

Neutral Citation Number: [2014] EWHC 93 (QB)

Case No: HQ12X03868

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 29 January 2014

**Before :**

**THE HONOURABLE MR JUSTICE SUPPERSTONE**

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**Between :**

<b>(1) JACOB Thorne</b>	<b><u>Claimants</u></b>
<b>(2) GEORGE ROE</b>	
<b>(3) GAVIN THOMPSON</b>	
<b>- and -</b>	
<b>HOUSE OF COMMONS COMMISSION</b>	<b><u>Defendant</u></b>

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**Stuart Brittenden** (instructed by **Messrs Thompsons Solicitors**) for the **Claimants**  
**David Barr** (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 14, 15, 16 January 2014  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**MR JUSTICE SUPPERSTONE**

## **Mr Justice Supperstone :**

### **Introduction**

1. The three Claimants are employees (or in the case of the First Claimant a former employee) of the Defendant, the House of Commons Commission. The Defendant is a statutory body established by the House of Commons (Administration) Act 1978 (“the 1978 Act”) and is responsible for the administration and services of the House of Commons.
2. The Defendant employs some 2,000 staff in various roles in order to discharge its statutory functions. There are three main groups of staff for pay purposes: (1) those in pay bands A-E; (2) catering and retail services staff; and (3) senior Commons staff. The Claimants all fall within the first group.
3. The issue in this case is whether the Claimants have a contractual right to annual pay increases until they reach the top of the pay scale for their respective pay bands.
4. They have not received progression payments since 1 April 2011. House of Commons staff are not civil servants. However section 2 of the 1978 Act provides that

*“(2) The Commission shall ensure that the complementing, grading and pay of staff in the House Departments are kept broadly in line with those in the Home Civil Service, and that, so far as consistent with the requirements of the House of Commons, the other conditions of service of staff in the House Departments are also kept broadly in line with those in the Home Civil Service.”*

5. On 22 June 2010 the Government announced in its Emergency Budget a two-year pay freeze for all public sector workforces under Ministerial control, including the Civil Service. On 25 June 2010 the Cabinet Office advised Departments that in the Civil Service, progression payments would be payable to staff where there was a contractual entitlement to them, but not otherwise.
6. Mr Stuart Brittenden, for the Claimants, informs me that the three Claimants have been selected as a representative sample of more than 1,000 affected members of staff. They are supported by three civil service trade unions, the Public and Commercial Services Union, the First Division Association and Prospect. The Defendant makes no admission as to the extent to which any decision in these claims may impact on the position of other staff. Mr David Barr, for the Defendant, observes there are different bands and different individual factual circumstances.

### **The Factual Background**

#### ***The Claimants***

7. Mr Thorne, the First Claimant, was employed by the Defendant from 16 April 2007 until 28 September 2012 as a Band C Library Executive.

8. Mr Roe, the Second Claimant, commenced employment as a Band C Library Executive on 3 March 2008. He was temporarily promoted to Band B2 from 12 April 2010 until 31 December 2011. He was employed on Grade C between 1 January 2012 and 15 January 2012. He was employed 50% of his time on Grade C and 50% of his time on Grade B2 between 16 January 2012 and 15 April 2013. He has been employed on Grade B2 since 16 April 2013. Those changes do not affect his terms and conditions of employment, other than in relation to his pay scale and spinal point.
9. Mr Thompson, the Third Claimant, was employed as a Band A3 Statistical Researcher from 29 September 2008. With effect from 1 June 2012 he was promoted to Band A2.

### ***Letters of Appointment***

10. The First Claimant's letter of appointment dated 23 February 2007 states, in so far as is material:

“... This letter sets out the terms of your appointment as a Library Executive (Band C)...

This letter also sets out your main conditions of service as they apply at present. We will inform you of significant changes either by letters or by staff notices.

Conditions of service of the staff of the House are kept broadly in line with those of the Home Civil Service and may be changed from time to time.

This document and the Staff Handbook (except where otherwise indicated) form the basis of your contract of employment with the House of Commons Service.

### **Pay**

You will be paid monthly, in arrears, by credit transfer to your bank or building society. Your basic salary will be £19,831 per annum. Progression through the pay band will be dependent on satisfactory performance. In addition, highly effective and outstanding performers will receive a non-consolidated non-pensionable bonus. The performance pay system is set out in Chapter 9 of the Staff Handbook. The salary scale relating to your band is available from the House of Commons Department of Finance and Administration intranet site.

### **Trade Union Membership**

Changes to pay and conditions of service are negotiated with the recognised trade unions. We will inform staff of any changes by means of general notices and/or a personal letter...”

11. The Second Claimant's letter of appointment dated 1 February 2008 is, so far as is material, in identical terms. The Third Claimant's letter of appointment dated 23

September 2008 reflects the fact that Band A3 is unique in that it is the band used for fast stream entrants who can anticipate promotion to Band A2 after four years' service. The Pay paragraph states:

"You will be paid monthly, in arrears, by credit transfer to your bank or building society. Your salary will be £25,000 per annum. Progression through the Pay Band is on an annual basis on the anniversary of your appointment, and is dependent on your performance. See paragraph 9.4.5 of the Staff Handbook. On the fourth anniversary of appointment you can expect to be promoted to Pay Band A2 (or you may apply for accelerated promotion)."

### ***The Staff Handbook***

12. Chapter 9 of the Staff Handbook is concerned with Pay and Expenses. The Handbook in force at the time of the alleged breaches is that dated December 2009. Paragraph 9.2.2 for pay band A-E staff identifies the pay bands. It states, in so far as is material:

"...Your salary will fall somewhere between the minimum and maximum of the band and the rate at which you progress up the band is subject to satisfactory performance.

Details of each pay band and the progression arrangements can be found at ... or by contacting HRM&D..."

13. Paragraph 9.3.2 which is headed "Staff other than SCS" [Senior Commons Staff], and therefore applies to all three Claimants, states:

"The House is directly responsible for negotiating rates of pay for all other staff, including the craft and catering staff. Changes to pay and conditions of service are negotiated with the recognised Trade Unions (TUs). Information about pay offers and details of final agreements are circulated through the staff notice system.

At the start of each financial year the House of Commons Commission approves pay negotiating remits for each pay group (A-E structure and the Catering and Retail Services CG bands).

This sets the limit within which pay increases can be negotiated with the TUs. This limit is based on recommendations of the Management Board that take into account the need to stay 'broadly in line' with Civil Service pay. Separate negotiations take place with the unions representing staff in these three groups. Once the negotiations have been completed the TUs involved ballot their members on the final offers. The increases are normally payable from April although the time taken for negotiations usually means that the awards are

implemented later in the year with payment backdated to 1 April.

Copies of the pay agreements are available from HRM&D...”

14. Paragraph 9.4.5 concerns staff promoted within the reporting year. It provides, inter alia, that

“If you are promoted between 1 April and 31 December you will receive full revalorisation and progression in the higher pay band.”

15. Paragraph 9.4.6 concerns staff appointed after the start of the reporting year. It states:

“If you were appointed between 1 April and 31 December you will receive revalorisation (if applicable), and progression in full.

If you were appointed between 1 January-31 March you will receive full valorisation (if applicable).”

16. Paragraph 11.14 is a special provision for Band A3. It states:

*“Staff in pay band A3 normally enter at the minimum of the pay band (pay point 1 of 7) and progress annually on 1 April by two pay points (provided they receive a box 3 or higher in their annual report). On the fourth anniversary of their appointment Clerks in the Department of Chamber & Committee Services and Department of Information Services can expect to be promoted to Senior Clerk/Library Clerk and progress to the minimum of pay band A2.”*

### **Collective Pay Agreements**

17. The last pay agreement, for the years commencing 1 April 2008, 2009 and 2010, expired on 31 March 2011. The revised final offer dated 16 December 2008, which was accepted, states:

“1. I am writing to set out the revised final offer for 2008-10 band A-E pay. The details are set out below.

2. This offer, covering three years from 1 April 2008, is worth around 6.5% in 2008 and 5.95% in 2009 and 2010. It has the following elements:

(a) 4.5% on average consolidated pay in 2008 and 3.95% on average consolidated pay in 2009 and 2010, payable each year on 1 April (see paragraph 4-10)

(b) considerable improvements to journey times for pay bands A-D over three years (Annexes A1-A3).

...”

18. The agreement was communicated to staff by Staff Notice SN/05/2009, which states, so far as is material:

**“Purpose of this notice**

1. This notice gives staff [pay band A-E] details of the 2008-2010 pay award. ...

**Background**

4. The pay dispute has been settled by arbitration at ACAS. The pay award covers three years and is worth around 6.5% in 2008 and around 5.95% in 2009 and 2010.

**What are the details of the award?**

5. Full details of the award are shown in Annex A. The link will take you to an intranet page where you can see individual pay scales and other information. This will enable you to see what your salary will be with effect from April 2008, April 2009 and April 2010...”

19. Annex A contains details of the Band A-E Pay Award 2008-2010. Under the heading “Details of the consolidated part of the offer”, in respect of 2008 paragraph 3 states that the consolidated offer of 4.5% consists of, inter alia:

“(b) **Increases to all steps** by amounts that vary for each pay band and progression improvement to some pay bands (see Annex 1 for details)

...

(d) **Progression** within pay bands under existing arrangements, but allowing those at the old maxima to progress to the new maxima

...

(j) **Moving staff automatically to the maximum** of their current pay band if:

- for those in pay band A1 or A2, they have at least 10 years’ service in their current pay band as at 31 March
- for those staff in pay bands B-D (excluding former craft pay bands), they have at least 7 years’ service in their current pay band as at 31 March.”

20. It is recorded for 2009 and 2010:

“4(b) **Progression** within pay bands is improved each year. This will significantly reduce the time it takes to move from the minimum of the pay scale to the maximum (see Annexes A2 and A3 for details).”

21. The statement in paragraph 3(j) in relation to moving staff automatically to the maximum of their current pay band in respect of 2008 (see paragraph 18 above) is repeated at paragraph 4(e) in respect of the details of the consolidated part of the offer for the years 2009 and 2010.
22. Paragraph 10 of the staff notice, under the heading “Future work”, notes that “Management and unions are committed to undertaking the next equal pay audit in 2010/11 prior to the next pay negotiations in 2011”.

### **The Claimants’ Case**

23. The Claimants’ pleaded case (at paragraph 32 of the Particulars of Claim) is that their contracts of employment contain the following express terms in respect of pay progression:

- “(1) subject to satisfactory performance;
- (2) unless and until they reached the salary maxima applicable to their pay band in force at the time;
- (3) each Claimant was contractually entitled to pay progression through their pay band;
- (4) absent further collective agreement in respect of the period after 1 April 2011, the ‘existing arrangements’ applicable to pay progression continue to apply in accordance with Annex A3 of the Staff Notice which provides the prospective journey times to band maxima for 2010 and beyond;
- (5) absent variation by collective agreement, the express terms relating to pay progression contained in the Claimants’ contracts of employment continue to apply.”

24. In the alternative it is pleaded that “the particulars at paragraph 32 [of the Particulars of Claim] constitute implied terms by reference to custom and practice” (paragraph 33 of Particulars of Claim).
25. In his written closing submissions, at paragraph 6, Mr Brittenden summarises how the Claimants’ case is advanced as follows:

- “(1) The express contractual terms when read in conjunction with the Handbook must possess contractual substance/content as regards annualised pay progression. It is a breach of contract for the Defendant to unilaterally withdraw the pay progression scheme in its entirety.

(2) Further or alternatively, the progression arrangements agreed as part of the 2008-2010 (which themselves were built on the 2003-05 and 2006-07 pay agreements) agreement continue to apply (having been incorporated into individual contracts of employment), unless and until consensually varied.

(3) Alternatively, the Claimants rely upon the implied term of custom and practice, namely that annual progression payments would be made to staff, subject to satisfactory performance and them reaching the maximum of their pay scale.”

## **The Submissions of the Parties and Discussion**

### ***Express terms***

26. The applicable legal principles are clear. The first principle summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 is as follows:

“Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”

The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent (see 912H-913E for a full summary of the applicable principles).

27. The parties are agreed that the starting point is the actual words used in the letters of appointment, staff handbook and collectively negotiated pay agreements.
28. Mr Barr submits that the Claimants’ cases are flawed because they advance an interpretation which is inconsistent with the express contractual provision at paragraph 9.3.2 of the staff handbook. Pay progression is a form of pay rise. It therefore falls to be collectively negotiated pursuant to the mechanism provided in paragraph 9.3.2. Only once there is agreement do the contracts of the individual Claimants vary so as to include, for the year or years for which agreement is reached, terms which are specific enough to confer, for the year or years in question, the right to an actual increase in pay whether it be through progression or in any other form. It is not in issue that there has been no concluded collective agreement for the year commencing 1 April 2011 or any subsequent year.
29. Mr Brittenden submits that this analysis is erroneous. He submits that whilst the operation of paragraph 9.3.2 may, from time to time, modify the detail in respect of pay progression, it does not operate to eliminate an existing contractual entitlement to the same. There has, he observes, been no collective or consensual agreement between the parties to extinguish pay progression beyond 2010.
30. Mr Brittenden submits, by reference to the express term in the contracts of employment of the First and Second Claimants relating to pay progression and

paragraph 9.2.2 of the staff handbook that the intention of the parties was that progression would occur annually (subject to satisfactory performance and reaching the current band maxima in place at the time). Paragraphs 9.4.5 and 9.4.6 of the staff handbook, he submits, support this submission.

31. Mr Brittenden submits that where collective negotiations have changed rates of progression, minima and maxima, journey times and the amount of any revalorisation, those changes remain beyond the termination of any individual pay agreement; and it is only the amount, if any, to be applied to revalorisation of the pay scales in subsequent years which is dependent on the amount of the remit set by the Defendant pursuant to the second part of paragraph 9.3.2. This, he suggests, is how the provisions of the staff handbook should be considered in the light of the commonsense approach adopted by the courts (see *Briscoe v Lubrizol Ltd* [2002] IRLR 607 at para 14, per Potter LJ, endorsed by the Court of Appeal in *Keeley v Fosroc International Ltd* [2006] IRLR 961 at paras 34-38, per Auld LJ).
32. The express terms, Mr Brittenden submits, presuppose the existence of a scheme or formula by reference to which staff can progress through the pay scale applicable to their band. The absence of a pay progression scheme would render the provisions of the handbook devoid of any substance (see observations of Ackner LJ in *Robertson v British Gas Corporation* [1983] ICR 351 at 356F, and *Keeley v Fosroc International Ltd*, per Auld LJ at paras 33-38 in this regard).
33. Mr Brittenden invites the court to accept that the Defendant never contemplated that what had been agreed as part of the 2008-10 pay negotiations (including journey times) would be “finite”. Whereas monetary payments were limited to each of the three years in question, what was agreed as part of those negotiations also included agreement as to journey times. Journey times were communicated to staff on the Defendant’s intranet and staff were informed that they will receive a pay rise in successive years by means of progression so that they can reach the maxima in the timeframe. That was the understanding of Mr Higgins, who was the Negotiation Officer responsible within Prospect for members of his union employed by the Defendant. His evidence, Mr Brittenden suggests, is consistent with the Defendant’s recorded intentions. A briefing paper for the Defendant’s Management Board on issues relating to pay for 2011/12 and 2012/13, dated 17 November 2010, prepared by Ms Bryson (Director of the Defendant’s Human Resources Management Directorate) and Mr Perry (Head, Pay, Policy and Employee Relations) states:

“25. The House has a pay system based on fixed spine points (like rungs of a ladder) with pay progression within each pay band for all satisfactory performers.

26. From an HR perspective progression through the pay spine within a pay band is implied in the Staff Handbook and is explicit in the A-E Pay Band Agreement (Revised 2004). Although the rates of progression and the performance management system have changed since 2004, satisfactory performers have always progressed through the pay range until they reach the pay band maximum which is considered to be the ‘rate for the job’.

29. ... the intent of the 2008-2010 pay agreement was to ensure that all staff starting from the minimum of their pay scale, were guaranteed to progress to the maximum within a defined number of years.

30. ... the intent of the original negotiations with the trade unions was that the pay system would have a continuing life and would endure until we negotiated anything different with the unions.”

34. Mr Brittenden submits the demise or non-renewal of the collective agreement does not impact upon terms already incorporated (see *Roberston* at para 24, per Kerr LJ). Further, he relies upon the decision of the Employment Tribunal in *Bevan and others v Cabinet Office* (Case No: 1501381/2012), upheld by the EAT on 13 December 2013 where the written judgment is awaited. In that case the tribunal found that the pay progression regime was not only guaranteed but intended to continue beyond the two-year pay deal.
35. Mr Higgins gave evidence in respect of agreements relating to entitlements to annual leave, maternity and paternity rights, as well as removal of restrictions in respect of overtime. These are all operative beyond the agreement in question, as was the introduction of the single track progression in 2004 which was a permanent change (see paras 11 above and 35 below). Mr Brittenden submits that this accords with industrial relations reality and agreements should be construed accordingly (see *Anderson and others v London Fire and Emergency Planning Authority* [2013] IRLR 459).
36. Mr Brittenden submits that any suggestion that the introduction by the 2003-05 pay agreement of the single-track progression, which was a fundamental change to the pay system from the previous system of differential progression and how progression arrangements were approached, was limited to the period of the pay deal is wholly unrealistic. Mr Brittenden refers to the paper produced by Mr Walker, then the Defendant’s Director of Finance and Administration, dated February 2006 seeking the approval of the Defendant for the years 2006-2008 pay negotiating remit for staff of the House which stated:

“4. ... a three year deal covering the years 2003-05 was negotiated. The pay structure resulted in somewhat enhanced progression costs which also apply in 2006 and 2007.

...

8. Because there are automatic pay increases built in for bands A-E as a result of the last pay settlement, we are suggesting only modest negotiated increases beyond the already agreed progression. This will potentially make negotiations very tough, as the trade unions will no doubt argue that there should be consolidated pay increases of 3 to 4% *over and above* the inbuilt pay progression.”

Mr Brittenden suggests that the wording of these paragraphs shows that the parties considered the introduction of the new system in 2004 as creating a permanent right. They chime with the Claimants' case. Mr Perry confirmed that the pay structure has remained unchanged since 1 April 2011, notwithstanding the expiry of the pay award.

37. On 6 December 2007 Mr Musho'd, as Acting Director of HRM&D, in a report to the Defendant's Management Board, summarised (at paragraph 5.6) an alternative proposal to the current regime which sought to set pay progression only up to a reference point but "with no guarantee of reaching the maximum". Mr Brittenden suggests that his use of language acknowledges that it was proposed to remove an existing guarantee, by reference to the journey times which had been agreed with the unions.

38. In March 2008 Mr Walker, in a paper seeking the approval of the Management Board in respect of the pay negotiating remit for 2008, stated (at paragraph 11):

"A substantial element of pay cost in 2007 has already been committed, as a result of the 2003 agreement, which introduced faster rates of progression, in large part to bring House pay more in line with the public sector. As a result 'progression' will automatically increase the pay bill by 2.86%."

Again, this is a reference, Mr Brittenden suggests, to the 2003 agreement possessing consequences beyond the lifetime of the pay award. Mr Walker explained at paragraph 13 of his paper that one of the considerations to be taken into account when negotiating the 2008 remit for A-E bands was "continuing the process of shortening pay bands and journey times in order to reduce the risk of challenge on grounds of age discrimination".

39. In relation to the Third Claimant Mr Brittenden makes the point that Band A3 staff are "Fast Stream" staff and the Defendant's classification presupposes that they will progress, subject to performance, rather than stagnate. Ms Wilson, a Senior Library Clerk within the Social Policy Section of the House of Commons Library who is Branch Chair of the House of Commons branch of the FDA, observed that it is the intention that those in the Fast Stream should be promoted speedily. She said that since April 2000 there has been no change in the progression arrangements for A3 staff. A3 staff have progressed on an annual basis. Mr Brittenden submits that in breach of the express term of his contract (see para 10 above) the Third Claimant, like other Fast Stream staff, has not progressed as expected since 2011. This is not because of any unsatisfactory performance. Performance is not relied upon as a defence in relation to the Third Claimant (or indeed in relation to any of the Claimants) in these proceedings.

40. In my judgment paragraph 9.3.2 of the staff handbook expressly provides a mechanism for determining pay rises which is at variance with the automatic right to specific increases contended for by the Claimants. It sets out a system by which changes to pay and conditions fall to be negotiated with the trade unions who then ballot their members and the limits within which increases can be negotiated fall to be approved at the start of each financial year by the Defendant, based on the recommendations of the Management Board and taking into account the statutory duty to stay "broadly in line" with Civil Service pay. A Procedural Agreement dated

April 2002 covering the establishment and operation of joint machinery for the determination of defined aspects of the pay and conditions of service of staff in pay bands A-E provides a dispute resolution mechanism in the event of impasse.

41. It is, in my view, clear from the terms of the 2008-10 pay agreement that it is an agreement that covers those specific years. There is no collective agreement pursuant to paragraph 9.3.2 of the staff handbook for the year commencing 1 April 2011 or any subsequent year. Mr Perry in his evidence (see paragraphs 25-27 of his witness statement) describes the offers that had been made to reach agreement on a pay deal for 2011 and for 2013-2015 which have not been accepted. That being so I reject the Claimant's contention that the 2008-10 agreement affords them the right to ongoing specified pay rises in subsequent years. *Robertson* does not assist the Claimants. The terms of the 2008-2010 pay deal were incorporated into individual contracts of employment. However that collective agreement does not give the Claimants a contractual entitlement to the year-on-year progression payments contended for. There is no pay progression scheme presently in existence.
42. I accept Mr Barr's submission that for the Defendant to have committed itself to pay rises beyond the period of the 2008-2010 negotiations would not only have undermined the procedure provided for by paragraph 9.3.2 in future years, but would also have risked fettering the ability of the Defendant to comply in those subsequent years with its statutory duty to remain broadly in line with Civil Service pay.
43. Further a commitment to long term year-on-year pay rises would have involved a commitment to pay annual pay increases, by way of progression, to every existing employee until he or she reached the top of his or her scale; to any new recruit on the same basis; and to each employee promoted until he or she reached the top of his or her new pay band. This would have been a very significant commitment which temporally and financially would be at odds with the express contractual term at paragraph 9.3.2 of the staff handbook. The Defendant has estimated the costs of paying progression for staff at Bands A-E to be £1.8m for 2011/12 and £1.6m for 2012/13 (Briefing Paper dated 17 November 2010, at para 44). Progression payments form a significant proportion of the total pay costs.
44. Mr Barr accepts that both the 2008-2010 offer (and some of the earlier agreements) provide for pay systems which are capable of continuing to exist beyond the terms of the specific agreement itself. However he submits, and I agree, that their actual continued existence in a subsequent year is subject to agreement between the parties in accordance with the procedure set out in paragraph 9.3.2 of the staff handbook that they should do so.
45. I accept Mr Barr's submission that the publication of journey times is not inconsistent with the Defendant's case. The journey time, as the Claimants' agreed, is a necessary piece of information needed to calculate a specific year's pay rise. The Defendant has a large number of staff at varying points on the pay scale who need to see where they sit and will move to as a result of the annual, or tri-annual pay deals. That requires the publication to staff of the table. Each year's pay round has a disparate impact on individuals.
46. The terms of the First and Second Claimants' letters of appointment do not assist their argument. The words "*progression through the pay band will be dependent on*

*satisfactory performance*” is, in my view, too vague to confer the right to pay rises contended for by the Claimants. In particular they do not quantify what the progression will be or its frequency.

47. Paragraph 9.2.2 of the staff handbook which uses the phrase “*Your salary will fall somewhere between the minimum and maximum of the band and the rate at which you progress up the band is subject to satisfactory performance*” takes the matter no further. The frequency of progression and the financial value of progress are not specified.
48. The Third Claimant’s letter of appointment does, by contrast, specify that progression will be annual and on the anniversary of appointment. However it does not quantify the amount of the annual progression for the Third Claimant which pursuant to paragraph 9.3.2 of the staff handbook is a matter for negotiation. In relation to paragraph 11.14 the Third Claimant accepted in cross-examination that the form of the spine and the value of the spine points for 2011 and for subsequent years remains to be agreed. Further the provision is qualified by the use of the word “normally”; progression for Band A3 staff under the 2008-2010 pay agreement is not. The years 2011-2012, to which the pay freeze applies, were, Mr Barr submits, plainly abnormal. Accordingly Mr Barr accepts that the Third Claimant, in relation to his time in Band A3, does have an entitlement to an annual increase, but the size of that increase in the years commencing 1 April 2011 and 1 April 2012 remains to be negotiated. Accordingly the Third Claimant is not entitled to the declaration that he seeks.
49. Paragraph 9.4.5 and 9.4.6 concern staff promoted within the reporting year. Their purpose is to specify the arrangements for pay on promotion. Mr Barr submits, and I accept, that these provisions are subject to whether or not in any given financial year there has been a revalorisation or progression. Whether that is so depends on the outcome of pay negotiations for the year in question. Chapter 9 of the staff handbook must be read as a whole.
50. I accept Mr Barr’s submission that it does not follow from the fact that a pay rise for a particular year, or a change to maternity rights, or overtime arrangements, continues in force that there was an intention that further year on year progression pay rises in subsequent years were intended. It is inconsistent with the express terms of the 2008-2010 (and earlier) Pay Agreements and paragraph 9.3.2. of the staff handbook which provide for year by year negotiation of future pay rises.
51. Mr Barr submits that the terms of the contracts of employment are so clear and unambiguous that recourse to the factual background is not required to assist construction. However if reference is made to the factual background, he submits, it can be seen that previous agreements were each clearly time-bound and specifically quantify the value of the collective deals for the year or years in question as a percentage of the preceding year’s complete payroll.
52. I accept Mr Barr’s submission that statements made in various of the Defendant’s documents that the Claimants rely upon require careful consideration. In my view none of them assist the Claimants’ case. There were three documents on which Mr Brittenden placed particular reliance (see paras 32, 35 and 36 above).

53. First, the Management Board briefing paper dated 17 November 2010. This paper was written long after the agreements referred to were made. The passages relied upon set out the opinion of Ms Bryson, with which Mr Perry says he does not agree, albeit he was named as a co-author of the paper, having prepared the draft for Ms Bryson, his superior, which she amended. He said paragraphs 29-32 of the paper were her drafting. She felt strongly that pay progression payments should be made. Mr Perry said that he did not agree with Ms Bryson that the terms of the pay deal continued in perpetuity. He said each pay deal is ring-fenced. In any event, in my view, the statements in the paper, written after the agreement was made, as to what was intended are at odds with the contractual documentation.
54. Mr Perry in his PowerPoint presentation given in January 2009 of the details of the final award for 2008-2010 referred to “guaranteed moves to the pay band maximum after 7 years (pay bands B-D) or 10 years (pay bands A1-2)”. However his evidence was that the guarantee was not intended to apply beyond the term of the agreement; it was clear, he said, from the details that it applied only for the period of the three-year agreement. Staff who did not reach those milestones within the three year period had no guarantee for the future.
55. The second document that Mr Brittenden relied on was Mr Walker’s paper dated February 2006. That was written preparatory to the negotiations for 2006. In any event paragraphs 4 and 8, which the Claimants rely upon, must be read in context. They post-date the 2003 pay agreement to which they refer. They are not connected with the 2008-2010 pay agreement. Paragraph 4 refers only to 2006 and 2007 and not the open-ended commitment contended for by the Claimants. It was Mr Musho’d’s evidence that management considered at the time they would not be able to reach agreement unless they agreed to maintain the previous year’s progression structure.
56. The third document was the paper prepared by Mr Musho’d dated 6 December 2007. That paper sheds no light on what the parties objectively intended in respect of the scales which they actually agreed in the 2008-2010 pay deal.
57. The decision of the employment tribunal in *Bevan and others v Cabinet Office* does not, in my view, assist the Claimants. Each case depends on its own facts. The decision in that case turned on the wording of the final pay offer (see para 14 of the judgment).
58. In my view there is no express term in the Claimants’ contracts of employment that gives them the contractual entitlement for which they contend.

### ***Implied Term***

59. The relevant legal principles have been summarised recently by the Court of Appeal in *Park Cakes Ltd v Shumba* [2013] EWCA Civ 974 at paragraphs 26-36, per Underhill LJ.
60. Mr Brittenden submits that the following factors support the implied term for which the Claimants contend:

- i) The history of pay progression payments, the fact that annual payments have always been made subject to satisfactory performance and staff reaching the maximum.
  - ii) The journey times being specifically brought to the attention of staff.
  - iii) How the journey times were communicated – staff were expected to vote in a ballot as to whether to accept them.
  - iv) The fact that the journey times were adopted as part of an agreement with the trade unions.
  - v) They were presented in unambiguous and unequivocal language. By reference to the existing pay scale staff could ascertain what their pay would be unless and until varied by subsequent agreement.
  - vi) The implied term as to annual progression pay would not be inconsistent with the express terms of the contract, but would complement them.
61. Terms cannot be implied which contradict express terms. I accept Mr Barr's submission that the implied term contended for is inconsistent with the express terms set out in the letters of appointment, read together with paragraph 9.3.2 of the staff handbook and the 2008-2010 pay agreement which is limited in time. The earlier collective agreements evidence the practice of following the mechanism set out in paragraph 9.3.2.

### **Conclusion**

62. In my judgment, for the reasons I have given, the Claimants have failed to establish the express, alternatively implied, contractual terms for which they contend. Accordingly this claim fails.