating in November 2002) the base pay looked reasonable in comparison with church roles. It seemed to us from Mr Evershed's evidence that he did not actually know what the rates of pay for clergy in the Church of England were. He certainly did not give us a figure or claim any specialist knowledge.

247. Ms Romney also put to Mr Evershed a letter dated 4 September 2004 which was sent to chaplains by Ms English of the College of Healthcare Chaplains, which was part of Amicus. This was just before the key date of 1 October 2004. In that letter, Ms English advised chaplains who were entitled to the allowance and not receiving it to claim it now so as to be entitled to the RRP. Mr Evershed was unable to comment on the letter save to confirm that the allowance was payable not only to full-time chaplains but also pro rata to part-time chaplains.

248. Mr Evershed also told us that although Amicus was the main union for the chaplains, there were also some chaplains who were members of Unison. We do not know how many, but we suspect only a few, in view of Unison's lack of involvement on their behalf. Mr Marks commented on the RRP for the chaplains in a detached and objective way.

249. It is part of the case for the claimants that the RRP for the chaplains was agreed at the behest of Amicus MSF and to keep the union on side. We do not accept that submission. We are satisfied that the decision to pay the RRP to the chaplains had nothing to do with Amicus or with the fact that most of the chaplains were male. We make that finding of fact on the following grounds:

249.1 We have found Mr Evershed to be an honest and credible witness. It would require very clear evidence to persuade us of his bad faith in this matter.

249.2 It defies credibility that Mr Evershed and the JSG would bend the rules for the chaplains at the behest of Amicus, but fail to do so in terms of an RRP for the speech and language therapists and the building craft workers. Both these groups were influential. Both contained vocal opponents of AFC. A few hundred chaplains, on the other hand, were not a big battalion in any secular sense.

249.3 Mr Evershed has given a very clear explanation for the decision to pay the RRP to the chaplains. They were unique amongst NHS staff in receiving an accommodation allowance. It appeared that the allowance had been introduced as a market supplement to enable the NHS to compete in the external market. That external market still existed. The chaplains, even at band 6, would suffer a drop in pay if the allowance were to be removed and not replaced. The chaplains satisfied all the criteria which had been adopted by the JSG for awarding RRP.

250. The fact that the accommodation allowance was unique is confirmed by Annex B of the Final Agreement. This Annex lists various leads and allowances. It puts them into three groups – those which related to job weight, those which related to unsocial and flexible working patterns and those which related to recruitment and retention premia. In the first category, there were for example five items for maintenance staff (such as use of special equipment allowance) and five for ancillary staff (such as foul linen payments). The second category included a wide variety of on-call, stand-by, shift and night duty allowances. The only items in the third category were the chaplains' accommodation allowance, a special hospital lead and a regional secure unit lead.

251. The evidence of Mr Marks was that initially he had reservations about the RRP for the chaplains. His view was that no RRP should be paid unless it was required under the general no loss provisions which had been adopted for other groups. When he thought about the matter more, however, he could see a distinction between the case of the chaplains and that of the other groups. Before AFC they received their basic pay plus a discrete sum for accommodation. It was logical that after AFC they should receive whatever the correct figure was for their basic pay under the JES, together with the same discrete sum for accommodation. We agree with that analysis, particularly in view of the close similarity between the pre AFC pay and the band 6 pay.

252. We make one further finding at this stage in relation to the chaplains. We suspect that twenty years ago nearly all the chaplains would have been men. The Church of England did not admit women to the Ministry until 1994. Other faiths still do not admit women. There is an exception in the SDA permitting this discrimination. In this context, we find the proportion of women amongst the chaplains to be surprisingly high. If it has risen quite quickly from nil to 23%, we would expect it to keep on rising. The illustrative figures from the first respondent were interesting, showing a high proportion of women.

RRP – maintenance craft workers

253. The maintenance craft persons were at the material time an almost entirely male group. As a result of the decision made in September 2002 they were assured of a no loss RRP like the employees in the other 14 agreed groups.

254. Mr Whitlow, however, applied on their behalf for a fixed RRP. He sent an email to Mr Evershed on 21 November 2002, in which he said that the potential losses from AFC were becoming easier to quantify. It is not clear whether he and Mr Evershed had had any previous discussion on the subject. Mr Whitlow set out some figures based on the difference between the existing MAP rates for NHS craft persons and the lower rates which would be payable under AFC. He also made the point that these figures understated the true position, because many craft workers had local agreements on major elements of their pay, even where their basic pay was fixed under the national agreement. For example a survey some six months earlier had indicated that the majority of craft workers had local agreements under which their callout allowance was between £1 and £2 per hour, compared to the MAP figure of 64p per hour.

255. Mr Whitlow did not propose a specific figure in his email. Plainly he had in mind that the figure if agreed would mean some increase in pay, at least for those of his members who were on the national spot rate, as opposed to higher local rates. Otherwise there would have been no point in proposing a fixed rate.

256. We find that Mr Whitlow had two reasons for proposing a fixed rate, in addition to the obvious one of seeking additional pay for his members. These reasons were:

* The MAP spot rates payable to the maintenance craft workers and technicians had fallen in

relation to other staff since about 1990. More importantly, they had become uncompetitive against the rates payable outside the NHS. Maintenance and estates departments had been declining and it was necessary for pay to move nearer to the national industry figure to arrest that decline.

* There was also a problem regarding the age profile of the labour force. This was the oldest of all the staff groups in the NHS. Mr Whitlow believed that young workers tended to be less influenced than older workers by pension and other benefits and that they were more interested in the take home pay, which was not high enough to attract them. There were very few keen young craft workers coming into the NHS to make it their career.

257. Mr Marks explained that the way the case was put in the JSG was that, because of the spot rate, the maintenance group were not going to be " all over the place" on assimilation in the way that other groups with their variety of grades were. Because there was a set JIB rate, the external market factors could also be measured.

258. Mr Marks said that there was a full discussion in the JSG. His recollection was that he said that he did not see why this group should be treated differently from other groups. He was told (we do not know by whom) that with a fixed rate the amount of the RRP would be known in advance, whilst in other groups the amount would not be known until assimilation.

259. The outcome of the discussion was that Mr Whitlow was told to go away and see if there was evidence to support his contention regarding the fixed rate. He was to present to Mr Evershed whatever evidence he uncovered. They were to discuss the matter and report back on the outcome of the discussion.

260. Mr Whitlow sent an email to Mr Evershed on 19 December 2002. He said that the JIB hourly rate for an approved electrician was £9.75 per hour. He added that he would provide further information, including the JIB rate for technician electricians, in the new year. We have been told, and we accept, that the JIB rate for electricians was used as the rate for other maintenance craft persons as well. The technicians were multi skilled craft persons who in the event were likely to qualify for band 4, although at this stage the band 4 profile had not yet been produced.

261. On 13 January 2003, Mr Whitlow sent a further email to Mr Evershed. He gave some detailed information and stated his sources. There were four key figures for annual pay, as follows:

* The current MAP rate for a maintenance craft worker was £320.68 per week, equating to an annual salary of £16,675.

* The JIB rate for an approved electrician was £9.75 per hour, equating to £360.75 per week (on a 37 hour week) and an annual salary of £18,759.

* The current MAP rate for an NHS maintenance technician was £347.91 per week, equating to an

annual salary of £18,091.

* The JIB rate for a technician was £11.05 per hour, equating to a weekly figure of £408.85 and an annual salary of £21,260.

262. The annual figures would have been a little higher if Mr Whitlow had adopted the conventional approach of multiplying the weekly figure by 52.14 instead of by 52. This would have made the contrast with the AFC rates slightly more favourable to the case which he was putting forward.

263. The first two of the figures fall to be compared with the maximum band 3 figure under AFC. The initial figure was to be£14,900, uplifted to £15,381 after 1 April 2003. .The corresponding uplifted April figure for band 4 was £18,064. Accordingly, it will be seen, without RRP a band 3 craft worker on the maximum April rate would have been £1,294 below the MAP rate and £3378 below the JIB rate. A band 4 technician would have been only £27 below the MAP rate, but £3196 below the JIB rate.

264. The MAP and JIB rates were not the only figures quoted by Mr Whitlow in his email. He also gave several examples of named employers who in some cases paid above the JIB rate. There were 16 examples of the weekly rates for electricians and other craft workers and in most cases the rate was above the JIB rate. Indeed in five cases the weekly rate was more than £400. There were 12 examples of the pay of technicians, but here the picture was more variable. There were some employers paying below the JIB rate, but some paying well above it, in one case as much as £480.

265. Mr Whitlow's email also referred to the New Earnings Survey. He said that the basic weekly salary for electricians (excluding overtime and bonus payments and the like) was £368.90, equating to an annual salary of £19,182.

266. Mr Evershed and Mr Smith had a meeting with Mr Whitlow and his researcher. Ms Romney asked them if they had checked Mr Whitlow's figures at any stage. Their answers were rather vague. Mr Evershed said that he would have got some one to look at the figures. Mr Smith said that we had looked at some of the published information, he thought that published by the IDS. We find on the balance of probability that some checking was done, but that not very much time and effort went into it.

267. We also find that Mr Whitlow provided figures which he believed to be accurate and acted in good faith in providing the information. The MAP figures given in the second email and the JIB rate given in the first would have been well within his own knowledge. The examples of rates paid by individual employers appear to be broadly consistent, allowing for the time difference, with those quoted in the Greenwich report which is referred to later in these reasons.

268. At the meeting, however, the examples of these rates paid by individual employers were not taken into account. Mr Whitlow accepted that some of these might only have reflected local market conditions. Mr Evershed accepted that the evidence supported an increase on the MAP rates, but in negotiating the RRP he made the point that it would not be appropriate to go to the full JIB rate, even if this was generally treated outside the NHS as a base figure. The reason was that NHS employees

received benefits, the most important of which was the final salary pension scheme, which typically were not enjoyed by the craft persons in industry. Mr Whitlow conceded this point also.

269. It was expected at the time that most of the qualified crafts persons would assimilate to band 3. It was agreed by Mr Evershed and Mr Whitlow that a reasonable total figure would be £18,100. This would be £659 below the JIB rate.

The AFC band 3 rate from 1 April 2003 would be £15,381. The figure to be adopted as the RRP figure would also be increased by 3.225% on that date. Accordingly Mr Evershed calculated a figure of £2635, which would go up to £2720 on 1 April 2003, producing a total figure of £18,100. That would be an increase of £1,425 on the MAP rate.

270. Mr Evershed and Mr Whitlow discussed whether a higher premium should apply to technicians who were assimilated at band 4. It was agreed that the same premium should apply. This meant that the total figure, with effect from 1 April 2003, would be £20,784, being £476 below the JIB rate and £2693 above the MAP rate.

271. It is pointed out by Mr Lynch QC and Mr Milford that the shortfall on the JIB rates is increased if the 3.225% is taken off the AFC April figures (including the RRP) in order to compare the figures at January 2003.

272. Having considered very carefully Mr Evershed's evidence and the surrounding circumstances, we make the following findings of fact about Mr Evershed's reasons for agreeing to the fixed RRP figure for the maintenance crafts persons. We find as follows:

272.1 It was very much in his mind that the whole AFC project would be at risk if the Amicus vote was lost. There could be a knock-on effect on other unions such as Unison. Mr Whitlow plainly believed that there was a risk that this could occur.

Mr Evershed was in these circumstances more than willing to spend time considering the case put forward by Mr Whitlow. He wanted to be able to accept that case, but he needed to be satisfied in his own mind that the case had been made out.

272.2 There were advantages in having a single RRP rate for this group (or indeed any group) of staff, because there would then be a clearly ascertained and defined rate for the recruitment of new staff. It was not possible to have a consistent rate for other staff, because other staff groups did not have the NHS spot rate and the single external rates to be used as benchmarks.

272.3 Mr Whitlow had plausibly argued that the rates for crafts persons had fallen a long way below the rates in the external market and that something more than a no loss premium was needed in order to hold the line.

273. We have already found that one of the considerations very much in Mr Whitlow's mind was his aspiration to make a career in the NHS a more attractive option for younger craft workers. The

improvement of jobs and of career structures was consistent with the objectives of AFC, but we do not find that it was one of the matters taken into account by Mr Evershed when he agreed the RRP for the maintenance crafts persons and technicians.

274. Mr Evershed had subsequent discussions about RRP for staff in higher bands who held the relevant qualifications. The conclusion reached was that the premium should cease unless, exceptionally, the higher weighted job required the day to day exercise of the relevant craft skill. The expression used in the trade was remaining "on the tools". The Final Agreement does not appear to give any specific guidance on this issue, but it does state in Annex H that the premium is payable to staff who require the relevant qualification.

275. In the discussion at the hearing about the external market, Ms Romney pointed out to Mr Whitlow that rates for maintenance crafts persons in local government were lower than those in the NHS. Mr Whitlow was able to speak with authority on this issue, because the union represented maintenance workers in local government as well as those in the NHS. He explained that the difference was that the employees in local government had the opportunity of earning large productivity bonuses on top of their basic pay. There were no bonus schemes for his members in the NHS and their average total pay was very much less than the average total pay for those of his members who worked in local government.

276. Once the agreement on RRP had been negotiated between Mr Evershed and Mr Whitlow, it was effectively rubber stamped by the JSG. In his answers to the Tribunal's questions Mr Marks accepted that it had been left to Mr Evershed and Mr Whitlow to sort out. He was very frank in stating his reasons for his lack of interest in the details of the agreement. He and his colleagues had been "banging on" with AFC for a long time and "sort of put it to bed" just before Christmas. The focus now was on how to consult with members with a view to getting AFC accepted. The issue of the RRP for this small number of employees was not one of overwhelming importance.

Assimilation

277. There were some differences between the proposed agreement of 2002 and the final agreement of 2004, but the basic principle was the same. Even though we are dealing with an agreement made in November 2002, we shall outline the provisions contained in the final agreement.

278. The starting point was to calculate payments before assimilation. These included basic pay, any contractual overtime, leads and allowances measured in the JES (or taken into account in any RRP), London weighting and similar payments, shift allowances and other payments related to unsocial hours, on-call payments, bonus payments from schemes which were to be discontinued and other leads and allowances paid with part of regular pay which would cease on assimilation. All these items were to be totalled and the employee would go into AFC at the next highest pay point. Although there was provision for bonus payments to be taken into account, this was not a major factor. The only bonuses in the NHS were bonuses for ancillary workers. The number of NHS employees receiving bonuses at August 2000 (the latest date for which we had available figurers) was 11,920 women and 5,930 men.

279. Employees who came into a band from below the band would assimilate at the lowest point in that band, subject to some special transitional provisions. For staff other than those at band 1 and band 2, there were transitional points below the normal minimum figure. There was one transitional pay point at band 2 and no transitional point at band 1. Mr Marks told us that these transitional points were proposed by the management some time in August or September 2002. The reason was to control costs in the first three years of the system, which would allow the highest pay point in each band to be higher than would otherwise have been the case.

280. The agreement contained special provisions for staff returning from career breaks, maternity leave or other special leave and also for staff approaching retirement age.

281. Mr Evershed explained the thinking behind the assimilation rules. Staff enjoyed a wide variety of terms relating to pay under the Whitley provisions. There was further complexity where terms had been agreed locally. It would have been impossible in practice for managers to judge fairly where to place employees on the new pay scale. A further complication was that there was temporary protection for working hours (where staff were now required to work 37.5 hours a week and had previously been required to work for a shorter period). There were also some employees on spot salaries but the majority on pay scales. Placing employees on the new scale on a case by case basis would have given grounds for endless disputes. The advantage of the simple rule that was adopted was that it would in general take into account past management decisions (for example on performance and experience) without requiring very complex rules or judgments to be applied across over 1m staff.

282. Mr Marks also told us that the standard rule under Whitley was that anyone transferring went to the next highest pay point. It was generally expected on the union side that this would be in the agreement.

283. Mrs Hastings gave evidence to the same effect. When questioned by

Ms Romney, she said that it is the standard practice in this country and has always been the standard practice for those who are within the range to move over at existing salary, those below the minimum to go to the minimum of the scale and for those whose old salary is above the maximum to move, for their substantive salary, to the maximum point in the scale. The notion that employees who had or could have had equal pay claims should be put onto a higher point as well was plainly unfamiliar to her.

284. Mr Evershed said that the assimilation rule did not have the effect of permanently protecting differentials. He said that the implementation of the NHS Knowledge and Skills framework would gradually impose on the new pay grades a competence related check on progression. These are provisions under which at two points on the scale staff have to pass through a “gateway” at which their competence is tested. It should be noted, however, that some of the new pay spines had as many as 9 pay points, together with an extra 3 transitional points, and it could therefore take a very long time for some employees to move to the top of the pay scale.

285. We have no statistics at all to show the numbers of men and women who went onto the lowest transitional pay point in each band and the number of men and women who went onto higher points. We find that there has been no deliberate suppression of the statistics by the respondents. It is simply a case of the arrangements for compiling statistics being not very good.

Pay Protection

286. Mr Evershed told us that pay protection was one of the very last items to be negotiated in November 2002. The justification for pay protection was that staff who have been in receipt of higher pay prior to AFC would have shaped their lives and financial commitments on the basis of their pay. It would be harsh and unfair suddenly to reduce their remuneration. A protection arrangement could enable them to meet financial commitments that they had entered into on the basis of their old salaries. It is also an important factor that the unions would not have accepted AFC and their members would not have voted for it without pay protection.

287. At the same time, it was necessary to limit the number of employees on protection. It was undesirable in principle to have pay protection, because it left some staff on rates of pay above the level appropriate to their job weight. It could also lead to a loss of staff, because staff regard pay protection as a sign that their jobs are less valued than they had thought. They are also concerned that their real income would drop over time.

288. This evidence was confirmed by Mr Marks. Pay protection, although essential, is not popular with union members. One of the success criteria which was agreed for the new pay system was that no more than 8% of the staff should be on protection. This percentage came from the staff side.

289. The agreement provided that the protection pay would be the amount by which pay before assimilation exceeded payments after assimilation. The items to be taken into account to calculate payments before assimilation were those referred to above in relation to assimilation. The items to be taken into account on the other side were the same items but excluding the leads and allowances which were to cease on assimilation.

290. We did not have much detailed information about the negotiation of the period of protection. Historically, the NHS had had a protection scheme based on length of service and the number of years until normal retirement age. It was obvious to Mr Marks and his colleagues that it would be impossible to obtain a scheme as generous as this and he pointed this out at various Unison and other meetings. The management for their part, we were told by Mr Evershed, wanted to pay as little as possible in terms of protection. The provisions which were agreed, and incorporated in both the proposed agreement and the final agreement, were that staff were to have protection for six and a half years, with just one pay increase during that period, on 1 April 2005. The period of protection would be until 30 September 2009 in the early implementer sites and until 31 March 2011 at other sites. Protection would also end if and when payments under the new system exceeded the level of protected pay or when the protected person changed jobs voluntarily.

291. Obviously one way to limit the number of staff on protection was to increase pay rates, so that there would be fewer staff earning less than their former pay. Some employees were taken out of protection in this way, especially by the increase in the minimum payment at band 1. It was also expressly stated in the agreement that as soon as possible during the period of protection, the skills, knowledge and role of staff that were subject to protection would be reviewed, to establish whether they could be re-assigned to a higher weighted job or offered development and training to fit them for a higher weighted job.

292. Mr Evershed said in reply to Ms Romney that the final position on protection was less than the unions had demanded. There had been a process of negotiation. The unions had started with the demand for five years of full protection and then more or less indefinite mark time. The final agreement was the minimum that the unions were prepared to accept.

293. Mr Evershed had not given any consideration to the possibility of making payments to women who had or might have had equal pay claims so as to bring their pay up to the level of the comparators during the protected period. He said that if this had been done the cost would have been astronomical.

294. We were given figures showing the gender breakdown of the employees entitled to protection. The figures are not complete, which is why they fall short of the approximately 8% of employees who were on protection. The number of men was 7,865, amounting to 0.8% of the total of NHS employees. The number of women was 26,950, amounting to 2.9%.

Back pay claims

295. On 12 November 2002, the Secretary of State and the Minister of State had a meeting with Mr Marks and his colleagues Mr Abberley of Unison and Mr Humphreys of the RCN. The note of the meeting indicated that the Secretary of State was looking for reassurances, in return for movement on the union issues, the Government were looking for reassurances from all the unions, and in particular the RCN, that they would not encourage or support equal pay claims.

296. Mr Marks and Mr Abberley said that they thought that they would need to take legal advice on this to see what their contractual obligations were to their members in terms of representing them. This, to use a phrase favoured by Mr Marks, was their way of kicking the proposal into the long grass. The Secretary of State indicated that he saw the difficulties, but that a way must be found to reach an understanding that provided him with the reassurances which he needed.

297. We were told by Mr Evershed that attempts were made by the Department of Health to draft a memorandum of understanding. This, he said, would relate to the conduct of the parties following an agreement on AFC and would have no bearing on the design of the pay system itself. No agreement was signed, but Mr Evershed's understanding of the outcome was that the unions gave satisfactory assurances to Ministers that they continued to want a negotiated settlement of their members' concerns about equal pay. At the same time the unions refused to sign any document which limited their ability to fulfil their duties towards their members in respect of specific claims.

298. Although no guarantee had been given, the unions did hold back on further claims for a period of more than two years, until after the final agreement had been signed. In our view it is difficult to see how Agenda for Change could have been achieved in partnership if at the same time the unions had been actively encouraging and supporting equal pay claims.

The Proposed Agreement

299. Ms Romney drew our attention to a further document relating to the period leading up to the proposed agreement. This was a note dated 15 November 2002 from Mr Evershed to the Secretary of State. In that note, Mr Evershed referred to groups of staff who would secure substantially increased earnings as a result of AFC. One of these groups was ambulance paramedics on local contracts, whose earnings would be increased as a result of the new arrangements for unsocial hours payments. The other group were "skilled ancillary workers in female dominated groups (such as qualified cooks and sewing room supervisors) who have historically been paid much less than male groups with equivalent skills such as plumbers and electricians. In places like Carlisle which have retained the low grading of these staff, they could see increases of 30-40%. We think this can be presented positively and without impacting on wider IR issues, despite the fact that the new system will save us money compared to Tribunal settlements by phasing in the gains over several years as staff move through the pay points".

300. The proposed agreement was signed on 28 November 2002. Many of the important provisions of the document have already been referred to, particularly those relating to RRP, assimilation and protection. The document also set out the pay bands, which at this stage ranged from 0-720. The bands were as follows:

* Band 1: 0-160
* Band 2: 161-215
* Band 3: 216-270
* Band 4: 271-325
* Band 5: 326-395
* Band 6: 396-465
* Band 7: 466-539
* Band 8A: 540-584
* Band 8B: 585-629
* Band 8C: 630-674
* Band 8D: 675-720

301. There were two separate spines, one for jobs covered by the Pay Review Body and one for other jobs, but the two spines were and remained identical. We should add for completeness that by the time of the final agreement two years later, band 9 had been added at 721-765. This was simply because a number of senior jobs had come out with points exceeding 720.

302. After the document had been signed in November 2002, there was still a long way to go before AFC could be fully achieved. The three matters to be attended to early in 2003 were the arrangements for union members to vote on AFC, the arrangements for AFC to be applied in the early implementer sites and the publication of the first edition of the Job Evaluation Handbook and of additional profiles, initially for use at the early implementer sites. It is to those matters that we now turn.

Information for Union Members

303. Both management and unions now undertook an extensive communication exercise to the NHS staff. Letters were sent to all NHS organisations for distribution to members of staff and booklets on the new system were also widely distributed. We have seen these documents. There was also a web site, so that employees could go online to read the November 2002 Agreement and other documents. Unions also held road shows and special conferences.

304. We find as a fact that all reasonably practicable steps were taken to ensure that employees were fully informed about AFC before they voted. Each individual member of staff had the opportunity to find out what AFC would mean for him or her before casting a vote. The exercise was a transparent one.

305. The outcome of the votes was that all but two of the unions (The Society of Radiographers and UCATT) voted in favour, although three of them were to have a second vote before the final agreement could be entered into. These three included two of the largest unions, Unison and Amicus.

306. The union ballots had taken place by June 2003 and accordingly there was then authority to proceed with early implementation, preparations for which had already been made. The decision to proceed was announced through a press release. From this point, in June 2003, the CNG was replaced by the new Staff Council and the JSG by the Executive of the new Staff Council, both operating in shadow form pending the final agreement.

Early Implementation

307. Mr Smith and his small team of staff had the main responsibility for early implementation. Towards the end of 2002, Mr Smith had recruited a team of five Best Practice Facilitators. They themselves received additional training and they prepared a set of documents for use at the early implementer sites.

308. Early in 2003, Trusts in England were invited to apply to be early implementers and just over 50 applied. There was a joint selection process involving representatives of the Department of Health, NHS employers and the Unions. As a result of this exercise, 12 Trusts were invited to become early implementers. They had a geographical spread throughout England and there were representatives of each of the major type of Trust, Acute, Mental Health, Primary Care and Ambulance. A Teaching Hospital (Guys and St Thomas) and a Specialist Trust (Papworth) were also included.

309. One of the best practice team was assigned to each of the early implementers. A training package was tested and training was carried out in each of the 12 organisations. The typical length of

training was 5 days. Training was delivered by members of JEWP.

310. Mr Smith also commissioned a Computer Aided Job Evaluation programme for use first at the early implementer sites and then throughout the NHS if AFC went ahead. This programme was known as CAJE. The purpose of CAJE was to ensure that each organisation had its own record of each local match or evaluation. At the same time all the data could be recorded and stored centrally for consistency and equality monitoring.

311. Early implementation began on 1 June 2003. The responsible bodies in Scotland, Wales and Northern Ireland had chosen not to have early implemented sites themselves but obviously took close interest in the results from the sites in England. Scotland also did bench testing in a number of sites.

312. Progress on implementation was monitored by the JSG and the CNG. The 112 sites were visited by Mr Smith and by senior union officers. On occasions when there were contentious issues, Mr Smith and his senior union officer, usually Mr Marks, made joint visits. There was also a system for dealing with questions about the interpretation of the agreement. Mr Smith and Mr Marks worked on answers to the queries. Those answers were then discussed and either modified or agreed by the JSG and the CNG and were then sent to all 12 sites.

The Job Evaluation handbook – 1st edition

313. The first edition of the Job Evaluation Handbook was published in March 2003, so that it would be available for use at the early implementation sites.

314. The factor headings and maximum scores for each factor were identical to those which were to be set out in the second edition of the Handbook in 2004. Those details will be shown at this stage, since the first edition of the Handbook was the definitive one so far as the staff at the early implementer sites were concerned.

315. The factor headings and maximum points were:

* Communication and relationship skills – 60
* Knowledge, training and experience – 240
* Analytical skills – 60
* Planning and organisation skills – 60
* Physical skills – 60
* Responsibility – Patient/client care - 60
* Responsibility – Policy and service - 60
* Responsibility – Financial and physical – 60
* Responsibility – Staff/HR/Leadership, training _ 60
* Responsibility – Information resources – 60
* Responsibility – R&D – 60
* Freedom to act – 60
* Physical effort – 25

* Mental effort – 25
* Emotional effort – 25
* Working conditions – 25

316. The number of points under each heading depended on the level the job achieved against that demand factor. It was impossible to score no points at all for any factor. For example the level 1 scores for KTE (knowledge, training and experience) and for freedom to act were 16 and 5 respectively. There were only four levels for emotional effort (5, 11, 18 and 25 points), but at least five levels for every other factor and eight levels for responsibility for patient/client care (4, 9, 15, 22, 30, 39, 49 and 60 points).

317. Guidance was given in relation to each of the 16 factors on the matters to be considered in placing a job being matched at the appropriate level. For example, the 2 pages on the knowledge, training and experience factor began with an opening paragraph in the following terms:

"This factor measures all the forms of knowledge required to fulfil the job responsibilities satisfactorily. This includes theoretical and practical knowledge; professional, specialist or technical knowledge; and knowledge of the policies, practices and procedures associated with the job. It takes account of the educational level normally expected as well as the equivalent level of knowledge gained without undertaking a formal course of study; and the practical experience required to fulfil the job responsibilities satisfactorily."

318. There was then an explanation of what was required at each of the 8 levels. For example, at level 5, the requirement was:

"Understanding of a range of work procedures and practices, which requires expertise within a specialism or discipline, underpinned by theoretical knowledge or relevant practical experience."

There were then definitions and notes relating to each of the 8 levels. For example, the level 5 note stated that:

"Expertise within a specialism would normally require Degree level or the equivalent level of knowledge. Jobs requiring knowledge normally acquired through training for RGN should be scored at this level."

319. There was similar, but generally less detailed, guidance in relation to each of the other 15 factors. The handbook then contained pages on job evaluation weighting and scoring, followed by a copy of the weighting scheme; a page on the development of professional roles; a page on the procedure for agreeing and changing profiles; pages on the job matching procedure against the national profiles and the appeal procedure; and the national protocol for local job evaluations. There is also a one page guide to the use of profiles, but this ended with a note that detailed guidance on the profile matching process would follow. When the second edition of the handbook was published in October 2004, the detailed guidance on matching was contained in the handbook itself and will be considered when we come to deal with that edition of the handbook.

320 The first edition did not contain any reference to the hybrid procedure. We were told by Mr Smith that this procedure was developed and tested late in the early implementation process and was found to work well. Guidance on it was given in the second edition of the handbook.

321 The first edition also contained nearly 100 national profiles. In each case there was a short job statement, followed by a note of relevant information and a factor level (or range of factors) against each of the 16 factors, with a total score and a banding at the end. When the second edition of the handbook was published, the number of profiles had expanded to the point where it was not practicable to put them all in the handbook and instead they were placed on the website.

The Outcome of Early Implementation

322 In September 2003, the first staff in some of the early implementation sites transferred to AFC Terms and Conditions. By February 2004, there had been sufficient progress in job matching or local evaluation for just over half the staff in 11 of the 12 sites to transfer to AFC.

323 The remaining site was Sunderland. No staff at all had transferred. The reason was that Sunderland had adopted a "big bang" approach. All the matching and local evaluation was to be completed before any results were announced.

324 In May or June 2004, the CNG began to review the data from the 12 early implementation sites. There were more than 15,000 anonymised records of particular jobs. There were meetings with management and staff representatives from all the sites. There was also a report by the Nurses and Midwives Pay Review Body.

325 Some of the results from Sunderland appeared to be out of line with results from the other sites, including a higher level of staff on protection. Mrs Hastings visited Sunderland and analysed the monitoring data. She produced an initial report on 8 June 2004 and a second report on 16 June 2004. Her main conclusions were as follows:

* Unnecessary time had been spent on local evaluations. The analysis of unsuccessful outcomes showed that in some cases there could have been successful matches.
* Although the procedure adopted was more time consuming than necessary, it was both analytical and rigorous.
* The correlation between the scores achieved through matching and through evaluation of the same job was statistically significant and confirmed the consistency of the job evaluation process.
* There were several cases of unsuccessful matches when it had appeared from the job title that there should have been a successful match. In some of those cases the job title was misleading. For example, the job of nursery nurse in the neo-natal unit was significantly different in content and demand from the national profile job.
* There were also reasons of job content why some jobs had been matched against lower bands than might have been expected. For example, all the medical secretaries had matched against the band 3 profile, but this was because there was also a post of senior medical secretary and the medical

secretaries received more supervision and support than was likely to be the case in other Trusts. Medical secretaries employed in Sunderland were not required to have the same educational qualifications on appointment as in some other Trusts.

* There was no causal connection between the procedures adopted in Sunderland and the band outcomes causing concern.

326. We heard a good deal of evidence about Sunderland, but Sunderland was not even mentioned in the closing submissions.

327. Sunderland was not the only site where local evaluation was found to be time consuming. In February 2004, Mrs Hastings prepared a paper for the Shadow Executive about the reaction to the matching procedure from the early implementer sites (other than Sunderland at that stage). The reaction was extremely positive. The early implementers believed that the procedure worked well, giving results that were perceived to be fair and correct. Their experiences of the local evaluation procedure were more negative. Post holders were taking a long time to complete questionnaires and not completing them well. Some job analysis interviews were lasting between 4 and 6 hours and even then the Job Evaluation Panels were often finding that essential information was missing. This resulted in the job analysis questionnaire (JAQ) having to go back to the analysts and the post holder. All sites reported that the job evaluations themselves were taking at least half a day.

328. The problem of high protection levels was also not peculiar to Sunderland, although it was particularly acute there. The reason why this was a general problem was that the new arrangements for payment for work in unsocial hours were having a much more dramatic impact than had been anticipated. It was essential for this issue to be addressed. If the overall levels of protection at the early implementer sites were to be reproduced throughout the NHS (and there was no reason why this should not be), then the cost of implementing AFC would be greatly increased. Perhaps more importantly, those levels of protection would be unacceptable to union members. There would be a greatly increased risk that Unison and Amicus, which were due to have their second ballots in the autumn, would vote against AFC.

329. Mr Evershed had returned to the Department of Health in April 2004 and was involved in the final review of experience in the early implementer sites. The major problem which he and Mr Smith and their colleagues on the CNG had to address was this problem of the unsocial hours. They considered the possibility of designing and testing a new system, thus delaying the roll out of AFC. They rejected this option. It carried significant risks of the momentum and funding being lost. In the event, it was agreed to "de-couple" the unsocial hours arrangement from the agreement. The rest of the agreement stood as negotiated, but with some interim arrangements for unsocial hours. It was also agreed that a new scheme would be developed and tested after the final agreement had been entered into and the scheme rolled out.

330. The other major issue was one of timing. The proposed agreement in 2002 had provided that, if the agreement became unconditional, the new system should take effect from 1 October 2004. It had been intended that the final agreement would be signed before that date. This proved to be impossible. As mentioned, there were 3 unions which had promised their members a second ballot. One of these unions reported that, once the review of the early implementer sites had been completed, it would need 3 months to complete the ballot process. Accordingly, it was agreed that if the review was satisfactory and the ballots had come to a positive result, assimilation would begin on 1 December 2004. The unions which were already committed to the new pay system, however, were adamant that the benefits of the new system for their members should accrue as planned from 1 October 2004. Accordingly, this date was retained for pay purposes. Irrespective of when staff were actually assimilated to the new

pay structure, they would be treated as entitled to their new pay rates with effect from 1 October 2004. A joint statement announcing this change to the timetable was published on 11 June 2004.

331. The conclusion of the review of the early implementer sites was that, apart from the issue of payment for unsocial hours, the AFC pay system was deliverable and affordable. It was recommended that the system be rolled out, subject to the outcome of the second union ballots. The conclusion of the review was announced on 11 August 2004, and a document reporting the review was published on 23 August 2004.

332. In that same month, August 2004, a number of NHS staff represented by Mr Cross presented equal pay claims against the Morecambe Bay NHS Trust. Obviously those claims had not proceeded to any hearing by November 2004. Indeed, the claims have still not been concluded. The position regarding current claims, in November 2004, was that the Morecambe Bay claims were new claims and the Carlisle claims, which had been in the system for some 6 years, had not yet been resolved (although in the event they were settled a couple of months later). We had no evidence about any claims being decided prior to November 2004 (apart from the Northern Ireland claims which have been mentioned) and no evidence about any claims being settled before that date, apart from the Enderby cases.

333. A second edition of the Job Evaluation Handbook was published in October 2004. We shall return to that document shortly.

334. Of the 3 unions which were voting again, the 2 largest, Unison and Amicus, both voted in favour. We were told by Mr Jackson that the Unison vote was 60/40 in favour. The minority who voted against wanted even fewer people on pay protection, in other words a higher pay line throughout the pay scales. This was not possible because the financial envelope would have been massively exceeded.

335. The final agreement was signed on 23 November 2004 and published the following month. Apart from the de-coupling of the provisions for unsocial hours payments, the other main changes were the addition of a band 9, for jobs where the points score exceeded 720, and the removal of the lowest pay point in band 1. This gave a greater pay increase and would otherwise have been the case to those staff who were assimilating to band 1 at the lowest pay point because their previous pay had been less. There was no significant difference between the terms for RRP, assimilation and protection and those which had been set out in the proposed agreement.

336. Up to this point, negotiations on the management side had been led by the Department of Health. Mr Evershed was a senior civil servant and Mr Smith had been attached to the Department. Responsibility was now transferred to the employers' organisation, the NHS Confederation (Employers) Company Limited which is the fourth respondent in these proceedings. Mr Smith became Director of Pay Modernisation with that organisation.

The Job Evaluation Handbook – Second Edition

337. Before we deal with the implementation of AFC, following the final agreement, this appears to be an appropriate point at which to make findings on a number of allegations which the claimants make about changes to the guidance on national profiles and changes to profiles themselves. These allegations span a period which began well before the final agreement and continued for some time after it. It is convenient to deal with them all in one place, because there are some general considerations which apply to all or most of them.

We shall make these findings in the following order:

* The main provisions of the Job Evaluation Handbook, so far as not already explained
* The alterations to the factor guidance
* Some general principles regarding new profiles and changes to profiles
* Specific profiles to which the allegations relate

338. The introduction to the handbook refers to equality features of the JES and also to equality features of the implementation procedures. The former include specific factors to ensure that features of predominantly female jobs are fairly measured. The latter include:

* A detailed matching procedure to ensure that all jobs have been compared to the national benchmark profiles on an analytical basis.
* Training in equality issues and on the avoidance of bias for all matching panel members, job analysts and evaluators.
* A detailed job analysis questionnaire (JAQ) to ensure that all relevant information is available for local evaluations.

339. The factor headings, number of levels for each factor and number of points for each factor are all exactly as they were in the first edition of the handbook. There are changes to the guidance, as mentioned later in these reasons, but most of these changes consist only of giving additional examples in the notes. The exceptions are the responsibility for information resources factor and the emotional effort factor, where there are quite extensive changes.

340. The handbook then contains a whole chapter on evaluating under the most important factor, knowledge, training and experience (KTE). The point is made that this is the most heavily weighted factor and it often makes a difference between one pay band and the next. Some very detailed guidance is given. In particular, the point is made that, where indicative qualifications are given, this does not mean that there is a requirement to hold a particular qualification, but rather that the knowledge required must be of an equivalent level. Where qualification and/or experience requirements for a job have changed, the current requirements are to be taken as the necessary standard to be achieved. As it is the job which is evaluated, job holders with previous qualifications, which may be at a lower level, are deemed to have achieved the current qualification level through on the job learning and experience.

341. There is then a chapter explaining the principles of job evaluation, weighting and scoring. This is followed by the scoring chart for the various factors and also the job evaluation band ranges. These have already been stated, except that the range for the new band 9 is 721-765 points.

342. The next chapter is a guide to the use of profiles. It is explained that profiles work on the premise that there are posts in the NHS which are fairly standard and which have many common features. There follows a fairly detailed explanation of how profiles have been developed and the main principles.

343. The next chapter is an important chapter on matching procedure. Matching should be carried out by a joint matching panel consisting of both management and staff representative members, who must have been trained in the JES. The training includes an understanding of the avoidance of bias.

344. The matching process is based mainly on agreed and up to date job descriptions for the jobs to be considered. The information to be placed before the matching panel should include the job descriptions, person specifications and organisation charts for the jobs to be matched and also, where relevant, short-form questionnaires used to collect supplementary information.

345. The starting point for each job is for the matching panel to identify possible profile matches and identify what appears to be the nearest profile. The profile job statements must then be compared with the documents relating to the job being considered and this must be done on a factor by factor basis. The matching form contains boxes with information about the job to be matched and that must be compared with the information in the national profile.

346. It is not necessary for the job being considered to match the national profile exactly. There can be variations applying to not more than five factors, but no variation must be more than one level above or below the profile level or range (sometimes a profile sets a range of levels for a particular factor). The variations must not relate to the knowledge or freedom to act factors and the score variations must not take the job over a grade boundary.

347. The Employment Judge in this case has seen many matching forms. It is common for there to be some variations within the permitted tolerances.

348. There is then provision for consistency checking at local level once each batch of job descriptions has been matched to national profiles. It is only when consistency checking is complete and any apparent inconsistencies have been resolved that the matching form is to be issued to the job holders covered by the match.

349. Where a group of staff or an individual are unhappy with the result of matching, they may ask for a re-match by a different panel (different in the sense that a majority of its members must not have been on the previous panel). Any request for a review must include details in writing of the areas of disagreement and evidence in support.

350. Where there is no suitable national profile, the normal procedure will be for the job to be locally evaluated. The handbook includes a detailed procedure, including the completion of a job analysis questionnaire, an interview by two trained job analysts (one from the management side and one from

the staff side), checking the amended JAQ and evaluation of the JAQ by a Joint Evaluation Panel containing 3-5 members. The evaluation must be on a factor by factor basis.

351. There is also a page on the hybrid matching-evaluation procedure. This procedure has been used only to a very limited extent. The basis of the hybrid procedure is that where a job has been matched and the match has failed, the factors that have successfully matched exactly the profile levels or range in the national profile are regarded as correct. The remaining factors only are those subject to local evaluation. The key requirement for the hybrid procedure to be used is that the knowledge and freedom to act factors have matched.

352. The document ends with a chapter on consistency checking.

353. The document does not include any guidance on clusters at local level, for example guidance to the effect that where one individual is to be representative of a group for matching purposes, the other members of the group should all sign a document to show that they agree the relevant job description.

Alterations to Factor Guidance

354. There was one main reason for the changes which were made to the guidance in the second edition of the handbook. Some of the early implementer sites had expressed concern about the absence of national profiles for administrative and clerical jobs and about some difficulties experienced in the local evaluations of these jobs. The valuation of these jobs was specifically covered in the additional guidance. This job group was female dominated.

355. Ms Romney and Ms Beale, in their written closing submissions, allege that certain "alterations to the factor plan guidance were intended, at least by the Department of Health, artificially to bolster the position of men in posts which had been used as comparator jobs by women bringing equal pay claims against the NHS – and that they had that effect. As the documents before the ET evidence concern on behalf of the Department of Health only in relation to female equal pay claims, there are reasonable grounds for suspecting that these actions constituted direct discrimination".

356. This very serious allegation faces an insuperable difficulty. Mrs Hastings, as one of the two independent experts, was very closely involved in the development of the factor plan and the drafting and revision of the guidance. We find as a fact that alterations to the factor plan guidance to bolster the position of men could not have occurred without her knowledge and without her connivance. We have already recorded our finding of fact that she is a person of integrity with a commitment to equal pay. It would be absurd to suggest that she would have connived at the alteration of the guidance to secure higher banding for male dominated jobs. Indeed, Ms Romney never suggested that Mrs Hastings would have acted in this way. We find that whatever the Department of Health may or may not have wanted (and we most certainly make no finding of fact that they did want what is alleged), it simply could not have happened and did not happen.

357. We shall consider later in these reasons whether it is necessary to make findings as to whether the amended guidance did in fact favour the holders of male dominated jobs, even though this was not

the intention. In the meantime we shall make findings of fact about these matters.

358. Again, the claimants face a major difficulty. Although called to give evidence as a witness of fact and not as an expert witness, Mrs Hastings has great knowledge of and expertise in job evaluation studies. She had spent a very long time devising, in consultation with colleagues, the factor plan and the guidance. It had throughout been one of her main objectives to ensure that the JES was fully equality proofed. If it is suggested that she did not know what she was doing in revising the guidance and unwittingly gave an inappropriate advantage to the holders of male dominated jobs, then we should like to have heard evidence in support of that claim. We have not heard any expert evidence, or any evidence at all, on behalf of the claimants. It was noted at a case management discussion on 12 November 2007, that at that time no party was seeking leave to call expert evidence. No such application was ever made.

359. We shall consider this specific allegation, but first we make two further general points. The first is that the development of a factor plan and the drafting of guidance on the application of the plan is a complicated and sophisticated exercise. We are dubious about the approach of looking at individual factors in isolation. Secondly, no attempt has been made to demonstrate to us that the alterations to the guidance have resulted in any particular unreliable national profile or in any unsafe matching to profiles throughout England and Wales. Mr Cross is acting for approximately 7,000 claimants and he must have access to a large number of claimant and comparator matching reports. If there is a link between the alterations to the guidance which is complained of and any inappropriate matching, then it should have been possible to demonstrate that link.

360. We turn now to the allegations which are made in Ms Romney's and Ms Beale's written closing submissions. There are three allegations.

361. The first is that guidance on the emotional effort demand factor was broadened, so that, for example, if a maintenance worker were to be called upon, say, to repair a faulty switch on a ward, thus being exposed to patients in distressing circumstances, any such exposure would now be regarded as direct, not indirect. There are two short answers. The first is that under the guidance, for level 2 to be achieved, there must be at least occasional exposure, which is defined as once a month or more on average. Accordingly, a maintenance crafts person would move up to level 2, gaining an extra 6 points, if his job description showed that degree of exposure. Mrs Hastings told us that it was not the intention to give marks for direct exposure to maintenance workers in such circumstances. We find that it was not the likely effect either.

362. Secondly, we find that the most likely beneficiaries of the revised guidance were domestic and catering assistants, female dominated groups, who were far more likely than maintenance workers to be occasionally (or even frequently) on the wards when they were likely to be exposed to distressing or emotional circumstances.

363. The second allegation is one which we find very surprising. It relates to changes in the guidance for the application of the working conditions factor, so as to include being in the vicinity of unpleasant or highly unpleasant working conditions. It is suggested on behalf of the claimants that this change to the guidance was likely to benefit predominantly male groups such as medical engineering technicians or maintenance workers. We disagree. We find that the most likely beneficiaries of the amended guidance were employees such as laboratory scientists dealing with samples and domestic assistants who were in the vicinity of some of the items referred to in the guidance, such as body fluids and foul

linen. Indeed, these were the two examples given by Mrs Hastings when she was questioned by Ms Romney.

364. The main reason why we find the allegations surprising is that maintenance workers most certainly did not need the amended guidance in order to score highly under this particular factor. Maintenance workers, particularly plumbers, are not unaccustomed to unpleasant working conditions. We refer, for example, to the profile for a maintenance craftsperson which was prepared on 4 April 2002, long before the amended guidance. The level for working conditions was 3-4. The commentary referred to frequent exposure to highly unpleasant working conditions which included inclement weather, heat and humidity in boilers and exposure to sewage and gas fumes.

365. The third allegation is that the guidance on the responsibility for patient/client care factor was altered to qualify maintaining or calibrating specialist or complex equipment for use on patients for a level 4 or even level 5 score. Ms Romney pointed out to Mrs Hastings that she had previously rejected this change. Mrs Hastings said that there had been a long debate about which jobs should be covered by the amended guidance, but she was unable to help with the details of that debate (which had occurred four years before the date when she was giving her evidence). In their submissions, Ms Romney and Ms Beale suggested that there had been double-counting and contrasted this guidance with the fact that nurses are awarded only a level one for the information resources factor.

366. This is a less obvious issue than the two last mentioned issues but we are not persuaded that JEWP got it wrong after its long debate. There are many work activities which could involve demands under more than one (and sometimes more than two) factor headings and the judgments to be made on such matters call for a high level of expertise. We are not qualified to make our own assessment, without the benefit of expert evidence on behalf of the claimants. It is for the claimants to prove their case on this issue and they have not done so. We would add that the examples of other jobs which are given in the guidance at level 4 do not seem to us to be inconsistent with the job of calibrating specialist or complex equipment and include female dominated jobs. These other examples of clinical technical services are the initial screening of diagnostic test samples, the dispensing of medicines and the undertaking of standard diagnostic tests on patients/clients, such as radiography and neurophysiology.

367. Ms Romney and Ms Beale also suggested in their written closing submissions that the change to the guidance could benefit the overwhelmingly male maintenance and estates group. That suggestion is not supported by the evidence. Mrs Hastings told us that she had a clear memory of discussing whether patient care for the higher level maintenance craft workers could ever be at level 2. At the meeting in December 2004, referred to below, a community based maintenance craft worker explained that his job included fitting and adjusting equipment in patients' homes and he was required to explain the operation of the equipment to patients or their relatives. Mrs Hastings accepted that in such cases there is justification for a change which was to move the level for patient care from 1 to between 1 and 2. The expectation was that the great majority of jobs would be at level 1, but that there were these limited situations in which a 2 could be appropriate for a maintenance craft worker.

Changes to profiles – general principles

368. The process of preparing and publishing profiles was a dynamic one. If the CAJE results show that there are few matches against a profile, then JEWP or its successor JEG (the Job Evaluation Group) will look at that profile again. If management or unions provide evidence that a profile does

not properly reflect the demands of the job, then that profile will be reviewed in consultation with management and unions. Profiles also get out of date. Mrs Hastings referred to the need to have a mechanism for reviewing and updating profiles, adding new profiles and eliminating those that were no longer in use. That need was given added impetus by advice received from the EOC. It is also necessary to keep the system up to date by creating new profiles when new jobs come into existence.

369. There has also been a policy of creating job families. When there are profiles covering the whole range of jobs in a particular area of work, it makes it easier to see the matching possibilities. The first job families were for the larger healthcare groups such as nurses, midwives and physiotherapists. Then, particularly during and after early implementation, families were created for groups outside the healthcare field, such as finance and HR. The general but not universal practice was to start with the lowest band profiles and work up. Sometimes when a family was created and gaps were filled in it became necessary to examine the existing profiles.

370. There was also a move towards generic profiles, where there were sufficient similarities between different job groups. This helped to encourage flexibility and made it easier for staff to move between jobs, all of which was in accordance with the modernisation agenda.

371. It was also very much in accordance with that agenda for profiles to reflect the development and upgrading of jobs. Indeed, profiles could help to encourage this process. If a new profile is created as soon as there are even one or two people doing a more advanced job, then that can help to encourage the development of that more advanced job by other NHS employers. The earliest profiles had been based on a single JAQ. Increasingly, because of the similarity of so many jobs, profiles were based on two or more JAQs. Almost all profiles were, however, based on a JAQ, although there were one of two exceptions. For example, one profile was based on a profile which had been created in a particular Trust and that profile had itself been based on a JAQ.

372 The Profile Group did not operate in a vacuum. Ms Romney questioned Mrs Hastings about a number of representations by Amicus, who were very active in representing the interests of their members. It was not only Amicus, however, who were active in this way. Other unions and interest groups were also active in making representations and seeking changes. The Profile Group had regular meetings and consultations with these interest groups.

373. At the same time, the Profile Group did not simply accept and act upon whatever information was given to it. The members of the Profile Group included not only Mrs Hastings and Ms Fearn, but experienced HR managers from the management side and officers of unions whose members were mainly women, such as the RCN, Unison, GMB and indeed Amicus itself. There was a great amount of knowledge and expertise within the Profile Group. In addition, the Profile Group had access to experts within the Department of Health. When interest groups provided information to the Profile Group, they were questioned closely on that information. Nothing was accepted at face value. All national profiles were considered by Profile Group members at least 3 times, often many more times, and every decision was reached by consensus. All draft profiles were sent out via the JSG to relevant stakeholder groups, including both management side and union side representatives. On the rare occasions when the JSG refused to sign off a suggested profile, it then came back to the Profile Group for further consultation and discussion.

374. From time to time, unions prepared profiles themselves and submitted them to the Profile Group. Amicus was one of the offenders but not the only one. The Profile Group actively discouraged

this practice. Where changes were made after early implementation but before the general roll out in 2005, the only affected Trusts were the early implementer Trusts. There were informal links as well as formal links between JEWP and the early implementer Trusts. The job evaluation manager in JEWP had direct email links with all the job evaluation leads at the early implementation sites and they were in daily contact with one another. Mrs Hastings told us that she had no reason to doubt that when a profile was changed following early implementation, then any existing matches to the earlier profile will have been reviewed. She said that matching at the early implementer sites was still going on while the review of the early implementer sites was taking place.

375. There was a policy of reviewing existing matches when a profile was changed significantly. If the effect of changes to a profile was to take it into a higher band, then it was appropriate to reconsider the cases of those staff who had been placed in a lower band as a result of their jobs being matched to the earlier profile.

Allegations regarding changes to profiles

376. As part of the preparation for the hearing, the Department of Health disclosed to the claimants a vast number of documents consisting of audit trails which had been requested by the claimants relating to particular job groups. Audit trails contained the several versions of particular profiles showing how those profiles had been developed and what changes had been made. They also normally included the JAQs on which profiles had been based. Ms Romney questioned Mrs Hastings at considerable length about some of these audit trails.

377. All the allegations made by the claimants are allegations of manipulation of the profiles for male dominated job groups. During the cross-examination of Mrs Hastings, it emerged that some of the allegations which had been made initially were misconceived. Ms Romney and Ms Beale had understandably assumed that documents with the same number but a different prefix related to different versions of the same profile. That was not always the case. All the misunderstandings were cleared up. We make our findings in relation only to those allegations which remained live allegations at the close of the proceedings and which were stated by Ms Romney and Ms Beale in their closing submissions.

378. In making those allegations, the claimants face the same difficulties as those in relation to the changes in factor guidance. They must persuade us either that Mrs Hastings connived at the improper manipulation of profiles, a proposition which we would regard as unthinkable, or that she and her colleagues accepted inaccurate information from Amicus and other interest groups. That is not an unthinkable proposition, but it is one which we regard as unlikely in view of the expertise of Mrs Hastings and her colleagues.

379. It was also apparent from the evidence given to us by Mrs Hastings that the managers and union officials who attended meetings of the Profile Group did not do so simply to promote their own sectional interests. The Profile Group was a technical group which operated by consensus. The members of the Profile Group worked as a team.

380. The very clear evidence of Mrs Hastings, which we unreservedly accept, was that JEWP (and, it follows, Profile Group as a sub-group of JEWP) operated remarkably objectively. She said that cost

was never a factor in the design of the scheme. She did not know about pay rates and they did not feature in the discussions. It was never indicated either to her or to JEWP that any particular outcome, in respect of the banding of any job, was expected or hoped for. She stated the overall approach of herself and her colleagues very clearly in the following terms:

"At national level we took all steps we could think of to make sure the process was not discriminatory. I would be distraught if anyone could identify anything done in a discriminatory manner. It was not perfect but we went to endless lengths to try to make it as fair and non-discriminatory as possible".

381. It was a particular concern of the Profile Group that profiles should be consistent both within and across job groups. One of the members of JEWP, Ms Kathie Dickson of the GMB, developed a spread sheet to assist this process.

382. The difficulty faced by the claimants is that they are challenging profiles produced by the small technical groups, who worked together as a team, whose members had their own specialist knowledge and expertise and whose meetings were always attended by at least one of the two independent experts. They are making that challenge without the benefit of any expert or other evidence of their own.

383. Ms Romney and Ms Beale have referred more than once to the need for transparency and have asked us to draw inferences from the fact that in some of the audit trails JAQs and other important documents are missing and from the fact that Mrs Hastings was not always able to give detailed information about the reasons for particular changes. We do not accept that invitation. Transparency requires that staff should be able to see how they come to have been placed in a particular band. Transparency in that sense certainly exists. The Job Evaluation Handbook contains a great deal of information about the process, the national profiles, of which there are now more than 450, are on the website and there is a matching or evaluation sheet for every job that has been matched or evaluated in every Trust.

384. Transparency does not require that every piece of paper which has been produced in the evolution of every national profile, should be available for inspection. It does not require that Mrs Hastings should be able to give the Tribunal detailed evidence about every relevant discussion and decision which took place in 2003 or 2004. Disclosure on a massive scale has taken place and Mrs Hastings gave all the information she could in reply to questions put to her over several days. We decline to draw adverse inferences from the fact that some of the documents which might have been relevant cannot be traced or from the fact that there are some details which Mrs Hastings can no longer remember after an interval of 4 or 5 years.

385. We turn now to the particular challenges.

Chaplains

386. The allegation is that the profile for chaplains was pushed up from band 5 to band 6 as a result of pressure from Amicus. It is pointed out by Ms Romney and Ms Beale that at 1 April 2004,

Chaplains were placed on a Whitley scale ranging from £24,906 to £29,134. The maximum band 5 pay point was below this scale at £23,442. The top of the band 6 scale was very close to the top of the Whitley scale, the range being from £21,630 to £29,302.

387. The first profile for the job of Chaplain was produced in July 2002 and had a score range which straddled band 5 and band 6. There were then revised profiles at band 5 which Amicus refused to sign off. In October 2003 a draft profile was produced which was wholly at band 6 and that profile was published in November 2003.

388. We have been referred by Ms Romney and Ms Beale to a number of communications and actions by Amicus and also to comments by Mr Evershed which indicated that he was taking the Amicus concerns seriously. We find that Amicus were undoubtedly very active in trying to secure a band 6 profile for their Chaplain members. We were also satisfied that Mr Evershed and his colleagues on the JSG asked JEWP to look again at the relevant profiles. There was nothing wrong or unusual about this. We also find, however, that Mr Evershed and other members of the JSG would not have been able to influence the content of any new profile prepared by JEWP even if they had been minded to try and do so. In fact there was no evidence that any such attempt was made.

389. We find, on the basis of the evidence given to us by Mrs Hastings, that the eventual decision to put forward the band 6 profile was made by the Profile Group for valid reasons after a proper consideration of the relevant evidence. The material factors included the following:

* The first profile straddled band 5 and band 6. It was unacceptable to have a profile straddling band boundaries. One solution would have been to have two profiles with one at band 5 and one at band 6, but instead the next profile was placed entirely within band 5. It was entirely legitimate for Amicus to question why the profile had gone down into band 5 rather than up into band 6 and for that decision to be reviewed.
* The profile group accepted information that there was some responsibility for handling money, such as patient donations, so that the level for financial and physical resources should be increased from 1 to between 1 and 2. Mrs Hastings could not recall what the evidence was for accepting that the Chaplains did have this slight additional responsibility, but we are not prepared to draw any adverse inference.
* An assistant Chaplain profile was created at band 5. There were only 56 assistant Chaplains and it was unusual for a national profile to be created for such a small group. There was nothing improper in doing this, however, so long as the profile was based on the appropriate evidence. We have no grounds for questioning the validity of the profile. Once that profile had been created, there was a profile for assistant Chaplains at band 5 and there was also an existing profile for senior Chaplains at band 7. It was logical for the Chaplains to be at band 6 to complete this small job family.
* A very important point which was referred to by Mrs Hastings in her evidence was that the knowledge, training and experience (KTE) level for the Chaplains was level 6. It seems to us that that was plainly the right level, because the requirement was for a Degree plus post Ordination experience. Mrs Hastings said in her evidence that the great majority of jobs with the level 6 for KTE were in band 6 and that was really where the job ought to have been.

Mrs Hastings told us that the decision made in relation to the Chaplains was a pragmatic solution to a pragmatic problem. She also told us that there had been similar solutions to similar problems affecting female dominated job groups, where a profile straddled or fell close to a band boundary, for example, in relation to dieticians and health visitors.

390. Before we leave the findings relating to the Chaplains, we should add that we were told about three differences between Ms Beale's notes of the evidence and Mr Milford's note. One of these differences related to the evidence given about the Chaplains. That evidence could also be relevant to other job groups. Ms Romney was asking Mrs Hastings about information given to profile groups by Amicus and indeed by other groups and she put it to Mrs Hastings that it was possible that information could be tailored to what was needed. Ms Beale's note of the answer was:

"But open to challenge from profile group if concerns or in the consultation process by those consulted on draft profile."

The Employment Judge's note is in the following terms:

"Profile group can challenge the information, or ask for more – or it could be challenged in the consultation process."

The word "but", with the implication of "yes, but," was not used. The note has no reference to concerns. We find that it was the normal process for profile group to challenge and question information which was given to them, to ask for further information when required and to consult more widely on whatever information was given. That finding is based not only on the particular passage but on the totality of the evidence which we had from Mrs Hastings about the way in which JEWP and the profile group worked.

Hotel Services Manager

391. The post of Hotel Services Manager is a male dominated job group. A profile was prepared in May 2003 for use in the early implementer sites. This profile was at band 6. The profile was reviewed in July 2004. The CAJE data showed only two relevant matches (other jobs had been matched against the profile but they were not hotel service manager jobs). The Profile Group prepared a new profile, at band 7. This profile was approved by JSG and was published in April 2005. Trusts were required to revisit any matching to the old profile.

392. The allegation by the claimants is that Mrs Hastings did not give an adequate explanation for the change of profile. Furthermore, it is pointed out that two jobs did match to the band 6 profile and it is suggested that jobs which should properly have been matched to band 6 will now be matched to band 7 because the band 7 profile is the only one available. There is no allegation that the profile was upgraded as a result of pressure from Amicus or any other source.

393. We find that a satisfactory explanation has been given for the change of profile. It was a natural and proper process that profiles should be reviewed after early implementation. Reviews were by no means limited to male dominated job groups. In this case, Profile Group decided that the KTE level, which had been level 5, should be increased to level 6. We have a copy of an email from Mr Trevor McIroy, who either was then or subsequently became the Job Evaluation Manager, to Mrs Hastings. In that email he stated he believed that an increase in the knowledge level to level 6 could be justified, but

he asked Mrs Hastings to look at it and he suggested that she should consult two other named individuals. We are satisfied that the increase was discussed with Mrs Hastings and others. We are also satisfied that the increase was a proper one. The profile shows that the requirement was for professional hotel services and business management knowledge to degree equivalent, plus further management experience. It seems to us that that plainly justifies a level 6.

394. There is a logical inconsistency in the claimants' argument that upgrading the profile leaves no suitable profile for cases where band 6 would be the appropriate level. A key plank in the claimants' argument regarding the alleged manipulation of profiles in an upwards direction is that the existence of an inflated profile will lead to unsuitable banding to that profile. The corollary is that if the banding on a national profile is too low, but the profile is the only one available for a particular job, that may lead to the unjustifiably low banding of that job. That no doubt is the reason why the Trusts which had used the old profile were asked to revisit the matching.

Senior Healthcare Scientists

395. There are several job groups in healthcare science. The claimants' allegations about the healthcare science job groups amount to the following:

* Although many of the job groups are female dominated, the higher level positions, such as management and consultant jobs, tend to be male dominated.
* There are many national profiles for this group, including, in the higher bands, several instances of more than one profile in the same band.
* In September 2004, Amicus were refusing to comment on the profiles for band 1-6 until they received the profiles for band 7 and 8. Their purpose appeared to have been to apply pressure to ensure that the bio-medical scientist jobs at the top ends were moved up to bands 7 and 8.
* A number of profiles were moved up within band 8 (it will be remembered that band 8 was sub divided into four separate bands).
* Changes to profiles came about as a result of pressure, not only from Amicus but also from Professor Sue Hill, the Chief Scientist at the Department of Health.
* Mrs Hastings expressed concern about the disproportionate amount of time being spent on making repeated small incremental changes to the higher band profiles, impacting on a relatively small number of employees, and commented that Professor Hill and Mr Ison of Amicus were trying to achieve particular outcomes.
* An email from Professor Hill suggests that part of the problem was that she was attempting to obtain profiles for jobs that may not exist.

396. All the above allegations are factually correct, except that the evidence does not support any implication that Amicus, by refusing to approve profiles for bands 1-6, were trying to achieve outcomes for the higher bands which were not already being contemplated. On 30 September 2004, Mrs Hastings sent an email to Professor Hill, stating that she had been informed at JEWP that Amicus would not comment on the profiles for bands 1-6 until they received the profiles for bands 7 and 8. Mrs Hastings had explained that the delay was because of the need to address the band 7 and 8 profiles, but apparently the Amicus members believed that the delay in the band 7 and 8 profiles was due to

a "reneging" on the possibility of the movement of bio-medical science jobs up to bands 7 and 8 and/or due to pressure from clinical scientists.

397. The claimants draw the conclusion that the wide proliferation of profiles at bands 7-9, following pressure from the Department of Health and Amicus, gave Trusts a greater discretion to match predominately male top level employees near their existing pay scale. We have had no evidence, however, to suggest that any of the healthcare science profiles which were adopted by the Profile Group were in any way inappropriate. Mrs Hastings was not cross-examined on the content of any of the profiles and the submissions on behalf of the claimants do not deal at all with the content of the profiles.

398. Professor Hill, the Chief Scientist, did not give evidence, but we had evidence about her from Mrs Hastings and Ms Cartmail and we have also seen emails to and from Professor Hill. We find as a fact that it was Professor Hill who took the lead in seeking a wide range of healthcare science profiles at all levels, although with support from Amicus. We find as a fact that Professor Hill's purpose in doing so was not to maintain current levels of pay for male employees but to have generic profiles to accompany work on career pathways for healthcare scientists in the NHS, that work being work which was undertaken by Professor Hill and others within the Department and the service. Indeed, Ms Romney and Ms Beale, in their written submissions, quote a comment by Ms Cartmail in the following terms:

"Sue Hill is a fiend in relation to attempting to develop healthcare science roles to modernise them – and I imagine that's what referring to – her aspiration – joined by other health professionals in HCS."

399. We also find as a fact that part of the driving force for change, particularly from Professor Hill but also from Amicus, was to have a better career pathway so that employees at the lower levels, most of whom were women, could progress to the higher levels. Ms Cartmail told us that there had been "huge issues" about boundaries between HCS professionals. The object was to try to achieve a career pathway so that employees could progress to the higher levels. The "vast majority" of the people involved in healthcare science were women and there were "exciting opportunities" at the very top. The NHS was affected by occupational segregation. It was believed that the higher paid occupations were disproportionately populated by men and that this could change with a better career pathway.

400. We have looked carefully at the profiles which were produced. There is a complete family of profiles, starting at band 1 and going up through the bands to the higher levels. As one would expect from generic profiles, the job statements are expressed in very broad and general terms. For example, the profile for a Healthcare Scientist Principal/Consultant at band 8 refers to the performance of "a range of highly specialist healthcare science clinical/technical/scientific activities" and the provision of "expert advice, opinions, training to own and other professions in specialist area of activity". The KTE is at the very top level, level 8, requiring "Understanding of specialist healthcare science activities acquired through training to master's degree or equivalent level of knowledge plus further specialist training".

401. We were told by Mrs Hastings that this set of generic profiles provided the first matching option for some job groups, notably clinical scientists, whilst for other healthcare science job groups it provided an alternative option to matching to a specific job family. These job groups included medical engineering technicians, bio-medical scientists and healthcare support workers. The reason for having more than one profile at some of the higher levels was that there were both management posts and pure research posts at those higher levels. This made the healthcare science group unique.

402. Mrs Hastings told us that the outcome which Professor Hill and Amicus were trying to achieve was "to make the profiles and the bands and the career pathway match each other". Mrs Hastings made no complaint about this objective. Her frustration was about the number of detailed comments she was having to deal with and the amount of time she was having to spend on these profiles. She told us that she had to make sure that these profiles were "consistent with all other profiles". We have absolutely no reason to believe that she and her colleagues on Profile Group failed to achieve this consistency.

403. The other conclusion which the claimants draw from the evidence and documents relating to the healthcare science jobs is that matching panels were presented with high level "aspirational" profiles for jobs which did not at that time exist, causing a significant risk of distorted outcomes. The concern is based on an email from Professor Hill to Mrs Hastings which was sent on 24 January 2005 and which includes the following passage:

"I think some of the difficulty may be arising because as a general point, the band 8-9 profiles are intended to provide not only profiles applicable to where healthcare scientists are now, but also provide for development into different and extended roles – this will be critical to deliver the national priorities particularly around diagnostics for example.

It is to be expected that there will be a significant increase in the number of healthcare scientists at career pathway stages 8 and 9 over the next few years, and having a wider range for these profiles recognises the direction of development of the healthcare science workforce rather than being applicable to the here and now. This is also what all of the HCS career pathway members have signed up to including staff side representatives. Integral to the stage 9 post is the recognition of having to demonstrate medical consultant equivalence in terms of knowledge and experience (demonstrated through either medical role college examination or similar level evidence) above post."

404. When cross-examined about the above email, Mrs Hastings said that she was slightly puzzled by it and was not sure which profiles Professor Hill was referring to. She thought that jobs for all the profiles existed somewhere. She also mentioned the Consultant Pharmacist post, where, as with consultant nurses, the Government had proposed that that new level of job be created. The Government Adviser had put forward a job description for what the job might be and she was asked to look at that in terms of a profile.

405. We can see that, read in isolation, Professor Hills' email could give the impression that she was seeking higher level profiles which in some cases would relate only to jobs which had not yet been developed. Looking at the profiles themselves, however, with their very broad job statements, we think it more likely that the profiles are intended to cover jobs which do exist and also jobs which are still to be developed at each of the relevant levels. Furthermore, the prescriptive and high level requirements under the KTE factor will minimise the risk of inappropriate banding.

Maintenance and Estates Group

406. The main allegation centred on a 2 day meeting which either started or finished on 16 December 2004, a few weeks after the date of the final agreement. This was a meeting between, on the one hand, Ms Cartmail and representatives of the maintenance crafts and estates officers sections; and on the

other hand, Mrs Hastings, Ms Fearn, a management side representative, Mr David Renshaw and possibly one other management side representative of JEWP. The claimants' allegation is that as a result of this meeting, and generally as a result of pressure from Amicus, several profiles which had been prepared much earlier were replaced by higher band profiles. It is claimed that the re-banding of the profiles was inappropriate, particularly because there had already been matches to existing profiles during early implementation.

407. In summary, the details of the original profiles and the new profiles are as follows:

* The band 4 profiles which were published in the first edition of the Job Evaluation Handbook included profiles for the posts of Maintenance Supervisor and Works Officer (Engineering Maintenance). Following early implementation, the Profile Group proposed merging the two profiles into a single Maintenance Technician Team Leader profile. The reason was that the CAJE matching information had shown a low number of matches to the Maintenance Supervisor profile and some Maintenance Supervisor jobs matching to the other profile. The new profile for a single Maintenance Technician Team Leader was prepared at band 4, but not published. Following the meeting in December 2004, the profile for Estates Maintenance Worker Team Leader was upgraded to band 5 and the Works Officer (Engineering Maintenance) profile was withdrawn. The Maintenance Supervisor profile was not withdrawn. The Profile Group had recommended that it should be withdrawn, but this suggestion was opposed by the management side on the JSG and the profile remained. It was suggested, however, by Ms Romney and Ms Beale that it would be little used in view of the new band 5 profile.

* Shortly after the publication of the first edition of the handbook, but in time for use in early implementation, 3 Estates Officer profiles were published. These were for the posts of Specialist Works Officer (Buildings) and Specialist Works Officer (Electrical and/or Mechanical), both at band 5, and Works Officer Section Manager at band 6. New profiles for Estates Operations Officer at band 6 and for Estates Project Manager at band 7 were created in February 2004 and the profile for Estates Projects Manager at band 7 was created in June 2004. At some stage the three original profiles were withdrawn. Following the meeting in December 2004, 3 new profiles were published. These were for 2 band 6 Estates Officer posts and 1 band 7 Estates Manager post. It was contended by the claimants that the 2 band 6 posts had effectively replaced the 2 original band 5 posts and that the new band 7 post had replaced the original band 6 post and that this re-banding was inappropriate.

408. The background to the meeting in December 2004, was that during that year Ms Cartmail who had come into Amicus from the MSF side, had been made aware of concerns that the interests of AEEU members had not been properly represented in the development of profiles for the maintenance and craft sections. The AEEU and EESA representatives (EESA was the part of the AEEU representing estates officers) had not been particularly engaged in the development of profiles. A request was made in July 2004 by Amicus and the GMB for a set of generic estates and maintenance profiles. It was this request which resulted in the meeting in December 2004.

409. Mrs Hastings was unable to explain precisely why the 3 Estates Officer profiles were withdrawn before the meeting. One possibility is that following the preparation of the new profiles in 2004, there was evidence of inconsistencies between those profiles and those prepared the previous year.

410. Neither Mrs Hastings nor Ms Cartmail was able to help us with any details of the discussion which took place in December 2004 and the reasons for the banding of the new profiles. Ms Cartmail's role was essentially that of a facilitator rather than someone who had detailed knowledge and experience of the maintenance and crafts jobs. We are satisfied from her evidence, however, that she

acted in good faith and that before assisting her colleagues to put their case forward at the meeting in December she satisfied herself that the case was a sound one.

411. No agreement was reached at the meeting in December 2004. That was a fact finding meeting so far as Mrs Hastings and her colleagues were concerned. They went back to profile group and had a discussion about the information which had been given to them. New profiles were then published in January 2005.

412. It is disappointing that we do not have much information about the discussion which took place at the meeting in December 2004. The meeting is referred to in the notes in Ms Cartmail's day books, which were disclosed to the Tribunal, but the discussion is not recorded in sufficient detail to assist us on the reasons for the banding of various profiles.

413. Mrs Hastings, having reflected overnight on the matter, told us that what struck her was that it is easy to forget that the process of producing profiles was a developmental one, starting in 2001 with the original JAQs and continuing until 2005 when profiles were published or re-published for use in general roll out. She suggested that "what must be the key to all of this was whether the profiles now are… appropriate in relation to other profiles in the same band". Her evidence was that she did think that the profiles appeared to be appropriate relevant to other groups.

414. Ms Romney and Ms Beale, in their written submissions, have questioned the reasoning which caused Mrs Hastings to suggest that the banding of the original Works Officer (Engineering Manager) profile was too low, but we also had credible evidence from Mr Smith. He told us that he found the initial banding of the Works Officer (Engineering Manager) profile at band 4 to be a very surprising outcome. He had knowledge of the work done by Estates Officers as a result of his experience as a Trust HR Manager. Estates Officers tended to fall into two broad categories, those who undertook a specialist role (for example responsibility for an aspect of specialist services, such as energy) and those who were operational managers. The latter would typically be responsible for a group of building or engineering operatives and their supervisors. They would typically have an HND qualification with some further experience and training and skills or a Degree in a related subject, such as engineering. He believed that the band 4 matching was either for an atypical job or an incorrect or faulty match or evaluation. He would have expected the job to be band 6 but possibly band 5.

415. When Ms Romney cross-examined Mr Smith, she asked him why, if this was his view, he had not blocked the original profile. He replied that he did not think he would have had grounds to block a profile if it had been developed from a Job Evaluation Questionnaire and reflected a job done in the service. Ms Romney suggested that this response supported the claimants' argument that the elevation of the Maintenance Technician Team Leader profile to band 5 was inappropriate. We do not agree. We are satisfied on the evidence of Mrs Hastings and Mr Smith that the banding was appropriate. That is the best – indeed the only – evidence which we have on the question whether the profiles which were published in January 2005 and subsequently were appropriate or not.

416. The claimants face the difficulty, therefore, that we have the evidence of Mrs Hastings (and, in respect of one profile, that of Mr Smith) that the new profiles were appropriate and the claimants have no expert or other evidence to put against the evidence of Mrs Hastings. In those circumstances, we have no hesitation in finding that these profiles which have been challenged by the claimants were appropriate and were not manipulated because of undue pressure from Amicus.

417. In the absence of any evidence from the claimant, we have ourselves looked at the profiles and the other documents in the audit trails, including the relevant JAQs. If we had formed the view that the profiles were in any way inappropriate, we should have thought long and hard before preferring our own views to the evidence of Mrs Hastings. Dr Race, however, has considerable knowledge of these matters. He is not a medical doctor. His first Degree was in Mechanical Engineering. For several years he held senior HR roles with two companies in succession, both of which were heavy engineering companies in the north east. Both companies had their own maintenance departments. Although there are obvious and important differences between estates and maintenance jobs in industry and those in the NHS, Dr Race was able to make an informed judgment on the profiles. He sees nothing inappropriate about them. The bandings were at the level which he would have expected for the jobs described. Furthermore, he sees nothing out of the ordinary in the description of the jobs.

Maintenance Assistants

418. Profile Group developed generic profiles for assistants and crafts persons in both maintenance and building groups. The assistants in both groups were designated as estate support workers. There was a band 1 profile and also a band 2 profile for estate support workers higher level. The band 3 profile was for an estates maintenance worker, to include both a maintenance craft worker and a building craft worker. There was then a band 4 profile for the estates maintenance worker higher level, also described as a multi-skilled maintenance technician.

419. The claimants have raised a concern that employees of the first respondent, whose previous job titles were maintenance assistant, storesman or groundsman, have been matched to the band 3 profile. In principle, there is no reason why employees with the job title maintenance assistant should not be at band 3. It is possible for an assistant post to be made a more demanding post, including a requirement for additional qualifications, to the extent that it becomes a band 3 post. In January 2002, the Management Advisory Panel issued an Advance Letter which acknowledged that in some cases grading definitions "may not adequately provide for the current working practices, technical advances, multi-skilling and flexible working required of maintenance or building craft grades".

420. The claimants allege, however, that the band 3 banding has been obtained by the first respondent's employees on the basis of a job description requiring only City & Guilds basic electrical and PAT testing qualifications. We make no finding on that allegation so far as the first respondent is concerned. It is a local issue and the evidence and documents provided by the first respondent are for illustrative purposes only.

421. The claimants go on to allege, however, that the banding complained of has come about because of loose drafting of the band 3 profile. They go on to make the serious allegation that "Management and Staff Side on JEWP and the JSG secured/allowed the relatively loose wording of the band 3 profile in order to permit a wide range of low level maintenance workers to fall within that band". We consider first whether the KTE factor in the band 3 profile is loosely worded. The first edition of the handbook contained separate band 3 profiles for building craft worker and maintenance craft worker. In the former, the wording for the KTE factor was "knowledge of procedures for building and repairs; City & Guilds Apprenticeship". For the maintenance craft worker it was "knowledge of procedure for mechanical and gas maintenance and repair of electrical, equipment; City & Guilds/ Apprenticeship; relevant certification e.g. CORGI for gas fitters". In the generic profile the wording is "knowledge of

range of procedures for building and repair, or mechanical and gas maintenance, or repair of electrical equipment; City & Guilds Apprenticeship; relevant certification or equivalent experience".

422. It will be seen that one of the changes caused by combining the two profiles has been that the example of relevant certification, which was one applicable only to gas fitters, has been lost. There is also the new reference to "equivalent experience" which has been a common change to national profiles following early implementation.

423. Mrs Hastings was cross-examined by Ms Romney about the band 3 profile and the KTE factor in particular. The cross examination was related to an Amicus document about maintenance craft profiles, this being a 2006 document which Mrs Hastings had not seen previously. She said that in order for a role to qualify for the required KTE level 3, it would be necessary for the role to be developed through further education and training. It seemed to her to be unlikely that a one or two day course in electrical equipment would take the role to level 3 if that were the only education and training to be required.

424. It does seem to us that it would have been preferable for the reference to certification to be expanded, perhaps by reference to one or two examples, to indicate the kind of certification which is contemplated. Mrs Hastings did point out, however, that the guidance in the second edition of the handbook made it clear that level 3 for KTE required a base level of theoretical knowledge equating to NVQ Level 3, RSA III, City & Guilds Certification or equivalent level of knowledge. She also pointed out that matching panels would have been trained and should be well aware of what was required. On the former point, we are reminded by Ms Romney and Ms Beale that the guidance on matching in the Job Evaluation Handbook requires matching panels to return to the factor levels in the handbook only when the job information does not appear to match the profile levels. It remains our view, therefore, that the wording of the profile is not entirely satisfactory and could lead matching panels to fall into error.

425. We can see nothing whatsoever, however, in the evidence we have heard and the documents we have seen to support the very serious allegation that members of JEWP and the JSG deliberately secured or allowed loose wording of the profile in order to permit inappropriate banding. Although the allegation is directed in terms at the management and staff sides on JEWP, it does not seem to us to be credible that the wording of profiles could be manipulated in the way suggested by the claimants without involving Mrs Hastings and possible also Ms Fearn. Although Mrs Hastings was cross-examined about the wording of the KTE factor in this profile, the allegation that the wording was deliberately loose was not put to her. It should have been. The allegation is baseless and without merit.

Estates Maintenance Worker Higher Level

426. The first edition of the Job Evaluation Handbook included a band 4 profile for a multi-skilled maintenance technician. The wording under the Freedom to Act factor was "work is managed rather than supervised" and this factor was at level 3. In the set of new, generic profiles, the above profile is replaced by a profile for estates maintenance worker higher level/multi skilled maintenance technician. This profile is also at band 4 and the level for Freedom to Act is level 3, but the wording is now "works within maintenance procedures". It is suggested by Ms Romney and Ms Beale that this wording, with the removal of any reference to management rather than supervision, has enabled the authors of an Amicus document to argue convincingly that all time-served maintenance craft workers should fall

within the level 3 definition for Freedom to Act. Although Mrs Hastings was asked some questions about this profile and the Freedom to Act factor, the issue was not put to her squarely in the above terms and in particular she was not asked to explain the change of wording.

427. It does seem to us that the original wording was preferable. It is made clear in the handbook that work should be managed rather than supervised for level 3 to be achieved and it would have been better if this had been stated in terms in the new profile. It cannot be guaranteed that members of matching panels would remember what was said in their training about the requirement for level 3.

428. On the other hand, we think it very unlikely in practice that a job could be supervised rather than managed and still match the KTE factor under the new profile. In that profile, the job statement is in the following terms:

"1. Installs, maintains, services and repairs a range of electrical, maintenance, gas equipment.

2. Maintains equipment, fabric, utility services at Trust properties".

The wording for the KTE factor at level 4, is:

"Knowledge of procedures for mechanical and gas maintenance and repair of electrical equipment; BTEC/HNC level or City & Guilds plus relevant post apprenticeship training or equivalent experience."

429. It is in our view unlikely that someone who is installing and maintaining the above mentioned range of equipment and who has the above mentioned qualifications would be supervised rather than managed.

430. The more serious allegation relating to the profile is not aimed at JEWP. In 2006, concerns were raised in Wales and Northern Ireland about the use of the band 3 and band 4 profiles. Detailed monitoring was carried out of results from Wales, Northern Ireland, Cheshire and Merseyside. The monitoring group reported as follows:

* The majority of the jobs matching to band 3 were building crafts jobs but the profile was also being used for gardeners, handy men/women and a small number of electricians and plumbers and other maintenance crafts persons.
* The quality of the evidence on CAJE was variable but there was little evidence of mis-matching.
* The higher level band 4 profile was being used mainly for predominantly maintenance crafts, but with significant numbers of building crafts jobs.
* The justification for matching factor 2 (KTE) at level 4 was weak in many cases and this was particularly true of results in Wales and Northern Ireland.

431. It was recommended that the Profile Group should re-visit the wording of the band 4 profile. As a result of this recommendation, the Profile Group recommended two changes to the band 4 profile. The first was to insert the word "and" in the job statement, so that the first part of the statement would read "Installs, maintains, services and repairs a range of electrical and mechanical and gas equipment". The second recommendation was to expand the wording of the KTE factor, so that the wording would begin "Knowledge of procedure for the installation, maintenance and repair of mechanical and gas and electrical equipment…".

432. The purpose of the proposed amendments was to make it clear that only multi-skilled maintenance or building craft workers should match to the band 4 profile. Mrs Hastings said that she thought that the wording of the profile as published was clear. She said that it was "quite clear from the job statement for the band 4 profile that it needs sufficient knowledge in order to be able to deal with installation, repairs and maintenance across the range of trades…". Profile Group was seeking to "put some emphasis on that".

433. The amended wording, however, was blocked by Amicus in the JSG/CNG. There was a rule in the CNG and JSG and indeed also in JEWP that decisions were to be taken by consensus. Accordingly, although an individual or group could not force through a positive decision of any kind, there was effectively a veto on unwelcome changes. That veto prevailed in this case. We find that the purpose of the exercise of the veto by Amicus was to enable Amicus to argue that a time served crafts person should be banded at band 4 even if not genuinely multi-skilled.

434. As a result of the Amicus veto, the Profile Group put forward the alternative suggestion that a further monitoring report and guidance should be issued to Trusts, recommending that the matching of building and craft worker jobs to band 4 should be reviewed. This recommendation was made in March 2007. The evidence of Mrs Hastings was that the recommendation was a very strong one. The guidance that was issued explained about the monitoring which had been carried out and ended with the following paragraph:

"The Job Evaluation Group recommend that trusts review in partnership the matching of building craft - worker jobs and satisfy themselves that the outcomes matched to the band 4 profile can be justified and that the rationales are robust."

435. This guidance, however, was not issued immediately, because the guidance went through many revisions and it was not finally approved until May 2008. Mr Jackson's evidence was that the new Head of Health for Amicus, Mr Coyne, was extremely concerned that the guidance was "a stalking horse to removing band 4 grades from his members… He was very new in his role and lacked confidence re how he should handle this".

436. Mr Jackson said that in his role as Chair he was concerned about delays. He and Mr Coyne had a frank conversation about the need to bring the matter to a conclusion and as a result Mr Coyne was able to clear his lines and the guidance was issued.

437. Ms Cartmail, when questioned by Ms Romney, was unable to say why Amicus had blocked the changed wording. Her credibility on this point is challenged by Ms Romney and Ms Beale on the

ground that Mr Coyne was inexperienced and had to clear his lines with his superior officers including Ms Cartmail. We reject that challenge. We have the evidence of Ms Cartmail that she was not involved in blocking the amendment to the profile. There is nothing to put against that evidence.

Ambulance Staff

438. Mr Marks and Mr Smith both told us about the different grades for ambulance persons prior to AFC. Apart from the senior grade of leading ambulance person, there were ambulance technicians and paramedics. The latter had additional qualifications.

439. The first edition of the Job Evaluation Handbook contained a band 5 profile for a paramedic. The job statement included responding to emergency and urgent calls as well as routine calls and undertaking emergency driving, lifting and carrying patients. The KTE factor, at level 4, required knowledge of procedures for responding to emergency and other situations, with a diploma or equivalent training.

440. Mr Marks told us very frankly that a band 4 profile for ambulance technicians was under consideration shortly before Unison was to vote on Agenda for Change. He knew that this profile would be unpopular with his technician members. They could see paramedics going in near the bottom of band 5 with plenty of headway to move up through the band, whilst they would be stuck near the top of band 4. Mr Marks needed the votes of the ambulance sector if he was to obtain approval for AFC. As a matter of union politics, therefore, he blocked the technician profile to avoid losing the vote. He knew that it was likely to be approved in due course, but this particular time in 2003 would have been the wrong time from the point of view of achieving AFC.

441. Mr Jackson joined the CNG and JSG in July 2004. He began to pick up work from Mr Mark almost immediately. One of the pieces of work was to resolve the issue around the ambulance technician profiles. Mr Jackson knew by this time that there was a view, arising from early implementation, that there were some technicians whose role had been developed and who were working at a higher level than the rest. When Mr Jackson got involved, there had already been discussions about an alternative solution. This was to have profiles headed Ambulance Practitioner, Ambulance Practitioner Specialist and Ambulance Practitoner Advanced at bands 4, 5 and 6 respectively.

442. Mr Jackson took part in discussions about these profiles, which he thought had been signed off in 2005. The group who met to discuss the profiles included Mr Jackson himself, ambulance officers from the three unions, the HR Director for East Anglia Ambulance and two members of JEWP including Mrs Hastings. Mr Jackson said that the objective of the management side was to try to block any wording which allowed technicians to go into band 5. The union objective was to have a profile or set of profiles that reflected the developing and escalating skills of ambulance workers.

443. We had no evidence from Mrs Hastings about these discussions and about the three profiles which were produced. This was because the issue was not raised with her at all in cross-examination.

444. Mr Jackson explained that in the end all the technicians matched at band 4, except in Yorkshire. The role of the technicians in Yorkshire had been developed. They were responsible for drug therapy.

445. Technicians in other regions challenged their banding at band 4. There was a protocol, written mostly by Mr Jackson, for cases where there was a blockage at local level about matching to a national profile. Under this protocol, the issue could be referred up to national level. Mr Jackson said that there were about 20 appeals under the local blocked matching protocol. All but one of the appeals were by ambulance technicians objecting to the band 4 matching. All these appeals were successful.

446. Mr Jackson also told us about subsequent developments. After matching and assimilation had taken place, management and staff across the UK considered how technician roles could be developed so that technicians could have a greater role in ambulance crews. In London, 1,000 technicians have developed into the paramedic role. There are also plans in place to develop paramedics into a more advanced role, in some cases fulfilling the role of local doctors out of hours. Mr Jackson also said that there is an increasing number of women in technician roles, advancing through to paramedic roles. The number of women in the ambulance practitioner role in London has now reached 50%.

447. The claimants allege that the band 5 profile for ambulance technicians and the band 6 profile for paramedics were "aspirational" and were designed to meet the political demands of Unison's membership to achieve higher paid bandings. It is claimed that they did not reflect jobs within the service at the time.

448. The claimants rely in part on an internal note dated 9 December 2003 by Mr Nick Clarke of the Department of Health. This was a note prepared for a meeting with Unison and the GMB. This note included the following passage:

"Both Unison and the service have argued for a solution which acknowledges the existence (and perhaps the political strength) of more experienced ambulance technicians. According to this idea, there should be a band 4 technician, some higher band which the more experienced technicians could reach and then a further significant differential up to the level of paramedics. The problem with this approach is that paramedics are on band 5 and the management representatives would certainly not wish them to be pushing to be moved up to a band 6. Some creative solutions have been suggested but it turns out that all of these fall foul of the equal pay legislation."

449. The note went on to consider two options, one of which was to hold firm against having a band 5 profile and the other of which was to look at the possibility of agreeing a band 5 profile with very explicit criteria. The note recognised the disadvantages of both options.

450. Having reviewed all the evidence on this subject and the documents to which we have been referred, we make the following findings:

* Mr Clarke's note recognised the equal pay implications of whatever option might be adopted. We have heard no evidence at all to suggest that either he or anybody else from the Department of Health tried to impose a solution on Profile Group or that Profile Group would have responded to any

such pressure. In fact we have found the contrary to be the case.

* We have had no evidence to suggest that the banding of the national profiles which were adopted was in any way inappropriate or that there has been any inappropriate matching to those profiles. On the contrary, the only successful matching in the first instance was in Yorkshire, where the technician role was already more developed, and appeals against band 4 matching from other regions were universally unsuccessful.

* Since assimilation, there has been development of both technician and paramedic roles. That is entirely in accordance with the modernisation objectives of AFC. There has also been an increased role for women in the ambulance service. That is also very much in accordance with those objectives.

Perfusionists

451. The facts regarding the perfusionists are not in dispute. In September 2003, there was a band 5 profile which had been drawn up but not published. Perfusionists who were on standard rates of pay would have seen their income drop by nearly £6,500 if this profile had been published. Some of them would have had a still higher loss because they were on locally negotiated rates of pay.

452. The band 5 profile was blocked by the perfusionists. Although they were Amicus members, they did not have Amicus support.

453. All the AFC bodies, including the CNG, the JSG, JEWP and Profile Group, operated on the basis of consensus. This meant that the perfusionists were able to block the band 5 profile permanently. No profile was ever published.

454. This meant that the only available national profiles for perfusionists were the generic health

care science profiles which have already been discussed. It is suggested by the claimants that these generic profiles are necessarily broad and vague and wide open to interpretation in the matching process. They are indeed broad, but we are not convinced they are wide open to interpretation. We cannot recall having heard that point be put to Mrs Hastings.

455. Reference has already been made to the protocol for blocked matching at local level. Mrs Hastings also gave evidence about a blocked profile procedure at national level. This was introduced as an additional way of achieving consensus. There were several cases where the procedure was used successfully. There was a round table conference with Amicus and Unison to resolve difficulties regarding the profiles for dental hygienists and therapists. There was also a blocked profile meeting for mortuary technicians, at which difficulties were resolved.

456. We were told that there were three cases where it proved impossible to achieve consensus and the profile in question was never published. One of these cases was that of the perfusionists. Another involved maxillofacial dental specialists, commonly referred to max fax practitioners. Members of this group tend to start as dental technicians and then have additional training and specialisation. Their work involves preparing specialist orthodontic appliances for reconstruction of facial parts for patients who have had cancer. The third group consisted of solicitors in Scotland.

Implementation – National Roll Out

457. Mr Smith had the main responsibility for leading and co-ordinating the national roll out of the JES following the final agreement. Preparations began in earnest at the beginning of 2004. Mr Smith decided that it would not be practicable to recruit about 200 best practice facilitators and he decided to work through the Strategic Health Authorities. He wrote to the Chief Executive of each of them asking them to nominate a lead for the implementation of AFC. A national forum was set up, to include both the lead and a staff side representative from each Strategic Health Authority. The forum was led by Mr Smith and met on a monthly basis to discuss implementation matters and to deal with any problems raised by Strategic Health Authorities.

458. At the same time a forum with a similar constitution was set up to discuss more detailed matters relating to the JES. This forum was led by the Job Evaluation Project Manager, who reported to Mr Smith.

459. A further five best practice facilitators were recruited and trained. They joined the original five to form a team of ten. Each member of this team was allocated three Strategic Health Authorities for the provision of dedicated support.

460. The training programme which had been used during the early implementation period was updated and improved. A standard training course was developed for use throughout the NHS. It was estimated that about 18,000 people would require training in the use of the JES. It was decided to train persons to deliver the training. The trainers were trained directly by members of JEWP. They in turn delivered training to the management and staff side representatives who would be involved in the implementation of the JES at local level, whether on matching panels, on appeal panels or as job analysts or evaluators for the purposes of local evaluation. All these individuals received training over a period of several days based on a standard training programme.

461. Throughout the implementation of the JES, the Job Evaluation Project Manager carried out consistency checking, using CAJE. Any member of the Executive of the Staff Council could ask the project manager to look at a particular group of staff as a matter of urgency. Each consistency check was considered by the Executive and if there were conclusions of general significance, which required local action, those conclusions were shared at local level. When necessary, the technical expertise and advice of JEWP were sought.

462. We find that these arrangements for the implementation of the JES were thorough and comprehensive and had been carefully thought out. Thousands of management and staff side representatives were involved in partnership at local level. We have seen the documents which form part of the training materials, which were developed largely by Ms Fearn. We are satisfied that the training was thorough and that appropriate training on equality issues was included.

Back Pay Claims

463. At the same time as the early stages of the implementation of the JES, there were discussions at national level about back pay claims. Indeed, these discussions had started in August 2004, when the unions put forward a claim for back pay. This was at a meeting of the Shadow Executive on 13 August 2004. At this meeting, staff side representatives said that Agenda for Change should guarantee that different NHS staff doing work of equal value would receive equal pay. Some staff, however, would still have grounds for making equal pay claims which could include claims for back pay for six years. It was suggested by the staff side representatives that AFC should include a provision of six years of back pay where the new system had demonstrated previous disparity in pay. The response from the management side was that they were taking advice and consulting colleagues in the wider public service and were not in a position to accede to the request from the unions.

464. Mr Jackson gave evidence about this claim. He said that the unions did not know precisely where the equal pay claims might lie and wished to rely upon the outcome of the JES in order to give the unions the information needed to identify potential claimants and negotiate back pay for them.

465. Mr Jackson was also asked about the Carlisle cases. He said that in talking to colleagues and especially Mr Marks during the handover period, he formed the view that Carlisle could not be said to be typical of the rest of the NHS. In particular, he learned that there had been significant grade drift in Carlisle and also that additional payments had been made to some staff using local discretion. He made it clear in his evidence that the union was relying on the outcome of the JES, rather than on the Carlisle cases, in order to pursue the wider back pay agenda.

466. The meeting in August was not the end of the back pay. As soon as the ink was dry on the final agreement, the unions decided to pursue the matter. There were without prejudice meetings early in 2005 with senior civil servants but there was no successful outcome.

467. Discussions continued during 2005. At a meeting of the Executive of the Staff Council on 15 September 2005, it was stated from the employers' side that a key question was what the value of the claims would be. Mr Jackson told us that he was simply not able to identify the total value of the claims.

468. In the note of a meeting of the Executive held on 19 October 2005, it is recorded that staff side expressed disappointment that agreement had not been reached. It was reported that a number of trade unions had set up an equal pay unit to assess claims from individual members who might have an equal pay claim. Mr Jackson told us that there were four unions involved in setting up this equal pay unit. They were his own union, Unison, Unite (formed by the merger of TGWU and Amicus) the GMB and the RCN. Mr Jackson told us that Unison had written to every member who might have a claim. The total number of men and women who received letters was 450,000. These letters resulted in approximately 9,000 claims in England and Wales and 10,000 in Scotland.

Implementation by the First Respondent

469. Mrs Harwood told us that there were about 6,000 staff to be assimilated by the first respondent. In June 2004, one management side and one staff side training lead from the first respondent attended a

residential "Train the Trainers" Course. This was a residential course lasting for three days. In July and August 2004, road shows were run on every site in the Trust, explaining the process of implementation of AFC. Guidance on completed job descriptions was available on the Trust's intranet.

470. Volunteers were sought for training to become job evaluation practitioners. About 160 volunteers were trained, coming from both staff side and management side, between July 2004 and the end of the year. Most of the training was given by the two Trust leads who had been on the residential course. The training materials used were those which had been produced at national level so as to be consistent across the NHS. At the same time, the Strategic Health Authority ran Job Evaluation Training Courses for Trust job evaluation leads.

471. In August 2004, all members of staff were issued with a template for updating their job descriptions. They were asked to finalise the job descriptions by 19 November 2004. Guidance notes were circulated and were also available on the intranet.

472. Job descriptions were prepared and agreed by individual members of staff with the assistance of managers. Where appropriate, clusters of jobs were prepared and agreed by individual members of staff with the assistance of managers. Where clusters of jobs were formed for job evaluation purposes, the staff were initially asked to agree whether their duties were substantially the same and could be covered by the same job description. It was necessary for each member of the cluster to sign a cluster agreement form. We saw a specimen of this document. A copy of the job description would be attached to the cluster agreement form.

473. Job evaluation panels initially consisted of 4 trained Job Evaluation Practitioners, 2 from the management side and 2 from the staff side. Subsequently, as the workload increased, it became more usual for panels to have 3 members, which was within the recommended range specified in the Job Evaluation Handbook. There were 3 weeks in January 2005 during which practice matching was carried out by panels in order to test the process. The job evaluation process started in earnest on 28 February 2005. 3 panels met each day, 5 days a week.

474. So far as the alternatives to matching were concerned, only 11 clusters were assimilated by way of hybrid matching. Where jobs could not be matched to a national profile and could not be dealt with under the hybrid procedure, then they were locally evaluated. The job holder prepared a JAQ, with the support of job analysts and assistance from colleagues and line managers if required. There was then a job analysis interview of the post holder (or the representative post holder in the case of a cluster). The JAQ was then signed off with any revisions, by the job holder, the line manager and the job analysts. The latter were trained job evaluators who also sat on job matching and evaluation panels.

475. The JAQ would then be evaluated by a joint Job Evaluation Panel, usually consisting of 3 or 4 members drawn equally (if there were 4 members) from the management side and the staff side. The score arrived at by this method was then checked for consistency. Full outcomes from job matching or evaluation were sent to a different panel if the outcome was within 10 points of a band boundary. The job was also sent to a different panel for consistency checking if the job matching outcome appeared to be significantly different from that of other jobs in similar clusters. The jobs of approximately 29% of the Trust staff were locally evaluated.

476. By October 2005, there were band outcomes for 90% of the staff. It was agreed that in order to achieve 100% assimilation without delay, 180 senior managers would be assimilated, as a temporary measure, on the basis of the pay band nearest (above) their current grade. Once there was a band outcome for them they would go on to the appropriate pay point for that band.

Monitoring

477. A Trust in Cornwall also adopted the temporary expedient of assimilating staff to the pay point closest to their existing pay, but on a larger scale.

478. This was because the Cornwall Trust was conducting trials, during 2005, of the new electronic staff record (ESR) system for the NHS. Previously, most Trust pay roll records were kept on a manual system, which has been a major problem for parties to the current equal pay litigation. There have been long delays in many cases in obtaining pay and grade histories for claimants and comparators for the purpose of equal value claims relating to the period before AFC.

479. Unfortunately, ESR when it was introduced was too late to give useful information about the pre AFC and post AFC pay of individual employees. There is a serious shortage of helpful information for monitoring purposes.

480. The CAJE system records all the matching outcomes throughout the NHS (some 350,000 in total), but the information shows only the outcome for the particular job. There is nothing in the CAJE system to show how many individuals were affected by the outcome or the gender of those individuals. The system makes no distinction between an outcome for a person doing a unique job and an outcome for a person who is representing a cluster containing a large number of staff. Accordingly, although CAJE is a valuable tool for the consistency checking of outcomes, it does not provide useful information in terms of gender monitoring.

Completion of Assimilation

481. In May 2006, it was reported to Mr Smith by the Strategic Health Authorities that 99% of the staff in England were now on AFC terms and conditions. The Department of Health took the view that implementation was now substantially completed. Thereafter, the National Support, Advice and Performance Management Teams began to wind down.

482. The Staff Council had established a sub group to monitor equality. This had been done following a paper which was prepared by JEWP and considered by the Executive of the Staff Council in January 2005. This continued to function as the Equality and Diversity Sub-Group.

Effects of Assimilation

483. The assimilation of staff to AFC brought about considerable changes in relativities as between different staff groups. Some went up and some went down. Ms Romney and Ms Beale have presented us with comparisons, based on the documents, showing the Whitley Council pay range of various job groups at 1 April 2004, compared with the banding of those job groups and AFC. For example:

* Before AFC, maintenance assistants, on a spot rate of more than £13,200, were paid over £1,000 more than the maximum for ward clerks on A & C grade 2 and over £1,000 more than domestic team leaders. Under AFC, the ward clerk profile and domestic team leader profile were both at band 2, whilst the profiles for maintenance assistants were at band 1 and band 2.

* The top of the grade for A & C grade 3 Medical Secretaries was just under £14,150. The spot rate for building craft workers was more than £15,600 and that for maintenance craft workers was more than £17,750. Under AFC, there were profiles at bands 3 and 4 for both groups, although the craft worker jobs should have been banded at band 4 only if the holders were required to be multi-skilled.

* The top of the range for a D grade nurse under Whitley was less than £18,850. The bottom of the grade for a works officer (engineering maintenance) was more than £24,900 and the top of the grade was more than £32,750. Under AFC, both jobs were likely to be banded at band 5.

* There were also instances of winners in male dominated groups and losers in female dominated groups. The examples given by Mr Lynch QC and Mr Milford include the following:

* At band 1, porters, a predominantly male job group, had been paid less prior to AFC than medical records clerks, a predominantly female job group.

* At band 5, specialist works officers, a predominantly male job group, had been paid less than dieticians, a predominantly female job group.

The Greenwich Report

484. In 2006, the Staff Council decided to commission a report into the RRP payable to maintenance craft workers. Mr Jackson told us that there were 2 reasons why a report was required. The first was that there was a developing industrial relations crisis in parts of the country where employers were refusing to pay the RRP. In some cases there were threats of industrial action and in other cases industrial action occurred. Unite held 30 ballots. That was the reason why a report was required without delay. The second reason was that the Staff Council felt the need to ensure that there was a continuing justification for the payments and the need to be able to demonstrate to doubters that there was a justification in equal pay terms.

485. The University of Greenwich Work and Employment Research Unit, a well established institution, was commissioned to carry out the review. It was to report both on the existing RRP for maintenance craft workers and also on the possibility of RRP for building craft workers, but we are concerned only with the former.

486. The report was commissioned in May 2006. The terms of reference, so far as the maintenance craft workers were concerned, were to determine as an initial priority whether:

"There continued to be a justified and objective case for the continuation of the national RRP payable to qualified maintenance craft operatives and technicians with full electrical, plumbing and mechanical craft qualifications at the current value". It was also stated in the terms of reference that:

* "Continuation of an existing RRP or introduction of a new RRP at national level will require clear evidence of their being problems or predictable problems for NHS organisations in recruiting or retaining a particular staff group on a national basis and a recognition that such a national pay supplement would assist organisations to recruit from outside the NHS.

* Where it is agreed to continue or introduce a new national RRP, the Staff Council will agree whether the level of pay supplement should be agreed locally or set at national level (and, if so, at what rate). The parties would also have to agree when the RRP should be subsequently reviewed.

* If it were decided that a national RRP was no longer required, it would remain open to the Staff Council, if justified by evidence, to agree an RRP for an area or country within the UK."

487. The report, which was presented in April 2007, stated that the research consisted of two main research methods. One was a review of secondary literature and data concerning the labour market and the pay data for relevant jobs outside the NHS. The other was to undertake 15 case studies of the experiences of managers, staff and trade union representatives at local level.

488. The 15 employers to be approached were selected by the Staff Council, although the Greenwich team had the opportunity to comment on the selection. The researchers arranged to visit each of the 15 sites and carry out interviews (the number of persons interviewed ranging from 2-8). The report refers to the short timescale. There is also a comment that the absence of national NHS data on the earnings of the relevant staff had "impeded" the analysis. There is also a comment that the sample size was too small to be representative of the NHS maintenance craft workforce as a whole.

489. The report stated that local labour markets for maintenance craft workers had been largely untested, because there had been comparatively little recruitment over the previous 2 years, largely because of recruitment freezes. In 7 of the 15 organisations interviewed for the case studies, both HR and estates managers wanted the RRP to continue for maintenance crafts. In another 3, estates managers wanted it to continue whilst HR would have preferred a local supplement. There were 5 employers who opposed the continuation of the RRP.

490. The report stated:

"Overall, evidence from the case study interviews supports the case for continuing to pay the agreed RRP to maintenance craft workers…".

491. The reasons which were given included the following:

* The quality of job applicants and appointees was markedly lower than a few years earlier.

* There was no significant problem of workers leaving for other jobs, but the workforce was ageing and there were more than twice as many retirements as resignations. 10 of the employers had a workforce where around half the employees were aged 50 or over. The report stated that there seemed to be universal agreement among the interviewees that young people were not interested in pensions, preferring their earnings in cash so that they could pay for their mortgages.

* Most of the employers interviewed anticipated severe skills shortages as a result of major building and refurbishment projects. There was a comment in the report that the "current construction boom looks set to continue until at least 2010".

492. One of the comments by employers opposed to the national RRP was that it had been assumed that the job of maintenance craft worker would be evaluated at band 3 and it was on that basis that the RRP had been agreed. Another concern was fear of equal pay claims. The report commented that "it is outside the remit of this review to consider the equal pay implications of paying a national RRP". There was a comment that over the previous 10 years there had been a remarked reduction in the numbers of maintenance craft workers as work had gradually been contracted out. Many estates and HR managers, however, spoke of the advantages of in-house services in terms of the cost, quality and timeliness of the work and wanted to bring at least some of the services back in-house.

493. The report referred to the national agreements covering electricians and plumbers. It was stated that the national agreement for mechanical engineers had ceased to operate in 1989 and that pay for them was now determined at company or plant level. The report referred to national agreement rates of £11.04 for an approved electrician and £11.64 for an advanced plumber. The range of the AFC band 4 was much lower, at £8.39 to £10.09. The addition of RRP took the band 4 hourly rate up to a range of £9.91 to £11.61. The comment in the report was that the top of band 4, with the RRP, became competitive, but that the recruitment rate of £9.91 remained uncompetitive, despite the payment of the RRP.

494. The report included examples of a number of private sector employers paying maintenance crafts persons more (and in some cases substantially more) than the maximum of the band 4 scale. The report also stated that the only national agreement providing for lower pay than the NHS is the local government agreement. However, several organisations had reported that maintenance craft workers had left the NHS for better jobs in local government, which suggested that local authorities were paying local rates in excess of the national agreement. (This is consistent with Mr Whitloe's evidence to us, that the official local government rates are not representative of actual payments).

495. Finally, the report recommended that RRP should continue to be paid for qualified maintenance craft workers. The reasons were:

* Nationally agreed basic pay rates were higher in the external private sector labour markets than in the NHS and without the RRP pay levels would be uncompetitive.

* Although the recruitment market was largely untested, a number of NHS employers described the recruitment scene as challenging or difficult, even with the RRP.

* The workforce was ageing and there were twice as many retirements as resignations.

* Most areas anticipated severe skills shortages as a result of continuing major building and refurbishment projects.

* There was a time lag of some 2-3 years between recruiting a qualified maintenance craft worker and that worker being able to undertake the full range of NHS duties.

496. The NHS Staff Council endorsed the above recommendation and decided that the existing national RRP for maintenance craft workers was justified and should continue.

The NHS Pay Review Body

497. In April 2008, the NHS Pay Review Body (the PRB) presented its annual report. Since the previous report, the PRB's remit had been widened to include all staff paid under AFC. It will be recalled that initially there were 2 pay spines, one for staff covered by the PRB and one for other staff. There is now a single pay spine.

498. The report contained the following passage:

"The decision to continue the payment of a national RRP to maintenance craft workers was made by the NHS Staff Council on the basis of the recommendation to this effect in the Greenwich Report prior to this group coming within our remit. We do not consider that the Greenwich Report provides sufficient evidence to justify the continuation of a national RRP for maintenance craft workers on the basis of the criteria which we have previously set out. Whilst we draw no conclusions as to the appropriate outcome, in accordance with our duty to have regard to the principle of equal pay for work of equal value in the NHS, we urge the parties to review their decision in order to ensure that the integrity of the AFC pay system is upheld. We would also like to stress the importance of regular and robust reviews of national RRPs in general and that this should be done for all other groups where national RRPs currently exist."

499. In the following paragraph, the PRB, pending the review that it had recommended, recommended that the existing national RRP be increased by 2.75% from 1 April 2008.

500. The reference to the criteria previously set out was to criteria stated in the 2006 report. It was stated that parties seeking to justify pay differentiation in respect of specific staff groups would need to provide robust evidence and would need to address the following points:

* Why they consider that pay differentiation for the particular group is necessary.

* Why they consider their objective(s) cannot be achieved by a route other than pay differentiation: and

* Why they consider the level of any differentiation they propose, rather than a lesser amount, is appropriate to meet their objective(s).

Equality Report

501. The Equality and Diversity Sub-Group of the Staff Council commissioned a report to examine what effect the implementation of AFC has had on the relative pay positions of English NHS employees of each gender and ethnic group. The research was carried out by the NHS Information Centre.

502. The report is a very long one, but it is not very illuminating in terms of the comparisons between different job groups. The problem was a lack of suitable data, compounded by staff groups which were defined in such broad terms as to be almost meaningless.

503. Ms Cartmail referred to the frustrating process of trying to obtain relevant information. She said that data collection was like wading through treacle. She was interested in the equality and diversity sub-group and indeed helped to set it up. She wanted it to focus on monitoring. She thought that the report was a serious attempt to carry out equality monitoring but the report was hampered by the lack of suitable data.

Unsocial Hours Payment

504. Mr Jackson told us that the issue regarding payments for working unsocial was resolved in 2008. A new system was adopted and that system has applied since April 2008. In summary, a band 1 employee receives a 50% enhancement for working unsocial hours in the Monday to Saturday period and double time for working on a Sunday or Public holiday. For band 2, these percentages fall to 44% and 88%; for band 3 they are 37% and 74%; for band 4 and above they are 33% and 56%.

SUBMISSIONS – GENERAL COMMENTS

505. We have received very helpful but very lengthy submissions from Counsel on behalf of all parties in this case. We shall refer to some of those submissions when we consider the law relating to each of the agreed issues.

506. We shall not, however, generally include, in relation to each issue, a separate section for the submissions on behalf of the parties. The respective cases of the parties on some of the issues are apparent from the way in which those issues have been formulated. We refer in particular to issues 2, 4 and 5.

507. We shall, however, set out the main submissions on behalf of the claimants in relation to issue 7. This is a key issue. Although several differences in pay are identified in the formulation of the issue, the grounds on which the claimants contend that there was systemic sex discrimination in the NHS pay system before AFC are not identified. It is desirable that they should be clearly stated before we consider our conclusions on this issue.

ISSUES 7 AND 8 – SEX DISCRIMINATION IN PAY BEFORE 2005 AND KNOWLEDGE THEREOF – THE LAW

508. The submissions give rise to four questions of law which we must consider. These questions are:

508.1 Is it open to the Tribunal to make findings of systemic or endemic sex discrimination in pay based otherwise than on specific individual cases in which there have been concrete appraisals and comparisons of the work of claimants and their comparators?

508.2 What, if any, assumptions are we required to make?

508.3 Where does the burden of proof lie?

508.4 To what extent, on the basis of the Authorities, are we required or permitted to treat the outcome of the JES as evidence of equal value for an earlier period?

Is the Exercise Permissible?

509. Mr White submits on behalf of the second and fifth respondents that "the directly enforceable part of Article 141 of the Treaty of Rome, on which the domestic legislation is founded, is confined to situations involving concrete appraisals of the work actually performed by employees of different sex within the same establishment or service and does not extend to studies of entire branches of industry or even the economic system as a whole". He submits that in "the present case the Claimants' attempt to prove endemic historical sex discrimination invites the Tribunal to depart from the permitted territory of findings based on concrete appraisals of the work actually performed by employees of different sex within the same establishment or service and embark upon a study of an entire branch of industry".

510. Mr White relies on the decisions of the ECJ in Defrenne v Sabena [1976] ICR547, at paragraphs 18-24; Macarthys Ltd v Smith [1980] ICR672 at paragraphs 10-16; Worringham v Lloyds Bank Ltd [1981] ICR558 at paragraph 23; Jenkins v Kingsgate (Clothing Productions) Ltd [1981] ICR592 at paragraphs 17-18; and Coloroll Pension Trustees v Russell [1995] ICR179 at paragraphs 101-103. He also relies on the recent decision of the EAT in Walton Centre for Neurology and Neurosurgery NHS Trust v Bewley [2008] IRLR588.

511. We turn to the decision in Bewley, in which the former President of the EAT, Mr Justice Elias, reviewed a number of earlier Authorities, including all the above mentioned decisions of the ECJ. This was an equal value case in which the claimant sought to rely on two comparators in respect not only of periods when she and they were employed at the same time and in the same employment, but also an earlier period when she was employed but they were not yet in that same employment. The

Employment Judge had been constrained by an earlier decision of the EAT to find that she was entitled to rely on those comparators for the earlier period as well as the period of contemporaneous employment. It was held by the EAT on appeal that the comparison with a successor could not be pursued and the claimant's case failed in so far as she was seeking a remedy with respect to periods when her chosen comparators were not employed (paragraph 67).

512. Mr Justice Elias said at paragraph 52:

In my judgment the exercise of comparing with a"successor is too hypothetical. The comparison requires asking what would have happened in the past, as opposed to the question in Macarthys, which is what did happen in the past. The exercise reconstructs virtual rather than actual history; it asks how events would have progressed had things been otherwise. I accept, as Mr White submits, that there is an element of hypothesis in Macarthys itself. The assumption is made, at least absent some explanation, that had the predecessor man continued in employment, he would have received at least the same pay subsequently when the claimant was employed as he had done before she was employed. This does, however, seem to be at least in most cases a legitimate inference, if only because it would generally be a breach of contract to reduce the wage. It is a case where a concrete appraisal can be made using the concepts of equal work and equal pay".

He went on to say, at paragraph 58:

"There is plainly a rationale for the position adopted by the ECJ which has denied hypothetical comparators, and the question is, whether properly analysed, the jurisprudence puts the comparison with a successor outside the scope of the rights which Article 141 affords. For the reasons I have given, I think that the current jurisprudence does bar this comparison. It does not enable the concrete appraisal which the ECJ has emphasised is the bedrock of the application of Article 141, and it does not provide the secure factual premise which enables the proper and precise extent of the past and necessarily hypothetical discrimination to be determined."

513. If an actual claimant cannot rely on a hypothetical comparator, is it open to claimants seeking to show historic discrimination to rely on hypothetical claimants and hypothetical comparators? The answer must surely be no, but the claimants would reply that they rely not on hypothetical claimants and comparators but on actual claimants and actual comparators, albeit identified by job title and not by name. Their case is that prior to 2005, a large number of employers in the NHS were in breach of the equality clauses in the contracts of women in a number of specified female dominated job groups, the comparators being men in various specified male dominated job groups; and that those breaches of individual equality clauses occurred on such a scale that there was systemic and endemic sex discrimination in the pay of NHS employees. As a matter of law, is it open to the Tribunal to investigate and make a finding on that contention?

514. Obviously the best evidence of systemic sex discrimination prior to 2005 would be evidence that thousands of claims against a large number of NHS employers have been upheld or conceded. It seems to us, however, that even without such compelling evidence, it could be open to us in principle to make a finding of systemic sex discrimination prior to 2005. The possible ways in which the systemic discrimination could be or could have been proved include the following:

514.1 Our legislation contains no provision for class actions, but the arrangements under which lead claimants in a multiple claim are identified as persons whose jobs are representative of the whole spectrum of claimants' jobs has some similarities. If, for example, the claims of 50 lead claimants have been upheld or conceded on the basis of the concrete appraisal of and comparison of their jobs and those of the nominated comparators, and there are 1,000 other claimants standing behind the lead claimants, that could be evidence of breaches of the equality clauses in 1,050 contracts, absent any evidence of material differences between the cases of the lead claimants and those of the other claimants or reliance on any genuine material factor or other defences which are peculiar to any of those other claimants.

514.2 Even when claims against only one or two of several hundred relevant employers have been upheld or conceded, it may be possible to make a finding of wider breaches of equality clauses by relevant employers if there is very clear evidence that there is no material difference in the circumstances affecting those other employers and their employees. It would, however, be necessary for that evidence to show no material difference not only in job titles but also in the work actually carried out, pay and other terms and conditions of employment and potential general material factor and other defences.

514.3 If the only issue in a large number of claims or potential claims is whether a particular genuine material factor defence is valid (for example where the relevant jobs have been rated as equivalent or where there have been findings or concessions of equal value) and where it is apparent that that defence cannot be sustained (either because of an adverse finding in a particular case or for some other reason), then that could be relevant evidence. That case would not be very different in principle from the Redcar & Cleveland and Middlesbrough cases [2008] IRLR776.

514.4 Prior to the repeal of the section by the Equality Act 2006, the Sex Discrimination Act 1975 contained in section 57 a power for the former Equal Opportunities Commission to conduct a formal investigation for any purpose connected with the carrying out of the Commission's statutory duties. If any such investigation had been carried out and had made a finding of systemic discrimination in pay, then that would certainly have been relevant evidence.

514.5 If a research body had carried out a similar investigation otherwise than under statutory powers, the outcome of that investigation could also have been relevant, if the investigation had been sufficiently comprehensive, detailed and objective.

515. We direct ourselves therefore that it is open to us in principle to make a finding of systemic and endemic discrimination in pay in the NHS prior to 2005.

Necessary Assumptions

516. In paragraphs 301-303 of her written closing submissions, Ms Romney appeared to suggest that, for the purpose of showing historic discrimination in pay, it is unnecessary for the claimants to prove equal value as between any groups or individuals in the relevant period. She states in paragraph 301 that it is "inappropriate to use the techniques of equal value comparison in the context of cross group comparison". She states in paragraph 302 that in order "to show historic discrimination in pay for the purposes of the background to the questions of knowledge and manipulation, the Claimants do not have

to prove equal value in the way they would in a Schedule 6 case. Nor can they do so, as in these circumstances Schedule 6 is not yet engaged; they are still at the preliminary stages, trying to set the Job Evaluation scheme aside so that they can proceed with their equal value claims". She then states in paragraph 303 that the appropriate way for the Tribunal to proceed "is to make an assumption of equal value in the normal way of a GMF Hearing held in advance of the Equal Value Hearings".

517. If in the last sentence of the paragraph Ms Romney is suggesting that we must assume that the work done by the women in various specified job groups was of equal value to the work done by men in various other specified job groups, then that is a proposition which we cannot accept. We are being asked by the claimants to find that there was historic discrimination in pay, and that the respondents knew or should have known of that discrimination, because that finding would be relevant to several of the issues which we have to decide. If Ms Romney is asking us to assume equal value as between the women and men in the specified job groups then she is effectively asking us to assume that which we are required to decide. The exercise becomes a totally circular one.

Burden of Proof

518. Ms Romney goes on to consider whether the claimants need to prove the facts upon which they rely in support of the claim of systemic historic discrimination. Her primary submission is that under section 2A(2A) of the EPA 1970, the burden lies on the respondent to disprove historic discrimination. Alternatively, the claimants have only the "extremely low burden" of giving the Tribunal "reasonable grounds for suspecting" historic discrimination. Ms Romney also contends that section 63A of the Sex Discrimination Act 1975 applies, so that the burden of proof would shift to the respondents if the claimants proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondents have committed unlawful acts of discrimination.

519. We direct ourselves that the burden of proof is on the claimants to show historic sex discrimination on a balance of probabilities. In so far as there are pay disparities under the current pay system, the respondents rely on GMF defences relating to express pay protection, implied or indirect pay protection and recruitment and retention payments. The burden of proof, at least initially, is on the respondents in relation to those defences. If, however, the claimants seek to counter all or any of those defences by showing that there was historic sex discrimination, then it is for the claimants to prove the relevant facts on a balance of probabilities.

520. Furthermore, we do not accept the contention that the burden of proof is the "extremely low burden" of showing reasonable grounds for suspicion. Section 2A(2A) applies to the specific issues of whether an evaluation contained in a job evaluation study was made on a system which discriminates on grounds of sex or is otherwise unsuitable to be relied upon. It does not apply to the quite separate issue of historic sex discrimination.

521. We also reject the submission that the claimants can rely on section 63A of the SDA 1975. That section applies only to complaints under section 63 of the SDA 1975.

JES as Evidence of Equal Value

522. If two jobs have been given the same rating under the JES, is that rating conclusive evidence that the two jobs were of equal value before 1 October 2004, the date which was agreed as the effective date of the JES?

523. The leading authority is the case of Redcar & Cleveland Borough Council v Bainbridge [2008] IRLR776, in which this issue, described as the issue of retroactive effect, was considered at paragraphs 267-285. The Court of Appeal approved the reasoning of the Employment Appeal Tribunal in Bainbridge v Redcar & Cleveland Borough Council (2) [2007] IRLR494, in which this issue was considered at paragraphs 7-45.

524. We direct ourselves in accordance with these authorities that the rating given to the two jobs is admissible and relevant evidence of equal value for the earlier period but is not conclusive evidence.

525. The reason why the JES cannot be conclusive evidence for the earlier period was very clearly stated by Mr Justice Elias at paragraphs 40 and 41 of his judgment in the Employment Appeal Tribunal in the following terms:

"40 - We do not accept that a rating under a job evaluation scheme is the same as establishing that the two jobs so rated are necessarily of equal value. On the contrary, in our view that misunderstands the true nature of job evaluation schemes.

41 – In effect there are two elements to a job evaluation study. First, there is the evaluation of the jobs then there is the fixing of grade boundaries. These may be more or less complex. It is not uncommon for jobs to be fitted into grades where there may be real distinctions in the value of the jobs. It may be simpler for an employer to introduce pay scales which embrace a relatively wide class of jobs even although the value of the jobs at the higher end of a particular grade may be significantly higher than those lower down. That may be a pragmatic and sensible approach enabling the employer to select relatively simplified pay scales, even though it does not closely relate pay to value. If Mr Allen is right it would encourage employers to adopt very narrow grade bands in order to limit the potential effect of backdating claims."

526. Lord Justice Mummery, in the Court of Appeal, referred at paragraph 278 to the statutory language and said that "relative to the date when the equality of rating takes effect, it looks to the present and the future but not to the past." He went on to say, at paragraph 279, that the fact that jobs which can be quite different from one another in terms of points scored "have been given" an equal value in terms of grading under the study, evaluations and negotiations which would have formed part of the background to any JES, leads to the conclusion that the jobs are then "to be regarded as" RAE. But there is nothing in sub-section (5) that works to require them to be regarded as having "equal value" for the purposes of section.1(2)(c) or, indeed, any purpose other than the purposes of the JES itself. In many cases the equality rating will no doubt "assist" in proving equivalence for some purpose outside those of the scheme which establishes it, but it certainly does not "conclusively determine that jobs rated as equivalent for the purposes of a given JES must be taken to be of equal value for the purposes of section 1(2)(c)".

527. Lord Justice Mummery went on to say, at paragraph 280:

"As for the "logic" of retroactive effect, it is, in our view, to overlook that schemes have no force whatsoever before they are agreed and to overlook also that bands and brackets can and do change from one JES to another:…."

528. These principles are clearly illustrated by the banding structure of the AFC JES. The parties agreed that there should be only twelve pay bands for the more than one million jobs covered by the JES. At band 5, for example, the range was from 326 points to 395 points. For the future, the holder of a job with a job weight of say, 330 points, was to be in the same pay band as the holder of a job with a job weight of 390 points. The parties did not agree, however, that those two jobs should be treated as having been rated as equivalent for any earlier period. Furthermore, they could well have agreed much narrower pay bands than those which were in fact adopted.

529. We direct ourselves also in accordance with a judgment of the Employment Appeal Tribunal in Hovell v Ashford & St Peters Hospital NHS Trust UK EAT/0163/08. There is no rule of law which requires a Tribunal, in a case where two jobs have been given the same rating under a JES, to discount that rating as evidence of equal value on the ground that the comparator's job was given a higher point score than the claimant's job (paragraph 33). There is also no rule of law requiring the Tribunal to accept the rating as evidence that the two jobs are of equal value. In such a case, it is for the Employment Tribunal to exercise its discretion and decide whether it requires the assistance of an independent expert to report on the question of equal value. In exercising that discretion, the Tribunal must have regard to all material factors, including the rating of the two jobs, the point scores and the quality of the evidence thereby provided; considerations of speed of decision making

and of expense; and any other relevant factors.

530. Similar principles will apply when we consider whether the rating of jobs under the AFC JES is evidence of systemic or endemic inequality in pay for an earlier period. As a matter of law, we are not required either to reject the evidence or to treat it as determinative. We must assess the quality of the evidence. How robust would the evidence be if we were concerned with the concrete appraisal and comparison of the jobs of a specific claimant and a specific comparator? If we have only the rating or banding of the jobs and not the points scores does that affect the quality of the evidence? To what extent, if at all, is the quality of the evidence affected when the comparison is between whole job categories and not the jobs of specified individuals? These are questions of fact rather than questions of law and we shall address them in our conclusions.

ISSUES 7 AND 8 - SUBMISSIONS

531. The claimants' case on historic discrimination is that it was systemic and long standing; throughout the NHS women's work was less well rewarded than men's work of equal value. The system was maintained and prolonged by separate collective bargaining procedures, by the indifference of the Department of Health even after the Enderby ECJ decision and by a widespread failure of understanding about the meaning and importance of equal pay on the part of Trade Union leaders. In advancing these submissions, the Claimants rely upon the following matters:

532. The numbers of overwhelmingly female job groups which were paid much less than

overwhelmingly or exclusively male job groups to whom they were subsequently rated as equivalent or even higher in the AFC job evaluation scheme;

532.1 That AFC was designed specifically to evaluate healthcare jobs and according to one of its principal architects, Mrs. Hastings, it properly reflected and evaluated the work done; it is therefore a fair reflection of the respective value of the jobs;

532.2 The correlation of the original evaluations of the Claimant and comparator jobs in Carlisle and in the AFC job evaluation;

532.3 The unfairness wrought by separate bargaining procedures;

532.4 The recognition, (since denied) by all the Respondents that the equal pay claims brought in Enderby and in Carlisle were not unique in the NHS and posed a substantial threat in terms of successful equal pay claims;

532.5 The recognition by the Respondents of the historic underpayment for work with equal skills, for example skilled female ancillary workers compared to painters;

532.6 The designation of the threat of equal pay claims by the Department of Health as one of the "main drivers" of AfC;

532.7 The settlement of both the Enderby and the Carlisle claims;

532.8 That even within the some of the job groups, some men were higher paid;

532.9 The lack of gender monitoring both before and after AfC.

533. The Respondents argue that without proof of equal value between specific groups no finding of historic discrimination is possible. The Claimants take the view that the relevance of historic discrimination for the purposes of these proceedings is as follows:

533.1 It is relevant to the GMF defences for pay protection (both explicit and implicit) and RRP, namely the continuation of discriminatory pay;

533.2 It is relevant to the issue whether the Respondents knew of the existence of any such discrimination, and to the issue of objective justification;

533.3 It is relevant to the issue of whether there was manipulation of the AfC system and if so, why.

ISSUES 7 AND 8 – HISTORIC DISCRIMINATION AND KNOWLEDGE THEREOF – OUR CONCLUSIONS

We begin with some preliminary observations.

534. The first question which we need to decide is whether we find, on the evidence, that there were breaches of the equality clauses in contracts of NHS staff on such a scale that the unlawful discrimination can properly be described as systemic or endemic, which is the claimants' case. Can we quantify the breaches? Can we identify them, at least by reference to job descriptions and work categories? Can we point to the particular NHS employers who were in breach? Can we specify the period during which or a time at which the breaches occurred?

535. If we find for the claimants on the above issue, we must then go on to consider whether the respondents knew or should have known, or suspected or should have suspected, the scale of the unlawful discrimination. If, however, we find that there was no endemic or systemic discrimination, then the question of knowledge or suspicion does not arise. The respondents could not have known what we find to be false; if they entertained unfounded suspicions, those suspicions are immaterial.

536. This is plainly not a case which falls within any of the categories identified in the earlier sections of these reasons. There has been no formal investigation by the EOC and there was no comparable academic investigation. There is also the surprising fact that we have not been told of one finding or concession of unlawful discrimination in pay within the NHS. There were some preliminary findings in favour of the claimants in the Enderby and Carlisle litigation, but those cases were settled before the litigation was concluded. We have not even been told of any settlements other than those.

537. Furthermore, evidence of discrimination in pay prior to 2005 could have been available if any of the 16,000 current cases had been concluded. Some of these cases were started in 2004 and the majority were started in 2005 or 2006. So far, however, only one case has been concluded and that case was unsuccessful. Some possible explanations for the very slow progress of the cases are considered later in these reasons.

538. Finally, in terms of these preliminary comments, none of the respondents claims that the NHS is totally free from unlawful discrimination in pay. Starting from the launch of AFC, in 1999, it has been the consistent and public position of the Department of Health and the other respondents that the separate bargaining structures in the NHS made NHS employers vulnerable to equal pay claims . In such circumstances, "pockets" of inequality, to adopt Mr Evershed's phrase, can arise without it being any employer's intention to discriminate unlawfully. It is, however, the respondents' position that these "pockets" cannot be identified or quantified and that there is no evidence to suggest that they amount to endemic or systemic discrimination.

The JES – looking back

539. The strongest part of the claimant's case on these issues is that based on the outcome of the JES. A very large number of women in female dominated job groups have been placed in the same pay band as men in male dominated job groups who were previously paid very much more than those women. Mr Lynch points out that there are also many men who have been placed in the same pay band as women who were previously paid very much more than they were. Ms Romney responds that that this is beside the point. If some women have been the victims of sex discrimination in pay, it would not assist the respondents to show that there are also men who have been the victims of similar discrimination. We agree. The point made by Mr Lynch may, however, be relevant in terms of genuine material factor defences and we shall return to the point in that context.

540. We turn now to three reasons why the potentially successful claimants on the basis of the JES must be taken to be reduced to an unquantifiable extent .

541. First, it cannot be safely assumed that the disparities in pay which have been identified by Ms Romney existed in all cases. The majority of the employees in the NHS were either on local terms or a mixture of Whitley Council terms and local terms. This, however, is a minor factor. It is likely that the disparities pointed out by Ms Romney existed to a greater or lesser extent in most of the groups of employees which she has identified.

542. Secondly, there were six existing job evaluation schemes in the NHS before the AFC JES. These schemes were additional to the long established scheme for ancillary workers. The evidence of Mrs Hastings was that none of these schemes fully met the criteria to be adopted as a scheme for the whole of the NHS, but that two of them came close. We have no evidence to show how many of the jobs in the NHS were covered by one of the six schemes. It is also impossible for us to say how many of the six schemes would have been held to be sufficiently analytical and otherwise satisfactory to serve as a defence to equal pay claims involving the jobs of claimants and comparators covered by one of the schemes. That issue has not yet been tested in any of the cases with which we are dealing.

543. The third reason is a more substantial one. We have directed ourselves in accordance with the authorities that the evidence of the JES scores and ratings is admissible evidence and relevant evidence of equal value for the earlier period but it is not conclusive evidence. Ms Romney has given a number of examples of job groups placed in the same pay bands, but has not given any details of comparative scores. For the purposes of the JES, the actual scores are immaterial so long as the jobs to be compared are in the same band. Where, however, two jobs have been placed in the same band, but with a points difference between them which could be 50 or more points, and which could be in the comparators' favour, it cannot safely be assumed that an independent expert would advise a tribunal that the jobs were of equal value or that the tribunal would be prepared to make that assumption without that advice. Accordingly the examples given by Ms Romney do not enable us to draw conclusions except in the minority of cases where the previously higher earning and predominantly male employee job groups have been placed in a lower pay band than the predominantly female job groups with whom she is comparing them.

544. Furthermore, even where a job in one of the latter groups has been given, under the JES, the same points score as or a larger points score than a job in one of the former groups, it cannot safely be assumed that a tribunal would find that to be sufficient evidence of equal value for the earlier period. Ms Romney relies on the evidence of Mrs Hastings that if two jobs came out differently she would

want to know the reason why. It must obviously be an aspiration for jobs to be evaluated to the highest possible level of accuracy, whether the work is being carried out by an independent expert or as part of a job evaluation scheme.

545. There are, however, significant differences between the two processes, both in relation to the object to be achieved and in the way in which the work is carried out. The purpose of a job evaluation scheme is to place jobs in the right pay band. So long as this purpose is achieved, the exact number of points is immaterial. The independent expert, on the other hand, needs to advise the tribunal whether the two jobs are in fact of equal value. In order to do so, he or she focuses very precisely on the two jobs, preparing a factor plan specifically for those two jobs and then evaluating the jobs on the basis of detailed job analysis reports prepared by the parties.

546. For the purposes of a job evaluation scheme covering more than one million jobs, it would be completely impossible to employ experts to give the same degree of individual attention to each individual job or job group of in each of several hundred relevant employing organisations. Jobs are matched to national profiles or individually evaluated not by experts but by employees who have been given a few days' training. It would be unrealistic to expect the same level of accuracy as would be achieved by evaluations carried out by independent experts, but that same level of accuracy is not required. Where a job is placed somewhere near the middle of a pay band, for example, 20 points more or less would make no difference for the purpose of the job evaluation scheme.

547. Because of these differences between the two approaches, employment tribunals in Newcastle have been prepared to withdraw the requirement for an independent expert only where a number of criteria have been satisfied, including a significant points difference in favour of the claimant's job. For these reasons, in our view, the evidence of the JES is sufficient evidence of equal value for the earlier period in relation to a very much smaller number of jobs than Ms Romney has suggested and those jobs can neither be quantified nor identified.

548. The above 3 factors mean that the outcome of the JES must be approached with caution as evidence of equal value for the earlier period. That evidence cannot, however, be ignored altogether. If one stands back and looks objectively at the overall picture, there must be a strong likelihood, in view of the large number of job groups to have moved up or down, that equal value will eventually be established in a significant number of the 16,000 cases. The difficulty lies in identifying and quantifying those cases.

GMF Defences

549. Ms Romney then, however, faces a much more substantial obstacle. The third and fourth respondents have given particulars of GMF defences which may be relied upon for the period prior to AFC. Those particulars are given with the proviso that the respondents cannot set out definitive GMF defences in relation to any job or jobs, because, for example, the claimants have not posited particular comparisons between particular groups of claimants and comparators during particular periods. They do, however, outline three defences which may be relied upon, as follows:

* The need to pay certain categories of employees more in order to recruit and retain them as a result of market forces. Prior to AFC, that requirement was reflected in a number of ways, including

grade drift, the national negotiation of higher pay for particular types of jobs, the employment of specific recruitment and retention payments and the employment of particular workers on higher locally negotiated pay. It is stated that these factors applied to jobs in which men predominated and also to jobs in which women predominated and to jobs reflective of a mix of genders.

* There was also negative grade drift, in that prior to AFC, NHS organisations employed particular workers at lower pay than that anticipated for their post under national pay arrangements, where for market-related reasons, they were able to recruit and retain workers for lower pay. Negative grade drift applied to jobs irrespective of whether they were dominated by men or by women or comprised a mix of genders and simply reflected market forces.

* In respect of differences of pay prior to AFC, collective bargaining arrangements gave rise to the particular pay and grades applicable to different groups of employees. It is stated that the respondents will rely on the findings of fact of the Employment Tribunal in Enderby in regard to the complete absence of any sex discrimination in connection with the bargaining process.

550. The final agreement includes provisions for RRP for a number of job groups, including some which are male dominated, particularly maintenance craft persons. Those provisions were negotiated by management and staff side representatives. It seems to us to be impossible to say that market forces defences to the equal value claims relating to the earlier period are frivolous or hopeless. Furthermore, there may be such defences in respect of groups who were not included in the AFC provisions. It may, for example, be arguable that there was an external market for building craft workers.

551. So far as collective bargaining as a GMF defence is concerned, the respondents would face the difficulty that the ECJ in Enderby found that the fact that different pay arrangements have been freely negotiated through collective bargaining is not in itself a GMF defence. That, however, was a case in which there was a claimant group consisting mainly of women and there were comparator groups consisting mainly of men. There may be grounds for a GMF defence based on the overall picture in the NHS, with some male dominated groups doing well out of collective bargaining and at the same time some female dominated groups doing well. It may be argued that this is illustrated by the similar percentages of men and women receiving pay protection.

552. There could also be an arguable collective bargaining GMF defence where it can be shown exactly how and by reference to what criteria pay has been negotiated. That may be the case, for example, where a pay review body has fixed the pay of nurses or of employees in other predominantly female groups by reference to the pay of other professional groups which are not predominantly female.

553. As Mr Lynch and Mr Milford point out in their further particulars, we cannot adjudicate on these matters without a specific context and without hearing the relevant evidence and submissions, but we are driven to the conclusion that there are likely to be GMF defences raised in all or most of the cases in which equal value is found, that some of those defences may succeed and that it is impossible for us to estimate the number of cases in which the defences will succeed and the number in which there will ultimately be findings for the claimants.

Carlisle

554. We are not assisted one way or the other by the evidence relating to Carlisle. The circumstances in Carlisle, particularly in relation to the nurses, were not typical and the only tribunal hearing before the case was settled was in relation to the methodology of the independent experts. There was no

substantive hearing on the findings of equality in relation to some comparisons and inequality in relation to others. It was clear from Mrs Hastings' evidence that those sets of findings were going to be subject to challenge.

555. More importantly, the settlement in the Carlisle cases was before there had been any decision on GMF defences. Indeed, it is not clear even that such defences had been raised by the time the case was settled. Any argument based on the Carlisle cases is, therefore, subject to the same difficulties, regarding GMF defences, as that which applies in relation to the argument based on the AFC bandings.

Other Matters

556. The other matters relied on by the claimants take the matter no further. It is undeniable that there were separate bargaining procedures, but the issue is whether those procedures gave rise to unlawful and endemic discrimination in pay. It is not sufficient for the claimants simply to assert that there was unfairness.

557. The claimants have drawn our attention to numerous documents in which ministers and civil servants refer to the vulnerability of the NHS to equal pay claims and to the avoidance of such claims as one of the main driving forces behind AFC. There are also comments about historic disparities in pay between different groups. The claimants also point to a variety of estimates of the cost of equal pay claims.

558. These various documents, even considered cumulatively, do not persuade us either that there was endemic sex discrimination in pay or, if there was, that any of the respondents knew the extent of it or where it could be found. It would have been obvious to any intelligent person, following the ECJ decision in Enderby, that the NHS was vulnerable to equal pay claims because of the separate bargaining arrangements. The authors of the various documents to which we have been referred were certainly intelligent. There is a massive gulf, however, between awareness of vulnerability to claims and either the fact that particular claims are likely to succeed or knowledge of that fact.

559. So far as estimates of the cost of equal pay claims were concerned, these seem to us to be a mixture of wild guesses and of generous estimates to support the case to be put to the Treasury for the funding of AFC. In at least one case, an estimate by Mr Evershed, the figure was arrived at simply by estimating the amount of the pay increase if a few current equal pay claims were to succeed and then grossing that figure up across the NHS.

560. We are puzzled by the reference in the claimants' submissions to the fact that even within some of the job groups, some men were higher paid. We have had no evidence at all that any such difference in pay is the result of direct or indirect discrimination and no evidence to link any such difference in pay to disparaties as between different job groups.

Monitoring

561. Finally, the claimants referred to the lack of gender monitoring, both before and after AFC. It is indeed disappointing that only a limited amount of monitoring has taken place. The only satisfactory monitoring arrangements to have been put in place are the monitoring of the outcomes of job evaluations, using the CAJE system. We put the lack of monitoring, however, down to an absence of reliable data rather than to a lack of will and we are not prepared to draw any adverse inference.

562. The difficulties which have been faced in obtaining reliable data should not be underestimated. Several references have already been made to the 16,000 cases which are currently before the Tribunal. There are several reasons why those cases are still outstanding. There has been a shortage of independent experts, although that in itself is not a sufficient reason, because there have been delays in many cases where there has been an independent expert from an early stage. Claimants in other cases have faced legal challenges, for example relating to time points. The position has been complicated in many cases by a series of mergers and de-mergers which have made it harder for claimants to identify suitable comparisons. The amount of work required on the part of representatives in order to interview claimants and comparators and prepare and agree very lengthy job descriptions can be formidable, especially in some of the multiples where there are very many claimants and comparators.

563. All these factors have been causes of delay but there is a further factor which is common to most cases and which has tended to cause very substantial delays, particularly in the early stages. This is the lack of easily accessible and reliable pay information relating to the period prior to AFC. Unfortunately, the electronic staff record system was not in place before the implementation of AFC. Indeed, the trials of that system were being carried out at the same time as the general implementation of AFC during 2005. The absence of computerised records for the earlier period has caused great difficulty to the parties in the litigation and their representatives. The absence of computerised information and of information held centrally for the period prior to AFC has also caused great difficulties in terms of monitoring. Those difficulties should not be underestimated.

Code of Practice

564. There have been suggestions from time to time during the proceedings that the third and fourth respondents failed to have due regard to the Code of Practice. The first Code of Practice on equal pay was issued on 26 March 1997. This was at the time when the first informal discussions about the possibility of a comprehensive job evaluation study were taking place. Indeed, JEWP 1 started its work of examining existing NHS job evaluation studies in that same year.

565. The code states that there is no legal obligation on employers to carry out a pay system review or to adopt an equal pay policy. These were included in the code as good practice which was recommended by the Equal Opportunities Commission.

566. The code sets out the various steps in a review of pay systems for sex bias. The first step is to undertake a thorough analysis of the pay system to produce a breakdown of all employees, covering, for example, sex, job title, grade, whether part-time or full time, with basic pay, performance ratings and all other elements of remuneration. In our view, if the Department of Health had undertaken a comprehensive review of the NHS pay system, in accordance with the recommended steps, that work would have taken a period of years, not months. Instead, the energies of the Department and others were directed to the design and implementation of a comprehensive job evaluation study covering more than one million employees. That was in our view a more sensible expenditure of time, money and

effort. We do not draw any adverse inference from any failure to comply with the code.

The Union position on equal pay claims

567. Although we are not sure of the relevance to these proceedings, the unions have been criticised for their failure to take active steps to promote and support equal pay claims before AFC. We note at this juncture that it was MFS, one of the constituent unions of Amicus, which supported the Enderby litigation and Unison supported the Carlisle claims.

568. In general, however, for the period from 1997-2004, the comments which we have made about the Department of Health apply equally to the unions. It was of course open to the unions to pursue and support equal pay claims throughout the NHS. The experience of the claims currently before the Tribunal (and of the Enderby and Wilson cases) persuades us that it could have taken a period of several years for those claims to come to fruition. The outcome might have been that some employees would have obtained equal pay; others would not.

569. In our view, the decision of the unions to spend those years from 1997-2004 in developing, in partnership, a comprehensive job evaluation study was a sensible and enlightened decision and one which was in the best interests of their members as a whole. It is not one for which they can properly be criticised.

570. There are two matters in relation to the unions which are of great importance in relation to the issues currently being considered. The first is that it is clear from the evidence given, in particular by Mr Jackson, that even as late as 2005 the unions did not know where the potentially successful claims were and how many of them there were. This supports our view that the Department of Health did not know either.

571. The second important point is that, in spite of the 450,000 letters which were sent to union members after the discussions about back pay in 2005 broke down, only 20,000 claims were presented by the unions on behalf of their members – 9,000 in England and Wales and 11,000 in Scotland. This is a high number of claims, but it is very small in relation to the number of women who, it is suggested by the claimants, had been subject to unlawful discrimination in pay. Furthermore, the claims which have been presented include male contingent claims, although they are a fairly small minority. The number of claims presented does not support the contention that there was endemic sex discrimination in the NHS pay system before AFC.

572. Our conclusions on issue 7 are as follows:

572.1 It was the case before AFC that some groups of predominantly female employees were paid less than some groups of predominantly male employees, but the number and identity of the female

employees who were doing work which was of equal value to that of relevant male employees has not been established.

572.2 There were potential GMF defences to claims based on such disparities, as identified in further particulars which were identified by the 1st, 3rd and 4th respondents in further particulars served in December 2008.

572.3 The Tribunal cannot make any findings about the existence and extent of unlawful sex discrimination in the NHS pay system pre AFC. The Tribunal cannot conclude from the evidence presented in the PHR that there was systemic sex discrimination in those pay systems before AFC. It follows that the Tribunal cannot make any finding that either explicit pay protection or implicit pay protection (the assimilation rules) can be said to perpetuate systemic sex discrimination by virtue of the design and implementation of AFC at national level. We do not find that AFC is void.

573. Our conclusions on issue 8 are as follows:

573.1 The parties to the final agreement did not know the extent of any such disparities in pay as are mentioned above.

573.2 The said parties could not reasonably have been expected to know the extent of any such disparities and there were no steps which they could reasonably have been expected to take to investigate.

573.3 The parties to the final agreement did not know the extent and the strengths and weaknesses of any GMF defences.

573.4 The parties could not reasonably have been expected to know the extent and the strength and weaknesses of any such defences and there were no steps which they could reasonably have been expected to take to investigate.

573.5 The parties to the final agreement did not know and could not reasonably have been expected to know about any unlawful sex discrimination in the NHS pay systems pre AFC.

ISSUES 1 AND 2 – THE LAW

574 The following are the provisions of the 1970 Act with which we are principally concerned ;

1. Requirement of equal treatment for men and women in same employment -

(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that--

(a) where the woman is employed on like work with a man in the same employment--

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

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

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment--

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

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

(c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment--

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

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

(3) An equality clause falling within subsection (2)(a), (b) or (c) above shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor--

(a) in the case of an equality clause falling within subsection (2)(a) or (b) above, must be a material difference between the woman's case and the man's; and

(b) in the case of an equality clause falling within subsection (2)(c) above, may be such a material difference.

(4) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences.

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

(6) Subject to the following subsections, for purposes of this section--

(a) "employed" means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly;

(b) . . .

(c) two employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control

and men shall be treated as in the same employment with a woman if they are men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes.

2A Procedure before tribunal in certain cases

(1) Where on a complaint or reference made to an employment tribunal under section 2 above, a dispute arises as to whether any work is of equal value as mentioned in section 1(2)(c) above the tribunal may either--

(a) proceed to determine that question; or

(b) . . . require a member of the panel of independent experts to prepare a report with respect to that question;

(1A) Subsections (1B) and (1C) below apply in a case where the tribunal has required a member of the panel of independent experts to prepare a report under paragraph (b) of subsection (1) above.

(1B) The tribunal may--

(a) withdraw the requirement, and

(b) request the member of the panel of independent experts to provide it with any documentation specified by it or make any other request to him connected with the withdrawal of the requirement.

(1C) If the requirement has not been withdrawn under paragraph (a) of subsection (1B) above, the tribunal shall not make any determination under paragraph (a) of subsection (1) above unless it has received the report.

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

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

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

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

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

(b) is otherwise unsuitable to be relied upon.

(3) An evaluation contained in a study such as is mentioned in section 1(5) above is made on a system which discriminates on grounds of sex where a difference, or coincidence, between values set by that system on different demands under the same or different headings is not justifiable irrespective of the sex of the person on whom those demands are made.

(4) In this section a reference to a member of the panel of independent experts is a reference to a person who is for the time being designated by the Advisory, Conciliation and Arbitration Service for the purposes of that paragraph as such a member, being neither a member of the Council of that Service nor one of its officers or servants.

575. There is one uncontroversial principle. In order to decide whether the first respondent is entitled, under subsection 2A(2A), to rely on the JES as a defence to an equal value claim, the Tribunal must consider subsection 1(5) as well as subsections 2A(2), (2A), and (3). The reference in subsection 2A(2)(b) to "a study such as is mentioned in section 1(5)" must mean a study which complies with the requirements of subsection 1(5). No suggestion to the contrary has been made to us. Accordingly, when considering each of the technical challenges covered by issue 1, we must consider the requirements of subsection 1(5) as well as the question of suitability raised by subsection 2A(2A).

576. That appears to be the only uncontroversial question of law arising in relation to issues 1 and 2. The controversial questions appear to be:

576.1 Where does the burden of proof lie under subsection 1(5) and where does it lie under subsection 2A(2A)?

576.2 What is the standard of proof required under subsection 2A(2A) to show reasonable grounds for suspicion?

576.3 What are the criteria for compliance with subsection 1(5)?

576.4 As a matter of law, is the JES under AFC incapable of satisfying any of those criteria, in any of the respects alleged by the claimants?

576.5 What is the correct legal analysis of subsection 2A(2A)(a)? What form or forms of discrimination are envisaged?

576.6 How strict is the test of unsuitability under subsection 2A(2A)(b)?

576.7 In relation to both parts of subsection 2A(2A), does a finding of reasonable grounds for suspicion in relation to a particular evaluation prevent the employer from relying on any part of the study?

The Burden of Proof

577. Ms Romney and Ms Beale, in their written closing submissions, submit that it is for the employer to show that there has been a JES which satisfies the requirements of subsection 1(5) and that "there are no reasonable grounds to determine that the evaluation in the study was tainted by sex discrimination or was otherwise unsuitable to be relied upon". That submission is based on passages in the judgments of Dillon, LJ and Neill, LJ in Bromley v H & J Quick Ltd 1988 ICR 623 at pages 627 and 637 respectively. For example, Dillon LJ said, at page 627:

"It may be noted that s.1(5) serves two different functions under the Act. On the one hand, if a woman wants to claim that she is within s.1(2)(b) as a woman employed on work rated as equivalent with that of a man she has to point to a job evaluation study such as is mentioned in s.1(5) which has so rated the work of her job. On the other hand, if an application is made by the woman employee to an Industrial Tribunal and the employer wishes to avoid a reference to a member of the panel of independent experts for report, it is for the employer to show if he can, under s.2A(2),

(a) that the work of the woman and the work of the man in question have been given different values on a job evaluation study such as is mentioned in s.1(5), and

(b) that there are no reasonable grounds for determining that the evaluation contained in that study was, within the meaning of s.2A(3), made on a system which discriminated on grounds of sex."

578. It was pointed out by counsel for the respondents, however, that the relevant statutory provisions have been amended since judgment was given in the above case. The submissions by Mr Bowers QC and Mr Sweeney were to the following effect:

Previously, the Tribunal had to be satisfied not only of compliance with subsection 1(5) but also of the absence of reasonable grounds for determining (not merely suspecting) that the evaluation was made on a system which discriminated on grounds of sex; under the current provisions, the emphasis has changed so that the reference to reasonable grounds for suspicion is in a proviso introduced with the word "unless".

579. Mr White QC put the matter in the following terms which we cannot improve upon:

"The structure of the reorganised section makes it clear that it is for the employer to point to different evaluations under a scheme falling within Section 1(5), but that once he has done so it is for the employee to show reasonable grounds for suspecting that the evaluation was made on a system which discriminates on grounds of sex or is otherwise unsuitable to be relied upon."

580. We agree with and adopt Mr White's submission that the burden of proof is located as follows:

"(i) It is open to the employer to show, in response to an equal value claim, that the work of the woman and that of the man have been given different values on a study such as is mentioned in Section 1(5). This will involve the employer proving that the job evaluation study falls within Section 1(5).

(ii) If the employer establishes a study falling within Section 1(5) it is then open to the employee to establish that there are reasonable grounds for suspecting that the evaluation contained in the study was made on a system which discriminates on grounds of sex or is otherwise unsuitable to be relied upon. This shift in the burden of proof arises from the obligation on the Tribunal under Section 2A(2A) to determine that the work of the woman and that of the man are not of equal value "unless the Tribunal has reasonable grounds for suspecting…".

Standard of Proof

581. In their written closing submissions, Ms Romney and Ms Beale submitted that, if the burden of proof falls on the claimants, it is "extremely low". They state that the standard of proof must be similar to that which would be applicable in (presumably when resisting) a strike-out application under rule 18(7) of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004.

582. Mr Bowers QC and Mr Sweeney, in their written closing submissions, submit that the bar must not be set "too high or too low". It is for the claimants to put before the Tribunal sufficient evidence to provide it with reasonable grounds.

583. Guidance on the practical approach was given in Bromney by Dillon LJ at page 635B – D, but

that guidance was of course on the basis of the earlier statutory provisions. We have not been directed to any authority on the current provisions.

584. Approaching the question by reference to first principles of statutory construction, we direct ourselves as follows:

584.1 The claimants must point to evidence relating to one or more evaluations contained in the study. It is not sufficient for them to rely on mere assertions.

584.2 In a case such as this, where the claimants have not called any evidence, they may rely on the evidence of the respondent's witnesses, including that obtained by cross-examination, and on any documents which are before the Tribunal.

584.3 The evidence need not be strong enough to show discrimination or unsuitability (as the case may be) on the balance of probabilities. It need not even be strong enough to enable the Tribunal to draw an inference of discrimination or unsuitability in the absence of a satisfactory explanation by the respondents. It must, however, be strong enough to give the Tribunal "reasonable grounds" for suspicion.

584.4 The Tribunal must also have regard to any evidence in rebuttal or explanation provided by the witnesses for the respondents. The question for determination will be whether the Tribunal, having considered the evidence on both sides, is left with reasonable grounds for suspicion, even if there is not sufficient evidence to make a positive finding of discrimination or unsuitability.

Subsection 1(5) – The Criteria for Compliance

585. Mr White QC referred us to the well known passage from the judgment of Phillips J in Eaton Ltd v Nuttall 1977 ICR 277, at pages 277 – 8, in the following terms:

"It seems to us that subsection (5) can only apply to what may be called a valid evaluation study. By that, we mean a study satisfying the test of being thorough in analysis and capable of impartial application. It should be possible by applying the study to arrive at the position of a particular employee at a particular point in a particular salary grade without taking other matters into account except those unconnected with the nature of the work. It will be in order to take into account such matters as merit or seniority, etc., but any matters concerning the work (e.g. responsibility) one would expect to find taken care of in the evaluation study. One which does not satisfy that test, and requires the management to make a subjective judgment concerning the nature of the work before the employee can be fitted into the appropriate place in the appropriate salary grade, would seem to us not to be a valid study for the purpose of subsection (5)."

586. Mr White also referred us to the case of England v Bromley London Borough Council [1978] ICR 1, in which Phillips J summarised the effect of the above guidance in the following terms:

"In effect and in particular [a job evaluation study] should be complete and objective and by its application enable all factors of importance in relation to the work to be taken into account, making it unnecessary for the employers to make subjective judgments upon the work content."

587. We were also referred by counsel for all parties to the leading case of Bromley. The facts can be briefly stated. As part of a job evaluation study, 23 jobs were selected as representative benchmark jobs and they were ranked in order by paired comparisons. This was done on a whole job basis, but the job

descriptions contained job details under five factor headings. The jobs of the claimants and comparators were then slotted in by management representatives on an assessment of the whole job in each case, without regard to the factors. Two of the claimants appealed. The appeals panel considered each of their jobs under each of the factor headings in order to find which of the benchmark jobs it was closest to under that heading. An arithmetical formula was then applied in order to arrive at a revised ranking for each of the two jobs. There was no similar exercise for the jobs of the comparators, who did not appeal.

588. It was held by the Court of Appeal that none of the jobs of the claimants, except the two who had appealed, had ever been valued according to the factor headings. The employers could not rely on the outcome of the appeals by two of the claimants, because there had not been any appeal by their comparators. The evaluations of their jobs had not made in accordance with subsection 1(5).

589. Ms Romney, in her oral submissions, relied on the following passage from the judgment of Dillon LJ, at page 633:

"What s.1(5) does require is, however, a study undertaken with a view to evaluating jobs in terms of the demand made on a worker under various headings, for instance effort, skill, decision. To apply that to s.2A(2)(a) it is necessary, in my judgment, that both the work of the woman who has made application to the Industrial Tribunal and the work of the man who is her chosen comparator should have been valued in such terms of demand made on the worker under various headings. Mr Lester submitted that the method used on undertaking a study within s.1(5) must necessarily be 'analytical', a word he used in the sense of describing the process of dividing a physical or abstract whole into its constituent parts to determine their relationship or value. Sir Ralph Kilner Brown criticised the use of the word 'analytical' as a gloss on the section. In my judgment, the word is not a gloss, but indicates conveniently the general nature of what is required by the section, viz that the jobs of each worker covered by the study must have been valued in terms of the demand made on the worker under various headings."

590. Clearly, therefore, subsection 1(5) requires the following criteria to be satisfied before a claimant can rely on evaluations under a job evaluation scheme where her job and her comparator's job have been given an equal value, and before a respondent can rely on evaluations, for the purpose of section 2A, where jobs have been given different values:

590.1 The study must identify the demand factors which are to be used to evaluate the jobs covered by the study.

590.2 The study must provide for jobs to be evaluated by reference to those demand factors.

590.3 In order for either party to rely on the study in a particular case, the jobs of the particular claimant and comparator must have been evaluated by reference to the demand factors identified in the study.

590.4 Evaluations cannot be valid for the purpose of subsection 1(5) (and hence for the purpose of section 2A) if the job of either the claimant or the comparator has not been evaluated by reference to the demand factors. The evaluations are invalid for those purposes if either of them is based on a subjective assessment or estimate of the value of the job as a whole, without reference to the specific demand factors. An evaluation would also be invalid for either purpose if it was by reference to only some of the factors or if it was wholly or partly by reference to factors outside the scheme.

590.5 It is not sufficient for benchmark jobs to be evaluated by reference to the scheme's demand factors, if the particular evaluations relied upon, or either of them, have then been "slotted in" by reference to a comparison with those benchmark jobs which is itself a subjective "whole job" or "felt fair" comparison.

591. Neither Dillon LJ nor Neill LJ states in terms in Bromley that the evaluations in the last mentioned case could be relied upon if each of the comparisons with a benchmark job was by reference to the demand factors specified in the scheme. Mr Bowers QC and Mr Sweeney, however, rely on the following passage from the judgment of Woolf LJ:

"(a) The reason this appeal succeeds is that with the exception of Mrs Bromley and Mrs Owen it was not established that any of the applicants' jobs and any of their respective comparators' (including the comparators of Mrs Bromley and Mrs Owen) were ever evaluated under various headings as required by section 1(5). However, subject to this critical defect, in my view the employers' study complied with section 1(5). If both an applicant's job and her comparator's job had been the same job as any of the 23 benchmark jobs or 73 representative jobs the study in relation to that applicant and comparator would have fulfilled the requirements of section 1(5).

(b) In order to comply with section 1(5) it was not necessary for employers to have arranged for every single job performed by their employees to be subject to the same exhaustive process as took place and is described by Dillon LJ in relation to the 73 and 23 jobs. Such a requirement would make a benchmark study wholly useless and place an immense burden on many employers. The employers can identify a group of jobs which when evaluated under the headings have no material difference. Then one of that group of jobs can be evaluated under headings and slotted into the rank in the appropriate position having taken into account the factor value and that job can then represent the other jobs within the group. It is possible, as the 73 were chosen as typical, that this is what in fact happened in the case of the applicants and their comparators but if it did there was no evidence of this and as the onus is on the employers to satisfy s.1(5) the absence of evidence is fatal to their case.

(c) If, however, a system of choosing a representative job for a group of jobs is adopted then in relation

to a job which has not been evaluated under headings, it will be open to an employee to contend that his or her job is materially different from the alleged representative job and if this is the case the study will not comply with section 1(5)."

592. In the above passage, Woolf LJ recognises the practical reality that in a job evaluation study covering a large number of jobs (for example 1.2 million jobs) it would not be practicable (indeed we would say that it would in practice be impossible) to evaluate every single job specifically. There must be provision for representative jobs to be evaluated. There are, however, two parts of the above passage which require further consideration, as follows:

592.1 In (a), Woolf LJ suggests that both the claimant's job and her comparator's job must be "the same job" as one of the representative jobs. In (b) he refers to a group of jobs "which when evaluated under the headings have no material difference". Does this mean that, if one of a group of jobs is to be selected as a representative job for evaluation, the jobs must all be identical; or does it suffice if there is no material difference between them? If the latter is the case, must the fact that there is no material difference be established by comparing the suggested representative job with each of the other jobs by reference to the scheme factor headings? It seems to us that an exercise of that kind would place an impossible burden on managers and employee representatives implementing a scheme at local level, in an organisation such as the NHS, and is not required by the terms of subsection 1(5). If it is accepted by those implementing the scheme and, importantly, by the employees themselves that a group of jobs are all the same or that there is no material difference between them, then the evaluation of any one of those jobs is an evaluation of all of them.

592.2 In his final sentence, Woolf LJ states that a study will not comply with subsection 1(5) if the job of a particular employee is materially different from that of the representative employee. Where, for example, an employer relies on subsection 2A(2A), it will be open to a claimant whose job was not the representative job to contend that she did not agree that the job which has been evaluated should be treated as representative of her job and that there are material differences between the two jobs. Where, however, Woolf LJ states that the study will not comply with the subsection that can only be in the context of the particular evaluation. The fact that a particular evaluation was not carried out in accordance with subsection 1(5) cannot invalidate the study in relation to the evaluations which were carried out in accordance with the study.

593. Mr Bowers QC and Mr Sweeney, in their written closing submissions, summarised their analysis of subsection 1(5) in the following terms:

"1 Section 1(5) EPA is a defining provision. It is not concerned with anything other than the evaluation of work for the purposes of defining the circumstances in which a man and a woman may be said to be doing work 'rated as equivalent'.

2 Thus it can be seen that all that is required by section 1(5) is to ask these simple questions:

(i) Has there been a study undertaken which has evaluated jobs to be done by all or any of the employees in the undertaking? (yes)

(ii) Has that study been done with a view to evaluating those jobs on the basis of the demand made on a worker under various headings? (yes).

3 Once those questions are answered in the affirmative, that is the end of the 'section 1(5)' issue, subject only to the study being an analytical one (Bromley v H & J Quick Ltd [1988] ICR 249 (CA)),

which AFC clearly was."

594. Mr White QC referred us to the following passage in the judgment of Dillon LJ in Bromley:

"It must follow that, within measure, there may be subjective elements in an objective process. Where there are such subjective elements, care has to be taken to see that discrimination is not, inadvertently, let in. But such a possibility of discrimination falls to be considered, in the present case, in considering s.2A(2)(b) of the Act ('whether there are no reasonable grounds for determining that the evaluation contained in the study was made on a system which discriminates on grounds of sex') and not in considering whether the study was 'such a study as is mentioned in s.1(5).

Much the same considerations apply, in my judgment, to the complaint that alterations to the rankings were made to correct what were perceived to be anomalies. If there are no universally accepted external criteria for measuring the factors involved in assessing jobs, and the relative values of such factors, it seems to me to be only sense, at the end of a calculation, to take an overall look at the result to see if it looks right (as in the assessment of damages in some cases) and to make any necessary adjustments. Particular care would have to be taken to see that the adjustments are not the result of ingrained attitudes of discrimination, but that is again a matter for consideration under s.2A(2)(b), and the making of such adjustments, which are an ancillary part of the study, do not, in my judgment, automatically make the study not one 'such as is mentioned in s.1(5)."

595. He then summarised his view of subsection 1(5) in the following terms:

"The point Dillon L.J. was making is that Section 1(5) identifies a certain type of analytical job evaluation scheme. Provided the scheme has the essential features identified in Section 1(5) it will remain "a study such as is mentioned in Section 1(5)" even if, as a result of the application of Section 2A(2A) the Tribunal has reasonable grounds for suspecting that an evaluation contained in the study was made on a system which discriminates on grounds of sex or is otherwise unsuitable to be relied upon."

596. We agree with and gratefully adopt both the above formulations. They seem to us to be entirely consistent with the wording of subsection 1(5), the apparent purpose of that subsection and the principles stated in Bromley.

597. Ms Romney and Ms Beale, in their written closing submissions, referred us to the decision of the Employment Appeal Tribunal in Paterson v London Borough of Islington EAT/0347/03. In our view, however, this decision does not assist the claimants. The case was an unusual one in that it was the claimants who sought to rely on the job evaluation scheme, for the purposes of a claim under section 1(2)(b), and it was the employer who argued that their comparator's job had not been evaluated under a scheme which complied with subsection 1(5). Under the scheme, there were 37 jobs which had been nationally evaluated against the demand factors specified in the scheme. Each local job was to be compared on a factor by factor basis with those national jobs which were most appropriate in relation to each factor, so that the score for the local job could be built up factor by factor. When evaluating the comparator's job, however, the panel compared that job with four jobs, of which only three were within the group of 37 national jobs. The fourth job was a post which had previously been assessed and evaluated under the scheme by a joint panel. There was no provision in this scheme for a comparison to be made with a job which had been evaluated in this way instead of or in addition to jobs which were in the group of 37.

598. The Tribunal rejected the challenge by the employer. The Tribunal noted that there was no

suggestion in the evidence that the comparator's post had been incorrectly scored or graded when it was evaluated. The respondent's appeal was allowed by the Employment Appeal Tribunal. In allowing the appeal, the EAT accepted the submissions of Mr Lynch QC on behalf of the respondents, those submissions being based in part on the passages from the judgments in Eaton and Bromley set out earlier in these reasons. Mr Justice Rimer said, at paragraphs 21, 22, 23 and 24:

"21 Coming now to our conclusions, we regard it as clear that, for the purposes of section 1(5), the evaluation of the applicants' jobs and that of assistant caretaker had to be carried out under a particular "study," and that must mean the same study. Were it otherwise, different jobs would or might be evaluated by reference to different criteria, with the result that a comparison between the results would not be one of like with like. There is no doubt that in this case the "study" adopted by Islington was the Scheme. There is also no doubt how the Scheme was required to be operated at local level. In particular, as regards the "assessment" of local jobs which could not be "assimilated" to any of the 37 model national jobs, a factor comparison was required with the closest national jobs (paragraph 10 of the Scheme). We do not accept Mr Ford's submission that this (and other requirements) of the Scheme were merely recommendations from which local departure was permissible in the assessment of jobs. If that were so, the Scheme would be of little worth. We accept that the Scheme was not mandatory in the sense that either Islington or any other local authority was bound to adopt it. But, if it was adopted, it had to be applied uniformly, and according to its terms, since otherwise the job evaluations carried out under it could not be said to be carried out under it as a single "study".

22 In the present case, there is no doubt that Islington did adopt the Scheme and purported to evaluate the relevant jobs under it. The evaluation of the assistant caretaker post was, however, assessed by reference to three national model jobs and also to a fourth non-national model job. In the last respect, the assessment involved a clear departure from the Scheme. We are disposed to agree with Mr Ford that, in principle, not every such departure will necessarily compel a conclusion that the relevant evaluation was not carried out under the "study" represented by the Scheme. We agree this will usually raise a question of fact as to the materiality of the departure.

23 We have found ourselves divided as to the materiality of the departure in this case. Mr Jacques, who is in the minority, favours the view that the use of the jobbing assistant post as a comparator did not involve a material departure. It was only one of four comparisons used in the exercise, and was itself a job which had earlier been locally evaluated under the Scheme. He would uphold the tribunal's decision.

24 The majority prefers the view that for the panel to evaluate the assistant caretaker post by reference to four comparator posts, of which one was not a national model post, did involve a material departure from the requirements of paragraph 10 of the Scheme. The majority does not regard it as a departure that can be dismissed as minimal or trivial. It involved the deliberate inclusion of an impermissible comparator post for the purpose of assessing the assistant caretaker post, and that comparator post can only have been so included on the basis that it was regarded as material for the purposes of the assessment. In the majority's view, therefore, it cannot be said that the evaluation of the assistant caretaker post was carried out under the Scheme, or therefore under the same "study" as that under which the evaluation of the applicants' posts was carried out."

599. Paterson is, therefore, an authority for the proposition that, where an evaluation is carried out in a way which involves a material departure from the job evaluation scheme which has been agreed and adopted, the scheme which has been used for the purpose of that evaluation is not the agreed scheme and does not comply with subsection 1(5). That proposition seems to us to be entirely consistent with the principles stated earlier in these reasons.

600. The claimants also rely on the judgment of the Employment Appeal Tribunal in Diageo plc v Thomson EATS/0064/03. In this case, the respondents, for the purpose of their defence under section 2A, relied on a Hay job evaluation scheme which had been adopted some 20 years earlier. By the time of the evaluations with which the case was concerned, the respondent was moving towards a different scheme and several important aspects of the Hay scheme had been discarded. A central evaluation panel which was described by a witness as being integral to the scheme, to ensure consistency, had been disbanded. The former practice of having evaluations carried out by two trained evaluators had been abandoned of necessity, because the respondent now had only one trained evaluator. The respondent had ceased to use job descriptions which, in the Hay guidance were referred to as a vital

part of the overall evaluation programme, and was instead using role profiles which were not tailored to the Hay scheme in the same way. The respondent had also ceased to subscribe to Hay, so that Hay no longer provided audits of the scheme. Having heard evidence from Mrs Hastings and had regard to all the above matters, the Tribunal decided that the evaluation relied on by the respondent fell outside "the Phillips test" (being the test in Eaton set out earlier in these reasons). The evaluation fell outside the test "on the grounds of being insufficiently rigorous, or not being thorough in its analysis, as it should have been had a proper system been used".

601. The EAT held that this was a conclusion which was in law open to the Tribunal. Mr Justice Burton said at paragraph 25 that the problem was "that the Respondent had run down the methodology of compliance with its own Hay Scheme, before introducing any new scheme, and was doing its best with the assistance of only one trained evaluator, to hold the fort".

602. Mr Justice Burton also gave valuable guidance on the approach to be adopted by Tribunals in considering whether a study complies with the two requirements of being thorough in analysis and capable of impartial application. He said at paragraph 13 that these two requirements in "apply to the study itself, and not to the way in which it is applied. Of course if it is not capable of impartial application, then it will be unlikely to be impartially applied. But of course, equally, if it is, in practice, partially applied but was capable of impartial application, then the study itself is not invalid."

603. In paragraph 17 of his judgment, Mr Justice Burton commented on the way on which the Tribunal had constructed its decision and gave helpful guidance on the way in which Tribunals should approach the question whether a study fails to be thorough in analysis or not capable of impartial application. That paragraph is in the following terms:

"17 We consider it unfortunate that the Tribunal did not construct its decision the other way round, namely, to set out the issues from the outset, by reference to the very helpful test of Phillips P in Eaton Limited v Nuttall, as being whether the 2000 evaluation, which was before it, fell foul or not of that formula; then recite the defects which it found, and then conclude, in relation to each defect, whether, either individually or collectively, it caused the study in question either not to be thorough in analysis, or not to be capable of impartial application, or both. There was a very real risk, without following that approach, of the Tribunal being left with a much more difficult question, and probably the wrong one, to answer, namely whether this looked like a good study, or whether it had defects in it. Almost every study is going to be capable of being suggested to have some defects, but it will only be a study which is invalid, and invalid in accordance with proper and rigorous assessment, that will fall foul of the Phillips test and will not be available under the statute as a block to a s2 Equal Pay Act application."

604. In summary, therefore, the criteria for compliance with subsection 1(5) are as follows:

604.1 The study must require that jobs be evaluated by reference to the identified demand factors. That is an absolute requirement. Failure to comply with it invalidates the study.

604.2 In relation to any particular evaluation, there must be no material departure from the provisions of the agreed study. The question whether a particular departure is material is a question of fact. Where there is found to be a material departure, it invalidates the study for the purposes of the particular evaluation but it does not invalidate the study as a whole.

604.3 The study must be designed in such a way that it is capable of impartial application. If the study as designed requires the persons implementing the study to make subjective judgments, then the study is not a valid study for the purpose of subsection 1(5). The question whether the study is so designed is a question of fact.

604.4 The study must be so designed that evaluations carried out in accordance with the study must be capable of being carried out thoroughly and rigorously. That is also a question of fact.

Must the JES be held invalid as a matter of law?

605. As mentioned above, most of the questions which need to be addressed in relation to subsection 1(5) are questions of fact, to which we shall turn in our conclusions. Are the requirements for a scheme to be analytical, however, such that as a matter of law the JES is incapable of complying with subsection 1(5), because certain admitted features of the JES fall short of the requirements for an analytical scheme?

606. In their written closing submissions, Ms Romney and Ms Beale challenge several features of the JES both on grounds of invalidity, under subsection 1(5), and on grounds of unsuitability, under section 2A. We are concerned at this stage only with the challenge to the effect that certain features of the JES make it incapable of satisfying the requirement that a job evaluation study must be analytical.

607. It is not conceded by Ms Romney and Ms Beale that a scheme is valid for the purposes of subsection 1(5) if it requires that jobs be compared with benchmark jobs on a factor by factor basis. We have already stated our view that such a scheme is compliant.

608. Ms Romney and Ms Beale then make the point that, whilst each of the benchmark jobs in Bromley was an actually and existing job within the organisation, that is not the case under the AFC JES. Most of the national profiles, as stated, are composites of more than one job and others are based on a hypothetical job yet to be created and filled. We see nothing in the statute or in the authorities which have been cited to us to invalidate a study which provides for jobs to be evaluated on a factor by factor basis against benchmark jobs or national profiles which may or may not represent actual jobs. The national profile is a yardstick against which the matching panel can evaluate a job under each of the demand headings. If it is suggested that the use of composite profiles as a yardstick makes the study unsuitable to be relied upon, then that is a factual issue to be considered when we come to our conclusions. We can see no basis at all, however, for automatically invalidating the study as a whole on the ground that most of the national profiles do not represent actual jobs.

609. The study is also criticised on the ground that a job is deemed to match a national profile if the job description is found to be “broadly similar” to the job statement in the national profile and the information in respect of each factor is equivalent. This criticism, it seems to us, misses the point. Where the job of a claimant or comparator is matched against the national profile, it is not the national profile which is being evaluated; it is the claimant’s or comparator’s job. The rules of the JES allow for differences, within certain limits, between the values attributed under each demand factor to the national profile and the values attributed under each demand factor to the jobs being evaluated. In our view the fact that there can be a match if the job being evaluated is given a slightly different value to

that of the national profile under up to five demand factors is a strength, not a weakness of the study. The ability to give increased or reduced points under five demand factors must encourage matching panels to apply their independent judgment instead of simply adopting the score attributed to each demand factor in the national profile.

610. We can take the next two points together. Ms Romney and Ms Beale point out that at the early implementation stage some jobs were matched against national profiles which were subsequently revised and in some cases regraded subsequently. They also point out that the JES provides for three different methods of evaluation and suggest that jobs analysed using the local evaluation procedure cannot be regarded as having been analysed under the same study as those matched to national profiles. In our view these objections are also misconceived. A JES cannot be set in stone. It needs to be evolved to meet changing circumstances. If there is provision under the study to add new national profiles, the addition of those profiles does not turn the scheme into a different scheme. It is still the same scheme.

611. Similarly, if a study provides that there are three different methods of evaluation of jobs, this does not mean that there are three separate job evaluation studies. There is a single study which specifies demand factors and requires the evaluation of jobs, by reference to the demand factors, in one of three separate ways. We can see no possible basis for suggesting that a scheme formulated in this way is invalid as a matter of law because it does not meet the requirements of subsection 1(5). If and so far as the claimants contend that particular aspects of the study make it unsuitable to be relied upon, then that is a factual issue to be considered under subsection 2A(2A). A study which provides for three methods of evaluation by reference to the agreed demand factors is not thereby automatically invalid.

612. The final matter which the claimants raise under this heading is that of "clustering". In theory it would have been open to every Trust and other NHS employer to arrange for the job of every individual employee to be evaluated either by matching against national profiles or, where there was no suitable profile, by local evaluation. This would, however, have been an unnecessarily laborious process in those frequent if not universal cases where there are several employees working to the same job description and doing identical or virtually identical jobs (for example some of the nurses at most hospitals). Accordingly, in most cases, employers have tended to make arrangements for the job of one particular individual to be identified as being representative of the whole cluster of jobs and it is that job that is then evaluated. This process is known as clustering.

613. The claimants accept that this is a legitimate approach where a group of employees is carrying out exactly the same job in the same location. They contend, however, that the JES fails to ensure that clustering will occur only when the cluster members are carrying out precisely the same job. No guidance is given in the job evaluation handbook as to how clustering should be carried out for the purposes of the matching process (although there is some guidance for cases where jobs are instead being fully evaluated locally). Mrs Harwood's evidence was that where the first respondent's employees were in a cluster, then each member of the cluster was required to "sign off" the job description being used for the cluster. There was, however, the claimants say, no guidance to ensure that this was done by every NHS employer. They say that this is a vital omission.

614. Mr White QC, in his written closing submissions, has given the short answer. He submits that:

"This issue discloses no structural or systematic flaw in the AfC JES. It leaves open the possibility that inappropriate clustering might occur at local level, but that would not give rise to a national issue."

We agree with and accept that submission.

615. Although that is a complete answer to the clustering challenge, we should add that we do not accept that subsection 1(5) requires, as a matter of law, that the job which is evaluated as being representative of a cluster of jobs must be identical to every other job in the cluster down to the smallest detail. Even when two jobs are apparently identical, detailed consideration of them may show minor differences in the demands of the two jobs which could have no practical effect on the value of those jobs. Where differences are small and of no practical importance, it is no abuse of language to say that the evaluation, by matching or by local evaluation, of one of the jobs is an evaluation of all of the jobs. It would be frankly ridiculous if, after a cluster of employees have agreed that the job of one of them should be treated as representative, one of their number could subsequently contend that the evaluation of his or her job is not compliant with subsection 1(5) because of a small and unimportant difference between his or her job and the representative job. Subsection 1(5) should not be construed so as to place impossible barriers in the way of comprehensive job evaluation studies in large organisations.

The Analysis of Subsection 2A(2A)(a) - Discrimination

616. Mr Bowers QC and Mr Sweeney, in their written closing submissions, point to an important distinction between parts (a) and (b) of subsection 2A(2A). The focus under (a) is on the system, in contrast to that under (b), which is on the particular evaluation. Plainly, it seems to us, this is a national issue. Any evaluation which is made at local level must be made in accordance with the system which has been agreed and adopted under the collective agreement for AFC. As already discussed, any material departure from the system would invalidate the evaluation for the purpose of subsection 1(5). If the system set up under the collective agreement is one which discriminates on grounds of sex, then no evaluation made on that system can be relied upon for the purposes of subsection 2A(2A)(a).

617. What, however, is meant by the words “discriminates on grounds of sex?” It would appear that those words are not to be given their normal meaning, because we are taken to the specific definition contained in subsection (3). That is a very limited definition, which focuses on the values set by the system on different demands. The possibility of discrimination arises where there is a difference (or coincidence) between values set by the system on different demands under the same (or different) headings. In such circumstances, the system discriminates on grounds of sex if the difference (or coincidence) between the values set by the system is not justifiable irrespective of the sex of the person on whom those demands are made.

618. This definition in subsection 2A(3) is not an easy one to construe. The justification test is reminiscent of the original justification test in the SDA (and still the current test in non-employment cases), that contained in subsection 1(1)(b). One looks in vain, however, for the definition of disparate impact which one would expect to precede that justification test. A literal reading would suggest that, in a job evaluation system, justification is required for each part of the factor plan, whether or not that part is discriminatory in relation to gender in its effect. That cannot be right. It can only be where there is a direct or indirect discriminatory effect that justification is required.

619. Once that necessary adjustment has been made, the definition is a very limited one. It covers not sex discrimination in general, but only discrimination in the values set under different demand

headings. It is concerned with direct or indirect discrimination in the factor plan. That construction is consistent with the second sentence of article 1 of the Council Directive 75/117/EEC, as follows:

"In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex."

620. The case of Rummler v Dato-Druck G.m.b.H. 1987 ICR 774 is a case on the application of the Directive to a collective agreement relating to wage ranges in the printing industry in the former West Germany and West Berlin. The following principles emerge from paragraphs 13, 14, 15, 23 and 24 of the judgment:

620.1 A system of rewarding work may include a criterion based on the expenditure of physical effort necessary to carry out the work or the degree to which the work is physically heavy, provided that the criterion is measured objectively.

620.2 This is the case even if a particular criterion tends to favour men on the assumption that in general they are physically stronger than women. A system is not necessary discriminatory simply because one of its criteria favours men, so long as there is objective justification for the value placed on that criterion.

620.3 Indeed if the physical demand criterion were to be based on values corresponding to the average performance of women, to remove any disadvantage, that would carry a risk of discrimination. This is because work objectively requiring greater strength would be paid at the same rate as work requiring less strength (paragraph 23).

620.4 The system as a whole, however, must be organised in such a way as not to discriminate generally against either men or women. If one criterion, relating to the physical demands of a job, favours men, regard must also be had to other criteria which may tend to favour women.

621. Subsection 2A(3) refers to a difference or coincidence between values set by the system on different demands. Examples in the context of a job evaluation study could include the following:

(i) Under the factor plan, the maximum number of points for physical effort is four times greater than that for mental effort (the number of points available under the AFC JES being the same for both demands). That difference between the values set by the system on those different demands would require objective justification.

(ii) The factor plan gives the same maximum points for knowledge, training and experience as for working conditions (the former carrying maximum points nearly ten times greater than the latter under the AFC JES). That coincidence between the values set by the system on different demands would also require objective justification.

622. The language of values, demands and headings which is used in subsection 2A(3) clearly limits the subsection to the factors and weighting contained in the factor plan. That language does not permit discrimination in other parts of the study to be considered under subsection 2A(2A)(a).

The language used in subsection (3) causes us to accept the submission by Mr Bowers and Mr Sweeney that "a system" discriminates on grounds of sex "where the difference between values is not justifiable irrespective of the sex of the person on whom the demands are made. Thus the subsection absolutely confines considerations of sex discrimination in job evaluation studies to consideration of the system (section 2A(2A)(a) makes this clear). The "system" sets the values on different demands. The system will be discriminatory if the difference between those values which have been set by the system are not justifiable irrespective of the sex of the person on whom the demands are made".

623. It follows that we do not accept the submissions by Ms Romney and Ms Beale that the scope of subsection 2A(3) extends beyond the headings, values and weightings under the factor plan. They submit that the subsection covers changes in the guidance given on the application of the factor plan and also changes in national profiles. Reliance is placed on paragraphs 42 and 46 of the judgment of Mrs Justice Cox in Ministry of Defence v Armstrong 2004 IRLR 672, but in our view those passages are taken out of context. They are certainly not concerned with the construction of subsection 2A(3).

The test of unsuitability

624. This is not to say, however, that the Tribunal lacks jurisdiction to deal with allegations of discrimination in relation to the guidance and the national profiles. The legislation is concerned with sex discrimination in pay. It follows that a particular evaluation must be unsuitable to be relied upon if it has come about as the result of sex discrimination.

625. Furthermore, discrimination in relation to national guidance or the amendment of national profiles is not a local issue. If, for example, a national profile is deliberately amended with a view to describing a job in a higher pay band than could properly be justified, and if 2000 jobs at local level are matched against that profile, then the result is 2000 evaluations which are unsuitable to be relied upon. The fault lies not with those local evaluations but with the taint of sex discrimination introduced at national level. Accordingly, although we do not accept the submissions by Ms Romney and Ms Beale in relation to subsection 2A(3), the point is academic insofar as they make allegations of deliberate manipulation of profiles and amendment of guidance to attain discriminatory and unjustified objectives.

626. We do, however, have concerns as a matter of law about a submission which Ms Romney and Ms Beale make at paragraph 262 of their written closing submissions. They raised in the two preceding paragraphs contentions that alterations to the factor plan guidance were intended "artificially to bolster the position of men in posts which had been used as comparator jobs by women bringing equal pay claims against the NHS". We have jurisdiction to deal with those contentions and we propose to do so.

627. It is suggested in paragraph 262, however, that even if changes were made without any improper

motive, such changes may amount to indirect sex discrimination. That discrimination, it is argued, would occur if the changes give advantages disproportionately to men or cause disadvantage disproportionately to women and do so without objective justification.

628. Our concerns are as follows:

628.1 The effect of subsection 2A(2A) is to preclude equal value claims where the job evaluation study satisfies certain conditions.

628.2 The conditions arising under subsections 1(5) and 2A(2A)(a) are fundamental conditions relating to the system itself.

628.3 The condition under subsection 2A(2A)(b) relates to a particular evaluation, not to the system as a whole. If subsection 2A(2A) is to have any effect at all, however, some limitation must be placed on the words "otherwise unsuitable to be relied upon". Without such limitation, arguments could be advanced in every case to the effect that a particular evaluation is wrong and therefore unsuitable to be relied upon. Expert evidence could be called to challenge the evaluation and expert evidence could then be called on the other side to support it. Litigation of this kind would plainly be contrary to the purpose of subsection 2A(2A).

628.4 The mischief would be almost as great if every change to national guidance, every production of a new national profile and every withdrawal of a national profile were to be subject to challenge on the basis of technical disagreement with what has been done.

629. For these reasons, challenges under subsection 2A(2A)(b), whether at national level or local level, should in our view, as a matter of law, be confined to cases where there are reasonable grounds for suspecting direct discrimination or an act or omission motivated by bad faith or an improper motive.

The one bad apple point

630. If we find reasonable grounds for suspicion that one particular evaluation or group of evaluations is unsuitable to be relied upon, must those reasonable grounds for suspicion extend to all evaluations under the JES? Mr Lynch and Mr Milford suggested in their written submissions that the claimants' allegations do not require an "all or nothing" approach to the JES. There could be more limited grounds for suspicion if it were found that one or two profiles had been improperly revised upwards but that the rest of the profiles had been created in a non-discriminatory way. Ms Romney and Ms Beale, however, in their submissions contend that if they can show that job profiles and the factor guidance were "manipulated", that must be sufficient in itself to provide reasonable grounds for suspecting that the JES as a whole is unsuitable to be relied upon. They also suggest that there is a subsection 1(5) point, because if there are reasonable grounds for suspecting inappropriate manipulation of any profiles, the scheme cannot be said to be thorough in analysis and capable of impartial application.

631. It seems to us that in theory Mr Lynch and Mr Milford are right. It may in theory be possible to have reasonable grounds for suspicion about the suitability of only one set of profiles or even one particular profile and to say that this is a subsection 2A(2A)(b) point, because malpractice in changing guidance or in relation to national profiles would go to the implementation of the study rather than the design of the study. Furthermore, once it has been found that the study as established satisfies a subsection 1(5) test, something more than reasonable grounds for suspicion would be required to show that it no longer satisfies that test.

632. In practice, however, we think that Ms Romney and Ms Beale are right. If we have reasonable grounds for suspecting deliberate acts of discrimination right at the centre of the JES, it is difficult to see how those suspicions could be limited to a particular evaluation or group of evaluations. If the members of JEWP were to recommend the adoption or withdrawal of a national profile for an improper motive, that would show bad faith on their part. If the members of JEWP were themselves to be manipulated by the "special pleading" of a particular interest group, that would not show bad faith on their part, but it would show a worrying lack of judgment and expertise (which could also extend to the parent bodies, the JSG or Executive) and the CNG (or Staff Council). We do therefore think that in practice an all or nothing approach is required in relation to the serious allegations of manipulations of profiles and guidance which have been made by the claimants.

ISSUE 1 – VALIDITY OF THE JES – OUR CONCLUSIONS

633. We have already directed ourselves that as a matter of law a JES is capable of being a valid JES notwithstanding that:

* It requires that jobs be compared with benchmark jobs on a factor by factor basis.

* Most of those benchmark jobs are composites of more than one job and some may be based on a job yet to be created and filled.

* A job being measured against a benchmark job need not be exactly the same as the benchmark job.

* A job evaluation study may provide for different methods of setting values for the jobs under consideration.

* If the description of benchmark jobs or the guidance relating to them has changed, jobs measured against those benchmark jobs may properly be regarded as having been evaluated under the same study as jobs measured against those benchmark jobs before the changes.

* A job which is being evaluated as being representative of a cluster of jobs need not be identical to every other job in the cluster down to the smallest detail.

634. We turn now to the specific questions arising under issue 1.

Question 1.1

635. Does the principle of matching local jobs against national profiles, instead of requiring them to be specifically evaluated locally, comply with the requirements of subsection 1(5) and/or are there reasonable grounds for suspecting that it renders an evaluation arrived at by use of the JES "unsuitable to be relied upon" under subsection 2A(2A)?

636. The second part of this question strays into issue 2. We shall, however, deal with both parts in this section. We remind ourselves of the provisions of the JES for matching local jobs against national profiles. The matching panel must first identify a suitable profile. The job described in the profile need not be the same or nearly the same as the job to be matched against it, but it must be close enough for the comparison between the jobs to have some meaning.

637. Once the most suitable national profile has been selected, the job under consideration must then be matched against that profile on a factor by factor comparison. Each of the 16 factors must be considered separately. The match will fail altogether if either the KTE factor or the Freedom to Act factor is found not to be at exactly the same level as that in the national profile. The other 14 factors must be scored individually and the match will not fail if there are differences between those scores and those for the national profile, provided that the difference is not more than one level in any case and provided that there are not more than five of those differences. The score under each of the sixteen factor headings must be separately recorded on the matching sheet. At the end of the matching the job will have its own score which may well, because of the permitted variations, be different from that of the national profile.

638. We are satisfied that a study which provides for jobs to matched in this way is an analytical study. The key is the factor by factor comparison rather than a whole job comparison. If, at any local level, a job is matched without that factor by factor comparison, with the scores for the national profile being simply "read across" to the job being matched, then that process has not been undertaken in accordance with the JES. It is non-compliant with subsection 1(5) and the value placed on the job being matched is unsuitable to be relied upon for the purposes of subsection 2A(2A). Any such departure from the JES at local level is, however, a local issue.

639. It is in our view immaterial, for the purposes of subsection 1(5), that most national profiles are composites of existing jobs. As Mrs Hastings pointed out repeatedly, it is the job being matched against the profile which is being given a value under each of the headings and which ends up with its own individual record sheet. The national profile simply provides a benchmark against which that job can be assessed under each of the factor headings. Moreover there are advantages, in terms of the modernising agenda, in having sets of generic profiles against which jobs can be assessed. The availability of such profiles facilitates job changes without the need for the job to be re-evaluated, thereby giving the system some of the flexibility needed as part of the modernisation agenda. Furthermore we see no objection in principle to the use of profiles which contain elements which do not yet exist. The profile is only a benchmark. Furthermore, to adapt an example used in a different context in submissions on behalf of the first respondent, if it were otherwise how could a new job be evaluated before that job is filled? Suppose that an employer has adopted a comprehensive job evaluation study, using matching against benchmark jobs, and now wishes to recruit staff to carry out a range of jobs which are different from any existing jobs in the organisation. Those jobs themselves will have some minor variations. The employer prepares a detailed job description for each of the new jobs and also prepares, in accordance with the guidance set out in the study, a generic profile to cover all the proposed new jobs. The job description for each of those new jobs is then compared and scored against the generic profile on a factor by factor basis, following the guidance in the job evaluation study which has been adopted. It seems to us that the job evaluation study if used in this way remains compliant with subsection 1(5) and that the values given to the new jobs are suitable to be relied upon, provided of course that the job descriptions are genuinely descriptive of the new jobs to be created.

640. We do, however, recognise the dangers inherent in the use of profiles which are neither profiles of existing jobs nor composites of existing jobs. If a profile describes a job which does not yet exist anywhere, there is the risk of incorrect matching by taking into account the hypothetical elements of the national profile which do not reflect actual demands of the job being matched. It is a fundamental principle, and one very clearly stated by Mrs Hastings, that the evaluation of a particular job, whether by matching or by local evaluation, must be based on the actual demands of the job under consideration and not on any predicted future demands. In the example just given of a new set of jobs, it would be a fundamental requirement for the job descriptions to be used for matching purposes to be the job descriptions which would apply to the new jobs from the outset.

641. We have described in our findings of fact the exhaustive processes to which Mrs Hastings and her colleagues in profile group subjected information about particular jobs, before preparing national profiles based on that information. It was their policy that national profiles should reflect actual jobs or composites of actual jobs and we are satisfied that this objective was achieved in nearly every case. The possible exception is in relation to the generic profiles for senior healthcare scientists, where generic profiles were required for new jobs which were being developed. Another example is the role of nurse consultant. Where new jobs are being developed as part of the modernisation agenda, we see no objection in principle to the preparation of generic profiles in advance, to cover the new jobs, provided that any matching takes place only when there is an actual job to be matched. If any current job is matched against a national profile and is given a score based partly on predicted future demands of the job, then that evaluation would be unsuitable to be relied upon.

642. Having considered the issues relating to composite and generic profiles, we conclude that this job evaluation study, with its provision for matching against national profiles on factor by factor basis, is compliant with subsection 1(5) and that evaluations properly arrived at in accordance with the provisions of the study are suitable to be relied upon. We go further than that, however, We do not believe that any job evaluation study covering more than a million jobs and several hundred different organisations could be carried out in a satisfactory way without using a matching procedure similar to that adopted in this case. Mrs Hastings told us that the process of carrying out local evaluations would still have been going on, in 2008, if that had been the only method relied upon. We agree with that view. It would have been disastrous if the evaluation of jobs and assimilation of employees had taken four years or more. Agenda for Change had received positive votes from a majority of the affected employees. They saw benefits in the study. Agenda for Change would have lost all credibility if those benefits had been deferred for a period of years.

643. There is a further important point. Under Agenda for Change, jobs are being matched and, where necessary, local evaluations are being carried out, not by independent experts, with years of experience behind them, but by local panels of management and staff representatives working in partnership. Members of the panels have received training, but the training programme is measured in days not in weeks. It makes it very much easier for local panels to achieve consistency of outcomes throughout the country if they have national profiles against which to measure local jobs on a factor by factor comparison.

644. There are two further questions of fact which we must consider. Has the JES been designed in such a way that it is capable of impartial application? We are satisfied that it has. Neither the matching of jobs at local level against national profiles nor the local evaluation of jobs requires subjective judgments. Matching panels and evaluators have been given guidance and training to enable them to measure jobs objectively on a factor by factor basis.

645. We are also satisfied that the JES has been so designed that evaluations carried out in accordance with it are capable of being carried out thoroughly and rigorously. It is obvious from the reading of the job evaluation handbook how much care and expertise has gone into this document to ensure that matching and local evaluation carried out in accordance with the guidance in the handbook will be thorough and rigorous.

646. We conclude that the answer to question 1.1 is yes.

Question 1.2

647. Is it a defect in the scheme (such that it fails to comply with the requirements of subsection 1(5) and/or such that there are reasonable grounds to suspect that an evaluation arrived at by use of the JES is "unsuitable to be relied upon" under subsection 2A(2A) that there was a lack of consistency of approach because of the ways in which national profiles were changed and new profiles were introduced after some matching at local level had taken place?

648. The implication of this question seems to be that, if national profiles are to be used for matching purposes, they must never be changed or replaced by new profiles, even if the evidence shows that particular profiles have proved to be unhelpful. Even if it is found on the review of a profile that the levels for particular factors are too high or too low, leading to unsatisfactory matches or no matches at all, that profile must not be changed once it has been used. That proposition need only be stated for its absurdity to be apparent. Any job evaluation study which is frozen in its initial form and cannot be reviewed and corrected will quickly lose all credibility. It is inevitable that any job evaluation study, however much expertise has gone into the design of it, will prove in practice to have some features which do not work as well as others. As Mr White QC pointed out, a "JES of any size will always be, to some extent, a living system. Errors will emerge, fine-tuning will occur. It cannot be the law that correction of errors and the introduction of minor improvements invalidate the whole system."

649. The core of the JES lies in the factor plan – the sixteen factor headings and the scoring system for each factor. Those key elements of the JES have not changed. The guidance on the application of the factors and the national profiles are simply the instruments made available for the evaluation of particular jobs, whether by matching or by local evaluation. Changes to the guidance or to the national profiles do not change the key elements of the JES. Where those changes are considered changes, based on a proper review of the working of the JES, they make consequent evaluations more suitable to be relied on, not less suitable.

650. We also note that most new profiles were developed or existing profiles changed either during of the process of early implementation or between early implementation and general roll out. Only the early implementer sites were affected. We note the evidence of Mrs Hastings that the job evaluation manager at national level was in regular contact with the job evaluation leads in the early implementer sites and that discussions took place with a view to the review of matching against profiles which had been withdrawn or subject to material changes.

651. Our answer to the question posed is no.

Question 1.3

652. Can a JES comply with subsection 1(5) and/or are there reasonable grounds to suspect that an evaluation arrived at by the use of the JES is "unsuitable to be relied upon" under subsection 2A(2A) where it provides for the jobs of individual claimants and comparators to be "evaluated" in different ways (as defined by the procedures applicable within AfC), namely:

* Job matching

* "Hybrid" matching/evaluation

* Local evaluation

653. The principles which are relevant to this question are the same as those which were relevant to the last question. The key elements of the JES, the factor headings and the scoring system, are the same whichever of the three methods is used. If a job is measured in accordance with the provisions of the JES, the number of points for that job should be the same whichever of the three methods is used.

654. As with the last question, there would be absurd consequences if there was a requirement to use the same method of scoring for every job. We have already pointed out that it would have been neither practicable, in terms of cost, nor desirable, in terms of consistency, to have local evaluation for every job. Accordingly, if a universal method of measuring jobs had been adopted, it would have had to be matching against national profiles. Every time, at local level, it proved impossible to find a suitable national profile for a particular job, the local matching panel would have had to ask the profile group to prepare a new profile to cover that job. Every time a match failed, the matching panel would have had to make a similar request. The process would have become ridiculously cumbersome.

655. We have had no evidence of unsuitable outcomes arising from the different methods of measuring jobs. It will be recalled that Mrs Hastings, in her report on Sunderland, one of the early implementer sites, recorded a consistency of outcomes as between jobs which were matched and those which were locally evaluated. Mr Smith's evidence was that the hybrid procedure had been developed during the early implementation stage and had found to be useful in the few cases where it was used. The CAJE system is available for any discrepancies between outcomes under the different methods to be investigated. We have heard no evidence of defective outcomes or disadvantage to individuals as a result of the different methods.

656. Our answer, therefore, to question 1.3, in relation to the three different methods, is that yes the JES can comply with subsection 1(5) and there are no reasonable grounds to suspect that any evaluation arrived at by use of the JES is unsuitable to be relied upon because of the three different methods.

Question 1.4

657. This question relates to clusters. Does the use of clusters for the purposes of job evaluation and development of a job description comply with the requirements of subsection 1(5)? Are there reasonable grounds to suspect that it renders an evaluation arrived at by use of the JES unsuitable to be relied upon within the meaning of subsection 2A(2A)? The JES as designed at national level and as explained in the job evaluation handbook does not require clustering. It would be in accordance with the JES if every one of the 1.2 million jobs were to be matched or evaluated individually. The fact that this could not be done arises not from any requirement of the JES but from the fact that it would be impossible (and a ridiculous waste of resources), under any job evaluation study, for that number of jobs to be evaluated individually. Plainly, where there are clusters of jobs which are the same or are not materially different, representative jobs should be matched or evaluated.

658. The full text of the question which is posed in the list of issues refers to the possibility of a "family" job description being constructed for nurses in a particular ward based on the "average" or approximate content of the different roles of all the nurses in the ward. That is not something which is required by any provision of the JES and if it has occurred then it is something to be considered as a local issue.

659. The job evaluation handbook does refer to options to be considered when there is a job to be locally evaluated and there are a number of job holders carrying out that same job. For example, when the job holders work at the same location, one option for them is to select one of their number to complete the JAQ and be interviewed by job analysts. The resulting JAQ is circulated to other job holders for comment both before the interview and again before being signed off if any changes have been made as a result of the interview. Another option is for the job holders to work together to complete the JAQ and then select one of their number to represent them at the interview with the job analyst. It seems to us that this guidance is entirely appropriate and indeed it would have been helpful if similar guidance had been given in the handbook for selecting a representative job to be matched against the national profile. The guidance does not address the question of groups of jobs which are not the same but which are broadly similar with no material differences. Accordingly the question whether in any particular case such jobs have been appropriately clustered is entirely a local issue.

660. The answer, therefore, to the question posed is that, whilst the use of clusters in an appropriate way is an essential and inevitable feature of the local application of any job evaluation study on this scale, it is not something which is explicitly required by any of the provisions of the JES. Accordingly, the question whether clustering has been appropriate in any particular case is entirely a local issue. Inappropriate clustering does not in any way invalidate the national scheme for the purposes of subsection 1(5) or render any evaluation properly arrived at by use of the national scheme unsuitable to be relied upon within the meaning of subsection 2A(2A).

ISSUE 2 – REASONABLE GROUNDS FOR SUSPICION – OUR CONCLUSIONS

Our conclusions on this issue flow directly from our findings of fact and there is little need for further discussion.

661. Question 2.1 is in three parts. We have found as a fact that national profiles were not amended or withdrawn as a result of political and economic considerations; national profiles were not designed so as to benefit employees in male dominated job groups; national profiles were not inflated to preserve the previous salaries of the male job holders. We add for the avoidance of doubt that national profiles

were not designed so as to benefit employees in female dominated job groups either and that national profiles were not inflated to preserve the previous salaries of female jobholders.

662. In summary, all these allegations founder on the rock (if she will forgive the term) of Mrs Hastings. Her integrity and her commitment to gender equality are absolute; her expertise is great. We are satisfied that she would not have participated in or connived at the manipulation of profiles which is alleged. We are also satisfied that it would not have been possible for such manipulation to occur without her knowledge.

663. We are also satisfied from the evidence of Mrs Hastings that she never saw any reason to doubt that the other members of JEWP and of profile group shared her commitment to equal opportunities. Both JEWP and profile group operated as technical groups, with a strong corporate spirit, insulated from political and economic considerations. Questions for example of preserving existing pay differentials simply did not enter into their discussions.

664. We have been referred by the claimants to a number of internal documents which show a less purist approach to job evaluation than that of Mrs Hastings and her colleagues. We have noted in our findings of fact explanations for some of those comments. We find in any event that even if anybody in the Department of Health or elsewhere had been minded to manipulate the JES in the way alleged, it would not have been possible for them to achieve that objective.

665. We have made findings of fact about the other witnesses as well as Mrs Hastings. We simply do not believe that Mr Evershed, the person mainly responsible for seeing AFC through to the final agreement, and Mr Smith, who had the main responsibility for implementation, would have corrupted or been party to the corruption of the JES in the way which has been alleged. Mr Marks was the leading person on the staff side until the time of the final agreement. He had a long standing commitment to equal opportunities. He was very frank in his evidence to us about the one occasion when he felt he had to bow to political expediency, blocking the band 4 profile for the ambulance technicians because of the forthcoming vote.

666. We have not yet dealt with the allegation, which falls under question 2.1, that national profiles were blocked as a result of political and economic considerations. Plainly the blocking of the band 4 ambulance technician profile by Mr Marks was done for political considerations, as mentioned above. We have found as a fact, however, that in the event there were band 4, band 5 and band 6 profiles for ambulance practitioners and that there is no evidence of inappropriate matching to those profiles.

667. We have found that three profiles were permanently blocked as a result of the opposition of the employees in the job group concerned. One of these profiles was for the perfusionists, who blocked their profile without the support of their union, Amicus. The other groups were the “maxfax” group and solicitors in Scotland.

668. We have also made findings about the blocking by Amicus of proposed changes to the estates maintenance worker higher level profile at band 4. We have had evidence about a number of Amicus actions and documents. This is the one action which we find to have been seriously inappropriate. It did not involve either of the Amicus witnesses, Ms Cartmail and Mr Whitlow. The wording of the profile, without any change, was clear, and any inappropriate matching to it would have been a local issue, but

plainly, from the monitoring exercise, such matching had taken place. There was in these circumstances every reason to amend the profile to make the position clear and it is difficult to think of any respectable argument to the contrary. Amicus were blocking the changes simply in the sectional interest of their members, which was contrary to the way in which matters had been conducted in the staff council, the executive and the predecessor bodies. They did not even have the excuse of a need to keep their members on side for the vote on AFC, because this was long after the vote had been taken and the final agreement entered into.

669. At the end of the day, however, any inappropriate matching to the band 4 profile is a local issue. The actions of Amicus in blocking the changes to the profile do not have any ramifications beyond that profile.

670. We turn now to question 2.2. We conclude that neither the following trade unions nor any trade unions exercised influence which achieved an inappropriately higher banding for the following job groups or any job groups, except to the extent that the actions of Amicus in blocking the changes to the band 4 profile may have resulted in some inappropriate banding to that profile at local level:

* Amicus concerning maintenance assistants, maintenance craft workers, maintenance supervisors, maintenance technicians and estates officers.

* Amicus concerning building craft workers.

* Amicus concerning chaplains.

* Amicus concerning senior clinical scientists.

* UNISON concerning ambulance staff.

671. We do not need to consider the additional question whether this was done for male groups in contrast to female groups. We conclude that it was not done at all, either for male groups or female groups.

672. The reasons for this answer to question 2.2 are very similar to the reasons for the answer to question 2.1. They relate to the integrity and expertise of Mrs Hastings and her colleagues on JEWP and profile group.

673. We turn now to question 2.3. We conclude that the department of health did not intervene in the proceedings of JEWP or exercise influence over JEWP in order to achieve inappropriately higher banding for predominantly male job groups. The CNG and JSG, on which the Department of Health was represented, did influence JEWP and profile group to the extent of asking them to give priority to the preparation of particular profiles. This was one of the matters of detail referred to in Mr Evershed's note regarding Amicus. The Department of Health did not, however, intervene or exercise influence in order to attempt to achieve inappropriately higher banding for any predominantly male job group or any other job group. If that attempt had been made, it would have been unsuccessful.

674. Question 2.4 should be considered in three parts. Have low-ranking maintenance jobs been

"bolstered" prior to the job evaluation process through training or agreement between employers and trade unions? If so, has this been done as part of the introduction of Agenda for Change? If low-ranking jobs have been bolstered, has the effect been to achieve inappropriately higher bands for those jobs?

675. The answer to the first question is that we have found as a fact that there were long standing arrangements for maintenance jobs to be developed through training. That was how the multi-skilled maintenance technician post was developed. Such arrangements were entirely legitimate and indeed desirable.

676. Turning to the other questions, we had no evidence to suggest that the arrangements for AFC at national level included any arrangements for "bolstering" specifically maintenance jobs. It was, however, a key objective of AFC, as part of the modernisation agenda, that jobs should be developed and that staff should be encouraged to improve their skills. Furthermore, there was explicit guidance to the effect that consideration should be given to making a job a more heavily loaded one if it was straddling a band boundary. There was also guidance that consideration should be given to making jobs more demanding as an alternative to pay protection. There was no suggestion that any of this should be done only in relation to male dominated job groups and we see nothing wrong with it. There was no evidence that inappropriately high bands were achieved.

677. We turn now to question 2.5. Were the JES factor plan and guidance altered following early implementation so as to benefit predominantly male groups?

678. No such alterations were made with the intention of benefiting predominantly male groups. It is well beyond the bounds of credibility to suppose that Mrs Hastings and her colleagues in JEWP and profile group would act in this way.

679. The main changes which were made following early implementation were to give additional guidance to assist the appropriate matching of non health care jobs. That guidance was not given with the intention of benefiting any particular group and certainly not with the intention of benefiting predominantly male groups. Indeed one group in particular which was likely to benefit from the guidance was that of administrative and clerical staff, a predominantly female group.

680. When the factor plan and initial guidance had been prepared, it was very much in the minds of Mrs Hastings and her colleagues that they should ensure that healthcare jobs were properly valued. A concern about some of the earlier commercial schemes was that healthcare jobs had not been properly valued. This objective had been achieved, but there was a concern, following early implementation, that the guidance was so much directed towards healthcare jobs that there was a need for additional guidance to ensure that non healthcare jobs could be given their due weight. Profile group responded to this concern and did so in a way which was entirely appropriate.

681. In making our findings of fact, we have considered some allegations regarding changes to the factor plan guidance and also concerns raised on behalf of the claimants about the precise wording of particular profiles. In our findings, we have not upheld the allegations about alterations to the factor plan guidance but we have agreed that the wording against one demand factor in each of two profiles could have been improved.

682. We do not believe, however, that the latter findings are relevant to the issues which we have to decide. Plainly we do need to decide whether there has been deliberate manipulation of profiles or guidance in order to secure inappropriate outcomes. If we had found that JEWP or profile group had deliberately manipulated profiles or guidance in that way, then, for the reasons already given we should have found felt bound to conclude that no evaluation made pursuant to the JES was suitable to be relied upon.

683. In order to help us to decide whether there has been any deliberate manipulation, it has been appropriate for the claimants to point to alleged inconsistencies and defects and ask for an explanation. If we had had expert evidence that particular national profiles were overvalued, or described in an inflated way the jobs which they purported to describe, then that evidence would also have been relevant in this context. Evidence of inappropriate outcomes on a large scale or in key areas could be evidence of malpractice.

684. Once we have found, however, that there has been no deliberate manipulation of profiles or guidance, then in our view it is not part of our function to subject the national profiles or the guidance to minute examination in order to decide whether the odd word or phrase here or there could be improved. It is inevitable, in a JES covering more than one million jobs, that there will be some respects at both national and local level in which the study falls short of perfection. There may even be some mistakes. We direct ourselves, however, in accordance with paragraph 629 of these reasons. Subsection 2A(2A) would become meaningless if parties could second guess those charged with implementing the JES by showing or purporting to show that mistakes have been made and the wrong outcome has been achieved. The JES should be free from that kind of minute scrutiny, so long as it is an analytical scheme which has been designed and is being implemented in good faith, without sex discrimination and in accordance with the formal and procedural requirements set out in the scheme documents (in this case the job evaluation handbook). Mistakes should be corrected and improvements considered not by way of challenges in the Tribunal on points of detail but through the scheme's own monitoring procedures. In this case JEWP is still active and there is a job evaluation manager, with access to some 350,000 evaluations on CAJE to investigate any concerns that may be raised.

685. It follows from our replies to questions 2.1 to 2.5 that we conclude that there are no reasonable grounds to suspect that the AFC JES was made on a system which discriminates on grounds of sex, within the meaning of subsection 2A(2A)(a) and subsection 2A(3). It also follows that there are no reasonable grounds to suspect that evaluations arrived at by the use of the JES are otherwise unsuitable to be relied upon within the meaning of subsection 2A(2A)(b).

ISSUE 5 – THE GMF ISSUES – THE LAW

686. Mr Lynch QC and Mr Milford, set out at paragraphs 164 and 165 of their written submissions the general approach to be adopted in considering GMF defences. They did so in the following terms:

Equal pay and GMF defences: a general taxonomy

1. The general taxonomy of a claim under the Equal Pay Act 1970 is as follows:

(a) A prima facie or conditional right to equal pay arises once a comparison shows that an employee doing like work, work rated as equivalent or work of equal value to a relevant comparator of a different gender is being paid less than that comparator;

(b) The burden passes to the employer to show that the explanation for the variation is a genuine material factor (GMF) which is not the difference in sex;

(c) Where the employer is able to show that "the difference in sex" is not the reason for the disparity in pay, then he is not obliged to show a "good" reason for the disparity. The employer need only show that the reason proffered is actually the cause of the disparity; is "genuine" in the sense that it is not a sham; and is "material" in the sense that it is significant and relevant to the difference between the woman's case and the man's (see Glasgow City Council v Marshall [2000] ICR 196 at [23], Strathclyde Regional Council v Wallace [1998] ICR 205.)

(d) Where the reason for the disparity is directly discriminatory, the employer will be able to justify (if at all) it only in exceptional circumstances, and the issue of a GMF will probably not arise.

(e) If the employer is able to show that the difference in pay is not directly discriminatory, then the burden passes back to the claimant to show that the employer's pay arrangements are indirectly discriminatory (subject to the establishment of objective justification). It is for the claimant to prove indirect discrimination on the balance of probabilities: see Nelson v Carillion Services Ltd [2003] IRLR 428.

(f) If the claimant is able to satisfy the tribunal that the employer's pay arrangements are indirectly discriminatory, then the employer will be required objectively to justify any GMF relied upon.

(g) Pay arrangements are not necessarily indirectly discriminatory simply because it may be shown that they have a disparate adverse impact upon women: see Armstrong v Newcastle upon Tyne NHS Hospital Trust [2006] IRLR 124 (CA), Redcar & Cleveland Borough Council v Bainbridge [2008] IRLR 776 CA at [57] – [60] and Middlesbrough Borough Council v Surtees [2007] IRLR 869 EAT at [45] – [55] in particular. It is open to an employer to show that even though there is disparate adverse impact, it is not in any way related to any act of the employer that is sex tainted, and thereby to avoid the need to show objective justification.

2. The above taxonomy reflects the purpose of the equal pay legislation at both domestic and European level, which is to eliminate discrimination on grounds of sex. If an employer adduces evidence which satisfies the tribunal that the variation in pay is not for sex reasons, that objective has been met and there is no reason in policy or logic for requiring a non-sex based distinction to be objectively justified.

687. We grateful accept and adopt that broad outline. It seems to us to be in accordance with the

authorities which are referred to in it.

688. The following matters arise for further consideration:

(i) Where does the burden of proof lie in relation to each of the various stages?

(ii) In what ways can the claimant show indirect discrimination in order to put the respondent to proof of objective justification?

(iii) Where the claimant relies on statistics for that purpose, how striking do those statistics needs to be? Can the Tribunal draw inferences adverse to the respondent if relevant statistics are not available?

(iv) Is it possible in practice for a respondent to avoid the need to show objective justification, once disparate adverse impact has been shown?

(v) What are the main principles to be applied in a case where there is a need to show objective justification? In particular, is the balancing exercise still appropriate and can cost be taken into account?

(vi) Are there any specific principles which are applicable to the pay protection issues?

(vii) Are there any specific principles which are applicable to the RRP defence?

(viii) Does the collective agreement for AFC contain provision for the RRP payable to maintenance crafts persons or that payable to chaplains to be removed or reviewed? This is a question of law because it relates to the construction of a document.

689. The parties have helpfully provided us with a bundle of 65 authorities, most of which have been referred to in their written or oral closing submissions or both. Where, however, earlier authorities have been reviewed in recent decisions of the Court of Appeal or the Employment Appeal Tribunal, it would be neither necessary nor helpful for us to repeat that exercise and we do not propose to do so. We begin with the burden of proof.

690. We accept the submissions made on behalf of all the respondents that, once the employer has shown the genuine and material reason for the difference in pay, not being the difference of sex, it is then for the claimant to prove indirect discrimination on the balance of probabilities. The decision of the Court of Appeal in Nelson v Carillion Services Limited 2003 ICR 1256 is clear authority for that proposition. If the claimant succeeds in showing indirect discrimination, the burden then passes to the

employer to show objective justification.

691. Ms Romney and Ms Beale suggested, at paragraph 366 of their written closing submissions, that section 63A of the SDA 1975 applied so that they were required only to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed unlawful acts of discrimination. That proposition seems to come very close to one of the propositions expressly rejected by the Court of Appeal in Nelson. Simon Brown LJ said, at paragraph 26:

"Unless and until the complainant establishes that the condition in question has had a disproportionate adverse impact upon his/her sex the tribunal could not, in my judgment, even without explanation from the employer, conclude that he or she has been unlawfully discriminated against."

This comment was made at the end of a paragraph in which section 63A was expressly considered. The 1970 Act does not contain any equivalent of section 63A, but the Directive 97/80/EC does apply. It is plain from paragraph 27 of his judgment that Simon Brown LJ did not regard the Directive as requiring a test which was more favourable to claimants than that under section 63A.

692. Finally, on this issue, in his oral closing submissions Mr Lynch QC stated, for the avoidance of doubt, that the reasonable suspicion test under subsection 2A(2A) does not apply for the purposes of subsection 1(3). Ms Romney immediately conceded that that must be right.

Ways of showing indirect discrimination

693. There are traditionally three ways in which a claimant can show indirect discrimination so as to put the employer to proof of objective justification. They are as follows:

693.1 The claimant can show that the reason advanced by the employer for the difference in pay is one which, almost by definition, and without the need for statistical evidence, has a disparate impact on women. The obvious example is a reason which involves giving advantages to full time workers and imposing disadvantages on part time workers. Objective justification is always required in such cases.

693.2 The second case is where the employer gives a reason which may or may not involve indirect sex discrimination but which can be shown, on the basis of relevant statistics, to have an adversely disparate impact on women. The case of Armstrong and others v Newcastle upon Tyne NHS Hospital Trust 2006 IRLR 124 is authority for the principle that it may be possible in such cases for the respondent to show that the reason for the difference in pay has nothing to do with sex. The extent and limitations of this principle will be considered a little later in these reasons.

693.3 There is then the case where the statistics show disparate adverse impact against women and the only reason which can be given for the difference in pay is that it has been negotiated through collective bargaining. That describes a mechanism, or process, not a substantive reason for a difference in pay. That was the situation in Enderby. As Elias J explained in Villalba v Merrill Lynch Inc 2007

ICR at paragraph 113, the Court or Tribunal is in effect holding in such a case "that there must somewhere have been some element of indirect discrimination – in other words there is an assumed indirect discrimination" (paragraph 113). Objective justification is required in such cases, but in practice there would be obvious difficulties in showing objective justification, where the reason for the pay disparity is unknown..

694. These are not, however, the only ways in which indirect discrimination can be shown. In Redcar and Cleveland Borough Council v Bainbridge and others 2008 IRLR 776, in the Court of Appeal, Mummery LJ approved at paragraph 46 the statement by Cox J, in Ministry of Defence v Armstrong 2004 IRLR 672, at paragraph 42, that "tribunals should not apply a formulaic approach to issues of sex discrimination; what matters is whether the tribunal is satisfied in any particular case that the evidence discloses a pay difference which is related to the different of sex." This principle is particularly relevant in the context of pay protection, as mentioned under that heading later in these reasons.

The statistics

695. The starting point is to define the pool which will contain the advantaged men and women and the disadvantaged men and women. Guidance on the choice of the pool was give by Sedley LJ in Allonby v Accrington and Rossendale College 2001 ICR 1189, at paragraph 18, where he said:

"once the impugned requirement or condition has been defined there is likely to be only one pool which serves to test its effect. I would prefer to characterise the identification of the pool as a matter neither of discretion nor of fact-finding but of logic. This was the approach adopted by this court in Barry v Midland Bank plc 1999 ICR 319, 344, and endorsed by Lord Slynn of Hadley on further appeal 1999 ICR 859, 863. Logic may on occasion be capable of producing more than one outcome, especially if two or more conditions or requirements are in issue. But the choice of pool is not at large."

696. The next step is to consider the available statistics. The first question in relation to the statistics is whether they are sufficiently reliable. It was said in Enderby , at paragraph 17, that:

"It is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short term phenomena, and whether, in general, they appear to be significant."

697. Where a female claimant relies on statistics in an Enderby type of case, must the disadvantaged group contain a majority of women? The decision of the Court of Appeal in Home Office v Bailey 2005 ICR 1057 suggests not. Peter Gibson LJ said, at paragraph 29, that there should be a common approach as between "requirement or condition" cases and cases "involving disparity of pay which has arisen between two work groups". He went on to say at paragraph 30:

"Where, as here, there is one group of employees of an employer which contains a significant number, even though not a clear majority, of female workers whose work is evaluated as equal to that of another group of employees of the employer who are predominantly male and who receive greater pay, it would be very surprising if an Employment Tribunal were to be precluded by the presence in the

disadvantaged group of a significant number of men from holding that that disparity in favour of men required justification by the employer."

698. In Tyne and Wear Passenger Transport Executive v Best and others 2007 ICR 523, however, Judge Serota QC took a somewhat different approach. Referring to the above passage in the judgment in Bailey, he said at paragraph 85:

"Mr Cavanagh submitted that the reference by Peter Gibson LJ to a "clear majority" must be understood in the context of the factual basis of that case, set out at para 7 of the decision. The majority of women in the disadvantaged group was 191 to 189 and Mr Cavanagh submitted that Peter Gibson LJ was speaking of a "bare majority" as opposed to a "substantial majority" which might be sufficient to raise a prima facie case of discrimination. We believe Mr Cavanagh to be correct in this submission but in any event, in the light of the authorities cited to us, it seems to us that a "significant number" must still be a substantial percentage, just falling short of a "bare majority". We repeat, however, that in our opinion at least a "bare majority" is necessary".

699. In his judgment, Judge Serota reviewed a large number of authorities, including Bailey and Villalba and the passage quoted above is clearly binding on us.

700. We have not been directed to any authority to show whether, in a case brought by a female claimant, there must not only be a majority of women in the disadvantaged group but also a majority of men in the advantaged group. In the absence of any authority either way, we direct ourselves that this is a factor to be taken into account but not necessary a decisive one.

701. Once the claimant has overcome the hurdle of being able to show that women are in a clear (or possibly near) majority in the disadvantaged group, there are then several ways in which the statistics could be analysed. Should the focus be on the proportion of the men and proportion of the women who are in the advantaged group? Should it instead be on the disadvantaged group? Is it relevant to consider the ratio of men to women in the advantaged group and in the disadvantaged group? Are numbers as opposed to proportions relevant? Helpful guidance which was given by Burton J in Cross and others v British Airways plc 2005 IRLR 423 suggests that all these approaches could be relevant. He said at paragraphs 47 and 48:

47. "It seems to us clear, from the authorities cited to us, that the Employment Tribunal was at least entitled, if not obliged, to look at all the factors and all the figures and calculations and make of it what it could. We derive this from Seymour-Smith in the Divisional Court at 904-6 per Balcombe LJ and 914 F-G per McCullough J, and, in particular, from the helpful guidance of Lindsay P in Rutherford in the EAT ([2002] ICR 123 <http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKEAT/2001/1128_99_1007.html>), which does not appear to us to have been doubted in the Court of Appeal:

"18. Where does this leave us? Again leaving aside the case where a smaller but persistent constant disparity appears, we believe the authorities are to be synthesised and may be extended as follows:

(i) There will be some cases where, on the statistics, a disparate impact is so obvious that a look at numbers alone or proportions alone, whether of the advantaged (qualifiers) or disadvantaged (non-qualifiers) will suffice beyond doubt to show that members of one sex are substantially or considerably disadvantaged in comparison with those of the other.

(ii) However, in less obvious cases it will be proper for an employment tribunal, as the national court of fact, to use more than one form of comparison, no one of which is necessarily to be regarded as on its own decisive.

(iii) In such less obvious cases it will be proper for the employment tribunal to look not merely at proportion (as proportions alone can be misleading) but also at numbers, and to look at both disadvantaged and non-disadvantaged groups and even to the respective proportions in the disadvantaged groups expressed as a ratio of each other.

(iv) It will never be wrong for a tribunal to look at more than one form of comparison, if only to confirm that the case remains as obvious as it at first appeared. Moreover if there is any doubt as to the obviousness of the case, the tendency should always be to look at a second or further form of comparison.

…

(vii) The employment tribunal, in … less obvious cases, after looking in detail at such figures as should have been laid before it, must then stand back, as it were, and assimilating all figures, judge whether the apparently neutral provision, criterion or practice has a disparate impact, be it on men or women, that could fairly be described as considerable or substantial."

48. This is consistent with the judgment of the European Court in Seymour Smith [1999] ICR 447 <http://www.bailii.org/cgi-bin/redirect.cgi?path=/eu/cases/EUECJ/1999/C16797.html> at 489-492, and with the approval by the Court of Appeal per Potter LJ in London Underground Ltd v Edwards No 2 [1999] ICR 494 at 504-5, of the submissions of Mr Allen QC in that case that "the approach to the disparate impact question should not be formulaic at any stage".

702. It is also relevant in this context to note the judgments in the House of Lords in the case of Secretary of State for Trade and Industry v Rutherford 2006 ICR 785, to which we were referred by Mr White QC. Lord Walker of Gestingthorpe pointed out that, in a case where nearly all the men and nearly all the women are in the advantaged group it could be misleading to focus on the proportions who are in the disadvantaged group. He said at paragraph 67 that “the more extreme the majority of the advantaged in both pools, the more difficult it is, with any intellectual consistency, to pay much attention to the result of a disadvantaged-led approach”. Is the converse true? In a case where the great majority of the men and the great majority of the women are in the disadvantaged group, should the focus be on those proportions and not on the proportions who are in the advantaged group? We are not aware of any authority on the point. We propose to direct ourselves in accordance with the guidance given by Burton J in Cross and consider every aspect of any relevant statistics before making a finding on disparate impact.

703. Finally, in this section, what is the position where statistics on which the claimants would like to be able to rely are not available? Ms Romney has referred in other contexts to a claimed lack of transparency in certain aspects of AFC and has suggested that inferences can be drawn in accordance with the principle in Barton v Investec 2003 ICR 1205. She does not appear to have made that submission in terms in relation to the statistics, but we should make it clear, for the avoidance of doubt, that the mere fact of the unavailability of potentially relevant statistics would not be sufficient to enable us to draw the inference that those statistics would have proved the disparate impact which the claimants seek to prove. The circumstances in which it could be appropriate for us to draw inferences adverse to the respondents are:

703.1 If we find that there has been deliberate suppression of statistics by the respondents or a deliberate failure to compile statistics because it was known or suspected that they would be unhelpful to the respondents;

703.2 If there has been a deliberate and inexcusable failure to reply to a questionnaire served under section 7B of the 1970 Act or if a reply to the questionnaire has been evasive or equivocal;

703.3 If there was a failure to observe any relevant provision of the code of practice on equal pay which was in force at the relevant time under section 56A of the SDA 1975.

Armstrong

704 Mr White QC, in his written submissions, points out why there have been competing formulations of issue 5. The respondents' formulation is on the basis that:

"the demonstration of disparate adverse impact does not of itself give rise to the obligation to prove objective justification." The authority which he gives for that principle is the case of Armstrong v Newcastle upon Tyne NHS Hospital Trust 2006 IRLR 124 as explained by the Court of Appeal in Bainbridge/Surtees. Later in his submissions, he states the relevant principle in the following terms:

"Notwithstanding evidence of disparate adverse impact, it is still open to the employer to satisfy the Tribunal that the pay differential was not due to the difference of sex. If that can be established there is no obligation to justify."

705. That does appear to us to be an accurate statement of the principle to be derived from Armstrong. In Bainbridge/Surtees, the Court of Appeal referred to Armstrong in the following terms, at paragraphs 57 – 60, a passage relied on by Ms Romney in her oral submissions:

57. "The second case in which the Court of Appeal has considered the process of decision making in an equal pay case is Armstrong v Newcastle upon Tyne NHS Hospital Trust <http://www.bailii.org/ew/cases/EWCA/Civ/2005/1608.html> [2005] EWCA Civ 1608 <http://www.bailii.org/ew/cases/EWCA/Civ/2005/1608.html> ; <http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/2005/1608.html> [2006] IRLR 124 <http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/2005/1608.html> (CA). The precise ambit of that decision is not entirely clear, but it is accepted for present purposes that it is authority for the proposition that, merely because it has been shown that the pay arrangements have a disparate adverse effect on women, it does not necessarily follow that the employer will have to show objective justification. Even though there is evidence of disparate adverse impact, it is still open to the employer to satisfy the tribunal that the pay differential was not due to the difference of sex, directly or indirectly or was not tainted by sex. If he does so, there is no obligation to justify.

58. Mr Cavanagh and Mr Jeans submitted that this case was correctly decided. Mr Allen submitted that it was wrongly decided and was inconsistent with Enderby. He suggested that it was decided per incuriam because Enderby was not considered. He was supported by Lord Lester in this regard. Both submitted that the effect of Armstrong was to insert into the process of decision-making an additional stage, which ought not to be inserted, which made the process more complicated and gave the employer a further opportunity to avoid liability. Lord Lester sought to persuade us of the importance of putting right this erroneous development.

59. In its Middlesbrough decision, the EAT considered Armstrong in some detail and concluded that it was correctly decided, but that it would be of limited effect in practice. The EAT considered that, if a tribunal found that there had been disparate adverse impact (at least if the statistical evidence was convincing), it would usually be impossible in practical terms for the employer to show that the pay disparity was not related to the difference in sex. In particular, in an Enderby-type case, where the disadvantaged group comprised all or almost all women and the advantaged group were all or almost all men, it would be impossible in practical terms for the employer to show that the pay differential was not related to the difference of sex. Thus, although, in theory, it was right to say that an employer could still show that the pay differential was not due to the difference of sex, even in the face of evidence of disparate adverse impact, it would only be possible in a case where the statistical evidence was not very strong or convincing.

60. We are inclined to think that that analysis of the decision is correct. But in any event, we do not consider that this is the right case in which this Court should analyse the decision and decide whether it was correct and whether it is binding or was decided per incuriam. That is because we are satisfied that the case does not affect the determination of these appeals. We will demonstrate that that is so as we deal with the issues in the appeals. We mention in passing that, although the EAT in the Middlesbrough case analysed Armstrong in detail in its introductory section, once it turned to the issues which arose for determination in the appeal, it never mentioned the case again. Thus we consider that it is inappropriate to accede to Lord Lester's request that we correct the wrong turning the law has made, if it has indeed made any such wrong turning."

706. The analysis referred to above, by the EAT in Middlesbrough Borough Council v Surtees, was in the following terms. Elias J said at paragraphs 45 – 50:

45. "We have no doubt that we are bound by the decision in Armstrong. It is not for the Employment Appeal Tribunal to act on the assumption that the Court of Appeal has misunderstood European law. Nor, in a case where that Court has sought to explain the effect of a decision of the House of Lords, at least in circumstances where that is part of the essential reasoning of the Court, is it open to the Employment Appeal Tribunal to say that the Court of Appeal has misinterpreted it and to adopt its own preferred construction of their Lordships' speeches. Whether right or wrong, the principle of precedent requires a loyal adherence to what is clearly the ratio of the decision of the Court of Appeal.

46. In any event, after a careful consideration of the relevant arguments, we consider that in principle the analysis of indirect discrimination adopted by the Court of Appeal in Armstrong is correct. The EAT went too far in Villalba in saying that where the arrangements have a sufficiently strong disparate impact there is always an irrebuttable presumption of prima facie indirect sex discrimination, although in many cases - and particularly situations akin to Enderby itself - the presumption will be extremely difficult to rebut in practice. But logically it ought in principle to be open to an employer to show that even although there is disparate adverse impact, that it is not in any way related to any act of the employer which is sex tainted, and thereby avoid the need to establish justification.

47. It is true that Enderby does on its face appear to be a case where statistics themselves established a prima facie case of sex discrimination. However, it is necessary to look at that case in context. The non-discriminatory explanation for the difference in pay was the fact that the independent processes of collective bargaining had led to different terms and conditions. Neither process taken independently identified discrimination. But that would not meet the possibility that with regard to each of the bargaining arrangements there were stereotypical assumptions as to the appropriate pay for what were historically perceived to be male and female jobs. Indeed, para 39 of the opinion of the Advocate General supports this analysis:

"The structure of the reasoning for both direct discrimination and indirect discrimination is comparable with regard to the evidentiary aspect of the proceedings in as much as a rebuttable presumption of discrimination can be raised, in one case by means of a specific comparison and, in the other, by a comparison of groups, which places the onus on the employer to adduce evidence in rebuttal of that presumption or to produce a justification."

This presupposes that the statistics may be rebutted by proof that there is no discrimination, although the Advocate General did not consider that this was achieved merely be showing that the bargaining processes, taken separately, did not disclose discrimination.

48. The purpose of the equal pay legislation - both domestic and European - is to eliminate discrimination on grounds of sex. It is not to correct pay differentials for other reasons. If the employer adduces evidence which satisfies the tribunal that the variation in pay is not for sex reasons, that objective has been satisfied and there is no reason in policy or logic for requiring a non-sex based distinction to be objectively justified.

The implications of this analysis.

49. We accept, therefore, Mr Jeans' submission that proof of a non-sex based reason will be a complete answer to any discrimination claim, direct or indirect. At the same time, it is important to bear in mind the purpose of the legislation and in particular the fact that there are structural reasons causing unequal pay. There has historically been much stereotyping of jobs with assumptions being made both about what work is suitable for men and women and what pay is appropriate for these jobs. This has led to much de facto job segregation (which is not to suggest that this is a deliberate or intended policy of employers, or that they have in any way formally limited women's access to the predominantly male jobs.)

50. That history continues to leave its mark on pay structures. Tribunals must be alive to the very real possibility that where there is adverse impact, identified where necessary by sufficiently cogent statistics, that may be the result of factors which are sex tainted. We agree with the observation of Cox J in the EAT in Ministry of Defence v Armstrong [2004] IRLR 672 <http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKEAT/2004/1239_02_0704.html> , para.42, that tribunals should not apply a formulaic approach to issues of sex discrimination; what matters is whether the tribunal is satisfied in any particular case that the evidence discloses a pay difference which is related to the difference of sex."

707. Elias J went on to consider the practical significance of this analysis at paragraphs 51 – 55, in the following terms:

51. "It may be helpful to consider what we perceive to be the practical significance of this analysis, assuming it to be correct. First, in all cases of what might be termed "classic" examples of indirect discrimination the very criterion which the employer chooses to differentiate pay scales will, because of the position of women in society, itself impact adversely on women rather than men (or vice versa). A traditional example is where full timers are paid more than part timers as in the Bilka case. The criterion itself - the distinction between full and part time - is the very factor that causes the disparate impact. In such cases the pay arrangements are inevitably tainted by sex - it is the direct consequence of the employer's pay criterion - and plainly the obligation to justify arises. That was not of course the Enderby situation, as the Court of Justice in terms recognised.

52. Second, in many cases the women will be claiming that the pay arrangements adversely impact upon them as a group, but there is no obvious feature which causes the differentiation. It is not possible to point to a specific factor which would be likely to cause the women to fall into the lower paid group. However where disadvantage, typically gleaned from the statistics, is sufficiently striking, it may be justified to draw the inference that the difference in pay reflects traditional attitudes about what is appropriate male and female work and pay, even though no obvious discriminatory factor is identified.

53. Classically the employer will rely upon the fact that the result is the outcome of different negotiating structures, as in Enderby. In practice it will be extremely difficult for the employer to demonstrate that the differences are not sex tainted, as Enderby itself shows. As we have said, the fact that jobs are determined by separate negotiating structures does not of itself show that the bargainers have not, for example, been adopting stereotyped assumptions about the appropriate rates for the jobs; and in practice the employer will be likely to find that it is very difficult to prove otherwise.

54. Even then, it is possible to envisage how exceptionally the charge of sex discrimination may be discharged. For example, it may be shown that a particular group of workers (group A) has always been paid less than another group (group B) even although the jobs are of equal value. If both groups were originally predominantly male, but group B has over time become mainly female (such as might well be the case with lawyers or academics, at least in certain fields), a tribunal might readily be satisfied that despite the current adverse effect, there is no proper basis for inferring prima facie discrimination, whether based on historical stereotyping or otherwise. The factors leading to the difference in pay may be long established but the history suggests that they do not have their roots in sex discrimination but have operated independently of the sex of the job holders.

55. A third situation is where the employer identifies some particular and specific factor which he submits causes the difference in pay but which is applied only to the predominantly male group. The factor does not create the two pools but it is applied to only one of them. In those circumstances it will be sex tainted unless the employer can show - the onus being on him - that notwithstanding that the factor has been applied so as to benefit only the male group, there are non-discriminatory reasons why that is so. This may involve not merely focusing on why the men receive more but also why similar opportunities to earn the higher pay were not afforded to the women. For example, where the difference results from a bonus arrangement, the employer might show that the bonus scheme was offered to both groups and the predominantly female group chose not to adopt it. That might demonstrate that there was no sex taint in the application of the scheme and therefore nothing to justify."

708. The above quoted paragraphs 50 – 55 were relied on by Ms Romney on her oral submissions to us. In view of the analysis of Armstrong by Elias J, she invited us to exercise "great caution" when applying Armstrong. We agree that caution is required in a case where the test of disparate impact is satisfied on the basis of "valid" and "significant" statistics (paragraphs 16 and 17 of the judgment in Enderby). In any such case, it will always be difficult in practice for an employer to satisfy a Tribunal, on evidence which falls short of objective justification, that the reason for the difference in pay has nothing to do with the sex of the employees concerned.

709. In his opening submissions, Mr Lynch QC had pointed out that the Advocate General had made the following comment in Enderby at paragraph 32:

"The applicant's representative is correct in stating that in the case of a purely female profession the link to membership of that profession can have effects which are similar to a link with part-time work. According to the information before the court, the fact that speech therapists are almost exclusively women is also at least partly due to the connection between the social role of women and work. The opportunities of working part-time and of flexible arrangement of working hours are particularly attractive to women."

710. Ms Romney, however, pointed out in her oral closing submissions that that factor was not referred to in the judgment of the court in Enderby. We agree. Indeed the Advocate General himself went on to say, at paragraph 35, that "attention should be directed less to the existence of a requirement or a hurdle by means of which women suffer a disadvantage, and more to the discriminatory result". We direct ourselves that Enderby is a pure disparate impact case and not a PCP (provision, criterion or practice) case.

711. In his oral closing submissions to us, Mr Lynch QC submitted that the Tribunal "will never be driven back to bare statistics" as indicating a causal connection between gender and lower pay. Statistics can be part of the evidence and if the Tribunal have statistics and have not been given any context or explanation, then in those circumstances the Tribunal could find the connection between sex and pay so as to require objective justification. It would, however, be a "false step" for there to be a "mechanistic movement from the statistics as to gender to a ruling that objective justification has to be

shown".

712. We do not accept that submission. It seems to us to place more weight on Armstrong than the decision in that case will bear. Where the statistics are valid and significant then, we direct ourselves, it is entirely right for the Tribunal to move directly from the statistics to a requirement for objective justification, unless the employer can provide compelling evidence, short of objective justification, to show that the disparate impact has nothing to do with gender. That approach may or may not deserve the epithet "mechanistic", but in our view it is the approach which the law requires us to take. The approach urged on us by Mr Lynch would be inconsistent with the guidance given by Elias J in Surtees, that guidance having been in no way disapproved by the Court of Appeal.

713. There is one further question which we need to address in this section. In Enderby, the employers relied on two separate reasons to explain different parts of the difference in pay. It was contended that the greater part of the difference in pay was explained by the separate collective bargaining processes and that a smaller part was explained by a market forces factor, being the need, faced with a shortage of candidates for a job, to attract candidates by offering higher salaries.

714. What, however, is the position where two separate reasons are advanced as significant reasons for the whole of a relevant difference in pay? We refer to the RRP payable to maintenance crafts persons insofar as it exceeds the "no loss" RRP payable to other groups. One reason or set of reasons advanced for the difference in pay is the need to protect the NHS during the transitional period by making it possible for the NHS both to retain key staff and to compete effectively for staff in an external market. The other reason advanced is the need to retain the support of the relevant union for AFC because without that support the whole project would be placed at risk. It is not suggested that either of these reasons account for only part of the difference in pay; they are both relevant to the whole of the difference. If we find that these were indeed both reasons for the whole of the difference in pay, is it necessary for the respondents to show, in the Armstrong sense, to avoid the need to prove objective justification, that neither of the reasons involves any taint of sex discrimination. It seems to us that that must be necessary. Otherwise an employer could have both a discriminatory reason and a non-discriminatory reason for a difference of pay in a case where the statistics are sufficient to show disparate impact, prove the former reason to be free from any taint of sex and thereby successfully defend the case without having to show objective justification. That cannot be the law. We should add for the avoidance of doubt that none of the respondents has contended that this is the law. At the start of the first day of the three days of closing submissions the Tribunal proposed some questions relating to the RRP for maintenance crafts workers and for chaplains. Mr Lynch QC and Mr Milford gave their replies in writing in a document dated 9 February 2009. It is clear from that document that their position is that both reasons are justified in the Armstrong sense, but that in any event objective justification has been shown.

715. If it is necessary for objective justification to be shown for any RRP for express pay protection and/or indirect pay protection, what is the appropriate test? Subject to one qualification, we agree with and gratefully adopt the following analysis stated by Mr Lynch QC and Mr Milford in their written closing submissions:

"1 The basic test for objective justification remains that laid down by the House of Lords (per Lord Nicholls) in Barry v Midland Bank plc [1999] ICR 859 and by the CA in Hampson v Department of Education and Science [1989] ICR 179. What is required is an application of the principle of proportionality i.e. an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition, applying the principle that the more serious the discrimination, the more cogent any justification must be. The employer does not have to demonstrate that no other condition is possible; the principle of proportionality requires the tribunal to take into account the reasonable needs of the business, and to make its own judgment upon a fair and detailed analysis of the working practices and business considerations involved (see Hardy and Hansons v Lax [2005] ICR 1565 at [32]. In essence, the question is, were the pay arrangements a proportionate means of achieving a legitimate aim."

716. The one qualification is that we must also have regard to the following comment by Sedley LJ in British Airways v Grundy (no. 2) 2008 IRLR 815, at paragraph 4:

"4 I would, however, add a respectful caveat to the accepted test. The proposition that the cogency of the justification must be proportionate to the seriousness of the disparate impact has the authority of Lord Nicholls in Barry v Midland Bank [1999] ICR 859 <http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/1999/38.html> , 870. It derives from, but goes beyond, the ECJ's ruling in Enderby v Frenchay Health Authority [1994] ICR 112 <http://www.bailii.org/cgi-bin/redirect.cgi?path=/eu/cases/EUECJ/1993/C12792.html> , § 29:

"it is for the national court to determine, if necessary by applying the principle of proportionality, whether and to what extent [the justification advanced] constitutes an objectively justified economic ground for the difference in pay between the jobs in question."

For my part I have found it impossible, and experienced counsel on both sides have not been able to help me, to know how to gauge the seriousness of the disparate impact of a particular practice or term. Ex hypothesi the disparity is substantial, not marginal, otherwise justification would not be needed. It cannot matter that it affects a relatively small number of employees, for the right which it invades is a personal contractual right. Nor can it matter that the amount involved is small: for an employee who is unlawfully underpaid 50p an hour, the difference may be between subsistence and poverty."

717. This guidance cautions Tribunals against accepting arguments which trivialise the detrimental effects of inequalities in pay on the ground that the amount of the difference in pay is small or on the ground that, although the disadvantaged group is composed of women, there are only a few of them.

718. It is, however, possible to think of other contexts in which the discriminatory effect of a particular PCP may be greater or less according to the facts of the particular case. For example, in the context of pay protection, how long is the period of protection? To what extent is the protection on a "mark time" basis? Is it known, or should it be known, that some of the women excluded from the protection arrangements had valid equal pay claims? If so, is it possible to identify those women? All those are matters to be placed in the balance on one side, against the importance of the legitimate aim on the other side.

719. Can cost be taken into account as part of the objective justification? Again, this is particularly relevant in the context of pay protection.

720. In their closing written submissions, Ms Romney and Ms Beale contended that neither the Government nor the Trust as employer can rely at all on economic or budgetary considerations. For example, in the context of pay protection, if the Government is providing the money, then "the question of cost is not a defence upon which the Trust can rely". They base this submission on the decision of the ECJ in the case of Roks 1994 ECR1.

721. We do not accept that submission. We were referred by Mr Lynch QC and Mr Milford to the decision of the EAT in Cross v British Airways and the decision of the EAT in Bainbridge. Both those decisions had regard to the decision of the ECJ in Roks and other ECJ decisions. Where decisions of the ECJ have been explained by the EAT or the Court of Appeal, it is not for us to go behind those explanations and to substitute our own views. Accordingly, we direct ourselves in accordance with those two decisions and in particular with paragraphs 83 to 93 of the judgment in Bainbridge. Elias J, having referred to the argument that consideration of costs must be excluded altogether, said at paragraphs 90 – 92:

"90 The EAT in Cross rejected that argument and Mr Allen has re-run the same point before us. We are not persuaded that it would be right for us to be depart from the decision in Cross at least not unless we were convinced that Mr Allen's argument is plainly right and that the only proper

construction of these decisions of the European Court is that costs can never be taken into consideration when considering the question of objective justification. We do not think that such a broad statement is consistent with the case law. We accept that the cases show that it is not legitimate to discriminate where the aim or purpose is to save costs; see De Weerd, Nee Roks v Bestuur van de Bedrifsvereniging voor de Gezondheid ("Roks") [1994] ECR 1571 where the ECJ held that a state cannot rely upon budgetary considerations to justify a discriminatory social policy. But we do not think that the case law supports the conclusion that the question of cost should always be irrelevant.

91 We would add this. It is not in our view helpful simply to talk about costs in an abstract way. Almost every decision taken by an employer is going to have regard to costs. Given an unlimited purse there need be no losers at all. We wholly accept that where a benefit is introduced and where costs determine the scope and size of that benefit, as they inevitably will, then it would be unlawful to allocate the benefit on a discriminatory basis. In that sense it would not be open for an employer to say that the restriction on cost prevented him from conferring the benefit on the disadvantaged group.

92 If there are cost constraints, they must be allocated in a way which limits any discriminatory impact as much as possible: see for a recent example the Elias case to which we have made reference. This in our view is the explanation of the Schonheit case. Usually, however, the issue of costs may become material when an employer is being asked to put right some alleged continuing discrimination. Cross suggests that an employer cannot defeat the right to equality by pointing to financial burdens alone, but he can pray the financial burdens in aid as some support for a decision which is objectively justified on other grounds. Pay protection arrangements provide a good example. Transitional arrangements of such a kind will sometimes be appropriate (and often unavoidable in practice) to cushion the pay of those moving to lower pay. It would theoretically be possible to confer the benefit of the higher pay on everyone, but the cost may reinforce the justification limiting the benefit."

722. The employers in those cases were local authorities providing a public service and whose staff were paid from public funds raised by national and local taxation (or by borrowing). The employers whose staff are affected by AFC are NHS organisations providing a public service and paying their staff out of public funds raised by national taxation(or by borrowing). We see no material differences between the two cases.

723. Accordingly, we direct ourselves that when considering objective justification cost may not be relied upon as the only justification but it may be a supporting reason.

Pay Protection

724. Some of the comments already made refer to or are relevant to the issue of pay protection (whether express or indirect) and will not be repeated here.

725. In their written closing submissions, Ms Romney and Ms Beale submit that the payment of pay protection to men in protection of their formerly discriminatory pay, whilst denying such a right to women, is directly discriminatory and cannot be justified. They rely on the case of Snoxell v Vauxhall Motors Limited 1977 ICR 700. We note, however, that in Bainbridge/Surtees, at paragraph 103, Mummery LJ did not accept "that the distinction between historic direct discrimination and historic unlawful indirect discrimination is a material distinction". If, however, we were to find that there has been direct discrimination by the respondents in relation to the pay protection or assimilation arrangements under AFC, then that would be a very different matter. We would be concerned not with historic direct discrimination but current direct discrimination and there could be no question of justification.

726. Ms Romney and Ms Beale also submitted that in order to give rise to a requirement of objective justification there is no need for statistics. They rely on Armstrong v Ministry of Defence, as explained in Bainbridge/Surtees, for the proposition that where the differences in pay arise from occupational gender segregation, there is a clear need to provide objective justification. We accept that submission if what the claimants are saying is that there is no need for statistics if it has been shown that the differences in pay being protected have been caused by indirect (or direct) sex discrimination (whether or not caused by occupational gender segregation). That principle is plainly supported by the following

passage from Bainbridge/Surtees at paragraphs 106 – 108.

106. Here, the overt or superficial reason for inclusion in the pay protection scheme was the suffering of a wage drop on changeover day. That was not, on the face of it, anything to do with sex. But, if one then looks at the underlying reasons why the men suffered a wage drop on changeover and the women did not, the questions and answers go as follows: Why did the men suffer a drop in pay? Because they lost their old bonuses. Why did the women not suffer a drop in pay on that day? Because they had been underpaid in the period preceding changeover. Why had they been underpaid in the preceding period? Because they were being unlawfully discriminated against in that period. They too had been entitled to the same pay as the men who had been on bonuses. Thus the reason for the new pay differential was causally related to the historic unlawful sex discrimination.

107. It seems to us that, however one looks at this case, whether by comparison with Snoxell or by free-standing analysis of the facts, one cannot avoid the conclusion that the new pay arrangements were tainted by sex. Put the other way round, the reason for the pay differential was indirectly 'the difference of sex'. The same reasoning as was set out in the passage we cited from the judgment of Phillips J (see paragraphs 74 and 75 above) applies to the present circumstances. The EAT in Redcar v Bainbridge endorsed it (see paragraph 83 above). We think they were right to do so. This means that, in order to avoid a finding of unlawful sex discrimination, the employer had to justify its reason for excluding the women from pay protection on objective Barry/Cadman grounds.

108. At this stage, we wish to mention two matters. First, if the ET made a sustainable finding of fact (which it did) that the reason for the pay differential was indirectly 'the difference of sex', it matters not who had borne the burden of proving that fact. So the question as to whether Nelson was correctly decided does not arise. Second, the fact that the existence of sex taint was not proved by the production of statistics showing an adverse disparate impact on women does not affect the validity of the conclusion. As Enderby demonstrates and, as Cox J observed in MOD v Armstrong (see paragraph 46 above), statistical analysis is not the only way in which a sex taint may be recognised in a pay differential case."

727. If, however, the submission is that occupational gender segregation (which has not been shown to have occurred through any direct or indirect discrimination) is sufficient in itself to dispense with the need for statistics, then that cannot be right. There is no authority for that proposition and it is plainly wrong on principle. The need for objective justification cannot arise unless we make a finding that the need for pay protection arises because of historic sex discrimination or unless there are valid and significant statistics to show disparate impact. In the former case, objective justification must be required. In the latter case, it is required subject to any Armstrong argument.

728. Incidentally, where there has been systemic indirect discrimination against women, then one would expect the statistics also to show that a considerably greater proportion of men than of women are in receipt of pay protection. One cannot, however, exclude the possibility that there has been indirect sex discrimination against some groups of women and some groups of men. Complications can also arise where there is more than one aspect of the previous pay system giving rise to the need for protection, as in Bainbridge and Surtees (the basic pay in the case of the women and the bonuses in the case of most of the men).

729. We have already referred to the general principles relating to objective justification. In Bainbridge/Surtees, Mummery LJ identified in the following passage at paragraph 163 two legitimate aims which could also be relevant in this case if we find that objective justification is required:

"163 At paragraph 104, the EAT said that it found the arguments on justification very finely balanced. It had to consider whether the employers' reasons for excluding the women from pay protection were a proportionate means of attaining a legitimate objective (the Barry/Cadman test). First, it considered whether the difference in treatment constituted the pursuit of a legitimate aim. The EAT observed that it was 'a legitimate objective to protect the salary stream and to distinguish between two employees on that basis'. The ET had thought the same. The EAT also considered that it was legitimate to have as an objective the introduction of a job evaluation scheme which would eliminate discriminatory pay for the future. If the scheme would be undermined by extending it to these women, that was a highly relevant consideration, potentially constituting justification. As we understand it, Mr Allen does not quarrel with that and, in any event, we think the EAT was right on that point."

pH

730. We also direct ourselves that, if we find objective justification is required, the following factors may be relevant to the question whether the arrangements adopted are a proportionate means of achieved the legitimate aim(s):

730.1 If it has been shown that the need for pay protection arises because of historic discrimination against women, did the respondents know the extent of that discrimination? If not, should they have known? Did they turn a blind eye to evidence of discrimination?

730.2 Would it have been possible to estimate the cost of extending express pay protection or indirect protection or both to claimants or potential claimants? If so, has that exercise been carried out? Could the JES have been achieved if express or indirect pay protection or both had been extended in that way? If not, could the objectives of the scheme have been achieved in some other way?

730.3 Have the pay protection arrangements been negotiated with the relevant unions?

730.4 To what extent, if at all, have claimants or potential claimants been consulted about the pay protection arrangements?

730.5 How long is the period of protection? Could it or should it have been shorter?

731. So far as the question of collective agreement is concerned, Mr Bowers QC and Mr Sweeney have referred us to the case of Loxley v BAE Land Systems Ltd 2008 ICR 1348, in which Elias J said at paragraph 42 that "the fact that an agreement is made with the trade unions is potentially a relevant consideration when determining whether treatment is proportionate". He added that "the imprimatur of the trade union does not render an otherwise unlawful scheme lawful, but any tribunal will rightly attach some significance to the fact that the collective parties have agreed a scheme which they consider to be fair."

732. Finally, so far as protection is concerned, we remind ourselves that we must guard against making any assumption that protection can always be justified as the price of achieving an agreed job evaluation scheme. We direct ourselves in accordance with the very strong statement of principle in Bainbridge/Surtees at paragraphs 172 – 177:

"172 In short, in our view, the EAT was not entitled to interfere in the ET's decision. That in itself is enough to dispose of this appeal. However, because the EAT went on provide its own views on justification, we must make some observations on them. At paragraph 108, the EAT said:

"We consider given that the purpose of the scheme was to cushion employees from the potentially disastrous effects of a sudden drop in pay, the Council was entitled to take the view that it should limit the benefit to those actually in that group and to exclude all others even if some of them ought to have been in the group. Unless the pay was actually being received, there was nothing to protect. We think that is itself sufficient justification, but it is reinforced by the fact that the need to reach a protected pay arrangement, with the agreement of the unions was crucial to the making of the job evaluation scheme. Any assessment of future costing would inevitably be highly speculative and would undermine the ability to obtain agreement for the scheme."

173 We would accept that, if the EAT had been the tribunal of first instance, it would have been entitled to decide the issue of justification in that way. However, it was not and that passage must be treated with reserve. We note that the reasoning in that passage would have been equally applicable to the Redcar case and it would be unsatisfactory if the EAT were to promulgate two quite different decisions in two cases which were factually very similar without providing a rational basis for distinguishing them. Indeed, far from providing any basis for distinguishing justification in the Redcar case from that in the Middlesbrough case, the EAT went on to express the view that, in cases of this kind (viz cases where pay protection was introduced to cushion the blow of a pay reduction which had been necessary in order to remove past pay discrimination) the exclusion of the women claimants

would always be justified. It said:

"109. …it seems to us that in substance the matters we have identified will be true of all schemes of this nature. In truth the answer is not likely to be fact sensitive, at least not where large employers are involved. In every case the justification based on the need to cushion the reduction in pay actually received will apply. So, to a greater or lesser extent, will the risk of a large but unknown number of potential claims which would scupper the ability to reach agreement."

174 We are concerned about this final statement which appears, in this kind of case, to take away from tribunals the task of deciding whether the employer's arrangements can be objectively justified notwithstanding the fact that they are prima facie indirectly discriminatory. The EAT seems to think that the same answer will apply in every case where, following pay reorganisation, pay protection is given to the employees who have been the advantaged group under the old arrangements and is denied to the gender group who have been discriminated against in the past. We do not think it can be right to take that essential evaluation away from tribunals. Moreover, we cannot accept that the answer will always be as the EAT thinks.

175 It is apparent that the EAT in the Middlesbrough case was sympathetic to the position of an employer who, on finding that he has been or might have been discriminating against women seeks to reorganise his pay structure so as to avoid discrimination in the future. The EAT recognises that employers (or at least public employers such as these local authorities) will have a limited budget and many calls upon their resources. The argument accepted by the EAT in the Middlesbrough case is that in such circumstances, the employer will always be entitled to say that it must continue to discriminate against the women for another three or four years (albeit to a reducing extent) because it cannot afford to bring them into line with the men at the time of reorganisation. We find that a very surprising and undesirable general conclusion. We accept that a large public employer might be able to demonstrate that the constraints on its finances were so pressing that it could not do other than it did and that it was justified in putting the need to cushion the men's pay reduction ahead of the need to bring the women up to parity with the men. But we do not accept that that result should be a foregone conclusion. The employer must be put to proof that what he had done was objectively justified in the individual case.

176 A significant part of Mr Jeans' submission to this Court was concerned with the difficulties faced by local authorities with large workforces. His submissions began from the premise that the authorities were not in any way to blame where the pay of women employees had fallen behind the men's in a discriminatory way. It was unrealistic to expect the authorities to be able to prevent such inequalities arising. So, in cases of this kind, he submitted, that was where they were starting from. "We are where we are". Authorities such as Middlesbrough were having a very difficult time because large numbers of equal pay claims were cascading down upon them. At times, in the submissions of both Mr Cavanagh and Mr Jeans, it appeared that the authorities' stance was that they were under a duty to get rid of sex discrimination in pay only when claims were made and the inequality of pay had been demonstrated to them. In short, they only had to ensure equal pay in response to a successful claim. The EAT appears to have been sympathetic to those submissions. But, as Mr Allen pointed out, equal pay legislation came into force in 1975 and, at that time, employers had been given 5 years in which to reorganise their pay structures so as to get rid of sex discrimination in pay. Mr Allen submitted, and we accept, that an employer's duty since then has been to ensure that there was no sliding back into discrimination. Employers have been and are under a continuing duty to avoid sex discrimination in pay, regardless of whether their female employees seek to assert their rights by litigation.

177 If the general rule suggested by the EAT were to apply, employers would be able to allow their pay structures to fall out of compliance with the law and then, when forced to do something about it as the result of claims being brought, would be able to assert that they could legitimately take a further three to four years to bring their pay structures into compliance. We do not think that such a situation is consistent with the provisions of the 1970 Act which have now been in force for over 30 years. We consider that it will be possible for an employer to justify the continuance of indirect sex discrimination through the discriminatory application of a pay protection scheme but not as a matter of course and only where the employer satisfies the test of justification as set out in Barry/Cadman."

RRP

733. The general principles regarding GMF defences and objective justification have already been considered.

734. We direct ourselves that, in a case where objective justification is required, the test may be satisfied if the employer can show a business need to make an additional payment in order to recruit or retain staff. We agree with the following extract from the written closing submissions by Mr Lynch QC and Mr Milford:

The leading case on objective justification for market-related differences in the payment of claimants and comparators is Rainey v Greater Glasgow Health Board [1987] ICR 129 HL. In Rainey the claimant was a female prosthetist employed by the NHS on terms and conditions determined by Whitley bargaining arrangements. Her comparator, Mr Crumlin, was a male prosthetist who had transferred into the new NHS prosthetics service on his previous, private sector, rate of pay. This was because the new prosthetics service could not have been established within a reasonable period of time unless prosthetists transferring from the private sector had been paid remuneration no less favourable than that they were previously enjoying. The House of Lords found the arrangements to be objectively justified, since (i) there was good justification for paying all NHS employees, including prosthetists, according to NHS salary scales and pay arrangements. So it was appropriate not to pay the claimant on a different scale from other employees within the NHS; (ii) however, the fact that the new prosthetics service could not have been established without paying Mr Crumlin his previous private sector salary was "undoubtedly a good and objectively justified ground for offering him that scale of remuneration". Such justification was found notwithstanding the fact that there were no arrangements for phasing out the disparity between Mr Crumlin's salary and that of the claimant (see 137B). Rainey is a classic example where protection of the NHS (in this case, ensuring the swift establishment of a prosthetics service) was justification for a market-related differential: in that case, a permanent differential.

735. We also note the concession by Mr Lynch and Mr Milford of disparate impact insofar as the chaplains and maintenance craftsmen are entitled to payments which exceed the "no loss" payments to other groups in receipt of RRP. Mr Bowers QC and Mr Sweeney, in their written submissions, contended that it is impermissible and is positively misleading to isolate the chaplains and maintenance crafts workers from the other groups. We do not agree. On a proper analysis of the AFC provisions there is more than one category of RRP payment – the "no loss" payment to all the groups on the approved list and the additional payments to crafts persons and chaplains.

736. Mr Lynch QC and Mr Milford go on to suggest that there are non-gender related reasons for the additional payments for maintenance craftsmen and chaplains and that objective justification is not required. In our view, however, that proposition in relation to the maintenance group fails as a matter of law on the basis on which it has been formulated by Mr Lynch and Mr Milford. The reasons which they advance for the different treatment of the maintenance craftsmen are that they are in a distinct position from the other groups because, unlike those other groups, they were paid a spot rate prior to AFC and because there are published rates in the industry which represent at least a bottom floor for the market. Those facts, however, cannot in themselves be a material reason for paying RRP in excess of the "no loss" amount. They may well have facilitated the calculation of the appropriate figure once it was decided to make the additional payment, but they cannot in themselves explain why the additional payment was made. Is it suggested that, if there had been an identifiable market rate figure for all the other groups on the list, then the employees in those groups also would have received additional payments to take them closer to that market rate figure? If so, why? If not, why not? Unless there is some other non-gender related reason for making the additional payment, then objective justification is required.

737. We turn now to the written closing submissions by Ms Romney and Ms Beale. They contend

that the reason for the payments was to avoid damaging equal pay claims and if so that a GMF defence cannot succeed. We agree that the defence could not succeed in those circumstances, but there is a factual issue to be decided. The case for the respondents is that there were legitimate and non-discriminatory reasons for the additional payments.

738. It is then submitted on behalf of the claimants that the need to attract new workers into the work force when older workers retired could not be a legitimate application of a market forces argument. We do not accept this as a proposition of law. The NHS is a large and complex organisation with many hundreds of different employers. In principle it may be objectively justifiable for a collective agreement to provide for a consistent RRP payment to address a need which has not arisen yet but is likely to arise in the near future.

739. It is also suggested by Ms Romney and Ms Beale that, so far as the maintenance craft workers are concerned, the market itself is sex tainted and they rely on the decision of the House of Lords in Ratcliffe v North Yorkshire Council 1995 ICR 833. In Ratclffe, it was held that the GMF defence could not succeed in circumstances where the pay of the women was being reduced to enable the employer to compete in a market in which women were paid low wages because they were women. In those circumstances, it could not be said that the variation between the women's pay and that of their male comparators was genuinely due to a material factor which was not the difference of sex. It is suggested on behalf of the claimants that this case is the converse of Ratcliffe, because the RRP is payable to men because they are men doing a man's job in a purely male market. That is an allegation of direct sex discrimination which the claimants have not made out and in support of which they have produced no evidence. The case for the respondents is that qualified crafts persons have skills which are in short supply and for which there is a large external market. They happen to be mainly men, but there is no evidence to suggest that it is because they are men, rather than because of their skills, that they receive comparatively high pay both in the NHS and, to a greater extent, in the external market. Without such evidence, then this case has nothing in common with Ratcliffe.

740. It is also submitted on behalf of the claimants that, even if the RRP for the maintenance craft workers was justified initially, it ceased to be justified once it became clear that many of the maintenance craft workers and technicians were being graded at 4 and 5 and suffering no loss at all. Reliance is placed on the case of Benveniste v University of Southampton 1989 IRLR 122. That was a case where the claimant was on appointment paid a lower salary than her comparators because of financial constraints, but continued to receive the lower pay once those constraints had ceased to operate. It was held that when the financial constraints came to end, there was no longer a justification for the lower rate of pay.

741. That proposition is not only binding but is plainly right in the circumstances of Benveniste. It does not necessarily apply with the same force in a case where RRP payments are agreed with employees and new recruits at a time of labour scarcity and where subsequently labour is no longer scarce. In principle, an employer may be entitled to make a long term assessment and make an objective decision that there is a need for a permanent payment, notwithstanding any ebbs and flows in the market. An employer could properly conclude that an RRP is likely to be less effective in terms of recruiting or retaining labour if employees and new recruits know that it is likely to be withdrawn at any time. These are questions of fact, to be decided in accordance with the well established rules for proving objective justification, not questions of arbitrary legal principle.

742. In any event, the factual basis on which the claimants contend that the Benveniste principle applies is challenged by the respondents. It is said by the respondents that it was known when the RRP was agreed that it would be payable to craft workers on band 4, and to a few craft workers on band 5, as well as the craft workers on band 3, and that the payments to employees in all three bands were objectively justifiable. These are also questions of fact.

743. If we find that objective justification for an RRP is required, and that there is such justification in principle, we must also decide whether the actual amount agreed is also objectively justified. It was suggested by Mr Bowers QC and Mr Sweeney, in their written closing submissions, that the amount of RRP is not susceptible to scientific proof so that there must be a margin of discretion. Indeed it is suggested that the test to be applied is one which is akin to a range of reasonable responses test. We do not accept those propositions, which appear to us to be inconsistent with the approach endorsed in Enderby and Dow as mentioned earlier in these reasons. We accept that in practice the evidence will

often, perhaps usually, point to an approximate figure, or a range of figures, rather than a single figure which can be precisely identified. The test of objective justification, however, is a stricter test than one based on the minimum standard of the reasonable employer.

744. Finally, in this section on RRP, Ms Romney in her oral closing submissions, contended that it is necessary not only for the respondents to show why the men, i.e. the male craft workers, receive RRP, but also to show why women do not receive it. She based this submission on the following passage in the judgment of Elias J in Surtees in the EAT, at paragraph 55:

"A third situation is where the employer identifies some particular and specific factor which he submits causes the difference in pay but which is applied only to the predominantly male group. The factor does not create the two pools but it is applied to only one of them. In those circumstances it will be sex tainted unless the employer can show - the onus being on him - that notwithstanding that the factor has been applied so as to benefit only the male group, there are non-discriminatory reasons why that is so. This may involve not merely focusing on why the men receive more but also why similar opportunities to earn the higher pay were not afforded to the women. For example, where the difference results from a bonus arrangement, the employer might show that the bonus scheme was offered to both groups and the predominantly female group chose not to adopt it. That might demonstrate that there was no sex taint in the application of the scheme and therefore nothing to justify."

745. The situation postulated in the above paragraph is one where an issue has been raised in relation to two pools of employees, one pool predominantly male and the other predominantly female. Where that issue is raised, and there is a difference of treatment, then the employer may indeed be asked for an explanation. That is not, however, an issue which is before the Tribunal in this case. The claimants contend that objective justification for the RRP payments to the craft workers and chaplains was required and that such justification has not been shown. There is nothing in the agreed list of issues or in the written submissions on behalf of the claimants to suggest that they are advancing the alternative case that a specified predominantly female group of workers should also receive the RRP.

Can the RRP be removed?

746. The claimants say that the RRP given to the maintenance craft workers and the chaplains cannot be removed and that is one reason why the provisions are objectionable. The respondents say that the payments can either be removed or reduced to a nominal amount by way of a review.

747. It happens that the Employment Judge in this case was also a member of the Tribunal which sat in a case of Newcastle upon Tyne Hospitals NHS Foundation Trust v Philpott and others (case number 2512331/06). The issue in that case was whether Mr Philpott and his colleagues had a contractual entitlement to the RRP and it was decided that they had. The case had been presented on the basis that it had never been intended that the RRP would be payable to craft workers other than at band 3 (a contention which is strongly disputed by the respondents in this case) and the final paragraph of the judgment contained a comment that it could be open to a party to the agreement to apply to the Court for rectification and also that the current arrangements are for a transitional period and are subject to review. Philpott did not go to appeal and is, therefore, of no consequence in terms of the issues which we have to decide.

748. The provisions of the final agreement regarding RRP are contained in section 4 on pages 17 and 18 and in annex H, on pages 64 – 66.

749. It is explained in section 4 that an RRP may be applied locally, by an NHS employer, or may be awarded on a national basis to a particular group of staff. In the latter case, the level of payment should be specified or guidance should be given to employers on the appropriate level of payment.

750. Whether an RRP is awarded nationally or locally, it may awarded as either a long-term or a short-term premium. It is stated in paragraph 4.10 that short-term premia will be regularly reviewed, may be withdrawn or have their value adjusted subject to a notice period of six months, and will not be pensionable, or count for purposes of overtime, unsocial hours payments or any other payments linked to basic pay. Under paragraph 4.11, in contrast, long term premia will have their values regularly reviewed, may be awarded to new staff at a different value to that which applies to existing staff and will be pensionable and count for the purposes of any payments linked to the basic pay.

751. Paragraph 4.14 then lists the jobs for which there is "prima facie evidence" that a premium is necessary to ensure the position of the NHS is maintained "during the transitional period". The 15 jobs listed include chaplains and qualified maintenance crafts persons. Paragraph 4.15 then states that initial guidance to employers in setting appropriate levels of premia in these cases is included at annex H. The paragraph ends with a statement that the guidance may be revised by the NHS Staff Counsel and that "any uprating of these premia beyond 2005 will be by agreement at national or local level".

752. In annex H, the background to the arrangements for the 15 specified jobs is explained. There are further references to "the transitional period", in paragraph H5, and to "prima facie evidence", in paragraph 6.

753. Paragraph H7 is in the following terms:

"Under these circumstances however it is difficult, and in most cases would be inappropriate, to determine a national rate for the premium. The agreement therefore provides in these cases only that the premium must be sufficient to ensure no loss (in line with the principle that the NHS should not be disadvantaged in the labour market during the transitional period), while requiring employers working in partnership with staff representatives to review the evidence available locally. The exception dealt with below is that of staff who require full electrical, plumbing or mechanical craft qualifications, where there is a high degree of consistency in NHS rates and readily available published market rates, on the basis of which an initial rate for the premium has been set".

754. Paragraphs H13 and H15 respectively contain the specific provisions for maintenance crafts persons and chaplains. There is nothing in those two paragraphs to show whether the premium can be reduced or removed.

755. Paragraph H17 is in the following terms:

"The agreement instituting the new pay system includes a provision that any premia agreed should be uprated by 3.225% in April 2005. Any premia paid prior to this stage should be uplifted at that date by this amount. Any uprating of premia thereafter will be by either national or local agreement."

756. Paragraph H18 is then in the following terms:

"This initial guidance on the level of nationally agreed recruitment and retention premia has been drafted to allow flexibility for the service during assimilation to the new system, taking account of the fact that the current grading of posts varies widely. Future reviews of the guidance should seek to introduce greater consistency in rates of premium for newly appointed staff, unless variation is justified by the evidence."

757. We direct ourselves in accordance with the well known guidance given by Lord Hoffman in Investors Compensation Scheme Limited v West Bromwich Building Society 1998 I WLR 896 at pages 912 – 913. What meaning would the above mentioned provisions convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the agreement? We must disregard any evidence regarding the previous negotiations of the parties to the collective agreement and any declarations by them of subjective intent.

758. We note first the important distinctions in paragraphs 4.10 and 4.11 between long term and short term premia. It is stated in terms, in relation to the short term premia, that they may be withdrawn or have their value adjusted subject to a notice period of six months. The long term premia will be regularly reviewed, but there is no reference to withdrawal or adjustment. If it was the intention that the review could include a downwards review, then surely there would have been a similar provision for a notice period. It does, therefore, seem to us that where a premium is awarded on a permanent basis or for a specified period, it cannot be removed or reduced at all or during the specified period (as the case may be). Can we discern a different principle in annex H?

759. We note the references in annex H to prima facie evidence and to the transitional period. Those terms do appear to indicate that it was contemplated that the premia with which we are concerned were awarded for a transitional period and would then be subject to review or possible removal. There is, however, no definition of the transitional period. There is also no express provision under which a premium may be reduced or removed. On the contrary, paragraph H17 refers only to the "uprating" of the premia.

760. We turn now to paragraph H18. That paragraph contemplates future reviews of the "initial guidance". That expression appears to relate to the whole of annex H. The word "reviews" is capable of meaning a downwards review as well as an upwards review. The references to the transitional period and the period of assimilation also suggest that the whole of annex H will be subject to review.

761. On the other hand, there is no express provision anywhere in the agreement that any of the annex H premia will be time limited and that they may be removed or reduced. The only reference in paragraph H17 to variation is to an uprating. The reference to newly appointed staff in paragraph H18 suggests that if there were to be downward reviews then only newly appointed staff would be affected. Furthermore, it is indicated in paragraph H18 that the purpose of future reviews would be to introduce greater consistency. There is already consistency in the rates for maintenance crafts persons, because of the specific figure stated in paragraph H13. The impression that the premium cannot be removed or reduced on review is strengthened by the above mentioned differences in section 4 in the terms applicable to long term and short term premia.

762. We conclude, therefore, looking at the relevant provisions as a whole, that the meaning which the agreement would convey to a reasonable person having all the relevant background knowledge is that the agreement does not provide for the premium to be removed or reduced on review. It may be a matter of some slight embarrassment to the Employment Judge but the view expressed in the final sentence of the judgment in Philpott was wrong. If the Staff Council wishes at any future time to remove or reduce the premia payable to maintenance crafts persons or chaplains, then the agreement must first be amended.

ISSUE 5 – THE GMF ISSUES – OUR CONCLUSIONS

763. There are two formulations of issue 5. We shall state our conclusions by reference to the claimants' formulation.

764. The first question, question 5.1, is whether any or all of the provisions of the final agreement relating to explicit or implicit pay protection discriminate directly in favour of male employees. As part of that question, do the provisions confining pay protection to those who would otherwise have suffered actual loss of remuneration (as opposed to those who should have received higher pay but did not do so in breach of the equality clause) discriminate directly in favour of male employees?

765. We can deal very shortly with this issue. The claimants contend that the payment of pay protection to men, in protection of their former pay which is alleged to have been discriminatory, whilst denying such a right to women, is directly discriminatory. That is not a true representation of what has occurred. The provisions in the final agreement on express pay protection have been applied equally to the men who would otherwise have suffered a drop in pay and to the women who would otherwise have suffered a drop in pay. Pay protection has been extended neither to men nor to women who have suffered no drop in pay but who might have done so if they had previously brought equal pay claims and succeeded in those claims. Neither the terms nor the application of the provisions in the final agreement on pay protection have been influenced in any way by the gender of the employees affected by them. Nor have the provisions relating to assimilation. The only serious questions under issue 5 relate to indirect discrimination.

Questions 5.2 and 5.3 – Pay Protection and Assimilation

766. Question 5.2 is in exactly the same terms as question 5.1, except that the question is whether the relevant provisions discriminate indirectly in favour of make employees. Question 5.3 is in the following terms:

If any discrimination is indirect,

(a) is the first respondent obliged to show those provisions to be objectively justified?

(b) can the first respondent (with the assistance of the third/fourth respondents) show those provisions to be objectively justified?

767. Ms Romney and Ms Beale have made it clear on behalf of the claimants that they do not object to the provisions under which male employees received pay protection. They do not object either to the arrangements for assimilation under which the starting point under AFC is dependent on pre-AFC pay. Their case is that, in respect of both pay protection and assimilation, women who could have brought equal pay claims before AFC, and who would have been successful in those claims, should benefit from the same terms as those given to the men who would have been their male comparators.

768. The first question which arises is whether there is a need for objective justification. We have concluded, in relation to issues 7 and 8, that there was no endemic sex discrimination in the NHS pay system before AFC. Accordingly, the need for objective justification will arise only if the arrangements for either pay protection or assimilation have a disparate impact against women.

769. The relevant statistics are to be found in paragraph 294 of these reasons. There were 7865 men on protection, amounting to 0.8 percent of the total of NHS employees. The number of women was 26,950, amounting to 2.9 percent.

770. On the basis of the above figures, 77.4 percent of the employees who received protection were women and 22.6 percent were men. The proportions of men and women respectively employed in the NHS were 19 percent and 81 percent respectively.

771. What are the respective proportions of male and female employees who became entitled to pay protection? Bearing in mind that the figures in paragraph 294 are not complete, we will take a denominator of one million employees. If 7,865 out of 190,000 men received pay protection, that is a percentage of just over 4 percent of men who were in the advantaged group. If 26,950 out of 810,000 women received protection, that is a percentage of just over 3.3 percent in the advantaged group. It follows that approximately 96 percent of the men and 96.7 percent of the women were in the disadvantaged group.

772. Whichever way the statistics are analysed, they do not appear to us to be significant. They show no disparate impact in favour of men. It follows that the provisions regarding express pay protection do not require objective justification.

773. We have no statistics at all relating to the numbers or proportions of men and women who benefited from the arrangements regarding assimilation, by going into the new pay system on pay points above the lowest point or lowest transitional point for the relevant band. This is not because any of the respondents have suppressed any statistical information or refused to comply with requests for that information. The problem is that no one has the relevant information. In these circumstances, the claimants are unable to prove their case on disparate impact and the provisions for assimilation do not require objective justification.

774. We shall, however, consider whether we would have found the provisions on pay protection and assimilation to have been objectively justified if disparate impact had been shown.

Pay protection – objective justification

775. We find that pay protection had two legitimate objectives in this case. They are broadly the same as those which were found in the cases of Bainbridge and Surtees. One was to introduce a job evaluation scheme which would eliminate discriminatory pay for the future. The other was to cushion the impact on those male and female employees who would otherwise suffer an immediate loss of pay, having entered into commitments and made their financial arrangements on the not unreasonable

assumption that their pay would not be reduced. The question which we have to consider is whether the protection arrangements which were adopted were a proportionate means of achieving those objectives.

776. The major item on the debit side is the very long period of protection. A period of 6.5 years, with one pay increase during the period, is much longer than would generally be considered acceptable.

777. We also take into account on the debit side the fact that at the time no one involved in the negotiations for AFC appears to have give a thought to extending pay protection to employees who might have been able to bring successful equal pay schemes. The cost of extending protection in that way was not costed, carefully or otherwise. It would, however, have been a very difficult exercise to carry out, because no one on either the management side or the union side knew where the claims lay. We had very clear evidence from Mr Jackson on this point. In that respect, the case could not be more different from those of Bainbridge and Surtees, where the issue related to a bonus which was received by male employees and not received by female employees.

778. We turn now to the arguments in favour of the arrangements which were adopted. The first is that AFC and the JES which forms part of AFC have been achieved in partnership by the Department of Health, the employers and the unions. There has been active partnership both in the negotiation of AFC and the design of the JES at national level and in the local implementation of the JES by thousands of managers and union representatives and members working together in partnership on matching panels and appeal panels. It seems to us that there are immense advantages in having a pay system which has been developed and implemented in partnership and not simply been imposed by the management. That scheme would not have been achievable without pay protection. That is not simply a question of cost. It was very clear from the union evidence that union members do not like pay protection. The JES would not have been acceptable to the unions or their members if protection levels had gone significantly above the 8 percent which was achieved. There would have been no Agenda for Change and no agreed JES. A second important and unusual feature of this case is that the AFC and JES, including the protection arrangements, were not simply negotiated between management and unions, important though that feature is. They were also approved by positive votes of the union members, with 13 of the 15 unions, including the largest unions, all voting in favour. The Department of Health, employers and unions went to great lengths to ensure that the union members were able to make an informed decision. Employees were given full information about the provisions which they were to vote to accept or reject, including the arrangements for pay protection. The unions which voted in favour of proceeding with Agenda for Change included unions with very large majorities of women, including the RCN, UNISON, the RCM and Amicus. One of the two unions to vote against was composed almost entirely of men. It seems to us to be a fact of considerable importance, in a case where there are allegations that the pay protection arrangements were indirectly discriminatory against women, that a majority of the women who were excluded from those arrangements must have voted to accept them.

779. Having considered all the above factors, we conclude that the protection arrangements which were adopted were a proportionate means of achieving legitimate objectives. It was a substantial achievement to design, develop and apply in partnership a job evaluation scheme affecting more than one million employees and to obtain the approval of the majority of the affected employees before entering into an unconditional agreement. That achievement would not have been possible without pay protection. We find that the arrangements for pay protection were objectively justified.

Assimilation – objective justification

780. We find that the objectives of the rules on assimilation were to manage the transition from the old pay system to the new pay system in a way which was workable, affordable and acceptable to the unions and union members. We find that these were legitimate objectives. Was the method of achieving them proportionate? There are two main items to be considered on the debit side. The first is that the effect of the assimilation provisions was to maintain disparities of pay within pay bands for a very long time, exceeding even the six and a half year protection period. The number of pay points, including transitional points, is 9 at band 2, 10 at band 3, 10 at band 4, and 12 at bands 5,6 and 7. If an employee goes into one of these last three bands on the lowest transitional pay point, it is likely to take that employee at least 11 years to catch up with someone who goes in on a higher point. This is a very

long time indeed.

781. The second disadvantage is that it is an important feature of the AFC arrangements for pay progression that all staff should have annual development reviews against the knowledge and skills framework and within each pay band there are two points which are referred to as gateways. Staff pass through these points only if there is a positive assessment that they are applying the full range of knowledge and skills required for their post. Staff who are assimilated above the bottom of a band, and in some cases at the top of the band, will avoid one or both of these gateways, which are an important feature of the scheme.

782. The main justification for the arrangements which were adopted is that there was simply no practical alternative. Staff whose pay was previously below the lowest transitional point for their pay band moved up to that lowest point; those whose pay was above the highest point for the band assimilated to that highest point; those whose pay was within the range for the band assimilated at the next highest pay point to their pre-AFC pay. The existing arrangements for pay, with the great variety of different grades and all the leads and allowances, were so complicated that it would have been impossible to devise and implement any alternative system for assimilating staff at any point between the lowest and highest points of each band.

783. In particular, it would have been impossible to identify those employees who had potentially successful equal pay claims, to identify their comparators and to assimilate the former at the same pay points as the latter. As already mentioned, neither the employers nor the unions had sufficient knowledge of where the successful equal pay claims might lie. There were men and women assimilating at the top of each pay band, except the highest pay bands, because their pre-AFC pay was higher than the maximum point in their new pay band. It is likely that in most of the pay bands there would have been men and women at the top of the band who were potential comparators in equal pay cases. Accordingly, the only way to accommodate potential claimants by giving them equality in the assimilation arrangements would have been to put all employees at the top of their pay band. That would have meant that AFC would not have been affordable. Even if it had been affordable, it would have meant that every employee would have gone to the top of the pay band without passing through either of the gateways.

784. The other possibility would have been for every employee to assimilate at the lowest transitional point for his or her pay band, with those employees who thereby suffered a drop in pay benefiting from the transitional pay protection arrangements. This possibility was not explored. It would have been administratively complicated but may have been achievable administratively. It is likely, however, that it would have pushed protection levels up to a point which would have been unacceptable to the unions and union members, bearing in mind that the protection levels which were in the event achieved were close to the maximum levels which would have been acceptable.

785. On balance, therefore, we conclude that the assimilation arrangements, unsatisfactory though they were, were a proportionate means of achieving legitimate objectives and were objectively justified, because there appears to have been no better way of achieving those objectives.

RRP – Direct Discrimination

786. Question 5.4 is in the following terms:

Do any or all of the provisions of the final agreement relating to RRP discriminate directly in favour of male employees?

787. The allegation of direct discrimination which Ms Romney and Ms Beale make in their closing submissions is that the agreement under which maintenance crafts persons and technicians should receive a fixed RRP was directly sex- tainted, because the RRP was put in place partly to block female equal pay claims. That allegation is not supported by our findings of fact. The fixed RRP was negotiated by Mr Evershed and Mr Whitlow. They both had reasons, which were not identical reasons, why they believed that a fixed payment should be negotiated. Those reasons did not include the fact that the beneficiaries of the RRP would all be men or the fact that the RRP might have the effect of blocking female equal pay claims. Those matters did not influence either party in any way whatsoever.

788. We also conclude, for the avoidance of doubt, that there was no direct sex discrimination in the selection of the fifteen job groups whose members were to receive RRP. Apart from the special cases of midwives and perfusionists, for which satisfactory explanations have been given, all the groups were selected because they were the groups for whom it was perceived that there was an external market in which the NHS would have to compete. We are satisfied that other groups which were considered, such as speech and language therapists and radiographers, were excluded, not because they were female dominated groups but because the recruitment problems related not to the need to compete in an external market but to a national shortage of employees with the relevant qualifications.

Question 5.5

789. This question is in the following terms:

Do any or all of the provisions of the final agreement relating to RRP discriminate indirectly in favour of male employees?

790. The final agreement provided for payments of RRP, on at least a "no loss" basis, to employees in 15 job groups. Surprisingly, there are no statistics available for six of those job groups. This appears to be because of the way in which the NHS has traditionally compiled statistics, with the figures for the six groups in question being swallowed up in the figures for larger groups.

791. The table at paragraph 237 gives the figures for the remaining 9 job groups. The available figures for men and women in these nine job groups are 23,401 women and 16,574 men.

792. There were approximately 1.2 million employees affected by AFC. Of these employees, 81 percent are female. Accordingly the total figures for men and women are approximately 972,000 women and 228,000 men.

793. The figures can be analysed in the following ways:

(i) The percentage of the male workforce in the advantaged group, eligible for RRP, was 7.3 percent. The percentage of the female workforce in the advantaged group was 2.4 percent.

(ii) It follows that 92.7 percent of the male workforce were in the disadvantaged group, not eligible for RRP and 97.6 percent of the women were in the disadvantaged group.

(iii) The total of the available figures for men and women is 39,975. Of this number, 58.5 percent were women and 41.5 percent were men.

794. If these figures are considered in isolation, they are borderline in terms of disparate impact. As usual, where either the advantaged or disadvantaged group is very small, the perspective is different depending upon whether one looks at the larger percentage or the smaller percentage. The difference in the advantaged group, between 7.3 percent and 2.4 percent, looks greater than the difference in the disadvantaged group, between 97.6 percent and 92.7 percent. There is also the issue, on which there appears to be no authority, whether a finding of disparate impact is appropriate where women are in the majority in both the advantaged group and the disadvantaged group.

795. The figures in the table should not, however, be considered in isolation. As Mr White QC pointed out in his submissions, the evidence before the Tribunal was that the six groups for which there are no figures are all predominantly female job groups. We do not have the numbers of employees in each of those job groups, but we had a second witness statement from Mr Smith, in which he demonstrated that both nursery nurses and dental nurses can be found in several different pay bands, because job titles can cover a variety of different roles. The documents appended to his statement included 57 pages of banding outcomes for dental nurses. There were approximately 40 results on each page, showing dental nurses at bands 2, 3, 4 and 5. It follows that there were at least 2,300 or so dental nurses. We would expect the number of financial accountants and invoice clerks to be substantial as

well.

796. It seems to us that if we had the figures for these predominantly female groups, a recalculation of the percentages would bring the percentages for men and women significantly closer together. We are not persuaded, therefore, that the "no loss" provisions had disparate impact against women. Accordingly, we conclude, there was no need for objective justification.

Maintenance crafts persons and chaplains – disparate impact?

797. We must now consider whether objective justification is required for the special provisions for maintenance crafts persons and chaplains. We were invited by Mr White QC to consider on a collective basis the maintenance crafts persons, chaplains and new entrant qualified midwives, on the ground that the final agreement makes special provision for all these groups. We do not think that it would be appropriate for us to do so. The special provision and the reasons for it are different in these three cases. We think that we must consider each group separately. An important reason why that is so is that the qualified maintenance crafts persons and technicians were the only group to become eligible for an RRP which was expressly set at a figure exceeding the current nationally agreed figure. It was possible that other groups would also be eligible for RRP to take their pay above the current national scale, if for example they were receiving market forces payments under local agreements and the "no loss" RRP would embrace those payments. The maintenance group, however, was the only group for which there was specific provision for an increased payment.

798. The figures are stark in terms of the composition of the advantaged and disadvantaged groups. The advantaged group consisted almost entirely of men. There were 3,255 men and only 8 women. In the disadvantaged group, on the other hand, women were in a large majority, by 4 to 1.

The figures are less striking in terms of the percentages of the male and female workforce. Only 1.4 percent of the male workforce were in the advantaged group, compared with a statistically insignificant percentage of the female workforce. It followed that 98.6 percent of the men were in the disadvantaged group, compared with 100 percent of the female workforce.

799. This is a very small percentage difference. If we looked at it in isolation, we should probably be justified in concluding that there was no disparate impact.

800. We do not feel, however, that we can ignore the fact that the advantaged group, although small, consisted almost entirely of men. We are uncomfortable with the proposition that a pay practice which benefits a job group consisting almost entirely of men can be disregarded if that group is a very small one compared with the total workforce. With some hesitation, therefore, we conclude that there was disparate impact and that, subject to the Armstrong point, objective justification is required.

801. We turn now to the chaplains. The chaplains were the only group who enjoyed an accommodation allowance. The RRP was for the continued payment of an amount equivalent to that allowance.

802. The available figures show that the chaplains who were eligible for the RRP were 452 men and 164 women. Accordingly, approximately 73 percent of the advantaged group were men and approximately 27 percent were women.

803. The advantaged group represent tiny percentages of the total male and female workforce. The 452 men in the advantaged group represent 0.19 percent of the male workforce. The 164 women in the disadvantaged group represent 0.02 percent of the female workforce. These percentages are at the level where the expression de minimis would come to mind if the use of Latin were still permitted. Certainly, in themselves, they go nowhere near establishing disparate impact.

804. The principle which we have applied in relation to the maintenance crafts persons applies also to the chaplains, however. In the advantaged group there is a clear majority of men. In the disadvantaged group there is a very substantial majority of women. We do not feel able to ignore the statistics simply because the numbers are tiny.

805. Our hesitation in relation to the chaplains is, however, greater than it was in relation to the maintenance group. This is partly, but not only, because the numbers are smaller. We are also not wholly convinced that the statistics are significant in equal pay terms. We think it very likely that until a few years ago there would have been hardly any female chaplains in the NHS, because of the lawful discrimination by religious groups against women who wished to become ministers of religion. It was as recently as 1994 that the Church of England approved the ordination of women. The percentage of women amongst the chaplains has already risen to 27 percent and we think it very likely that it will continue to rise. We do not, however, have evidence about the gender statistics for earlier periods and without this evidence we do not feel able to disregard the statistics, such as they are. We conclude therefore that, subject to the Armstrong point, objective justification is required.

Armstrong - chaplains

806. It is submitted by Mr Lynch QC and Mr Milford and also Mr White QC that objective justification is not required either for the RRP payable to the chaplains or for that payable to the maintenance crafts persons and technicians because the Armstrong principle applies. We deal first with the question of the chaplains.

807. It is pointed out to us that the chaplains are the only group who received an accommodation allowance before AFC. That is the reason why they continue to receive an equivalent amount as RRP afterwards. It has nothing to do with their gender.

808. We are not convinced that that analysis in itself is sufficient. The fact that under a new pay system employees continue to receive an equivalent payment to an allowance which they received under the previous pay system is not necessarily unrelated to gender. It is possible at least in theory that the accommodation allowance payable before AFC was agreed as a result of direct or indirect discrimination in favour of this male dominated job group, however unlikely that may be in practice.

809. There has, however, been no evidence, and indeed no suggestion, that there was such discrimination. There has also been no suggestion that there is any other job group consisting wholly or mainly of employees who would have been entitled to accommodation if they worked in one of the jobs mainly available in the external market. The absence of any such evidence or suggestion seems to us to bring the case within the Armstrong principle.

810. There is, moreover, a further important point which satisfies any doubts we may have had on this question. The purpose of the RRP provisions in AFC was to preserve the status quo (Latin again) for employees in job groups which were vulnerable to market pressures, at a time when the NHS needed to retain key staff because of its programme of expansion and modernisation. It seems to us, therefore, that the principle under which the accommodation allowance was effectively continued for the chaplains was the same principle as that under which employees in the other, mostly female dominated, job groups were to be eligible for RRP on the “no loss” principle. This approach is reinforced by the fact that the chaplains at band 6, even with the RRP, would see little or no increase in their income, because the band 6 scale was very close to the existing pay scale. The assistant chaplains at band 5 would see a drop in their income, even with the fixed RRP, and would need an extra “ no loss” RRP.

811. Our conclusion on this issue, therefore, is that the respondents have satisfied us that the RRP payable to the chaplains has nothing to do with gender. Objective justification is not required.

Armstrong – maintenance group

812. It is submitted by Mr Lynch QC and Mr Milford that there is no need for objective justification. This is because the two reasons for the decision that the maintenance craft workers should be paid a fixed rate RRP had nothing to do with their gender. One of these reasons was that they were paid a spot rate under the national agreement for maintenance crafts. This meant that there was a high degree of consistency in their NHS rates. The other reason was that the JIB publishes rates which represent at least a bottom floor for the market. This meant that there were published data which enabled a sensible assessment to be made of base market rates for the craft jobs. Because the differential treatment of the maintenance craft workers was based upon reasons which were unrelated to sex, objective justification

was not required.

813. We do not agree with this submission. The spot rate and JIB rate are landmarks which made it easier to agree a specific fixed rate for the maintenance craft workers, but the existence of those landmarks does not in itself explain why it was decided to pay maintenance crafts workers and technicians an RRP which took their earnings above the previous spot rate. Why was it decided to give the maintenance craft workers and technicians a pay increase? What was the reason, unrelated to sex, for giving this group a pay increase which was not given to the other groups identified in annex H?

814. This was a classic case of negotiations between management side and staff side (Mr Evershed and Mr Whitlow respectively) leading to what was effectively a pay rise for a group of employees consisting almost entirely of men. There is nothing in our findings of fact to suggest that Mr Evershed and Mr Whitlow were negotiating in bad faith, but that is not sufficient to dispense with the need for objective justification. It is almost a given that in collective negotiations of this kind there is a risk of unconscious or indirect discrimination in favour of the male dominated group who are to receive a benefit. That is why objective justification is required.

Objective justification – the no loss provisions and chaplains

815. We turn now to question 5.6(b). If objective justification is required for any of the RRP provisions, can the first respondent (with the assistance of the third and fourth respondents) show those provisions to be objectively justified? We shall first consider the "no loss" provisions and the special provision for chaplains, in case we are wrong in our view that objective justification for those provisions is not required. We shall then turn to the objective justification for the RRP payable to the maintenance craft workers and technicians.

816. The objective of the negotiating bodies in agreeing the no loss RRP provisions was to protect the NHS against shortages of key staff in the period of transition to the new pay system. We are satisfied that this was a legitimate objective. The NHS was entering not only a period of transition but also one in which there was to be expansion and modernisation. The CNG and JSG identified groups which contained employees whose pay was falling under AFC and for whose services there was an external market. There was a need to protect the NHS against loss of staff to outside employers and against inability to compete effectively in the external market in order to recruit suitably qualified new employees. Was the "no loss" national RRP a proportionate method of achieving this objective? We believe that it was. In an ideal world, the CNG and the JSG would have foreseen in 1999 that particular groups were likely to need RRP and would have commissioned research bodies to confirm the identity of the groups requiring RRP and to advise on the appropriate provisions. In the real world, however, that was not a realistic scenario. The funding for AFC was not confirmed until mid 2002 and there was then a hectic period of regular meetings to consider the many issues which had to be resolved before the draft agreement could be settled in November of that year. At that stage there was simply not time for thorough research to be carried out. That research would in any event have been a major undertaking, in view of the large number of job groups to be considered, the large number of employers and variety of different terms and the inadequacy of the pay data. The "no loss" RRP for the groups which were identified was in our view a sensible and proportionate way of achieving the legitimate objective.

817. The discussions which took place in 2002 did not, however, provide objective justification for a permanent RRP for employees in the specified groups. If we had found that objective justification was required, then that justification would not continue indefinitely, in the absence of thorough research into the justification for the no loss RRP in relation to each of the job groups. That research should include steps to obtain pay data for the pre-AFC period and consideration of that data, in order to find out what market forces payments were being made before AFC and what the justification for those payments was.

818. The period of assimilation to AFC and of the "bedding down" of the new system was a much longer period than the sort of transitional period which had been envisaged. Furthermore, the difficulties of obtaining and evaluating pre-AFC pay data should not be underestimated. In our view a reasonable period for a proper review of all the AFC payments to be completed would have been the

period up to 31 March 2011, equating with the pay protection period.

819. The above comments would apply equally to the chaplains, if we had found that objective justification for their RRP was required. The RRP in their case was explicitly a maintenance of the existing arrangements, since the amount was to be the same amount as the accommodation allowance.

820. Mr Lynch QC and Mr Milford suggested to us that chaplains were not entitled to receive RRP up to the amount of any accommodation allowance already in payment, unless they actually suffered loss under AfC. That suggestion was made on the basis of a sentence in paragraph H15 of the final agreement stating that "any premium agreed, in addition to meeting the normal rules on the minimum level of allowance set out above, must not be less than the level of any accommodation allowance already in payment". We do not agree with that construction of the agreement. It seems to us to mean that the minimum amount of any premium must be such as to avoid any loss. In addition the level of the payment must be not less than that of any accommodation allowance already in payment. The required amount was therefore the greater of the accommodation allowance and of the amount required to prevent loss. This point may, however, be academic, since it seems to us that the pay and RRP of the band 6 chaplains will be very close to their pre-AFC pay and accommodation allowance, whilst assistant chaplains at band 5 will need a no loss payment under the general rules in order to bring their AFC pay and the RRP up to the total of their previous pay and the accommodation allowance.

821. We must not be taken to be suggesting that any review of the no loss RRP or of the RRP payable to chaplains would necessarily be in a downwards direction. We accidentally came across a document in the bundles of documents to which we had not been referred and which we have not therefore taken into account in our findings and conclusions. This was a letter dated 11 July 2001 from the Reverend Edward Lewis on behalf of the Archbishop's Council of the Church of England, to Mr Winnard of the NHS Executive. The letter referred to concerns that the importance and value of the housing allowance had been eroded over time.

Objective justification – the maintenance group

822. We have found, in paragraphs 256 and 272 of these reasons, that Mr Evershed and Mr Whitlow had several objectives in negotiating the fixed rate RRP for the maintenance group. Mr Whitlow believed that it was necessary for pay to move nearer to the national industry figure to arrest the decline in maintenance and estates departments and he persuaded Mr Evershed that something more than a no loss premium was needed in order to hold the line. Mr Evershed also perceived advantages in having a single RRP rate because there would then be a clearly ascertained and defined rate for the recruitment of new staff. Mr Whitlow, but not Mr Evershed, also had it in mind that if the pay rates in the NHS were to be made more competitive then there would be a chance of attracting younger workers and broadening the age profile. We find that all these are legitimate objectives. In addition, both Mr Evershed and Mr Whitlow believed that there was a risk that the Amicus vote on AFC could be lost if a fixed rate premium were not to be agreed. We find that that was a legitimate objective, but not one which could in itself justify fixing the RRP at a level which gave the maintenance group a pay increase. If these Amicus members had effectively been paid a bribe, for which there was no other justification, in order to help keep Amicus "on board", then we could not have found that arrangement to be objectively justified, however, important the objective was in political/ industrial relations terms. We have considered very carefully whether that was in fact what happened but we are satisfied that Mr Evershed and Mr Whitlow did genuinely have the further legitimate objectives mentioned above. The need to win the Amicus vote is relevant in terms of adding weight to those objectives, but could not be allowed to stand alone as sufficient objective justification.

823. At first sight, the negotiations which were conducted by Mr Evershed and Mr Whitlow were fairly unimpressive in terms of providing objective justification for the RRP which was agreed. Very little research was undertaken, the negotiations appear to have been brief and the agreement reached was effectively rubber stamped by the CNG.

824. We find, however, that the reasoning behind the figure which was adopted stands up to examination. Some of the points which Mr Whitlow made in his evidence and which he presumably also put to Mr Evershed have been supported by the Greenwich report, to which reference is made later in these reasons. For example, the spot rate had fallen well behind the JIB rate. The latter tended to be a base rate in the external market (and the figures for various private employers which were quoted by

Mr Whitlow appear to be broadly in line with the figures quoted in the Greenwich report four years later), there were management side concerns as well as union concerns about the decline of estates and maintenance departments and the age profile of the workforce and there was concern on the management side about the likely effects of the anticipated boom in construction. Mr Whitlow's evidence that the published rates for maintenance staff in local government were not truly representative was also confirmed in the Greenwich report.

825. There were two major omissions from the information which was available to Mr Evershed and Mr Whitlow when they negotiated the figure. They did not have information, other than anecdotal information, about existing market forces payments in the NHS. To what extent were employees already receiving more than the spot rate in order to recruit them or retain them? Secondly, there was no information to show the extent to which maintenance crafts persons and technicians were prepared to work in the NHS for less money in order to enjoy substantial benefits such as the final salary pension scheme. These are both items of information which Mr Eversheds and Mr Whitlow would have needed if they were to negotiate RRP provisions which would stand the test of time.

826. In 2002, however, they did not have the pay information and it would not have been practicable for them to carry out research into the pension and other benefits issue in the time available. Indeed more than four years later the Greenwich team did not have the pay information either and only had anecdotal evidence, from management representatives who were interviewed, on the benefits issue. The figure which Mr Evershed and Mr Whitlow agreed was not a ridiculous figure. It was below the JIB rate which itself was regarded as a base rate externally. On balance, we conclude that the figure agreed was a proportionate method of achieving the legitimate objectives, in particular the objective of being able to compete effectively for staff during the transitional period.

827. Since, however, the effect of the RRP was to give a pay increase to the staff concerned, and since the evidence in support of that increase was anecdotal rather than statistical, the period for which the increase was objectively justified, without further research, was very much shorter than that which was appropriate for the "no loss" RRP for the other groups.

The Greenwich report

828. Further research was in fact commissioned less than 18 months after the date of the final agreement. That seems to us to be a reasonable timescale. A reputable university team was commissioned to carry out the research and the recommendation by that team was that the RRP should be retained. Did the report afford sufficient justification for keeping the RRP in the long term?

829. It seems to us that some of the criticisms of the Greenwich report by the claimants are misplaced. We do not agree with the criticism of the report for the failure to consider the equal pay implications of the RRP. Plainly there is a need for the Staff Council to investigate whether any of the groups which do not receive RRP should receive it. Equal pay principles require continuing attention to be paid to the non selection of particular groups for RRP as well as to the selection of other groups and the amounts of the payments to those groups. It is not necessary, however, and would probably not be practicable, for a single report to consider the claims of every single job group to RRP. That research would take a very long time. The remit of the Greenwich report was to consider two groups, one of which was in receipt of RRP and the other of which was not. As it happened, they were both male dominated groups. The requirement of the research, in equal pay terms, was to consider whether the payments being made to the maintenance crafts persons and the technicians were objectively justified. If they were, then the fact that employees were receiving payments which were more than the weight of their jobs would justify did not infringe equal pay principles. The investigation of other job groups, including female dominated groups, as potential recipients of RRP was a separate piece of research to be carried out.

830. Also we are not sure that it is right to say that the Greenwich report failed to consider the amount of the RRP as opposed to the principle of paying it. The research was not undertaken in a vacuum. The researchers knew what the amount of the RRP was. Their brief was to consider whether there was a justifiable and objective case for the continuation of the national RRP which was currently being paid. It was surely implicit in that brief that the continuation which was in question was continuation of the payment of the current RRP.

831. The Greenwich report did, however, have several limitations, some of which were acknowledged in the report itself. In particular:

* The sample size was too small to be representative (page 27 of the report).

* The timescale for the report was too short. There was a need for the report to be produced quickly because of the industrial unrest caused by the refusal of some employers to pay the RRP.

* The researchers did not have data for pre-AFC market force payments.

* More research is needed on the extent to which pension and other benefits make up for comparatively low pay in the NHS and whether these benefits have little relevance to younger workers.

* There is a need to consider whether there should be a single rate of RRP for eligible employees, whether those employees are in band 3, band 4 or band 5.

* Consideration should be given to the question whether there should continue to be a single national rate of RRP or whether local variations should be permitted. On the one hand having a single rate may bring advantages in terms of consistency and avoiding a free for all. On the other hand, it may mean that employees are paid more than is necessary in areas where there are no market pressures.

832. It seems to us that the Greenwich report was a useful but limited piece of research which justified the continuation of the RRP but only for a limited period. Sufficient time should be allowed for further research to be carried out. A reasonable period would be the period of approximately 2 years until 31 March 2011, which is the date which would have applied to the other RRPs if objective justification had been required.

833. The further research should consider the position not only at the time of the research but also in 2002 when the RRP was negotiated and in October 2004 when it became payable. It may well be found that, if it had been possible to commission a thorough and comprehensive report in 2002, that report would have supported the level of RRP which was adopted. If so, it may be appropriate to consider whether the RRP payable to existing staff should continue to be payable irrespective of any change in market conditions. Where there is objective justification for a premium, that premium is more likely to be effective if the recruits or existing staff receiving it have the comfort of knowing that they will continue to receive it so long as they remain in the relevant jobs. If they know that the premium is likely to be withdrawn within a year or two then they are less likely to be persuaded to join or remain, as the case may be.

834. When further research is undertaken, there is one way in which it may be possible to obtain relevant information about payments made prior to AFC, including market forces payments. There has been substantial disclosure of pay histories in the NHS equal pay litigation. If that information were to be brought together in one place, it could form a useful database for research.

835. Finally, we should not leave this issue without a word about the position of the PRB. It is true that the PRB did not have before it any proposal relating to the RRP payable to maintenance crafts persons and technicians. That RRP was already in place. The PRB report did, however, contain very clear recommendations about the payment of the national RRP to maintenance craft workers. The parties were urged to review their decision to continue the payment of the national RRP in order to ensure that the integrity of the AFC pay system is upheld. It was stated that no conclusions were drawn as to the appropriate outcome. We endorse both that recommendation and that proviso.

836. Our answer, therefore, to the question posed is that the first respondent can show the provisions for payment of the national RRP to maintenance crafts persons and technicians to be objectively justified, but only for the limited period up to 31 March 2011.

ISSUE 4 – PERPETUATION OF DISCRIMINATION – OUR CONCLUSIONS

837. We can deal very shortly with this issue, because the answers to the questions which have been posed are determined by our conclusions on issues 2, 5 and 7. Our replies to the questions which have been posed are as follows.

838. We have made no finding of historic sex discrimination. We have also found that the provisions of AFC regarding assimilation are objectively justified (even though objective justification is not required). It follows that we conclude that the use of the claimants' and comparators' pre-AFC pay, calculated in accordance with the provisions of the collective agreement, to determine the spine point to which these employees are assimilated within their AFC band, does not amount to a perpetuation of historic sex discrimination.

839. Turning to the second question, again we have made no finding of historic sex discrimination. We have also found the explicit pay protection provisions of AFC to be objectively justified, even though objective justification is not required. Accordingly, we conclude that the explicit protection of comparators' pay at a level higher than the claimants' pay does not amount to a perpetuation of historic sex discrimination.

840. We have found that AFC provides for the payment of recruitment and retention premia in order to achieve legitimate objectives. We have found that those provisions are objectively justified, both in the cases where objective justification is required and in the cases where it is not required. We conclude that recruitment and retention premia were not used with the explicit or implicit aim of protecting and/or continuing the pre-existing salaries of comparator job groups.

841. In view of our negative answer to the third question, the fourth question, regarding the perpetuation of historic sex discrimination, does not arise. In any event, since we have made no finding of historic sex discrimination then there can be no finding of perpetuation of historic sex discrimination.

ISSUE 3 – THE RELEVANT DATE – THE LAW AND OUR CONCLUSIONS

842. We shall deal with both the law and our conclusions in this section, because the issue is entirely one of law.

843. There are two questions which we must decide. The first is the point at which it can be said in relation to a claimant and (we will assume) her comparator that her job and his job have been given either an equal value or different values under the JES. The question is posed in a way which expressly offers 7 options and leaves open the possibility of it being some other, unspecified date. The second question is this:

In so far as any comparator receives greater pay than the claimants after 1 October 2004, is the same caused by a genuine material factor other than sex?

844. Although we have been referred to several cases, it seems to us that the question is entirely one of principle and of statutory construction and that the cases do not assist.

845. We propose to consider the issues by reference to hypothetical case studies. It is to be assumed in each case that the claimant is a woman, that alternative claims are presented under sub-sections 1(2)(b) and 1(2)(c) and that the site at which the claimant and her comparator are employed is not one of the early implementer sites. It is also to be presumed for simplicity that a single male comparator is

nominated in the claim itself, although in practice comparators are nominated usually much later, and there is usually more than one comparator.

Case Study 1

846. A claim is presented on 1 October 2005. The claimant's job was evaluated under the JES on 1 August 2005. The comparator's job was evaluated on 1 September 2005. The jobs have been placed in the same band. The comparator has appealed but the appeal has not yet been heard. Neither employee has been assimilated. The claimant is on national terms, incorporating collective agreements.

847. This appears to be a straightforward case. Sub-section 1(5) applies because the two jobs have been evaluated under the same study and given equal value. It is immaterial that the comparator's appeal has not yet been heard. It is also immaterial that neither employee has been assimilated. Because the claimant's contract incorporates the collective agreement, she and the respondents are to be treated as having agreed that she can claim under sub-section 1(2)(b) for the period since 1 October 2004, the agreed date under the collective agreement. The Tribunal may well be asked to stay the case until the comparator's appeal against his banding has been heard.

848. The comparator's appeal is decided on 1 April 2006 and the appeal is successful, the comparator being placed in a higher band.

849. The claimant can no longer rely on that comparator for the purposes of either her section 1(2)(b) claim or her section 1(2)(c) claim. Her job and the comparator's job have now been given different values under the JES. Can she, however, continue with her section 1(2)(b) claim for the period between 1 September 2005 and 31 March 2006, the period during which both jobs had been given the same value? Can she also continue with a section 1(2)(c) claim for the period from 1 October 2004 to 31 August 2005, the period during which the two jobs had not yet both been evaluated? The answer, it seems to us, is no. In each case, the reason is that the collective agreement has been incorporated into her contract and she has agreed that the evaluations of both her job and her comparator's job are to be treated as having taken place on 1 October 2004, the relevant date specified in the collective agreement. Once the two jobs have been given different values, the claimant can proceed with her section 1(2)(c) claim only for the period prior to 1 October 2004. She no longer has a section 1(2)(b) claim at all.

850. What of the argument that, under the working of the statute, sub-section 2A(2A) applies only when both jobs have been evaluated. In this case study, the jobs had not both been evaluated prior to 1 September 2005. Why should the claimant not be able to proceed with a section 1(2)(c) claim for the period up to 31 August 2005?

851. We agree with the submissions on behalf of the first respondent that there is no reason why the parties cannot agree that the evaluations should be treated as having been effected from 1 October 2004. As Mr Bowers QC and Mr Sweeney put it in their closing written submissions, this is not one of those many areas of statutory employment law where Parliament has decided that the will of the parties should be overwritten by statute.

852. If we are wrong in this, then it seems plain to us that the first respondent has a GMF defence to any section 1(2)(c) claim for any period falling after 1 October 2004. The analysis of that defence is as follows:

852.1. The claimant and the respondent have agreed, under the collective agreement incorporated into her contract, that with effect from 1 October 2004, she should be paid in accordance with the new pay system.

852.2. Accordingly, that agreement between the parties is the reason for the difference in pay between the claimant and her comparator who has now been placed in a higher band.

852.3. The different banding under the JES is the reason for the difference in pay and it is one which is unrelated to the sex of the two employees.

852.4. There is objective justification if and so far as justification is required. It would have been an administrative nightmare, and would have been unacceptable to staff, if staff had been assimilated to Agenda For Change on the variety of different dates when their jobs were evaluated, or the variety of different dates when they were assimilated.

Case Study 2

853. The facts are the same as in case study 1, including the successful appeal, except that the claimant is on local terms which do not incorporate collective agreements.

854. It seems to us that there could be no back-dating in this case, for the purpose of the section 1(2)(b) claim, the section 1(2)(c) claim or the GMF defence, until the claimant is assimilated to AFC, because it is not until that point that the provisions of the collective agreement become part of her contract. Accordingly, she would be entitled to proceed with her section 1(2)(c) claim for the period up to 31 August 2005 and also, we think, her section 1(2)(b) claim for the period from 1 September 2005 to 31 March 2006. That position would change, however, once she became assimilated to AFC. That change would not occur at all if she never agreed to be assimilated to AFC, but we are not aware of any cases of that kind in the cases which are before the Tribunal.

Case Study 3

855. The claim is presented on 1 October 2005. The claimant's job has been evaluated under the JES, but the comparator's job has not. The evaluation of the comparator's job does not take place until 1 April 2006. The effect of that evaluation is to put the comparator in a higher band than the claimant.

856. During the period from 1 October 2005 to 31 March 2006, the claimant can proceed with her section 1(2)(c). Sub-section 2A(2A) cannot apply at this stage, because the two jobs have not yet been given different values under the same JES. It may well be, however, that the respondent would apply successfully for the proceedings to be stayed pending the evaluation of the comparator's job.

857. Once that evaluation of the comparator's job has taken place, the effect of the collective agreement is that both her job and his job are treated as having been evaluated on 1 October 2004. The sub-section 2A(2A) defence applies to the whole of the period since that date. Alternatively, the respondent has a GMF defence on the same basis as in case study 1.

858. We find the following principles to be both consistent with the legislation and workable in practice:

858.1 Neither sub-section 5(1) nor sub-section 2A(2A) can apply to a particular comparison until both the claimant's and the comparator's jobs have been given a rating under the JES.

858.2 One or other of the sub-sections will apply once both jobs have been given a rating under the JES.

858.3 Backdating for all purposes to 1 October 2004, will occur once both jobs have been given a rating under the JES, if the claimant already has a contractual term incorporating collective agreements.

858.4 If the claimant does not already have such term, backdating will not occur until the claimant is assimilated to AFC.

859. We should add that all this has nothing to do with the relevant date for the purpose of time limits for presenting a claim. That is an entirely different issue.

ISSUE 6 – SECTION 77 – THE LAW

860. The relevant statutory provisions are to be found in section 77 of the SDA 1975 and section 6 of the SDA 1986 as follows:

77 Validity and revision of contracts

(1) A term of a contract is void where--

(a) its inclusion renders the making of the contract unlawful by virtue of this Act, or

(b) it is included in furtherance of an act rendered unlawful by this Act, or

(c) it provides for the doing of an act which would be rendered unlawful by this Act.

(2) Subsection (1) does not apply to a term the inclusion of which constitutes, or is in furtherance of, or provides for, unlawful discrimination against a party to the contract, but the term shall be unenforceable against that party.

(3) A term in a contract which purports to exclude or limit any provision of this Act or the Equal Pay Act 1970 is unenforceable by any person in whose favour the term would operate apart from this subsection.

(5) On the application of any person interested in a contract to which subsection (2) applies, a county court or sheriff court may make such order as it thinks just for removing or modifying any term made unenforceable by that subsection; but such an order shall not be made unless all persons affected have been given notice of the application (except where under rules of court notice may be dispensed with) and have been afforded an opportunity to make representations to the court.

(6) An order under subsection (5) may include provision as respects any period before the making of the order.

6 Collective agreements and rules of undertakings

(1) Without prejudice to the generality of section 77 of the 1975 Act (which makes provision with respect to the validity and revision of contracts), that section shall apply, as it applies in relation to the term of a contract, to the following, namely--

(a) any term of a collective agreement, including an agreement which was not intended, or is presumed not to have been intended, to be a legally enforceable contract;

(b) any rule made by an employer for application to all or any of the persons who are employed by him or who apply to be, or are, considered by him for employment;

(c) any rule made by an organisation, authority or body to which subsection (2) below applies for application to all or any of its members or prospective members or to all or any of the persons on whom it has conferred authorisations or qualifications or who are seeking the authorisations or qualifications which it has power to confer;

and that section shall so apply whether the agreement was entered into, or the rule made, before or after the coming into force of this section.

(2) This subsection applies to--

(a) any organisation of workers;

(b) any organisation of employers;

(c) any organisation whose members carry on a particular profession or trade for the purposes of

which the organisation exists;

(d) any authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade.

(3) For the purposes of the said section 77 a term or rule shall be deemed to provide for the doing of an act which would be rendered unlawful by the 1975 Act if--

(a) it provides for the inclusion in any contract of employment of any term which by virtue of an equality clause would fall either to be modified or to be supplemented by an additional term; and

(b) that clause would not be prevented from operating in relation to that contract by section 1(3) of the Equal Pay Act 1970 (material factors justifying discrimination).

(4) Nothing in the said section 77 shall affect the operation of any term or rule in so far as it provides for the doing of a particular act in circumstances where the doing of that act would not be, or be deemed by virtue of subsection (3) above to be, rendered unlawful by the 1975 Act.

(4A) A person to whom this subsection applies may present a complaint to an employment tribunal that a term or rule is void by virtue of subsection (1) of the said section 77 if he has reason to believe--

(a) that the term or rule may at some future time have effect in relation to him, and

(b) where he alleges that it is void by virtue of paragraph (c) of that subsection, that--

(i) an act for the doing of which it provides may at some such time be done in relation to him, and

(ii) the act would be, or be deemed by virtue of subsection (3) above to be, rendered unlawful by the 1975 Act if done in relation to him in present circumstances.

(4B) In the case of a complaint about--

(a) a term of a collective agreement made by or on behalf of--

(i) an employer,

(ii) an organisation of employers of which an employer is a member, or

(iii) an association of such organisations of one of which an employer is a member, or

(b) a rule made by an employer,

subsection (4A) applies to any person who is, or is genuinely and actively seeking to become, one of his employees.

(4C) In the case of a complaint about a rule made by an organisation, authority or body to which subsection (2) above applies, subsection (4A) applies to any person--

(a) who is, or is genuinely and actively seeking to become, a member of the organisation, authority or body,

(b) on whom the organisation, authority or body has conferred an authorisation or qualification, or

(c) who is genuinely and actively seeking an authorisation or qualification which the organisation, authority or body has power to confer.

(4D) When an employment tribunal finds that a complaint presented to it under subsection (4A) above is well-founded the tribunal shall make an order declaring that the term or rule is void.

(5) The avoidance by virtue of the said section 77 of any term or rule which provides for any person to be discriminated against shall be without prejudice to the following rights except in so far as they enable any person to require another person to be treated less favourably than himself, namely--

(a) such of the rights of the person to be discriminated against; and

(b) such of the rights of any person who will be treated more favourably in direct or indirect consequence of the discrimination,

as are conferred by or in respect of a contract made or modified wholly or partly in pursuance of, or by reference to, that term or rule.

(6) In this section "collective agreement" means any agreement relating to one or more of the matters mentioned in [section 178(2) of the Trade Union and Labour Relations (Consolidation) Act 1992], being an agreement made by or on behalf of one or more employers or one or more organisations of employers or associations of such organisations with one or more organisations of workers or associations of such organisations.

(7) Any expression used in this section and in the 1975 Act has the same meaning in this section as in that Act, and this section shall have effect as if the terms of any service to which Parts II and IV of that Act apply by virtue of subsection (2) of section 85 of that Act (Crown application) were terms of a contract of employment and, in relation to the terms of any such service, as if service for the purposes of any person mentioned in that subsection were employment by that person.

861. These are strange provisions in the context of equal pay claims such as those before us. Provisions under which an employee can apply for a declaration to strike down a term in a collective agreement appear to us to be more relevant in a case where the application of the term in the collective agreement could cause detriment to the employee. An example would be a term which limits certain benefits to full-time employees. A female part-time employee could make an application on the ground that the term has an indirectly discriminatory effect against female employees and cannot be shown to be objectively justified. The removal of the term would remove the detriment to her.

862. In these proceedings, however, the claimants do not complain about a term which is explicitly detrimental to them in the above sense. For example, their complaints about the provisions relating to RRP and pay protection are not that these terms are explicitly detrimental to the claimants, but rather about the omission from those terms of provisions which would be beneficial to the claimants. Their complaint is that benefits are given to other employees and that there is no provision for similar benefits to be given to the claimants.

863. Even though section 77 was plainly not drafted with a case such as the present case in mind, the issue is the same in substance whether viewed in terms of an explicitly detrimental term or in terms of

the omission of a beneficial term. Furthermore, and more importantly, the decision of the Employment Appeal Tribunal in Unison and Another v Brennan and Others [2008] ICR 955 establishes that the tribunal has jurisdiction to consider a section 77 application such as that made by the claimants in this case. It was clearly stated by Mr Justice Elias, at paragraph 72, that "Employment tribunals have jurisdiction to grant declarations under section 77 of the Sex Discrimination Act 1975 to have terms of a collective agreement declared void, even to claimants who otherwise contest those terms in the context of personal equal pay or sex discrimination claims".

864. It will be apparent from our conclusions in the earlier sections of this judgment that we do not propose to make a declaration striking down any provisions of the collective agreement. Accordingly, the only question of law which we need to decide is whether we have the power to amend any term of the collective agreement. Mr White QC, submits that we do have that power. Mr Bowers QC and Mr Sweeney contend that where there is an offending term the only remedy is to declare it to be void. There is no half way house.

865. The latter submission appears to be justified by the express provisions of the 1986 Act. Sub-section 6(4D) provides that when a relevant complaint is upheld then the tribunal "shall make an order declaring that the term or rule is void". Unlike the corresponding provision for the County Court in sub-section 77(5) of the 1975 Act, there is no express power to modify an offending term instead of removing it.

866. It seems to us, however, that there are two routes by which we can identify a power to modify a term of the collective agreement. The first is to declare a term to be void in a conditional or temporal sense. In particular, we believe that we would be (just) within the terms of sub-section 6(4D) of the 1986 Act if we were to order that a term of the collective agreement shall become void, or cease to have effect, from a specified date unless specific measures are taken in the meantime.

867. Secondly, this broad construction of the sub-section can in our view be supported by reference to the Council Directive, 75/117/EEC. Article 4 (which remains in force until 15 August 2009) is in the following terms:

"Member states shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended".

868. We stress the last four words. It is a well established principle that domestic legislation should where possible be construed to conform with a relevant Directive. We also note that Directives can have direct effect as against an emanation of the State. In this case, the UK Health Departments are parties to the collective agreement.

ISSUE 6 – SECTION 77 – OUR CONCLUSIONS

869. There is nothing in our conclusions on the earlier issues to persuade us that it would be right to strike down any term of the collective agreement.

870. We do, however, think that it is appropriate for us to make an order providing for the specific provision for the RRP payable to maintenance crafts persons and technicians to cease to have effect unless an appropriate review is carried out within the next two years. We reach that conclusion for three reasons:

871. First, we have already directed ourselves, contrary to submissions which have been made to us, that the Staff Council does not have the power, under the unamended collective agreement, to remove or reduce the RRP for existing employees.

872. Secondly, even if the Staff Council does have that power, it is not obliged to exercise it.

873. Thirdly, reference has been made to the decision of the Employment Judge at first instance in the case of Newcastle upon Tyne Hospitals NHS Foundation Trust v Philpott and Others. If that decision was right, and individual employees have enforceable rights to claim the RRP, there could be legal difficulties with those employees if changes are made to the RRP provisions. Those difficulties should be avoided if the collective agreement is suitably amended by order of the tribunal.

_____

M D MALONE EMPLOYMENT JUDGE

RESERVED JUDGMENT SIGNED BY

EMPLOYMENT JUDGE ON

.....

JUDGMENT SENT TO THE PARTIES ON

.....

AND ENTERED IN THE REGISTER

.....

FOR SECRETARY OF THE TRIBUNALS

———

[1] The Respondents also consider that in respect of 2.2 and 2.3 the question arises: “and if they did so was that for male groups in contrast to female groups”. The Claimants wish it to be known that they do not wish any unnecessary burden to be placed upon them..:

[2] The Respondents contend that the words “and if so between whom (whether individuals or generic groups) and on what basis?” should be part of this issue at paras 4.1 4.2 and 4.3.

[3] The Claimants wish to make it clear that simply because a particular job group is not referred to above, this does not amount to a concession that employees within that group did not suffer unequal pay prior to AfC, nor does it prevent individual employees from within that group from raising equal pay claims at a local level based on historic discrimination prior to the introduction of AfC.