Neutral Citation Number: [2024] EAT 12

Case No: EA-2022-000737-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 February 2024

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MS V BARNARD

Appellant

- and –

HAMPSHIRE AND ISLE OF WIGHT FIRE AND RESCUE AUTHORITY (OPERATING AS HAMPSHIRE AND ISLE OF WIGHT FIRE AND RESCUE SERVICE)

Respondent

- -
- -

Daphne Romney KC and **Daniel Matovu** (instructed by Leigh Day) for the **Appellant**
Sean Jones KC and **Tim Dracass** (instructed by Hampshire Legal Services) for the **Respondent**

Hearing date: 13 December 2023

- -

JUDGMENT

SUMMARY

EQUAL PAY

The claimant was employed by the respondent. She was not a trained firefighter, and not employed in an operational firefighting role. As such, she was employed on what are called Green Book terms. Operational firefighters were employed on Grey Book terms. These were, in relation to aspects of their duties and obligations, more onerous, and in relation to remuneration, hours and holidays, more favourable, than Green Book terms.

The claimant claimed equal pay with regard to certain particular Grey Book terms, in respect of a period during which her comparators – who were both trained operational firefighters employed on Grey Book terms – were seconded to non-operational roles. She claimed that, in those roles, they were doing like work with her work in her own particular roles during the comparison period.

The tribunal found that (a) the claimant was doing like work with her comparators during that period; (b) the difference in the relevant terms was because of material factors reliance on which did not involve direct sex discrimination; (c) reliance on those factors did involve indirect discrimination; but (d) reliance upon them was a proportionate means of achieving legitimate aims. Accordingly the equal pay claim failed. The claimant had resigned, and a complaint of constructive unfair dismissal also failed, because the tribunal found that there was no fundamental breach of the implied duty of trust and confidence, nor, since none fell to be implied, of an equality clause.

This appeal concerned three aspects of the tribunal's decision.

(1) One strand of the material factor defence relied upon was that the comparators were, during the period of their secondments, required to maintain operational competence. The tribunal did not err by failing to make findings that they in fact did not fully do so. Even if that was,

to a degree, the case, which was to some extent (though not entirely) conceded, the tribunal was entitled to conclude that the respondent's requirement was genuine and could properly be relied upon in support of the respondent's legitimate aims;

(2) The claimant relied in particular on the fact that a group of Green Book employees in Head of Service Team (HOST) roles had received equal pay with colleagues on Grey Book terms in equivalent roles. The tribunal did not err by not concluding that this undermined the respondent's case that maintenance of the differential in respect of the claimant was necessary and proportionate to its legitimate aims.

(3) There was a challenge to the conclusion that the claimant was not constructively dismissed, which contended that if, by reference to either or both of the first two grounds of appeal, the tribunal had erred in dismissing the equal pay claim, then it had also erred by not finding that there was a breach of the equality clause that would have been implied, had the equal pay claim succeeded. As the first two challenges failed, this challenge also failed. It was therefore unnecessary to the disposal of this appeal to consider whether, as a matter of law, any and every breach of an equality clause must be a fundamental breach of contract.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The respondent in the employment tribunal is responsible for fire and rescue services in Hampshire and the Isle of Wight. Following an initial spell with it in 2005 the claimant re-entered the respondent's employment in 2009. Following her resignation with effect on 9 June 2017, she presented an employment tribunal claim claiming equal pay and constructive unfair dismissal.

2. The equal pay claim covered a period from the end of 2011 until the employment ended in 2017. Preliminary issues arose as to whether there was an unbroken stable working relationship through changes in the claimant's role that occurred over the course of that period, and hence as to whether the claim was in time in respect of that whole period. This resulted in two appeals to the EAT, the second of which was decided in December 2019. The net effect was that the claimant was able then to proceed with her claim in relation to the whole of that period as being in time.

3. There was then a full-merits liability-only hearing at Southampton from 30 November to 11 December 2020 before Employment Judge Emerton, Ms A Sinclair and Mr M A Knight. The tribunal issued a reserved decision running to some 92 pages, plus an annexe setting out the issues, sent in May 2022, promulgation having been delayed owing to ill health. The equal pay and constructive unfair dismissal complaints were dismissed. The claimant appeals from that decision. Before the tribunal Mr Matovu and Mr Dracass of counsel had appeared respectively for the claimant and the respondent. On the hearing of this appeal they were led, respectively, by Ms Romney KC and Mr Jones KC. Both skeletons were co-authored, and I heard briefly from Messrs Matovu and Dracass; but, for shorthand, and with no disrespect, I will refer generally to the submissions of the leaders.

Equal Pay – the Statutory Framework.

4. Section 64 **Equality Act 2010** includes provision that sections 66 to 70 apply where "a

person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does". Section 65 includes provision that A's work is equal to that of B if it is "like B's work", and elaborates on what it means for A's work to be like B's work.

5. Section 66 includes the following:

> **"(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.**
>
> **(2) A sex equality clause is a provision that has the following effect—**
>
> **(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;**
>
> **(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term."**

6. Section 69 provides:

> **"(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—**
>
> **(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and**
>
> **(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.**
>
> **(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.**
>
> **(3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.**
>
> **(4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex.**
>
> **(5) "Relevant matter" has the meaning given in section 67.**
>
> **(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's."**

The Facts and the Tribunal's Decision

7. At issue was the application of two sets of nationally agreed terms, known as Grey Book terms and Green Book terms. Staff trained as operational firefighters were on Grey Book terms, whereas staff who were not trained firefighters were on Green Book terms. The Grey Book is a

product of the National Joint Council for Local Authority Fire and Rescue Services. The Green Book is a product of the National Joint Council for Local Government Services. Grey Book terms cover all roles from Firefighter up to Area Manager. There were also Gold Book terms applicable to the most senior levels above Area Manager: Chief Fire Office, Assistant Chief Fire Officer and equivalent.

8. The claimant started in an administrative role on Green Book terms. She remained on Green Book terms throughout her employment. Her two comparators started as trained operational firefighters on Grey Book terms. They remained employed on Grey Book terms throughout the periods in relation to which she relied upon them as comparators. By her equal pay claim the claimant sought parity of terms with her comparators in three particular respects: the basic rate of hourly pay, the number of hours per week in respect of which it was paid, and annual leave entitlement.

9. From 12 December 2011 to 14 October 2012 the claimant was seconded into a new Business Support Officer (BSO) role with the job title "Compliance Officer – Protection". Her comparator in respect of that period was Gavin Ison. He was also, from that date, as a result of the same trial, put into a BSO role, in his case with the job title "Crew Manager – Fire Safety Adviser". She remained on Green Book terms, he on Grey Book Terms.

10. From 15 October 2012 to 15 June 2014 the claimant was promoted to the role of Fire Safety Officer (FSO) – Community Fire Protection. From 16 June 2014 she was promoted to the role of Office Manager (OM), which was later expanded and designated Community Safety Delivery Manager (CSDM). She remained in that role until she resigned. Her comparator in respect of the period from October 2012 to June 2017 was Justin Turner. He was, from prior to when the claimant was first promoted to an FSO role, himself in an FSO role, but at Grey Book Watch Manager level. At the same time as she was promoted to OM in June 2014 he was promoted to the OM role of

Station Manager. She continued on Green Book terms, and he on Grey Book terms, throughout. It appears that he moved on from that role some time before her resignation, but nothing turned on that.

11. The foregoing specific roles carried out by the claimant's comparators during the periods of comparison (which I will call their secondment periods) were not, themselves, firefighting roles. However, referring to the evidence of one of the respondent's witnesses, the tribunal said, at [114]:

> "**Mr Adamson stressed, and the Tribunal accept, that there were numerous operational competencies which must be maintained by all grey book contracted firefighters regardless of the role, albeit these related to the level of the role and the type of operational role they can be expected to carry out. As he put it, 'these include knowledge relating to firefighting tactics and operations, equipment and the risks present in emergencies of different kinds'."**

12. Further on, the tribunal summarised the position regarding terms in this way:

> **"126. There were provisions for the grey book staff which were more generous in relation to a week's pay, in that as nationally agreed all grey book staff would as a starting point be on a basic salary of 42 hours a week whereas green book staff were on a salary based on 37 hours a week. It is clear that the difference is accounted for by the agreement that all grey book staff would have paid meal breaks, which equated for staff working in weekly office hours for a paid one-hour lunch break each day of the week.**
>
> **127. On the other hand, however, grey book staff were subject to more onerous requirements to ensure that they kept themselves fit, and (albeit not reflected in the wording of the contract of employment itself) that they were operationally up-to-date and available for any operational role at their rank or role, consistent with their operational background. This was not a requirement placed on green book employees. Similarly, grey book employees were subject to a much more onerous regime of being required to move at managements' discretion to anywhere within the Hampshire area, and as required to work outside the area as the need dictated, and in some cases to be deployed abroad. Similarly, they could be redeployed for temporary operations, again, at the discretion of management.**
>
> **128. The green book employees were under less onerous requirements, and in terms of changing their permanent place of work, for example, this was qualified by the need that it should be within reasonable travelling distance of their initial contractual place of work."**

13. Grey Book employees received CPD payments which the claimant did not seek by her equal pay claim. But the tribunal found that there was a separate requirement for Grey Book employees to remain physically fit and operationally competent, which was not linked to CPD payments, and

applied regardless of them.

14. In relation to the BSO roles taken up by the claimant and Mr Ison in 2011 the tribunal found that the two job descriptions were "deliberately almost identical", subject to one additional requirement in her job description. The stated job purpose was, in both cases, as follows [139j]:

> **"To provide a high quality fire safety advice service, ensuring that designated premises are visited and possible operational risks are identified, enabling the service to meet its statutory obligation. Work within the scope of the better regulation agenda, achieve the aims of the published Hampshire Fire and Rescue Service Plan and raise the standards of fire safety awareness in the community".**

15. The tribunal described how the claimant and Mr Ison remained on their respective terms as to pay and hours, so that, while they worked the same overall hours, he had a paid lunch hour, while hers was unpaid. Both attended the same induction training for the role, and carried out "what was effectively the same role, visiting licenced premises, etc.". But, continued the tribunal [139n]:

> "**In respect of the training, however, Mr Ison explained that when he and the claimant attended training days together at Winchester fire station it would be the same technical competency training 0900 – 1100, but from around 1100 green book employees would continue their fire safety duties while grey book staff, including Mr Ison, would carry out fire ground operational training until lunchtime. Mr Ison also described how he carried out one week of training every six months on the essential competencies required at Crew Manager level to enable him to be competent to attend an incident as part of a firefighting crew, covering such matters as breathing apparatus, hose management, site safety, casualty handling and also maintaining first aid qualifications and driving assessment so to enable him to drive fire engines. The claimant was not required to attend such training. The Tribunal notes that Mr Ison also received CPD payments as well as his basic contractual entitlements."**

16. Around the same time, Mr Ison took part in a trial whereby Grey Book inspecting officers working in community safety would be put on a rota to respond to automatic fire alarm (AFA) activations (which are sometimes, literally, false alarms) in cases where no-one had dialled 999. There was no additional payment for being on this rota. The claimant was not required to do this. The tribunal held that the respondent properly considered that it had to be carried out by a competent operational fire officer, who could take initial steps, if it turned out that there was a real fire which the fire crew needed to attend. The tribunal accepted that this would be a relatively rare

occurrence.

17. When the claimant was promoted to FSO, a role that Mr Turner was at that point already performing, their respective job descriptions and day-to-day duties were the same, save that they were based at different locations. He had a separate additional contract under which he received an extra payment under a discrete call-out scheme. The claimant did not claim entitlement to that payment.

18. During this period Mr Turner was, in accordance with his contract, required to carry out training, maintain his operational effectiveness and remain physically fit. When based at a location covered by the AFA trial, he was on a call-out rota, for which he received no additional payment.

19. Although, over the period that she was in her various relevant roles, the claimant's pay was regraded at certain points, it remained the case that she was paid less than her respective comparators.

20. Relevant to a strand of the appeal to which I will come is the following finding [139eee]:

> **"Meanwhile, there had been discussions about remuneration packages for the Heads of Service (or "HOST" - a senior management role above the claimant's level, but below the most senior "gold book" levels). On 8 January 2015, a decision was taken to move several affected senior managers at HOST level from green book to grey book terms, so that they were all on broadly the same reward packages. The tribunal heard from Ms Dickinson that this local experiment was not seen as a success, and by the time of the hearing no employees remained on this scheme. Employees subsequently appointed to the Head of Service Team (HOST) remained on green or grey book contracts, as the case might be. Staff had moved on, retired or been promoted, and at the time of the hearing all members of the Team who had previously been on green book terms were still on green book terms."**

21. The claimant began a formal grievance effectively claiming equal pay at Grey Book level in 2016. The outcome in March 2017 was that the grievance was unsuccessful. The claimant embarked on an internal appeal. On 10 April 2017 she resigned on notice which took effect on 9 June 2017. During the notice period, in May, the appeal was rejected. The tribunal claim began in

August 2017.

22. The tribunal set out in full detail, the relevant facts and figures relating to the basic pay and annual leave entitlements of the claimant and her comparators at each stage of the claim period.

23. The next section of the decision, in which the tribunal began to work through its conclusions on the various liability issues, included the following [159]:

> "**Similarly, it may well be that the nationally agreed terms and conditions are something of a blunt instrument for dealing with local circumstances, which was reflected in the respondent's attempts to bring senior management (above the claimant's level, but below the "gold book" level) onto the same conditions of service at the HOST level. Although the claimant not unreasonably felt that if an exception could be made for more senior employees, it might also have been made at her lower level, the tribunal accepted the respondent's evidence that in fact this experiment was highly problematical and simply did not work effectively. After the experiment, management reverted to the previous model. Indeed, the sensible and thoughtful evidence from Ms Dickinson, who had been an inadvertent beneficiary of this experiment, before she was promoted on merit to Assistant Chief Officer (on gold book terms), was plainly herself uneasy with the package she had received. She confirmed that there was now nobody subject to these arrangements. The position remains that below Chief Officer/Assistant Chief Officer level, all employees remain either on green book terms, or on grey book terms.**"

24. Further on, there was the following passage:

> **"164. Indeed, one of the factors in this case is clearly that the claimant's professional skills enabled the respondent to experiment in giving her greater responsibility than would usually be the case for a green book employee, putting her in roles where there was little or no track record of green book employees. There was not, therefore, any clear model to follow. In those circumstances it is perhaps unsurprising that there was a degree of uncertainty as to how her terms and conditions of employment should be configured, and what rate of pay she should be on. She was very much a trailblazer. In carrying out these roles she was fully aware throughout, that terms and conditions for grey book operational firefighters were very different from those with local government employee terms and conditions, on green book contracts of employment. Nevertheless, she made it clear that she had no wish to train in firefighting and keep current all the operational skills required of grey book employees. It is evident that she wished to have the same financial package, for carrying out, in her view, the same role, whilst consciously choosing not to take on the necessary additional responsibilities which fell to grey book colleagues. That might include risking her life. The claimant explained to the tribunal that the commitments would not suit her domestically, but she nevertheless wished to be paid the same as grey book colleagues who were ready to carry out other roles, where and when required.**
>
> **165. The claimant had evidently reached the conclusion that any differences in pay must be discriminatory, because from her perspective she carried out same role on a**

> **day-to-day basis. Whilst, at the same time, she turning a blind eye to the telescope when that telescope focused on other significant differences in contractual liabilities, which were less attractive to her."**

25. The tribunal concluded that both comparators relied upon by the claimant were entirely appropriate and that both were, at the relevant times, engaged in like work with the claimant as defined in section 65 of the **2010 Act**. It concluded its analysis of that point in this way.

> **"188. As set out above, the tribunal accepts that it is required to focus upon the particular work done by the claimant and her comparators in the roles they were actually performing at the material time. It accepts that the focus should also be upon the work carried out under the relevant job descriptions. Taking a broad view, it is tolerably clear that there were few if any differences in the principal day-to-day roles carried out, as had been the case during the initial period relied upon.**
>
> **189. The tribunal agrees with Mr Matovu that the additional responsibilities reflected in the grey book contracts of the claimant's comparators did not, during the period in question, greatly impinge upon the day-to-day activities which were also carried out by the claimant. The tribunal considers that at this point in the analysis is different from that required in considering the respondent's material factor defence.**
>
> **190. The tribunal has come to the clear conclusion that for the whole of the period in question, the claimant was doing like work with that of her comparators. The tribunal is satisfied that at the material time the work of the claimant and both of her comparators was the same or broadly similar. In reality, the "broadly similar" test is comfortably met. Such differences as there were between their work were not of practical importance in relation to the terms of their work. Although the claimant's grey book colleagues were required to remain operationally trained, and liable and ready to carry out additional or alternative duties (possibly at a distant location), the reality was that during the specific period covered by the claim, the additional responsibilities turned out not to be particularly onerous, and were comparatively infrequent. Although this does not prevent the same matters being relied upon by the respondent for the material factor defence, the tribunal is satisfied that the claimant was engaged in equal work for the purposes of section 65 of the Equality Act 2010."**

26. The tribunal went on to accept, which the respondent did not dispute, that the claimant's pay and annual leave entitlements were less favourable than those of her comparators. The tribunal found that the differences between Grey Book and Green Book terms were causative of the differences in pay and other conditions between the claimant and her comparators and were plainly the real reason, not a sham or pretence. The differences in the relevant terms were material differences.

27. En route to these conclusions, the tribunal worked through the long list of specific material factors relied upon by the respondent, set out in the list of issues. This section included the following passages, in which references in the sub-headings to paragraph numbers are to the specific material factors relied upon by the respondent as set out in the list of issues:

> **"211. As the tribunal has recognised (see paragraph 81 onwards, above), as well as the respondent being bound by the national agreements, there are fundamental differences between what operational firefighters can be expected to do, particularly at times of local or national emergency, and what is expected of green book employees. The tribunal has concluded that these are fundamental differences, which might require far more domestic disruption, as indeed the claimant herself appears to have recognise in not pursuing this career option, and ultimately to risk life and limb and potentially a requirement to deal with difficult, dangerous and harrowing public duties. These are important differences.**
>
> **212. At all times the claimant was on green book contracts and her comparators were on grey book contracts. The tribunal has not been provided with any evidence that in non-operational green book employee at the claimant's level had ever been placed on a grey book contract, as if he or she was an operational firefighter. The only similar example brought to the Tribunal's attention was when the respondent, for a relatively brief period, experimented with moving green book employees to grey book terms and conditions at a more senior grade. Whilst the respondent accepts that it was within their discretion to do that, and to replicated at other levels, the tribunal accepts that this was a one-off decision, which was later reversed, with no suggestion that it was ever replicated."**
>
> **"215. Paragraph 8(b): Grey Book employees were required to be available for operational work and/or to respond to or be redeployed operational during emergencies or other major incidents (such as when there was widespread area flooding) while Green Book employees were not so required."**
>
> **"217. On this specific point, even if operational firefighters (when carrying out largely management roles) might go for some considerable time without being called out for operational duties, they remained available as required, and as explained above. Ultimately, the respondent could require grey book employees to carry out operational duties, and to assist with incidents. Although the claimant may assist with supporting operational duties, she had a considerably lesser contractual obligation to do anything other than her day-to-day job."**
>
> **"219. Paragraph 8(c): Grey Book employees were required to be "on call" and at the disposal of the Respondent during lunch breaks and were therefore required to work a 42 hour week and paid on that basis, while Green Book employees were not so required and worked a 37 hour week.**
>
> **220. The tribunal agrees with the respondent that even if in many cases, grey book employees were not required to give up their lunch break or to remain on call, they were required to be available on call if needed. Even if, in the roles specifically considered in this equal pay claim, call out during the lunch hour was uncommon, it was nevertheless a material factor. The tribunal recognises that one way to deal with this might be to move grey book employees between different rates of pay depending**

> **on what they were contracted to do any given period of time, but it also recognises that this may well be impracticable, and would in any event breach the national agreements as to the terms and conditions of service. Although the claimant did not like this difference, and the tribunal can understand why on any given day the claimant and her comparator might have the same lunchtime arrangements, for which the claimant would not be paid, the tribunal sees nothing objectionable in this requirement (or potential requirement) being linked to a particular difference in pay, namely the greater number of paid working hours per week to account for paid lunch break.”**
>
> **“224. Paragraph 8(d): Grey Book employees were required to maintain competencies for operational duty at the appropriate Grey Book role while Green Book employees were not so required.**
>
> **225. The tribunal agrees with the respondent that this requirement was fundamental to the role of grey book staff. They might at any point be required to carry out operational duties at short notice, including at a managerial level, where they might need to take charge of major incidents. But this also had a career dimension: even if a grey book employee was for the time being assigned to a role with less likelihood of carrying out operational duties, he or she would clearly also need to maintain skills ready for the next role, at the same level or on promotion, which might require the application of operational competence on a day-to-day basis.”**
>
> **“227. Paragraph 8(e): Grey Book employees were required to maintain fitness and undergo fitness assessments (in accordance with the Service Fitness Order) while Green Book employees were not so required.**
>
> **228. The tribunal agrees with the respondent: this is a similar point to the one made at paragraph 8(d), and the same arguments apply. The tribunal accepts the argument that operational firefighting duties could be very physical in nature, requiring grey book staff to maintain personal fitness levels. The nature of the contractual duties for green book staff did not require measurable levels of fitness.”**

28. The tribunal went on to find that section 69(1)(a) was satisfied – that there was no direct discrimination – but that section 69(2) was also satisfied – that there was an indirectly discriminatory impact of, in effect, the requirement to be on Grey Book terms generally in order to benefit from Grey Book pay, hours and holidays, either in the conventional domestic law sense or taking account of the approach deriving from **Enderby v Frenchay Health Authority** [1994] ICR 112 (ECJ). That was, in short, because very few women were on Grey Book terms. So the tribunal went on to consider, as required by section 69(1)(b), and the remainder of section 69, whether the difference was because of material factors, reliance upon which was a proportionate means of achieving a legitimate aim.

29. The tribunal accepted that the respondent had the legitimate aims of, in summary: (a) providing an effective and efficient service in respect of its various functions and to ensure the safety of the public, their property and the environment; and (b) rewarding employees for being 'on call' and/or competent and available for operational duties and deployment.

30. The tribunal said this:

> **"280. Although there may, inevitably, be some debate about the precise wording of the legitimate aim, the tribunal accepts that both of these aims are legitimate. Clearly the underlying argument, about which the tribunal heard much evidence, relates to the statutory and ministerial requirements placed upon the respondent to carry out functions which have been satisfactorily summarised as to "ensure the safety of the public, their property, and the environment." The tribunal has also given weight to the importance to society in maintaining a service of highly trained firefighters who can deal not only with the type of emergencies which arise on a day-to-day basis (which may well involve a firefighter risking his or her life), but which is available to deal with significant large-scale emergencies or disasters on a local or national scale. The tribunal recognises that this aim does not relate merely to a particular individual, carrying out a particular role at a snapshot in time, but the need to maintain career skills available for deployment in subsequent jobs, or if it is necessary to re-deploy a grey book employee at short notice, even if much of the work in their current job description is of a routine administrative nature. The tribunal found Mr Adamson's oral evidence particularly persuasive on these points. The tribunal also accepts that although these were the specific aims of the respondent, as the employer, they are clearly reflected in the contents of the grey book, which were binding on the respondent.**
>
> **281. The tribunal considers the first of legitimate aims very much encapsulates the argument, albeit it requires a linked argument that the operational effectiveness needs an appropriate remuneration package. The second aim picks up on the remuneration, relating to at least some of the reasons for paying grey book employees more. The tribunal readily accepts the underlying argument that it is legitimate to seek to reward employees (in line with the terms of the grey book) to reflect those more onerous terms and conditions, which did not apply to green book employees.**
>
> **282. On the specific point of the aim of rewarding employees for being on call, even if the comparators were in an actual on call rota (which included the lunch period) for only part of the time, again the national terms and conditions for grey book employees are relevant. The tribunal does accept that it is a legitimate aim to provide financial rewards to recompense for the requirement to be available to give up a lunch hour if required. This is relevant to the question of proportionality, and even if an employer who had not been bound by the agreed grey book terms and conditions might have dealt with this in a different way, it remains a legitimate aim. In a sense, it could be said that a grey book employee is always "on call", in the sense that grey book employees might at any point be called out to deal with an unforeseen emergency which needed additional deployment of grey book staff."**

31. The tribunal then turned to whether the application of the relevant more generous terms to

Grey Book employees was a proportionate means of achieving the legitimate aims. This part of the decision included the following passage:

> **"287. In principle, the tribunal accepts the respondent's arguments that it was a proportionate means of achieving those legitimate aims by keeping employees at the claimant's level on to separate terms and conditions of service, as governed by national agreements with the unions. In its analysis above, in relation to the actual differences in pay, the tribunal considers that they are not as significant as the claimant would argue, and particularly if one takes into account the general requirement that grey book employees may be required to be on call over lunch hour, and therefore to be paid for five additional working hours each week, the difference in wages (approached as a "per hour" rate of pay) is not nearly as great (less than £70 (gross) per month, on average). But even taking the claimant's case at its highest, the average gross difference in annual pay was some £4,400 (or less than £370 per month). Although not insignificant, this was not a particularly great disparity, given the more onerous grey book contractual requirements. Comment has been made above, in considering "particular disadvantage, as to he relatively modest difference in terms of % disparity.**
>
> **288. The Tribunal agrees with the respondent that when Mr Adamson was giving evidence, although some of what he said was challenged in cross examination, it was not suggested to Mr Adamson that the legitimate aims relied upon could have been achieved in some other way. This is a telling point.**
>
> **289. The particular challenge in this case is the extent to which broader criteria are relevant to the actual day-to-day work, with the claimant sharing identical, or near identical, job descriptions with her comparators. If, as the claimant sought to do, one looked purely at the job description, it may look as if the claimant was indeed being underpaid in comparison with male comparators, for doing the same job. However, even on a day-to-day basis, the actual job was not the same, as her comparators were required to do things which were not in the role description, but which were required under the grey book and associated role maps. It was almost as if grey book employees were subject to two separate contracts: one which related to the job description of the specific role they were appointed to, and anther relating to what was required of a grey book employees at their level. This is not part of the tribunal's legal analysis, but perhaps helps to explain the claimant's perspective: she focussed on the day-to-day activities relating to the job description, rather than all the other activities covered by the grey book contract and role maps (supplemented by local Orders).**
>
> **290. At various stages, grey book comparators were required to be on an oncall rota, which continued over the lunch break, they were required to retain levels of personal fitness (even if there was some margin of appreciation), and to attend (and/or deliver) regular continuation firefighting training to ensure they remained operationally effective. These were not requirements that the claimant had to meet, as referred to extensively above. As described, whatever particular job role a grey book employee was carrying out at any given stage, which included the comparators carrying out core duties near identical to the claimant's, they remained available for redeployment at a moment's notice, either to deal with the overall operation overall operational needs, or to deal with specific emergencies.**
>
> **291. The consideration of proportionality has required the tribunal to conduct a balancing exercise (see, for example, Barry v Midland Bank Plc (1999) ICR 859). As referred to elsewhere, the tribunal has given weight to the arguments relating to**

nationally agreed salary scales, with the aim of ensuring an efficient fire and rescue service. Whilst Mr Matovu is right that the respondent could have achieved its legitimate aims by unilaterally placing the claimant (as a green book employee) on a grey book financial package (but without the associated liabilities), it was under no obligation to do so, and this does not undermine the proportionate means of achieving the legitimate aim. It is ironic that, over time, the claimant's desire to improve her financial package was increasingly being met, and that a the time of resignation she was very close to her comparator's salary level, with a promise of working with her to see what other improvements could be made. The respondent was taking incremental steps to help the claimant, but without undermining the distinction between grey and green book for staff at the claimant's level. The tribunal considers that it was proportionate to maintain the distinction between the two types of contract, for staff at the claimant's level and below.

292. The claimant understandably questioned why an exception was not made for her, when the respondent did indeed experiment with making an exception for a more senior tier of management, namely the "HOST" level, where a local decision was taken to pay the Heads of Service on grey book terms, regardless of whether they had previously been (or would otherwise have been paid) on green book terms. The tribunal accepts that it shows that it was open for the respondent to depart from nationally agreed terms and conditions, at least on the basis of paying green book employees more money, without eroding the terms and conditions for grey book employees. Clearly, had this been rolled out more generally it would have had significant financial implications for the respondent's budget, and the tribunal accepts that one consequence might have been that grey book employees would query why they should have to be on call, to remain physically fit and trained to high operational standards, and keep themselves available at a moment's notice to be redeployed or to risk their lives, if they could receive the same pay without those requirements. That would somewhat undermine the respondent's ability to meet the legitimate aims. Furthermore, the Tribunal notes the persuasive evidence of Ms Dickinson, that although she was a beneficiary of this trial, she was in fact quickly promoted beyond that level, and in fact the trial has been discontinued. Whilst the tribunal was not provided with direct evidence as to why the decision was subsequently taken for managers at the HOST level to remain on green or grey book terms and conditions, it is plain that senior management took the view that this trial was not successful and that it did not benefit the organisation.

293. The tribunal considers that the particular disadvantage suffered by women (being in the minority of the operational grey book employees), by being paid slightly less under green book terms, was a function of the different contractual commitments, and balanced by the absence of onerous requirements in respect of training and remaining operational, keeping fit, mobility clauses, availability for on-call if required (including through lunch breaks) and the requirement to be deployed to dangerous and potentially life-threatening situations. It was open to any green book employee, male or female, who wished to transfer across to grey book terms as an operational firefighter, to apply to do so, accepting both the slightly higher remuneration package, but also the liabilities. The claimant did not wish to do so. The aims were not only legitimate, but sensible and in the wider public interest, and the different financial package for grey book employee was proportionate and reasonable."

32. In relation to the complaint of constructive unfair dismissal, the first question was whether,

at the time when the claimant resigned, the respondent was in fundamental breach of the contract of employment. As the equal pay claim had failed, no equality clause was deemed to be included in the claimant's contract, and hence the respondent was not in breach of such a term by failing to apply the Grey Book terms at issue to her. The tribunal also rejected the alternative contention that the respondent was in breach of the implied duty of trust and confidence, after working through the list of matters that she relied upon as individually or cumulatively establishing such a breach.

33. The absence of a fundamental breach by itself led to the conclusion that the claimant was not constructively dismissed, and hence the dismissal of the unfair dismissal claim.

The Grounds of Appeal

34. Three of the original seven grounds of appeal were permitted by me, at a rule 3(10) hearing, to proceed to a full appeal hearing. Preserving their original ground and paragraph numbering, they were grounds 4, 5 and 7, expressed as follows.

> **"Ground 4 – Whether the failure to maintain operational competence affected the comparators' pay**
>
> **10. The Tribunal failed to make findings in relation to a significant and relevant issue as to whether the failure to maintain operational competence ever affected the pay of Grey Book employees such as the Claimant's comparators.**
>
> **Had these findings been made, and had the Tribunal carried out the proper comparative exercise, it would have concluded that the material factor advanced for the difference in pay was not operative in the sense that the comparators' failure to maintain operational competence made no difference to what they were paid and so could not explain any difference in pay.**
>
> **Ground 5 – Objective justification**
>
> **11. Further and alternatively, the Tribunal misapplied the test for justification in relation to an established indirectly discriminatory disparity in pay as to whether the measure of applying Green or Grey Book terms and conditions of service was appropriate and reasonably necessary in order to achieve a legitimate aim and a proportionate means of achieving a legitimate aim.**
>
>> **11.1 The Tribunal made contradictory observations on whether or not the Respondent's legitimate aims could have been achieved in some other way, stating on the one hand that it was a "telling point" that it was not suggested to Mr Adamson that the legitimate aims relied upon could have been achieved in some other way (paragraph 288), whilst also acknowledging (paragraph 291) that it was "right" that the Respondent could have achieved its legitimate**

aims by unilaterally placing the Claimant (as a green book employee) on a grey book financial package (but without the associated liabilities). This was relevant to the third criterion of the *Bank Mellat* test for objective justification as formulated by the House of Lords in *Bank Mellat v HM Treasury (No. 2)* [2014] 1 AC 700 at paras. 20 and 74.

11.2 The Tribunal further accepted that the decision to pay the Heads of Service ('HOST'), who were Green Book employees, on Grey Book terms showed that it was open for the Respondent to depart from nationally agreed terms and conditions, at least on the basis of paying Green Book employees more money, without eroding the terms and conditions for Grey Book employees (paragraph 292 and see Para. 212 where ET noted that the Respondent accepted it was within their discretion to do that). This was again relevant to the third criterion of the *Bank Mellat* test; see too *Bilka-Kaufhaus v Weber Von Hartz* [1986] IRLR 317 at para. 36.

11.3 There was no evidence before the Tribunal to support its unjustified assumption that one consequence "might have been that Grey Book employees would query why they should have to be on call, etc…. if they could receive the same pay without those requirements". On the contrary, there was no evidence that this was the consequence of the decision that was taken to equalise the pay at HOST level of those on Green Book contracts with the pay of those on Grey Book contracts from the date when that decision was taken in January 2015 – see finding at Paragraph 139(eee) – up until the date of the ET hearing in November/December 2020.

11.4 The Tribunal has unjustifiably downplayed the significance of the said decision to equalise pay at HOST level by suggesting that this was only an "experiment" and one that lasted only "for a relatively brief period" – see paragraphs 159 and 212 of ET judgment; whereas the undisputed evidence before the Tribunal by reference to the permanent contract issued to Shantha Dickinson at HOST level was that her pay was "aligned for pay purposes" to Grey Book terms including pay, annual leave entitlement and paid lunch break but without any additional Grey Book requirements. Ms Dickinson further confirmed in evidence that she was not required to be operationally competent. It was not suggested that this was just an experiment or trial for a relatively brief period. Rather, this arrangement was said to be permanent and continued up until the termination of the Claimant's employment and far beyond that, for more than five years at least.

11.5 There was no evidence to suggest that the equalisation of pay at HOST level could not have been equally achieved at the Claimant's level or that there were any material differences as between the Green/Grey Book terms and conditions that applied at HOST level compared to the Green/Grey Book terms and conditions that applied at the Claimant's management level.

11.6 The fact that had this been rolled out more generally it would have had significant financial implications for the Respondent's budget, as suggested at Paragraph 292 of ET judgment, would not, without more, have sufficed as justification based solely on the ground of cost: *Heskett v Secretary of State for Justice* [2021] ICR 110.

11.7 Consequently, the Tribunal ought properly to have found that the Respondent had not shown objective justification– see too *Marshall* per Lord Nicholls and Ground 1 (Paras. 7.1/7.2) above.

> **Ground 7 – Unfair dismissal**
>
> **13. The Tribunal further erred, insofar as it wrongly rejected the unfair dismissal claim, by finding that there was no breach of the equality clause, which was relied upon as a fundamental breach of contract in itself and would necessarily have impacted on its whole assessment of breach of the implied term of trust and confidence (see Paragraphs 306-308 and following of ET judgment).”**

35. I note that, while paragraph 11.7 includes a reference to what was originally ground 1, Ms Romney KC accepted in oral submissions that this could not be relied upon to reintroduce the challenge posed by the original ground 1, which had not been permitted to proceed to a full hearing.

Arguments, Discussion, Conclusions

36. Counsel produced detailed skeleton arguments and I heard a full day's oral argument. I have considered it all; but in what follows I will focus on what, in summary, appear to me to have been the most significant strands of the arguments.

Ground 4

37. Ground 4 contends, in substance, that the tribunal erred by treating the continued application to the comparators, during the secondments, of the Grey Book requirement to maintain operational competence, as a material factor, without making a finding about whether they *in fact* fully complied with it during their secondments. Had it done so, it is contended, the tribunal would have been bound to find that neither of them did; yet this made no difference to their pay. The claimant's skeleton argument describes the challenge in this way: “A contractual obligation that is not enforced and is not essential to the performance of a non-firefighting job is not a material factor.”

38. Mr Jones KC fairly noted in argument that this ground does not contend that the continued contractual requirement to maintain operational fitness and/or the other Grey Book requirements that continued to apply to the comparators during the secondment periods *could not*, as such, constitute material factors. Rather, this ground raises, solely, the significance or not of whether the

comparators in fact continued to comply, or fully comply, with the operational fitness requirement.

39. The Answer takes issue with the premise of this ground as to the factual position. So far as Mr Ison is concerned, the tribunal accepted [139n] that he continued to undertake some operational training during the relevant period. He accepted in evidence that he failed to maintain *some* operational competencies, and so had to take steps to catch up before resuming an operational post. But it was not accepted that he failed to maintain his operational competences *as a whole*. As for Mr Turner, the tribunal had evidence of his undertaking operational training during the secondment period. He had also not conceded that there was any failure to maintain his operational competencies.

40. The Answer maintains that, in any event, while what they did in practice was relevant to the "like work" question, the material factor defence relied upon what was, or could be, *required* of the claimant and her comparators. Whether the comparators (fully) complied with this requirement was not a significant issue in that context, so it was not an error to fail to make further findings about it. In any event, this requirement was just one of many material factors relied upon by the respondent, as set out at paragraphs 8(b) – (n) of the list of issues before the tribunal, and which were upheld. Even if the tribunal should have disallowed this strand, the defence would still have succeeded.

41. The claimant's skeleton argument refers to **Paterson v London Borough of Islington**, UKEAT/0347/03, 23 April 2004. In that case, bonus payments paid to the comparators were said to be justified as a performance incentive. A reduction in the extent of supervision and a decline in performance standards did not, however, point to the relevant provisions having become a dead letter, such that there was no justification for the bonus continuing to be paid. The EAT held that the tribunal had been entitled to find that the employer remained committed to the scheme of which this was a part; and its conclusions in this regard were neither insufficiently reasoned nor perverse.

42. For the respondent reference was made to the observation in **Beal v Avery Homes (Nelson) Limited** [2019] EWHC 1415, at [30], that "as the parties agreed, if an employee refused or neglected to do something which they were supposed to do, that activity would remain part of their work". In the present case Mr Ison's evidence reflected that he recognised that he was *expected* to maintain his operational competence during his secondment, while accepting that he had in fact failed to maintain *some* (but not all) such competencies. Mr Turner also gave evidence, supported by a training schedule, that he did carry out operational training during the secondment period. There was also evidence that both of them had undertaken medical/fitness assessments during that period.

43. My conclusions on this ground follow.

44. The starting point is that the particular claimed material factor at issue, which was relied upon by the respondent, as one strand of its overall material factor defence, was that the comparators were *required to maintain* operational competence during the period of their secondments (see in particular [225], cited above). The respondent did not contend that the roles to which they were seconded were themselves operational roles – indeed that was why the claimant was also able to be deployed to them. But its case was that the comparators were nevertheless required to maintain operational competence during the secondment periods because, in summary, they *could* be called upon to engage in *some* operational duties during them; *and* because it was important for them to maintain the competencies associated with the operational roles to which, in due course, they could be expected to return.

45. Mr Jones KC rightly submitted that the live grounds did not contend that, whether because the work of the claimant and her comparators had been found to be like work, or for any other reason, the suite of material factors advanced by the respondent could not be relied upon in order to justify the differences in terms under challenge, *at all*. However, he also sensibly acknowledged

that, in a given case, the fact that a requirement remained a part of the comparator's contract would not enable it to be relied upon, if the tribunal were to conclude that it was, in reality, a dead letter. However, this would be an evidential matter for the appreciation of the tribunal. In **Paterson**, for example, the conclusion was, in substance, that the reduction in supervision and drop-off in performance levels was *not* reflective of the underlying aim relating to performance of the comparators having been abandoned by the employer, and so having ceased to be able to justify the different bonus provisions.

46. I agree that, in such cases, what matters is whether the employer in fact has (or still has) a *genuine* requirement, and, if so, whether the existence of it contributes to the explanation for the comparator's higher pay (or other term at issue). If so, that requirement can be relied upon as a material factor, as such, when considering the elements of the justification defence.

47. Of course, it might be contended, in a given case, that the fact, if fact it be, that a comparator no longer took steps to comply with the requirement, might form part of an *evidential* picture from which the tribunal should infer that the requirement had in reality been abandoned or suspended; but I struggle to see how it could be said that a tribunal *must* infer, from the mere fact that an individual was failing to take some proactive steps that they were required to take, that this was reflective of there no longer being a genuine requirement on the part of their employer, in the absence of, for example, some further evidence and factual finding about the employer's stance or conduct in that regard. (The dictum in **Beal** that was cited to me is perhaps making a similar point, though, in that case, it appears to me, not in the context of the defence. It is just illustrative.)

48. The present case is not factually analogous to a case in which, for example, it is contended that the purposes behind a bonus scheme can no longer be relied upon as a material factor, because the necessary monitoring is no longer being carried out *by the employer*, pointing to the conclusion that it has been abandoned. Even in such a case, as **Paterson** shows, it is for the tribunal to decide

whether to draw that inference. But what was relied upon in the present case was the fact, in and of itself, of the comparators themselves failing proactively to keep up their operational competencies.

49. Further, this ground does not contend that the tribunal erred, for example, by failing to make additional findings of fact about the stance or actions of the comparators' superiors, to the effect, for example, that there was evidence that the comparators were told that they did not need to keep up their operational competencies, or that superiors who knew that they had failed to do so, had told them that this did not matter for so long as they were on secondment. At best all that was relied upon was the fact that, the comparators having continued on Grey Book terms as to pay and hours when first seconded, at no subsequent point was that proactively then revisited.

50. In its summary of the parties' respective submissions, the tribunal noted, at [63], that, in response to this strand of the claimant's case, Mr Dracass, for the respondent, contended that "[t]he fact that some grey book employees may have fallen behind on operational fitness or training, did not undermine the underlying argument that they were required to remain operational and available for redeployment". There is no suggestion that this missed the nub of the case being advanced by the claimant. This passage also shows that, as far as it went, the tribunal had the point on board; and, for reasons I have given, that submission by Mr Dracass appears to me to have been a sound one.

51. In any event, the tribunal clearly found that this *was* still a genuine requirement. That was a finding of fact by the tribunal with which the EAT cannot interfere. The tribunal also properly concluded that this continuing requirement supported the aims of the comparators being in a position to carry out operational duties in the event of being called upon to do so on occasion, during secondment, however infrequently, *and* being in a position promptly to resume such duties full time, when their secondments ended. As the tribunal found, these were part and parcel of the ordinary Grey Book terms, which simply continued to apply to the comparators; and so the tribunal

was entitled to find that this requirement was a contributory cause of the difference in pay.

52. All of that being so, I do not think that the tribunal could properly have concluded that the fact, if found, that the comparators did not fully comply with the requirement to maintain their operational competencies during the secondment, meant, in and of itself, that it could not be relied upon as a material factor, or as a strand of the overall material factor defence. I therefore do not think that the tribunal was required to make further findings, on the basis of such an analysis.

53. The analysis thus far points to the conclusion that ground 4 fails. The Answer did also contend, further and in any event, that the requirement to maintain operational competencies was not the sole strand of the material factor defence advanced by the respondent. The full list at paragraphs 8(a) to (n) of the list of issues was worked through by the tribunal at [204] to [248]. So, argued Mr Jones KC, even had it erred as contended, in any event the tribunal would have concluded that the defence was made out by reference to all of these other material factors.

54. This point can be overstated, as Ms Romney KC fairly submitted that a number of the features on this list were related, or were consequences or facets of others. But the full list, and the tribunal's overall conclusions in relation to it, is nevertheless reflective of the fact that the tribunal accepted that the fact that the secondments were to non-operational roles, as such, did not mean that the comparators were no longer required to maintain operational skills, nor that there was no point to that.

55. Ms Romney KC's submissions on ground 4 touched upon other material factors relied upon by the respondent, such as the additional training requirements, involvement in AFA trials, the risk of being called out in an emergency to carry out operational duties and so forth. She stressed the tribunal's findings to the effect that these requirements were limited, not onerous and/or infrequent, such that it had found, for the purposes of like work, that the day to day roles were almost identical.

However, factual features which do not defeat a finding of like work, can nevertheless be sufficient to support a justification defence; as I have already noted, ground 4 was *not* a wholesale attack on the whole raft of material factors, but focussed on just one; and both in relation to this strand, and overall, whether the defence was made out was, in principle, a question for the appreciation of the tribunal.

56. For all of these reasons ground 4 fails.

Ground 5

57. The heading of ground 5 makes clear that it is squarely directed to the tribunal's reasoning in relation to justification.

58. In **Bilka-Kaufhaus GmbH v Weber Von Hartz** [1986] ICR 317 the ECJ postulated that the means chosen to achieve the legitimate aim must be "appropriate and necessary for that purpose". But this must be read as meaning "reasonably necessary", not that the employer must show that no other way of achieving the means was possible. (See **Hardy & Hansons plc v Lax** [2005] ICR 1565.) In the language of the formulation of the test in **Bank Mellat v HM Treasury** (No 2) [2013] UKSC 39; [2014] 1 AC 700 at [74] the ground identified the issue as being "whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective".

59. As Mr Jones KC submitted, it is not an argument for the claimant in effect just to say: "you could avoid the discriminatory impact of not giving me equal pay by giving me equal pay." But the substance of the challenge advanced by ground 5 is, it seems to me, the following. What the respondent had to show was that the *difference* between the relevant terms applied to the claimant and to her comparators was because of a material factor or factors, reliance on which was a proportionate means of achieving its legitimate aims. The grounds contends that the tribunal erred

in concluding that this had been shown, for the particular reasons that the ground sets out.

60. The principal feature of the claimant's case below, on which this ground is then founded, is the contention that the fact that the respondent had put HOST Green Book employees, such as Shantha Dickinson, on Grey Book terms, undermined its case that maintaining the differential in the terms of the claimant and her comparators was reasonably necessary to the achievement of the identified aims; or, to put the matter the other way around, its case that to put her on equal terms with her comparators would be damaging to those aims. The tribunal is said to have erred in rejecting that argument.

61. Breaking it down a little more, the ground contends that the tribunal erred, first, having regard to the fact that it acknowledged at [291] that the respondent "could" have achieved its aims by placing the claimant on a Grey Book financial package, in particular having regard to the fact that the respondent had in fact been able to put HOST Green Book employees on to Grey Book terms.

62. Secondly, it is contended that what had been done for the HOST employees, such as Ms Dickinson, without any apparent adverse repercussions, in substance undermined the respondent's case that maintaining the differential between the claimant and her comparators was reasonably necessary to the aims. It is said that the tribunal impermissibly downplayed the significance of this aspect, and perversely described it as an "experiment" or trial which ran for only a brief period and was then ended (for example at [159] and [212]); and that indeed the evidence was to the contrary.

63. Further, it said that there was no evidential basis for the tribunal's statement that one consequence of levelling up more widely might be that Grey Book employees would query why they should have to be on call and to remain fit and trained to operational standards, to be available to be redeployed and to risk their lives, if they could receive the same pay without doing all of these

things [292]. So, it is contended, that was an impermissible and erroneous finding.

64. Finally, this ground takes issue with the statement at [292] that rolling out the HOST approach more widely would have had significant financial implications for the respondent's budget.

65. The tribunal's self-direction as to the law is not criticised by this ground, and, for the respondent, it was submitted that whether the justification defence was made out was a question of fact for the tribunal acting as an industrial jury. See: **Coventry City Council v Nicholls** [2009] IRLR 345 (EAT) at [81]. That, it is said, is dramatically illustrated by the recent decision in **Pitcher v Oxford University; Ewart v Oxford University** [2022] ICR 338 (EAT), in which two different tribunals permissibly reached different conclusions on justification of age discrimination when considering the same measure adopted by the same employer in support of the same aims.

66. I turn then to each of the particular strands of challenge in turn.

67. As to the first of these, reading the observation at [291] on which it relies in the context of the whole sentence, the whole paragraph, and the whole passage in which it appears, it is clear that the tribunal was simply accepting there the contention that it would have been, as it were, logistically or industrially possible to put the claimant on to Grey Book terms, notwithstanding that she was on a Green Book grade, and the associated nationally agreed terms, just as had been done for Ms Dickinson and HOST Green Book employees like her. But that merely eliminates a line of defence from enquiries. The fact that levelling up the claimant *could*, practically, have been done does not show that the respondent had no sustainable defence for why it was *not* done.

68. I turn to the second and central aspect of this challenge, relating to what was done in the case of the HOST level employees. I will refer, neutrally, to the HOST exercise. To engage with this aspect of the dispute, the tribunal had to make what I will call hard findings of fact about what

happened in relation to the HOST exercise, and then make an evaluative judgment as to what light, if any, those facts cast on the respondent's contention that the maintenance of the differential in relevant terms between the claimant and her comparators was reasonably necessary to its legitimate aims.

69. None of what I would call the hard facts concerning the HOST exercise, as set out by the tribunal in the course of [139eee], [159] and [212], were said by this challenge to have been wrongly stated or perverse findings as such; and they are all borne out by the small selection of the documents and evidence that was before the tribunal that I was shown.

70. I start by noting that it was common ground that HOST was the highest level or grade to which Green Book terms applied, and a higher level than the claimant was on, and that HOST employees had distinct duties and responsibilities from her and her comparators. The terms of Green Book HOST employees and their equivalent Grey Book colleagues were aligned from around February 2015. A memorandum from January 2015 indicated that the difference between the terms of these two groups were felt to be divisive, and not conducive to the delivery of certain outcomes, and that the alignment had a very small cost implication which could be absorbed in the overall reshaping of HOST. There was no dispute that, in Ms Dickinson's case, these terms came to an end when she was promoted to a higher level. Nor was it disputed that, by the time of the tribunal's hearing, this exercise had come to an end entirely, the decision having, at *some* prior point, been taken to stop it, and those to whom it had been applied by then all having moved on, been promoted or retired.

71. The ground of appeal then takes issue with the tribunal's description of this exercise as an experiment or a trial and/or as having lasted for a brief period. While Ms Romney KC made the point that Ms Dickinson's new terms were not time-limited at the start, and contended that the evidence did not support the view that the exercise began life as a trial or experiment, she did not

seek to challenge the tribunal's findings that it *had* come to an end, nor the tribunal's broad observation that the exercise was adjudged by the managers concerned to have been unsuccessful. Given all the hard findings of fact that I have described, I do not think that the factual features on which Ms Romney KC relied show that the tribunal's use of words such as "experiment" and "trial" betray an error as such.

72. It was for the tribunal to assess what it thought could be learned from the overall evidence about this exercise, for the issues it had to decide. Specifically, whether it supported the contention that maintaining a differential in the relevant terms between the claimant and her comparators was demonstrably *not* supportive of the aims, was an evaluative matter for the appreciation of the tribunal. Its substantive conclusion was, in effect, that the fact of the HOST exercise having occurred, without any apparent ill effects on the morale of Grey Book employees, did not persuade it that eliminating the differential for other employees, such as the claimant, who could also point to Grey Book comparators in relation to *their* particular work, would not be deleterious to the legitimate aims which the differential between Grey Book and Green Book terms as to pay and hours was found to serve.

73. Ms Romney KC acknowledged that the HOST grade employees were in a higher and distinct grade from the claimant, and that HOST work was not like work with her work; but, she submitted, Ms Dickinson was still equalised with Grey Book HOST employees and the principle was the same. Further, she said that it was not being contended that this exercise demonstrated that levelling up could and should have been applied to Green Book employees across the board, but only to those like the claimant who were in roles in which they could point to Grey Book comparators doing like work.

74. However, as I have noted, it was found that this exercise did relate specifically (and, it would appear, only) to the HOST employees; that there were considered to be reasons peculiar to

HOST roles for starting the exercise, and that it would have minimal costs implications. It was also found that at a certain point it was judged not to have been a success, and ended. Given all of that, I do not think the tribunal erred by not concluding that it demonstrated that applying levelling up to those who, like the claimant, could point to their own comparators, would not risk damaging the legitimate aims of applying more generous terms as to pay and hours to Grey Book employees generally.

75. I turn to the specific criticism of the tribunal's observation at [292] that a roll out of the HOST exercise more widely might have had the consequence that Grey Book employees would query why they should have to be on call, etc., if they could receive the same pay without these requirements being applied. This is said to have been unsupported by evidence. Mr Jones KC submitted that this was a common-sense proposition which was "*Cockram*-obvious", a reference to **Air Products Plc v Cockram** [2018] EWCA Civ 346; [2018] IRLR 755 in which Bean LJ said at [30] that the proposition that a rule excluding retiring employees under age 55 from certain benefits tends to encourage them to stay on until the specified age was "surely so obvious that it barely requires evidence at all."

76. In the present case the respondent's two aims, which the tribunal accepted were legitimate, were to provide an effective and efficient service to the public and, specifically, "to reward employees for being 'on call' and/or competent and available for operational duties and deployment." The tribunal considered, among other things, that the first aim required "an appropriate remuneration package" and that the second aim picked up on this. It stated, at [281], that it "readily accepts the underlying argument that it is legitimate to seek to reward employees … to reflect those more onerous terms and conditions, which do not apply to green book employees."

77. In my judgment, the tribunal was fully entitled to accept as a common sense starting point, in the **Cockram** sense, that employees who had the particular more onerous responsibilities that

were at issue in this case, would expect that to be reflected in their level of remuneration, such that not maintaining that differential would risk damaging their morale, and undermining the aims that the tribunal found were properly relied upon as legitimate in this case. As I have found, the tribunal properly proceeded on the basis that those requirements genuinely continued to apply to the comparators during their secondments; and it did not err by not concluding that the facts relating to the HOST exercise fatally undermined the respondent's case.

78. I turn to the final strand of this ground, relating to the tribunal's observation at [292] that to roll out the HOST experiment more generally would have had "significant implications for the respondent's budget". As framed, this strand, at para [11.6] of the grounds, does *not* take issue with that factual proposition, but asserts that this could not, without more, provide a basis for a material factor defence, relying on **Heskett v Secretary of State for Justice** [2021] ICR 110. However, this was not a case where the tribunal found that cost was the sole material factor justifying the differential. Perhaps recognising this difficulty, Ms Romney KC's skeleton, at [13], acknowledged that, in this regard, **Heskett** is binding upon the EAT; but it advanced the distinct point (citing **Heskett** at [115]) that the employer must advance cogent evidence of the costs concerned; it being submitted that the tribunal had no such evidence, beyond what levelling up would cost in respect of the claimant.

79. That way of advancing the challenge was not, strictly, within the four walls of this paragraph of the ground. But in any event, I was shown (as I would have expected given that an indirect discrimination claim was run) that the tribunal was given tables of figures for the numbers of Grey Book and Green Book staff who were male and female, and similar gender breakdowns of other sub-categories pertinent to the roles during the relevant period of the claimant and her comparators. So it appears to me that the tribunal did have sufficient evidence before it to support this assertion as such.

80. In fact the cost implications of doing what the claimant wanted were not relied upon by the respondent as part of its suite of factors. But, even if it might therefore be said that this observation by the tribunal, though supported by evidence, was gratuitous, I do not think it affected the integrity of the decision, given the range of material factors relied upon, and which the tribunal did uphold.

81. For all of these reasons, ground 5 fails.

Ground 7

82. The premise of this ground is that, for the purposes of the unfair dismissal claim, and, specifically, the contention that the claimant had been constructively dismissed, one way in which it was said that there had been a repudiatory breach on the part of the respondent was by failing to comply with an equality clause. It is therefore dependent on the success of ground 4 and/or ground 5; as ground 7 does not advance any further basis, as such, for the contention that the tribunal erred by failing to imply an equality clause. As grounds 4 and 5 have failed, ground 7 must also fail.

83. Had either or both of grounds 4 or 5 succeeded, an issue would then have arisen as to whether any and every breach of an equality clause is, necessarily as a matter of law, a fundamental breach of contract. The respondent also advanced a further contention in its Answer relying upon a finding by the tribunal that the claimant had resigned when she did, because she misunderstood the position regarding the time limit for presentation of any employment tribunal claim. Ms Romney KC contended that this was misconceived as it confused the timing of the resignation with the material reasons for it. These are not, in the event, issues that I need to consider or resolve.

Outcome

84. For all the foregoing reasons, the tribunal did not err as contended by the grounds of appeal before me. The appeal is therefore dismissed.