Appeal No. UKEAT/0414/11/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE LONDON EC4Y 8JX

At the Tribunal
On 1 February 2012

Judgment handed down
On 29 February 2012

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MRS M MCARTHUR FCIPD

MR H SINGH

MS MARY ABENDSHINE AND OTHERS — APPELLANT

SUNDERLAND CITY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MICHAEL FORD (of Counsel) Instructed by: Thompsons Solicitors The Saint Nicholas Building St Nicholas Street Newcastle Upon Tyne NE1 1TH
For the Respondent	MR SEAMUS SWEENEY (of Counsel) Instructed by: Sunderland City Council Legal Services Civic Centre Sunderland SR2 7DN

SUMMARY

EQUAL PAY ACTS

PRACTICE AND PROCEDURE – STRIKING OUT/DISMISSAL

Insofar as claims made by employees relied on comparators who were other than those whom the employees had identified when setting out their grievances under the standard grievance procedure provided for by the Employment Act 2002, an ET struck them out. It considered (correctly, at the time of decision) that it was bound by the decision of the EAT in **Dundee City Council v McDermott and Others** to do so. Since then another constitution of the EAT to which **McDermott** was not cited had taken an opposite view, following observations made in an earlier EAT case to the same effect. After argument, this appeal panel would in any event have allowed the appeal, but the matter was put beyond doubt by a subsequent (majority) decision of the Inner House of the Court of Session which allowed an appeal against the decision in **McDermott**.

MR. JUSTICE LANGSTAFF (President)

Introduction

1. A large number of claims against Sunderland City Council came before the Employment Tribunal in Newcastle upon Tyne in early 2011. In a detailed judgment of 21 April 2011 the Tribunal resolved a number of issues. Only one has come for appeal to this Tribunal. That was the determination by the Tribunal that the complainants in some 250 cases listed in Schedule 3 to the decision would not be permitted to compare their jobs with anyone other than the holders of posts listed in Column H of that Schedule. In 46 of those cases no comparator was identified, and it would follow that those claims could not proceed further. In 80 cases, only a single post was identified such that the occupant of that post would be a suitable comparator for the complainant. This places practical limitations on the claims, which may render them of no, or much less, potential value to the claimants.

2. This decision was reached after consideration of what was known by the Tribunal as the "correlation issue". This issue arose out of the interaction of two statutes which were then applicable to claims of this nature: the **Equal Pay Act 1970**, and the **Employment Act 2002**, together with the **Employment Act 2002 (Dispute Resolution) Regulations 2004**.

3. The relevant provisions of the **Equal Pay Act 1970** are as follows:

> **"1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include … 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 benefitting that man included in the contract under which he is employed the woman's contract shall be treated as including such a term..."**

Section 1(2)(b) makes similar provision as in (i) and (ii) where the woman is employed on work rated as equivalent with that of a man in the same employment, as does Section 1 (2) (c) in respect of those cases where a woman is employed on work which is of equal value to that of a man in the same employment.

4. Section 1 (3) provides:

> **"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 … (b) in the case of an equality clause falling within subsection 2 (c) … may be … a material difference (between the woman's case and the man's)."**

5. It is trite law that the comparator to an equal pay claim, when made, must be an actual person not an hypothetical comparator. That did not, however, prevent the statutory procedures for dealing with equal value claims making it plain that there was no obligation to identify such a comparator until after the claim had been lodged with the Tribunal.

6. The **Employment Act 2002** provides by Section 32 (2) (in terms which apply to a claim for equal pay – see Section 32 (1) and Schedule 4 to the Act) that:

> **"An employee shall not present a complaint to an employment tribunal under a jurisdiction to which this section applies if a) it concerns a matter in relation to which the requirement in paragraph 6 or 9 of Schedule 2 applies, and b) the requirement has not been complied with"**

By subsection 6:

> **"An Employment Tribunal shall be prevented from considering a complaint presented in breach of subsections (2) to (4), but only if (a) the breach is apparent to the Tribunal from the information supplied to it by the employee in connection with the bringing of proceedings or (b) the Tribunal is satisfied of the breach as a result**

> **of his employer raising the issue of compliance with those provisions in accordance with regulations under section 7 of the Employment Tribunals Act 1996 (Employment Tribunal Procedure Regulations)…"**

7. Part 2 of the Schedule referred to in section 32(2) sets out grievance procedures. The "standard procedure" requires by paragraph 6 (under a heading entitled: 'Step 1 Statement of Grievance') that 'the employee must set out the grievance in writing and send the statement or a copy of it to the employer'. This is followed by 'Step 2: meeting'. Paragraph 7 provides for this in these terms:

> **"(1) The employer must invite the employee to attend a meeting to discuss the grievance**
>
> **(2) The meeting must not take place unless (a) the employee has informed the employer what the basis for the grievance was when he made the statement under paragraph 6, and (b) the employer has had a reasonable opportunity to consider his response to that information …"**

8. The provisions of paragraph 7 make it plain that it is not an essential feature of the grievance in writing referred to in paragraph 6 that it should set out the basis for the grievance, since it envisages that the basis may be expressed separately. Paragraphs 6 and 7 sit in stark distinction to the 'modified procedure' for which Chapter 2 of Part 2 provides by paragraph 9. There, Step 1, "Statement of Grievance" is described in these terms:

> **"The employee must - (a) set out in writing – (i) the grievance and (ii) the basis for it, and (b) send the statement or a copy of it to the employer"**

By paragraph 10 provision is made for a response, which is to be in writing, by sending the statement or a copy of it to the employee.

9. It is clear from this wording (although authority has confirmed it) that the "grievance" and the "basis for the grievance" are two separate matters.

10. The **Employment Act 2002 (Dispute Resolution) Regulations 2004** provide that where either of the grievance procedures is the applicable statutory procedure, the parties are to be treated as having complied with the requirements of that procedure if a person who is an

appropriate representative of the employee who has the grievance has written to the employer, setting out the grievance, and has specified in writing to the employer the names of at least two employees, of whom one is the employee having the grievance, as being the employees on behalf of whom he is raising the grievance.

11. It is common ground before us that collective grievances were made in the case before us: some on behalf of members of the GMB, and some on behalf of members of UNISON. It is also common ground that "grievance" has the same force and meaning in the context of a collective grievance as it does in paragraph 6 or as the case may be paragraph 9 of the Schedule in respect of an individual grievance. Which of paragraphs 6 and 9 is applicable depends upon whether the Claimant is still in employment with the employer to whom the grievance is addressed: if (s)he is, paragraph 6 applies; if not, paragraph 9 (subject to further conditions being met).

12. Of the claimants before the Employment Tribunal in the present case, those represented by the GMB union did not specify any comparator when making their grievance collectively. Those represented by UNISON did. It was submitted to the Tribunal, and accepted by it, that this difference was critical in the present case. In summary – we shall have more to say below - this is because it saw the legal principle in a case of equal pay as being that where a claimant identified a comparator in her grievance, but a different comparator in her originating application to the tribunal, there was by reason of that fact alone a claim in respect of which there had been no grievance sufficient to satisfy the demands of Section 32.

13. The following principles were not in contention between the parties:

(a) the definition of grievance does not, on its face, contain any requirement that the complaint should go any further than being a complaint about what the employer has or has not done. No particular formality is required by the statutory wording;

(b) the statutory requirements are minimal in terms of what is required: the grievance must be set out in writing;

(c) not even the basis for the claim need be stated (see above, but also per Pill LJ in **Suffolk Mental Health NHS Trust v Hurst and Others** [2009] ICR 1011 ("**Hurst**") at 1027F, para. 57 (j));

(d) it is a statement of grievance sufficient for a tribunal claim subsequently to be brought that it should inform the employer merely that the grievance is for failure to comply with the **Equal Pay Act 1970**: (paragraph 58, **Hurst**).

14. **Hurst** concerned whether claims brought before a tribunal should be barred from proceeding where the grievances made claims under the **Equal Pay Act 1970** but failed to identify any comparators. The Court of Appeal, agreeing with the conclusion and reasoning of Elias P in the Employment Appeal Tribunal (at [2009] ICR 281) accepted that they should not. Merely to identify the statute, and not to detail any comparison, was sufficient to amount to a qualifying grievance.

15. It follows that in the present case the GMB claimants, who said no more than that their claims were for equal pay, are able to proceed, identifying comparators during the course of the Tribunal proceedings as permitted by Tribunal procedures. However, the UNISON claimants were in a factually different position. They had identified comparators at the same time as making their grievances. If 'grievance' within the Statute were to be considered as including every detail provided in writing when making a complaint about the employer's conduct, then it might be said that a subsequent equal pay claim by which the complainants sought to compare

themselves with different comparators in the same employment would be barred. Because the grievance had identified actual comparators, it could be said that the claim bore insufficient relationship to the grievance for the claim to be permitted to proceed. If the 'grievance' were to be considered as that which would be sufficient to constitute a grievance, as per **Hurst**, with other additional allegations – even those setting out the basis of the grievance – as surplusage, then it would be plain that a subsequent claim brought in relation to the grievance – though not necessarily adopting the same details as to its basis – could not be ruled out by reliance on section 32(2).

16. In **Shergold v Fieldway Medical Centre** [2006] ICR 304 Burton J said (at paragraph 35):

> **"The grievance in question must relate to the subsequent claim and the claim must relate to the earlier grievance, if the relevant statutory provision is to be complied with. It is clearly no compliance with the requirement that there must be a grievance in writing before proceedings if the grievance in writing relates for example, to unpaid holiday pay and the proceedings … are based upon race discrimination or sex discrimination with no relevance to any question of holiday pay …"**

17. This has become known as the "correlation principle". As Mr Singh pointed out in the course of argument before us, in normal usage "correlation" might suggest a much greater degree of correspondence between the claim when made and the grievance when written than the cases refer to: Burton J himself, in expressing the principle for the first time in **Shergold** went on immediately to say, after the words just cited:

> **"But… that does not begin to mean that the wording of the simple grievance in writing required under paragraph 6 and the likely much fuller exposition of the case set out in the proceedings must be anywhere near identical; not least, as we have described, because, at any rate where the standard procedure is concerned, the basis of the grievance does not have to be set out in the first instance."**

He did not use the word "correlation". He plainly had in mind that there must be some relationship, to the extent that there was some common ground between the grievance and the claim, but certainly not to the extent that the one could be considered a copy of the other.

The Case Law

18. In **Highland Council v TGWU and Others** [2008] IRLR 272 originating applications made by multiple claimants in a claim against the respondent council included comparators whose names had not featured in letters of grievance written earlier. A Tribunal permitted the claims to proceed as set out in the originating applications. The reasoning appeared to be that it was enough that the claimant had in her grievance document sought to compare herself with any type of job rated in the "Green Book", and it would not have mattered if the comparators referred to in the grievance document were quite different from those relied on in any subsequent claim. The respondents submitted that if the Tribunal were correct, it was enough at a grievance stage to provide only a broad and very general statement of the grievance and leave the specification of comparators to the point where a complaint was being presented to a Tribunal. In the Employment Appeal Tribunal, Lady Smith regarded the exercise of comparison as so fundamental to the complaint that there had been a failure by the employer in his equal pay obligations that there had to be some specification of the comparator, at least by reference to job or job title, and without it an employer could not be expected to appreciate that a relevant complaint was being made. She envisaged that where appropriate comparators came to light after a grievance had first been made, a further grievance document would require to be communicated to the employer: but the existing claim could not simply be amended.

19. The case having been heard in Scotland was appealed to the Inner House of the Court of Session as **Caroline Cannop and others v Highland Council [**2008 CSIH 38]. The appeal was allowed. In the opinion of the Court, delivered by the Lord President, the legal discussion both

before the Employment Tribunal and before the Employment Appeal Tribunal had been bedevilled by an issue which was strictly irrelevant, to the resolution to the proceedings before them: whether it was necessary for a claimant to mention a comparator at all for the grievance to be regarded as a grievance within section 32 of the **2002 Act** (see paragraph 27). The Court, applying **Shergold**, regarded the relationship between the complaint when made and the grievance earlier pursued as being a question of fact and degree, an issue which it was for the Employment Tribunal to resolve. It was "fact sensitive". At paragraph 29 the Court said:

> **"We hesitate to add to the judicial pronouncements on this topic. We approve of the observations that, on this and related matters, an unduly technical or over sophisticated approach is inappropriate (Shergold paragraph 27; Canary Wharf Management Ltd v Ebedi [2006] ICR 719, paragraphs 24 and 41). We add only that in carrying out this exercise it should be recognised that the grievance document and the Tribunal claim are designed to perform different functions and that their language can accordingly be expected commonly to be different. The correlation to be looked for is whether underlying the claim presented to the Tribunal is essentially the same grievance as was earlier communicated. Moreover, the grievance document need not necessarily be read in isolation. There may have been earlier communications with the employer which provide a context in which the grievance document falls to be interpreted (Canary Wharf, paragraph 36). … Events subsequent to the communication of the grievance document (for example, the giving of the "basis" prior to the step 2 meeting and exchanges between the parties at that meeting) may illuminate the nature and scope of the grievance. Further … there may be some circumstances in which the employee (or those acting on his or her behalf) does not have access to the full facts; in such circumstances it may be sufficient to frame a grievance statement based on a suspicion or set of suspicions that certain facts exist."**

The Court expressly declined to go further for the purposes of the Appeal, and in particular declined to resolve the hypothetical question whether a grievance in an equal pay claim had to name a comparator if proceedings subsequently commenced by the complainant against the same employer were not to fall foul of the restriction on proceedings conveyed by section 32.

20. The appeal was allowed in terms upon which the advocates were asked to focus. The order as made by the Employment Appeal Tribunal was:

> **"IT IS ORDERED that the appeal be allowed and that the matter be remitted to the same Employment Tribunal to consider the issue of whether section 32 (2) of the Employment Act 2002 applies so as to prevent these complaints being presented in any respect, having regard to the fact that to determine that issue, it requires to consider whether each claimant has previously communicated a relevant grievance**

> **document to the respondents specifying comparator(s) that are not materially different from those specified in their forms ET1 …"**

All the words after "the issue of whether" were deleted by the Inner House. The issue for consideration (being conceded by the employer that Step 1 of the grievance procedure had been complied with by those of the claimants represented by Stefan Cross) was

> **" … whether in the case of each of these claimants … the grievance underlying the form ET1 submitted to the Tribunal was essentially the same as the grievance earlier communicated …"**

21. The hypothetical issue which had "bedevilled" the argument in **Cannop**, which the Court of Session had declined expressly to resolve, fell directly for resolution in **Hurst**. Both Mr Justice Elias, as President of the Employment Appeal Tribunal, and on appeal the Court of Appeal, held that it was sufficient for a claim not to be ruled out by section 32 of the **Employment Act 2002** for a statement of grievance under paragraph 6 of Schedule 2 to the Act to inform the employer that the claim had been brought under the **Equal Pay Act 1970**. The specification of a comparator was not required. The Court of Appeal expressly endorsed the reasoning and conclusions of Elias J. It is therefore of importance to identify that which is his reasoning, as opposed to observations immaterial to the result.

22. At paragraph 70 Elias J said:

> **"If my construction of what constitutes a grievance is correct, it follows that the correlation principle will in practice be very easy to satisfy. If the grievance states that the complaint is an equal pay complaint, a claim form which reflects that fact will suffice whether the details of the claim are provided or not. Again, this does not make the exercise a pointless one. If the claim raises claims of a quite different jurisdiction, for example, a dismissal claim or redundancy, there will obviously be no correlation."**

That, it seems to us, is ratio. The same cannot be said of important observations at paragraph 73 and 74:

> **"73. I do recognise that the construction I have adopted has certain unsatisfactory and anomalous consequences. Perhaps potentially the most significant is that, if this construction is correct, there is an argument that an employee who does identify**

> **with some precision the nature of the claim in his or her grievance statement but who subsequently, in the tribunal claim form adds comparators who are not originally identified in the statement of grievance, may be unable to pursue the claim against those comparators not already identified in the grievance. By contrast he or she will be able to do so if the grievance had been left suitably general and vague.**
>
> **74. I am inclined to think that this can be avoided without undue artificiality by treating a detailed statement of grievance as constituting in substance a statement of the basic grievance that there is an equal pay claim and together with the detail, or some of it, which strictly is only required to be provided as part of the basis of the claim. I heard no argument about that and I reach no concluded view one way or the other. However even if such a construction were not possible, I do not think that this anomaly should dictate the construction of the legislation."**

23. It was upon these observations in paragraphs 73 and 74 that Mr Ford for the appellant drew heavily, for understandable reasons.

24. The Court of Appeal proceeded upon the basis that the purpose of the legislation in providing for a grievance procedure was to encourage conciliation and settlement rather than the precipitation of proceedings. Mere suspicion by a potential claimant that the **1970 Act** had been broken would be sufficient to initiate a complaint (this much was conceded before the Court). In his conclusions, Pill LJ held that the 'admirable purpose' of discouraging the precipitate issue of proceedings and encouraging negotiation, conciliation and settlement could be frustrated if the procedure were to lead to satellite litigation on technical issues about whether a statement amounted to a grievance under paragraph 6, and whether a claim subsequently made to a Tribunal was the same claim as had been included in the statement of grievance. He recognised (paragraph 57) that an employee is 'most unlikely to have the necessary information or the facilities with which to obtain it' to identify that which is necessary to make the assessment under the **1970 Act** without full cooperation from the employer – therefore to give full particulars of the claim, even in a union assisted case, was to add content to a grievance unnecessary for it subsequently to be relied upon in an application to the Tribunal. At paragraph 57 (e) he stated:

> (that it was) **"..unthinkable that Parliament was creating a trap for employees by requiring detail in a grievance statement which, following legitimate and desirable negotiation and discussion, might well require amendment, by way of a further grievance statement or statements, and further discussion and delay before a complaint to the Tribunal is possible"**

In so saying, we consider that Pill LJ was giving an answer to the need for the procedure envisaged by Lady Smith in which the serial submission of grievances was contemplated; just as his reason at paragraph 57 (i) "merely to state that the claim is made under the **1970 Act** is not a surrender to tokenism. It excludes other types of claim often made to Employment Tribunals" may be seen to answer the point that it is hopelessly unspecific simply to refer to the statute without more.

25. In his conclusions, Pill LJ did not comment upon the test identified by the Lord President in **Cannop**, though he had earlier set it out (paragraph 56). In paragraph 62, however, he recognised the following restriction upon what might otherwise be thought to be a very broad permissive principle:

> **"What purports to be a grievance statement could so mislead or distract that it is an abuse of the procedure contemplated by Parliament. It would be open to the tribunal to hold such a statement was not a statement complying with paragraph 6 or 9 of Schedule 2. I would expect such cases to be rare. It is in the interest of potential claimants to initiate the procedure in a constructive way which is conducive to successful negotiation."**

26. Wall LJ did, however, deal with what appeared to him to be a conflict of opinion as to the meaning of paragraph 6 of Schedule 2 to the 2002 Act as between the English and the Scottish Appeal Tribunals. He thought there was nothing in the reasoning of the Court of Session to inhibit the Court of Appeal in preferring the reasoning of Elias J to that of Lady Smith, and had no hesitation in doing so (paragraph 83). He added (again an observation immaterial to the conclusion):

> **"It seems to me, however, that much of what Lady Smith seeks to achieve can be achieved in practice by a sensible operation of the system."**

His observations, however, as to that which he saw as a difference of view stands on its own: Etherton LJ, the third member of the Court, expressly agreed with Pill LJ and said nothing more about **Cannop.**

27. In **Dundee City Council v McDermott and Others** (on appeal reported at [2011] ICR 606) an Employment Judge in Scotland decided that he should construe the legislative provisions such that he did not accept that it was a requirement that comparators named in the grievance should not vary materially from those identified in the claim form. He considered that the effect of the Court of Appeal Judgment in **Hurst** was that if a grievance identified equal pay, and the subsequent claim to the Employment Tribunal was a complaint about equal pay, that was sufficient. The employer appealed, successfully, to the Appeal Tribunal sitting in Edinburgh. Lady Smith noted that the Court of Appeal in **Hurst** had not been concerned directly with a case in which a grievance had not been in general unspecific terms but had descended to detail and actually specified the comparators on whose circumstances the employee was relying. She observed, as was also the case, that Elias J's observations at paragraphs 73 and 74 were obiter.

28. Lady Smith noted that the Inner House in **Cannop** in applying the test of whether the grievance underlying the form ET1 was essentially the same as the grievance earlier communicated, was capturing that which the Court of Appeal had referred to as the correlation principle. Secondly:

> **" … it has to be concluded that the Inner House did not consider that the fact that the grievances and the subsequent claims both involved the assertion that the employers had failed to comply with their obligations under the Equal Pay Act 1970 of itself meant that the grievances and subsequent claims were essentially the same. If that had been their view, there would have been no need or basis for the remit or for the direction to the employment tribunal to carry out the task specified in it"**

She relied upon the view of Underhill J as expressed in **Brett v Hampshire County Council** [2010] ICR part 6, Recent Points (UKEAT/0500/08: Judgment 25th January 2010) in which a modified grievance procedure had been involved. That was an equal pay claim in which the grievance letters identified certain comparative posts, but the relevant ET1s referred in addition to other different posts. This Appeal Tribunal, presided over by Underhill P, had analysed each claim by reference to a different comparator as a different claim, held that the "correlation issue must be considered in respect of each comparison separately", and directed the relevant complaint to proceed only insofar as it relied on comparisons with those posts identified both in the grievance and in the ET1. Lady Smith said (paragraph 26):

> **"There would seem to be no reason why that approach should not also apply in a standard case. Thus, if a claimant specified comparators A, B and C in the grievance document, then specified comparators A, B, C, D, E and F in the form ET1 and a comparison of the two led to the conclusion that they were not essentially the same complaints because of the addition of D E and F the outcome would be the claim could proceed insofar as the claimant sought to compare herself to A, B and C. She would not be deprived of the opportunity to pursue a claim."**

The reasoning of Lady Smith (paragraphs 35-40) was that **Sandwell** was not in point (paragraph 35) but although there was much understandable judicial anxiety that a strict application of section 32 might give rise to unfairness, especially where it might prevent claimants having access to an Employment Tribunal, there were nonetheless cases in which particulars could readily be given by a potential claimant; where particulars were indeed given as in the case before her, the employers were specifically directed to consider those comparators at the stage of discussion and conciliation of the grievance, and could not have been expected to focus upon any wider comparator or comparator job.

29. Adopting, therefore, an approach derived from **Brett v Hampshire County Council** Lady Smith held that, since one or more of the comparators in the list in a sample ET1 were not specified in the grievance, the comparator jobs not specified in the grievance before her were

materially different from any of the comparator jobs that were so specified. She stated (paragraph 39):

> **"If it is determined that the new comparator jobs (i.e. those which appear for the first time in the form ET1) are such as to show that her grievance and ET1 are to any extent not essentially the same complaint, then I see no reason why the approach in Brett v Hampshire County Council … should not be adopted. That way the claim would go ahead in so far as the requisite correlation existed, but not otherwise.**
>
> **40. It seems to me that, in all the circumstances, it was not open to the Employment Judge to approach matters as he did. Contrary to what he asserts Cannop v Highland Council was directly in point and contradicted the approach upon which he determined. Furthermore, it was binding on him. As I have already observed, there would have been no purpose in the remit by the Inner House in Cannop had it been the view of the Court that the fact that the grievances and the forms ET1 all related to equal pay claims was enough and that therefore the specification of comparators in both sets of documents could be ignored. Further, for that to have been the view of the Court would have flown in the face of its clearly expressed intention to reach no view on the matter at all."**

30. We make the following comments. First, the test expressed by Lady Smith in that passage is not identical to the test set out in **Cannop**. In **Cannop** what was looked for was not that the claim as expressed in the ET1 was essentially the same as that expressed in the grievance, but that "underlying..." (a word we would emphasise) "…the claim presented to the Tribunal is essentially the same grievance as was earlier communicated". Second, arguably, the test proposed by Pill LJ in **Hurst** as a safeguard against a completely different claim being brought in the Tribunal from that underlying the concerns expressed in an earlier grievance is that the grievance statement must not be so misleading or distracting such as to amount to an abuse (paragraph 62). It is arguable too that this was expressed as if of general application, and not restricted simply to a case in which (unlike **Cannop** and **McDermott**) a grievance had specified no comparisons. Lady Smith's comments are at the other end of the spectrum. The phrase "***to any extent*** not essentially the same complaint" would, if taken literally, result in quite small differences between grievance and ET1 being treated as critical.

31. It is a matter of regret that when **Sefton Metropolitan Borough Council v Hincks and Others** [2011] ICR 1357 came before Underhill J as President of this Tribunal on 12th April 2011 the decision in **McDermott** was not cited to him. It is thus understandable that he did not refer to it in his judgment. **Hincks** was a case fitting the same essential pattern as did both **Cannop** and **McDermott**. In claims to an Employment Tribunal, female local authority employees named comparator jobs additional to those which had been referred to in their grievance statements. They later applied to amend their tribunal claims to add claims identifying different comparator jobs not previously identified in the grievances or claim forms. The employers applied to strike out references to jobs which had not been mentioned in the grievance. That application was dismissed by an Employment Judge. The appeal to the Employment Appeal Tribunal was also dismissed.

32. It is plain that on the approach taken in **McDermott**, the appeal would have been allowed. It is necessary, therefore, to set out Underhill P's reasoning with some care. First, Underhill P rejected the argument that what he had said in **Brett v Hampshire County Council** would be inconsistent with the decision of the Employment Tribunal under appeal in **Hincks**. He accepted, rather, the argument (paragraph 7) that if it were sufficient (as **Hurst** holds) to satisfy the requirements of paragraph 6 of the Schedule to the **2002 Act** for an employee to have lodged a statement that she has a claim of equal pay, even if no comparator is identified, it can make no difference that the claimant went further than she needed by actually proceeding to identify one. Having done so does not have the effect of limiting the complaint – for the purpose of section 32 (2) all that matters is that both the grievance and the subsequent complaint to the Tribunal related to a claim for equal pay. That approach was not, it was submitted, inconsistent with the passage from the decision in **Brett** in which it was said that each claim by reference to a different comparator is a different claim. Underhill P. accepted that the position was fundamentally different in the case of the modified procedure to which **Brett** related: under that

procedure an employee was required to set out the basis for the grievance, and not simply the fact of it. He drew from **Hurst** that it was important to construe the unsatisfactory statutory provisions as to grievance procedures in such as way as to prevent either claimants or respondents being caught in purely technical traps. He approved and adopted the observations of Elias J that a detailed statement of grievance could be treated as constituting in substance a statement of the basic grievance, together with detail which strictly would only be required to be provided as part of the basis of the claim, and commented: "In other words any additional detail including the naming of comparators, is to be regarded as in the nature of 'voluntary further particulars' which do not form part of the statement of grievance itself at step 1. That is entirely consistent with my own approach, and I respectfully believe it is correct."

33. Further, he noted that that which the employer had been misled about in **Brett** was not (as had erroneously been understood) the identity of the *comparator's* job, but rather the claimant's, and this seemed to him to be a real difference (see paragraph 11).

34. We have therefore been faced with diametrically opposed decisions of the Employment Appeal Tribunal. The second (**Hincks**) was reached in ignorance of the first (**McDermott)**, but the first was reached without having the benefit of the observations of the Judge who had decided **Brett** (on which heavy reliance was placed in **McDermott**), as to the significance of the views he there expressed. Before either decision was reached, the Appeal Tribunal in **Hurst**, had expressed views which are entirely consistent with the views of Underhill J in the second decision, and were endorsed by him, but which were rejected by Lady Smith in the first decision. To add a further complication, we were told at the oral hearing that **McDermott** was subject to appeal before the Inner House of the Court of Session, and that a judgment was awaited. Neither Counsel asked us to wait for this; they invited the Employment Appeal Tribunal to proceed

notwithstanding the pending appeal; and so it was entirely possible that whatever views we expressed might be overtaken by decisions elsewhere within the near future.

35. Since the oral argument concluded, and after we had reached our decision, we received a copy of the judgment of the Inner House (sub nom **Amery v Perth and Kinross Council and Dundee City Council** [2011] CSIH 11) on appeal from **McDermott**. We were reassured that the conclusions we had reached were correct, since the appeal was allowed.

36. In **Amery** the majority (Lady Paton, Lord Osborne) noted that the Employment Appeal Tribunal was wrong to conclude that "the exercise of comparison is so fundamental to a complaint that an employer has failed in his equal pay obligations that there must be some specification of comparator, at least by reference to job or job type, in the grievance document" (see paras. 12 and 13). **Cannop** expressly had not approved it, and the Court of Appeal had taken a different approach in **Hurst**. Employment law being applicable to the whole United Kingdom, the Court of Session should only take an approach different from that of the Court of Appeal if a point of purely Scottish application arose. None did. Further, supportive of that approach was the consideration (para. 37) that:

> **"It is important, in our view, not to import into [the] initial stage of the extra-judicial grievance procedure any of the formalities or restrictions more appropriate to court procedure, with its strict rules governing pleadings, questions of fair notice, and the scope of any subsequent procedure"**

Cannop did not bind the Court to support the conclusion of the Appeal Tribunal; and although the point did not arise directly for decision in **Hurst** nonetheless that decision indicated (per Pill LJ at 57(g)) that the law required a grievance to be expressed only in the most general of terms, the procedure should not be a trap for the unwary, and Pill LJ rejected "..the submission that the correlation principle is the mainspring of the procedure to the extent that the requirement to comply with it demonstrates the need for a detailed statement of grievance."

37. In agreeing with the decision in **Hurst**, and concluding that the appeal should be allowed on the basis that a claimant was not to be held precluded from advancing a claim based on comparators different from those identified in an earlier grievance, the Inner House noted (at paragraph 42):

> **"An employer will generally have full information about the pay structure. The grievance statement simply triggers a negotiation procedure, during which details of the equal pay claim ("the basis" of the claim) will be forthcoming. Discussions will then take place. In the course of these discussions, some comparators may be named, some abandoned, some added, some adjusted or altered. In the context of extra-judicial discussions and negotiations, we cannot accept that Parliament intended that a claimant who had volunteered some information about comparators at Step 1 should be restricted to those comparators at all future stages (unless able and permitted to amend) such that his or her form ET1 naming materially different comparators would be regarded as not being essentially the same complaint as that made in the grievance, with the consequence that the employee would be barred from proceeding further to the tribunal and would be relegated to the beginning of another grievance procedure."**

The Tribunal Decision

38. The Tribunal did not have the advantage of considering the decision in **Hincks**, nor (obviously) that in **Amery**.

39. It noted (paragraph 7.5) that the Court of Appeal in **Hurst** had concluded that there was sufficient correlation for a subsequent claim for equal pay to be brought where the grievance had specified no comparator at all; and contrasted that with the position where claimants had identified comparators in their grievances. It considered **Cannop**, **Brett** and **McDermott**. After setting out the rival submissions, the Tribunal expressed its conclusion at paragraph 17 in these terms:

> **"We were very mindful of the fact that it is now well established that a claimant in an equal pay claim does not need to identify any comparators at all in the claim form or indeed, if at the material time there is a requirement for such a document, the written grievance, at least so long as the latter is lodged under the standard procedure. It seems to us that to put such a claimant in a worse position if she does name comparators in the written grievance – perhaps in an effort to assist the respondent in an investigation – does not sit easily with that proposition or with the**

fact that the purpose of the 2002 Act is, as was confirmed by the Court of Appeal in [Hurst], "discouraging the precipitate issue of pleadings and encouraging negotiation, conciliation and settlement." For our part, we could see a very large difference between the standard procedure and the modified procedure: the former requires only that the employee sets out the complaint whilst under the latter she or he must state the basis for it, which must involve a great deal more detail. Were they the last words on the matter, we would have adopted the suggestion and reasoning of Elias P in [Hurst] in the Employment Appeal Tribunal and found that in a standard case the specification as to comparators is something extra to the setting out of the grievance which the employee is later entitled to change. However, these remarks – undoubtedly *obiter* – were not the last words on the subject. They were followed by the judgment of the Employment Appeal Tribunal in [McDermott]. We were unable to accept [Counsel for the Claimant's] submissions as to that case. It was not for this Tribunal to say whether the Employment Appeal Tribunal had gone beyond its remit. That said by Lady Smith on this point was not *obiter*. She had been asked to decide whether an Employment Judge had been correct to find that, as she put it:

> **'The purpose of the legislation would be better served if he construed it as not imposing a requirement that any comparators identified in the grievance be not materially different from those identified in the ET1'.**

She found that he had not been correct, that – in a passage which we have already cited – where the claimant had specified in the claim form comparators additional to those identified in the Grievance Document that claimant could not rely upon further individuals or job types and that the appropriate course was to remit all the cases to the same Judge to consider whether in the case of each claimant the grievance underlying the claim form was essentially the same as the earlier intimated grievance. That conclusion was binding upon us. Accordingly, we had to … effectively to strike out … those comparators who were specified in a claim form but had not been amongst those identified in that claimant's written grievance."

40. The Tribunal thus indicated a clear preference for the view which had appealed to Elias J, but reluctantly felt (and indeed, were) bound to follow the reasoning of the Appeal Tribunal expressed in **McDermott**.

Submissions

41. The Appellants submitted that **McDermott** had been wrongly decided. Accordingly the Tribunal erred in law, albeit understandably, in following it.

42. That submission must undoubtedly succeed given the decision of the Inner House in **Amery**.

43. We should in any event have accepted that contention. In particular, the Appeal Tribunal drew support from **Brett**. We accept Mr. Ford's argument that **Brett** was a case in which the modified procedure applied. The modified procedure requires that the basis of the grievance be set out in writing at the first stage. It is therefore arguable that in such a case, where the issue is equal pay, the Claimant has to set out the nature of the comparison at least sufficiently to act as the basis for the claim. It plainly requires greater detail than does the standard grievance procedure, with which this case is concerned.

44. Mr Sweeney accepted in oral argument that the central issue is whether **McDermott** was correctly decided. He would argue that the approach taken in **McDermott** had much to commend it, seeking as it did to strike a balance between Claimants and Respondents. A Claimant who identified comparators in her ET1 additional to those mentioned in her earlier grievance would not be precluded from leading evidence about those comparators which she had originally identified, merely the additional comparators. He sought to persuade us that the reasoning of the Appeal Tribunal was correct. He focussed upon the need for a careful factual enquiry by a Tribunal to see that the comparators relied upon in the claim were, in truth, not materially different from those who had been earlier identified in a grievance: the test of "no essential difference" required just such an investigation. Fears that to require the closeness of correlation applied in **McDermott** would lead to the need for hearings before tribunals simply related to that issue were balanced by the reality of a continuing need for factual investigation to determine if the complaint (as litigated) was essentially that which had been expressed in a grievance.

45. Both counsel made submissions in writing to us following the delivery of judgment in **Amery**. Mr. Sweeney (notwithstanding that the central plank of his submissions was that

McDermott had been rightly decided) urged us to follow the reasoning of Lord Emslie, in the minority, and thereby (some of) the reasoning in **McDermott**. He acknowledged this would be contrary to the usual approach, whereby (as explained in **Airbus v Webb** [2008] IRLR 309, at para. 11, per Mummery LJ) this Appeal Tribunal should ordinarily follow decisions of the Inner House of the Court of Session even if not technically bound by them, since the applicable legislation crosses both Scottish and English jurisdictions.

Discussion

46. It is plain that the Employment Tribunal erred in law in following **McDermott**, given the overturning of that case by the Court of Session. If we felt that the decision was plainly and obviously right, notwithstanding the decision of the Inner House, then a question might arise as to the form our judgment should take (as Mr. Sweeney submits). In present circumstances, however, this is an unnecessary hypothetical enquiry, since we would have allowed the appeal even had we not had the benefit of considering the reasoning of the Inner House. Having had it, we are reinforced.

47. It is unlikely that we can add much to the reasoning and logic of **Hurst** and the majority in **Amery**. However, one of the advantages of the Employment Appeal Tribunal is its composition. The presence of lay members of considerable experience and standing in the employment field may endow some decisions with greater authority than if they had been reached by a judicial member alone, however experienced in the Law she or he might be. The views of the lay members in this case have heavily influenced the way in which what follows is expressed.

48. We see the grievance and the Tribunal claim as addressing two separate matters. The latter, plainly, addresses the legal consequences of actions or omissions by an employer. The stating of a grievance is not properly to be seen as a step in litigation, albeit that in order to litigate that step had at first to be taken. It has a much broader function. The purpose of stating a grievance is, as the lay members are keen to emphasise, that of initiating discussion with the employer. Many matters so discussed will never have been heading for litigation, whatever the result of the discussion. Those that might have been may be headed off by discussion. That remains the position today, even after the 2002 Act ceasing to have force.

49. The legislation providing for grievance procedures included both "stick" as well as "carrot" to encourage a constructive dialogue between the parties. The "stick" was on the one side the bar to claims where the opportunity to talk had not been given to the employer, and on the other the holding of claims as automatically unfair where the employee complied but the employer did not; the "carrot" being that of on one side potentially increased or on the other reduced compensation if there had been an attempt to operate the statutory procedure, but the other party had failed properly to engage with it.

50. The purpose of facilitating discussion is essentially a practical one. The legislation should be interpreted therefore (as **Hurst** and **Amery** recognise) in such a way as to avoid undue technicality, and unintended consequences. Making a grievance – the equivalent of the footballing cry of "foul" – in the context of the **Equal Pay Act 1970** is to complain about discrimination in relation to the terms of employment, and in particular pay. Viewed practically, an employee may recognise that she is being paid less than a man, but where the man is not employed on the self same job as the woman, equivalence – either in respect of work rated as equivalent, or work of equal value – may not be easy for an individual to ascertain even with the support of a Union. In a contract of employment, by definition the

employer is in control (without at least the right to control there could be no employment contract at all). It controls its pay policies. The employer will hold most, if not all the cards: as between employer and employee, it is the employer who knows and should be able to explain the pay policies. They may not always be transparent: and it is open to an employer to raise the defence that a disparity in pay as between a man and a woman is due to a genuine material factor which is not the difference of sex. That may not have been readily apparent to the employee concerned, for whom the sense of being paid less than others who appear no more deserving may be the driving force. In discussion, which the stating of the grievance enables, these matters may become more obvious. In a collective grievance, a practical effect of discussing the complaint of an individual that she has been discriminated against in pay may naturally lead to the uncovering of the identities of persons with whom she is entitled to regard herself as comparable, but of whom she did not know at the time that she first called "foul", or did not know sufficient about at that time because the information was necessarily in the hands of the employer. To hold such a Claimant to an initial protestation, (that her pay was less than X, or less than the pay given for a man doing X's job) would risk tying her to her ignorance of the true facts, and prevent her from developing that particular claim (though in respect now of Y) without at any rate paying the penalty of having to issue a fresh grievance which, if the matter had been fully discussed already, should raise no further and obvious matter of concern between the parties.

51. The very difference set out in statute between the standard grievance procedure and the modified grievance procedure is that it is unnecessary for there to be a standard grievance for the basis of it to be set out. We accept, therefore, that additional information is unnecessary at that stage. It may rightly be regarded as intended to be helpful but it should not be regarded as anything other than surplusage when considering the scope of the complaint.

52. The sufficiency of the complaint such that a subsequent claim is not barred by application of the **2002 Act** is necessarily judged in retrospect. The question is not asked prospectively at the time of making the statement of grievance, but from the perspective of an Employment Tribunal seized with the claim. From that perspective, the question of policy is whether there has been an opportunity, at least, to discuss that which is to be generally the subject matter of the claim. So viewed, answering the requirement in **Cannop** that ***underlying*** the claim should be ***essentially*** the same complaint will generally be obvious. Any stark deviation (by introduction of a totally new complaint) from the course of the discussions which take place before a Tribunal claim is first made is likely to be clear.

53. That the law does not require a case to be set in stone, as if a subsequent claim were a tracing paper copy of an initial grievance, is demonstrated by the power given to the court to permit amendments of a claim. "Correlation" is, as we have observed, potentially a dangerous word if it suggests the need for a greater correspondence than that required by the underlying policy of initiating a discussion, and providing an opportunity for the later subject matter of a claim to be resolved by discussion. In this context, a procedure which required serial grievances, imposing a resource cost on employers requiring persistence from employees, and causing inconvenience to both is to introduce too great a formalism to a field in which the emphasis should be on the practical: discussion with a view to preserve good working relations, rather than encouraging a proliferation of complaint.

54. It is unlikely that a claimant who has a genuine grievance, opens it for discussion with her employer, and later modifies or adds to the claim in the light of the further information obtained as a result of that discussion, will not be presenting what the Courts describe as essentially the same grievance. Ultimately, as Mr Sweeney submits, it will be a question of

fact and degree whether the claim as presented may be traced back to the initial complaint in the way we have described, but as a practical matter we would expect an employer to have cogent evidence that the claim was in truth something distinct and different if it is successfully to be able to argue that the claim is barred for non-compliance with the requirements of the grievance procedure under the **2002 Act**. The control test, as we have described it, identified by Pill LJ at para. 62 in **Hurst** is indicative of the sort of material that might justify such a finding, as are the observations of Mr Justice Burton in **Shergold** to the effect that a claim for race discrimination or sex discrimination with no relevance to any question of holiday pay could not be said to be essentially the same as a grievance that holiday pay remained unpaid.

55. In the absence of higher authority, we would have been persuaded by and have adopted the observations of Mr Justice Elias in **Hurst** at paragraphs 73 and 74; and Underhill P in his reasoning in **Hincks**. We are, however, grateful that we do not have to add our weight on one side of a dispute between different constitutions of this Appeal Tribunal. It has now been effectively resolved by the decision of the Inner House of the Court of Session in **Amery**.

56. We have no hesitation in allowing the appeal.

Result

57. We propose to substitute a finding that section 32 (2) of the **Employment Act 2002** did not debar claims being presented in relation to comparators who were additional to those mentioned in the grievance letters, unless in any given case the Respondent Council can (consistently with our judgment) point to some factual feature which it is said might make a

difference in that particular case, as demonstrating that underlying that particular claim was not essentially the same grievance as had underlain the relevant grievance, or have some basis for arguing that the claimant has acted abusively so as to deceive or mislead the Tribunal.