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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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JANETTE MURDOCK

Plaintiff;

-v-

SOUTH EASTERN EDUCATION AND LIBRARY BOARD

Defendant.

_____

DEENY J

[1] The plaintiff in this action was at all relevant times a classroom assistant in the employment of the defendant. Her particular work was at Tor Bank Special School, Dundonald, and placed her in the category of providing Additional Special Needs as she cares for children with severe learning difficulties. She is currently on secondment full time to her trade union, the Northern Ireland Public Service Alliance ("NIPSA").

[2] Having commenced work on a short term contract in or about December 1994 the plaintiff subsequently was employed on a contract of employment commencing on 20 November 1995 (although the contract was signed by her on 12 January 1996). It is relevant for the purposes of this action to set out paragraph 3 of that contract of employment in full.

> "**Conditions of Service**
>
> Your terms and conditions of employment, including certain provisions relating to your working conditions, are covered by collective agreements negotiated and agreed with Trade Unions and Staff Associations (see paragraph 11 below), which are recognised by the Board for collective bargaining purposes in respect of the employment group to

> which you belong. These conditions are embodied in Scheme S of Conditions of Service relating to your employment group, as well as in other documents, all of which are available to you at Board HQ, or by prior arrangement at the Board's Personnel Office during normal office hours.
>
> From time to time variations in your terms and conditions of employment will result from negotiations and agreement with the Trade Unions and Staff Associations and these changes will be incorporated in the documents to which you have access. The Board undertakes to ensure that all future changes in the terms and conditions of service will be entered into these documents within 28 days of the change being agreed."

[3] For completeness I observe that paragraph 11 dealt with trade union membership which was encouraged by the Board which "supports the established system of collective bargaining" but which was not compulsory. This plaintiff was a member of NIPSA at all relevant times.

[4] Her claim against the Board arises in this way. The Boards dealing with education and libraries in Northern Ireland had some 30,000 employees in the 1990's. Their terms and conditions differed widely. Following examples which had occurred in England it was considered appropriate to evaluate the jobs of the employees to achieve greater fairness. It is the plaintiff's contention that that was agreed in a way that amounted to a binding collective agreement in 1994 and 1995. She further contends, without dispute, that as it was appreciated that job evaluation would take some time those whose pay grades were raised after such job evaluation would have any resulting increase in pay backdated to 1 January 1995. In the event this process took far longer than was anticipated. That was the submission of Mr John O'Hara QC who appeared with Mr Martin Wolfe for the plaintiff. It was not disputed by Mr Patrick Lyttle QC who appeared with Mr Adrian Colmer for the Board. The difficulty arises in this way. When the proposal was finally forthcoming by way of an offer, in effect, to this lady in 2007 it had one aspect that was disagreeable and indeed unacceptable to her. She had benefited from the job evaluation to be put into a higher pay grade, namely between points 18 and 25 on the relevant scale of pay – I was informed at point 25. Furthermore, as said above, it was not disputed that she was entitled to her back pay for that. But for reasons to which I will return in due course, this offer to her was conditional on her agreeing the measure of such back pay.

[5] It is common case that the Joint Negotiating Council, of Boards and Trade Unions, in 2007, was enabled to decide, and did decide, against the wishes of the plaintiff's union NIPSA, that classroom assistants in the future would be treated as part time workers rather than full time workers. It seems that while some workers at the plaintiff's former or existing grade of pay had worked for 39 hours a week and others for 36¼ hours a week she and other classroom assistants only worked for 32.5 hours a week (and some only then in term). The Joint Negotiating Council concluded that the standard working week would be 36 hours per week. 32.5 hours per week is almost exactly 90% of that time so that her new salary would be 90% of the point on the scale between 18 and 25 rather than 100%. This had the knock on effect, which is again not disputed, that instead of receiving £33,572.50 arrears of pay which she would have if her 32.5 hours entitled her to be treated as a full-time worker she was only offered £12,849.50 using a 36 hour working week or, for these purposes, "divisor". Therefore she claims a loss of £20,723.00.

[6] She claims in her writ of summons and statement of claim both a declaration that her contract of employment has been breached by the defendant in this regard and damages for that breach in that sum of money.

[7] To put that in another way, which Mr O Hara accepted, she must satisfy the court that there was a legally binding term of her employment that on a successful upwards evaluation of her job she would be paid any increased salary without deduction for the fact that classroom assistants only worked 32.5 hours per week.

[8] No such clause appeared in the plaintiff's own contract of employment.

[9] The plaintiff must therefore seek to show that there was a legally binding collective agreement which was included in her terms and conditions of service, further to paragraph 3 of her contract of employment and that the correct interpretation of such agreement imposes that obligation on the Board. One therefore looks at the material relied on by the plaintiff in support of that contention. The first component relied on by Mr O'Hara, who is not in the position of being able to point to a single contractual document, is a passage from the minutes of a meeting of Friday 25 November 1994. This was the 121st meeting of a Staffs Council dealing with administrative, executive, clerical, professional and technical staff ("AECP&T Staff Council"). All of the Education and Library Boards in Northern Ireland were represented on the Council as were all the unions who had members who were employees. This Council was one of the precursors, I was told, of the current Joint Negotiating Council. The topic of job evaluation had been discussed for some considerable period of time leading up to this meeting. I quote the entirety of the relevant section of the minutes.

> "**5.4 Job Evaluation**
>
> 5.4.1 The Staff Side Secretary stated that Staff Side were prepared to agree the job evaluation documentation "in principle" and stated that there were a few minor points which required clarification. It was agreed that the objective would be to have job evaluation implemented from 1 January 1995.
>
> 5.4.2 The Management Side Secretary stated that there was a degree of urgency with the job evaluation exercise and pointed out that there were a number of individuals waiting to have their jobs evaluated. It was agreed that the Joint Secretaries would progress the matter."

[10] It can be seen that the language of this minute is lacking in the certainty and precision to be expected of a legally binding contract. The phrases "prepared to agree" and "in principle" are inconsistent with such a conclusion. Mr O'Hara acknowledged that perhaps on its own that was the case but he relied on further documentary evidence. He referred to the minutes of the next, 122nd, meeting of AECP & T Staff Council held on 27 January 1995. I quote the relevant section of the minute.

> "**4.4 Job Evaluation**
>
> 4.4.1 The Management Side Secretary reported that the job evaluation documentation had been formally issued to Boards and that the Staff Commission was producing a guide outlining the essential features of the scheme for issue to all staff. It was noted that the working parties would continue to meet to deal with any problems and to monitor progress. It was also noted that the working party was addressing the problem of the evaluation of non-NJC posts." (my underlining)

Again the language underlined might indicate a lack of certainty as to terms.

[11] Counsel then took the court to the document entitled 'Northern Ireland Education and Library Boards: Job Evaluation – Officers Guide to the Scheme'. This was dealing with job evaluation for the various categories of staff who were indeed all the staff (as opposed to manual workers) working for the Boards except the teachers and, to an extent, the Chief Executives. The introduction begins as follows:

> "Job evaluation is a method used by employers to measure the 'worth' or 'value' of individual jobs. It is

> undertaken in order to allocate salary grades to jobs and thus establish a fair salary structure."

[12] Mr O'Hara relies on one paragraph and sentence in particular of the document. On page 2 a paragraph is headed: "What happens if my job is upgraded?" and reads as follows.

> "If your job is re-graded to a higher grade as a result of job evaluation you will automatically receive the increased salary. This increase will normally be backdated to the date when your application was lodged or the date on which your new duties were deemed to have started.
>
> Retrospective payments will not be made prior to 1 January 1995. However the settlement date for existing grading appeals will be the date the appeal was lodged."

[13] Mr O'Hara's key submission is that when this booklet says that an employee such as the plaintiff "will automatically receive the increased salary" it must be referring to the full time salary of a class assistant at that time. There was no suggestion at that time of classroom assistants working 36 hours per week. That was simply for the reason that even allowing for them coming in half an hour before school hours and leaving half an hour after small children and special needs children went home there was not 36 hours work for them to do. Needless to say that involves no criticism of them. They do valuable work requiring real dedication.

[14] Nor had the idea of treating the 32.5 hours as 90% of the labour of 36 hour people (let alone a lower percentage of 39 hour people) been discussed at that time. Therefore the reference to "the increased salary" precludes, in his submission, the Board from only paying 90% of the back pay from 1 January 1995 to which this plaintiff and other classroom assistants became entitled upon their successful job evaluation upwards.

[15] Mr O'Hara referred me to a considerable number of other documents in and about that time but it does not seem to me that they add anything of moment to the three documents which I have set out here.

[16] It can be seen that the plaintiff faces a number of possible difficulties at this point. Was there a collective agreement of the sort envisaged by paragraph 3 of her contract of employment? Is the booklet combined with the two minutes sufficient to constitute a collective agreement which is legally binding on the Board? Is it clear that it is not legally binding on the employee for she has exercised her right under the 2007 agreement and

proposal not to accept what is proposed to her? 94% of classroom assistants have accepted but that still leaves more than 300 who have not. This case acts as a test case for them.

[17] Even if this was a legally binding agreement was it the intention of the parties judged by the language used by them that the back pay of the salary could not be reduced because of the fact that classroom assistants only worked 32.5 hours per week? Was there consideration for such a contract so as to make it legally binding or was it merely an action of generosity and fairness on the part of the Boards? It is a notable feature of the job evaluation scheme that you could not have your pay reduced. It was an upwards only scheme. Indeed the 2007 scheme which the plaintiff accepts means that 32.5 hour a week is now treated only as 90% of a full working week has not and cannot lead to the actual reduction in salary of existing employees. Is the plaintiff asking the court to imply into the contract, if such in law it is, something that is not open to the court applying the normal rules with regard to the implication of terms?

[18] The secondary aspect which the plaintiff has to face is the contention by the Board that even if there was such an obligation on the Boards earlier it was successfully varied by a decision on 30 November 2007 of the Joint Negotiating Council. On that occasion the Council, consisting of representatives of all the Boards and of all the unions involved, decided by seventeen votes to five and one half to adopt the proposal which the plaintiff takes objection to. The management representatives all voted for the proposal and so did a majority of the trade unionists but not the NISA representatives. (They included the plaintiff herself on this occasion). But Mr O'Hara, while accepting that that decision affects the rights of the employees going forward, contends that it cannot affect their legally accrued rights to date including the right to arrears on evaluation with a divisor, he says, of 32.5 hours rather than the 36 hours which is now the standard full term working week.

[19] The defendants have not continued with their argument that for them to have adopted the approach espoused by the plaintiff would have amounted to discrimination. They were concerned that as the classroom assistants were entirely or almost entirely female whereas those working a 39 hour week were very often male that the payment of arrears on the basis the plaintiff seeks would amount to gender discrimination against male employees of the Boards. However this is not now put forward as a freestanding legal defence to the claim.

[20] What the defendants do say is that they have a legitimate apprehension that if they were to accord to the plaintiff the retrospective payment in the way which she desires there would be a significant risk of a claim which may be successful on behalf of a very large number of male

employees who throughout the period in question were working 6½ hours longer per week than the plaintiff. It can be seen that that is a legitimate apprehension. If this were a decision in a judicial review context I do not think it could be argued that the Board was not entitled to take into account that apprehension. If indeed the matter were one for the court on the merits again one would respect the apprehension of the Boards in that regard. However it seems to me that the decision turns on earlier points of law than on this issue.

[21] The court heard the evidence of the plaintiff Mrs Murdock. She disclosed, in cross-examination, that she was no longer paid for term time only but on a 52 week year basis. She agreed, in cross-examination that a collective agreement had to be promulgated and promulgated by the circular. She was unaware of any circular promulgating this collective agreement. The plaintiff's counsel accepts that there was no such circular as was confirmed by a later witness.

[22] At present she remains a full-time worker who is obliged to work 32.5 hours per week. If she accepted the 2007 offer from the Board that period of time would represent only 90% of a full-time week although she would get the back pay disclosed above. When asked in re-examination about the absence of a circular she said that other grades were evaluated upwards and that implied to her that there was an agreement.

[23] The court also heard from the General Secretary of NIPSA, Mr Brian Campfield. As it happens his first meeting as staff side secretary for the unions was the meeting of 25 November 1994 referred to above. It was the normal policy of the union to seek no detriment for their employees and this was achieved here i.e. if on a job evaluation an individual or group re-evaluated upwards they got the benefit of the higher earnings on the higher point on the salary scale. If however the job evaluation would lead to a conclusion that their post was over paid they would suffer no detriment but continue at their existing point on the salary scale.

[24] He helpfully clarified that when the guide relied on by the plaintiff refers to "officers" that refers to all non-manual, non-industrial staff referred to in the past as white collar. He said that hundreds or even thousands of these guides would have been circulated.

[25] It is a principle of the interpretation of contracts that parol evidence of the intention of the parties is not received (save in very exceptional circumstances). But it is right to note that this witness who was involved in these matters could point to no minute or document suggesting that the parties had consciously addressed the issue of the back pay attributable to those with a 32.5 hour week.

[26] In cross-examination he accepted that a collective agreement was normally promulgated by a circular and that there was none here.

[27] He admitted that there were rolling discussions regarding job evaluation of employees. His union did not seek to cherry pick agreements but would adhere to them on a basis of trust taking them warts and all. They would always have a right to withdraw from negotiations but it would be a big step to withdraw from an agreement. The only witness called by the defendant was a Mr Philip W Robinson who was an officer of the Staff Commission. It was a neutral body which facilitated co-operation between the employer Boards and the employee representatives. By coincidence he too was present on 25 November 1994. He confirmed that collective agreements were normally evidenced by a circular. Furthermore he pointed out that such a circular, sent out by the Staff Commission, provided authority to the finance officers of the employer Boards to implement the agreement. The Boards are funded by the Department of Education. The constitution of the AECP&T Council is silent on the topic of circulars. There is no record of a circular about this job evaluation agreement. The circulars were normally signed by both the staff side secretary i.e. a trade unionist or more than one and by the management side secretary. The Staff Commission had prepared the "Job evaluation – Officers guide to the scheme" and thousands would have been distributed to the Boards. They had also prepared a handbook for trained evaluators to work from, which was available to the court.

[28] In cross-examination Mr O'Hara put that the circular would not add to the minutes of the two board meetings which Mr Robinson was inclined to agree with but subject to the important qualification that a circular would encapsulate the details of the agreement reached and would be likely to be more extensive than the Board admitted. It was very important for the Boards to have the fine detail of what was agreed so that they could pay the appropriate amounts to employees. This is not found in the minute. Furthermore the Staff Commission circular, if issued, provides the important role of ensuring consistency of application across the five Education and Library Boards in Northern Ireland. When asked what a circular would have added in 1994 Mr Robinson replied that the agreement (ie. re job evaluation) was only regarding the documentation to be issued and so was not suitable for a circular. The actual pay rises were yet to come.

[29] I pause there to consider the related evidence of the witness. He went on to say that the agreement regarding documentation would have no immediate impact on the terms and conditions of the employees. In November 1994 there was an agreement in principle to the documentation which was then implemented in 1995. There was also agreement that any evaluation upgrade in pay would be back dated to 1 January 1995. As it happens the plaintiff was in the group of classroom assistants who were last to be evaluated.

[30] It seems to me that that is valuable evidence in arriving at a conclusion as to the nature of this agreement. I shall return to this in due course.

The law

[31] The court asked counsel after the commencement of the hearing, the skeleton arguments having dealt almost entirely with factual matters, for any relevant statutory provision or case law. Mr Lyttle relied on the Industrial Relations (NI) Order 1992. Article 26 deals with the enforceability of collective agreements and reads as follows:

> "26-(1) Subject to paragraph (3), any collective agreement (whether made before or after the coming into operation of this Article) shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement –
>
> (a) is in writing; and
>
> (b) contains a provision which (however expressed) states that the parties intended that the agreement shall be a legally enforceable contract.
>
> (2) Any such agreement which satisfies the conditions in paragraph (1)(a) and (b) shall be conclusively presumed to have been intended by the parties to be a legally enforcement contract."

[32] I note those provisions but I accept the submission of Mr O'Hara that the Article is dealing with agreements between a union and an employer whereas the plaintiff here is the individual employee. Nevertheless it is interesting to note that Parliament required the parties to provide expressly that they intended an agreement to be legally binding. I was also interested to see in a passage from Harvey on Industrial Relations and Employment Law the following paragraph at 32.01.

> "A collective agreement as such is not normally enforceable in law. Its primary effect is normally nothing more than a gentleman's agreement. Its terms may, however, become incorporated into the contracts of employment of the workers covered thereby and thus assume contractual indirectly. This

> secondary or indirect effect is sometimes described as the 'normative effect' of a collective agreement."

The expression "gentleman's agreement" had occurred to me to be perhaps applicable in this case. As I found in Bubble Inns Limited v Beannchor Limited and Others (No. 2) [2008] NICh 2 at paragraph 49 a gentleman's agreement is one that is not intended to be binding in law (unless the party can bring himself within a defined equitable doctrine which is not contended for here). I have had a brief opportunity, before delivering this judgment, of considering the judgment of Smith L.J. in Malone et al. v British Airways plc [2010] EWCA Civ. 1225, C.A., where the Court concluded that an agreement was not incorporated in the employee's contract but was intended to be binding in honour only (par. 62).

[33] Mr O'Hara relied on a decision of the Employment Appeal Tribunal in England namely Burke v Royal Liverpool University Hospital NHS Trust [1997] ICR 370. It seems to me that the facts there are very different from the facts before me. He seeks to rely on the view of Morrison J that one should not be looking for contractual language in a collective agreement of the sort one would find in a commercial agreement. That may be so but nevertheless the Tribunal did find that there had to be an intention to enter into an agreement which would modify the contracts of employment between employer and employee. On the facts of that case I respectfully agree with the conclusion reached but they related to a significant concession being made by the employees as to their working conditions in an attempt to prevent the outsourcing of those functions to a private body from the hospital. There was a clear quid pro quo there which does not exist here. Indeed at p.738 the judge expressly addressed the need for consideration and found it in the agreed reduction in wages.

[34] I also note the language used by another Employment Appeal Tribunal in Thornton's Limited v Badger [2006] All ER (D) 127; UK EAT/138/06:

> "30. It seems to us that the following principles can be gleaned from [the] cases. First, employees do not derive rights directly from the collective agreement. …
>
> 31. Second, there is a presumption that the collective agreement does not intend it to be legally enforceable. …
>
> 32. Third, that incorporation can operate either expressly, such as for the weekly operatives in this case, or by implication. In order to determine whether that has occurred it is necessary to focus on

> the relationship between the employer and employee and not on the relationship between the employer and the trade union.
>
> 33. Fourth, not all terms typically found in a Collective Agreement will be incorporated. That is so, even when the contract of employment ostensibly incorporates all the terms from the Collective Agreement. The terms must, by their nature and character, be suitable to take effect as contractual terms. Some collective terms will not do so because, for example, they are too vague or inspirational, or because their purpose is solely to regulate the relationship between the collective parties."

[35] Finally for these purposes I note the following dictum of Sir Thomas Bingham MR in Adams v British Airways Plc [1996] IRLR 574, CA:

> "On the facts here, it was a collective agreement which was incorporated into the contracts of employment of the individual plaintiffs. A collective agreement has special characteristics, being made between an employer or employers organisation on the one side and a trade union or trade unions representative of employees on the other, usually following a negotiation. Thus it represents an industrial bargain, and probably represents a compromise between the conflicting aims of the parties, or 'sides' as in this context they are revealing called. But, despite these special characteristics, a collective agreement must be construed like any other, giving a fair meaning to the words used in the factual context (known to the parties) which gave rise to the agreement."

Conclusions

[36] There are a number of factors which point to this being a collective agreement. It was discussed by management side and staff side. It was minuted at the 121st and 122nd meetings of the appropriate Staff Council. The Staff Commission prepared and circulated documents based upon that measure of agreement. It is true that no circular, as was customary for collective agreements, was prepared or circulated. But evaluation did follow with wage increases. On balance, I take the view that it could be said there was a collective agreement here.

[37] The court then has to consider a series of questions. The first of these is whether the collective agreement was truly incorporated in the plaintiff's contract. The words at paragraph 3 of her contract of employment are a little vague allowing such agreements to be embodied in Scheme S of Conditions of Service (which is not contended here), but also "in other documents, all of which are available to you at Board HQ or by prior arrangement at the Board's Personnel Office during normal hours". I find the officer's guide would have been available in all likelihood at Board HQ. However, the clause goes on to say that the Board undertakes to ensure "that all future changes in the terms and conditions of service will be entered into these documents within 28 days of the change being agreed". On one view there is no evidence that this was done. However I am inclined, with a degree of hesitation, to find for the plaintiff here that the formalities were just sufficiently met and conclude that that could be a reference to the officer's guide. But an alternative view would be that a Circular was necessary to achieve this.

[38] The next issue is what was agreed, before one considers whether there was an intention to create a legally binding contract or whether there was consideration for that. As set out above in paragraphs [13] and [14] the plaintiff's submission is that the increased salary referred to in the officer's guide must refer to an increased salary on the basis that a 32.5 hour week was a full working week for a classroom assistant. But Mr Lyttle points out that this is expressly described to be a guide. It does not take the form of an agreement. Furthermore the sentence and the paragraph relied on by Mr O'Hara says that "this increase will <u>normally</u> be back dated to the date when your application was lodged or the date on which your new duties were deemed to have started". The use of the word normally would appear to leave open the possibility of exceptions.

[39] The guide is directed to officers most of whom at that time were working 36¼ hours a week. One would presume that any job evaluation would have to take into account the number of hours that an employee was working. One would assume that that must, in public law terms, be a relevant consideration. But in fact the guide discloses no such factor. It sets out some six categories with various sub-categories which no doubt accorded with the then view of human resources practitioners as to what was appropriate. But it ignores the fact that some "officers" were working longer hours than others. They would thus have less time for their families or their leisure than the classroom assistants. But there is no reference at all to that in the guide. I infer from that that this issue was simply not considered at that time. The vast majority of officers worked 36¼ hours and the guide was addressing that vast majority. There is literally no evidence at all that the particular position of classroom assistants was taken into account; the absence of hours worked points strongly to them not being in mind.

[40] As Mr O'Hara agreed the sentence in the guide relied on by him must be read as meaning that the increased salary will be without deduction for the fact that classroom assistants only work 32.5 hours a week. It seems to me that that is to read too much into the wording, while acknowledging that it is a possible meaning to be taken from the words. The plaintiff, in effect, has to ask the court to imply a reference to the classroom assistants. But such a reference is not properly implied by the law of contract, which remains applicable here, as Sir Thomas Bingham MR pointed out. Such a reading is not necessary to give business efficacy to the agreement, such as it was. The method being proposed by the Joint Negotiating Council in 2007 with the agreement of management and the majority of the unions is a perfectly effective way forward. Indeed it might be thought preferable in terms of business efficacy given the serious risk of an enormously expensive claim if the alternative approach urged by the plaintiff was adopted. It is not contended, wisely, on behalf of the plaintiff that an officious bystander would have assumed that the words meant that. Clearly he or she would not. For completeness, although not referred to by counsel, I find that it is not a comparable situation to that of the plaintiffs in Scally v Southern Health and Social Services Board [1991] 4 All ER 563; [1992] 1 AC 294. The term sought by the plaintiff is, I find, neither an express nor an implied term of the agreement.

[41] Separately but consistently with that finding it appears to me that what was agreed between the parties was, as Mr Robinson's evidence and the documents together make clear, an agreement on the methodology and documentation for job evaluation coupled with two other matters. The first of these is that any increased pay found to be due as a result of a job evaluation would be back paid to 1 January 1995. The second was that there would be no detriment to existing employees if job evaluation led to a downgrading of their post in salary terms. That was the extent of the agreement. This leads on to the next important issue in the matter.

[42] I raised with Mr O'Hara in his opening what was the consideration for the obligation he sought to impose on the Board in order to establish a legally binding contract. At one point he suggested that she was asked to undertake additional tasks by her principal or vice principal and that they might constitute such consideration. However I did not understand him to persist in that argument because it was clear on the evidence that while the school was commendably active in encouraging the acquisition of skills and further training by its employees this was not, I find, on the plaintiff's own evidence, in any way a quid pro quo in return for the promise of job evaluation with back dating of pay. This was simply good management by the school principal or vice principal encouraging the staff to improve their skills which, inter alia, would stand to them on any future group evaluation.

[43] The plaintiff's counsel then sought to argue that there was forbearance on the part of the plaintiff from seeking individual evaluation in return for the promise which he contended was to be found in the contract. Leaving to one side the fact that I have ruled that that was not the nature of any promise made, I find that that case has not been made out. As Mr Colmer of counsel pointed out page 3 of the very guide in which the plaintiff relies expressly reserves the opportunity for individual requests for job evaluation. So if there was a binding legal agreement to be found in that guide in early 1995 it makes it clear that there was no forbearance. Mr O'Hara's answer to that was to point to a minute of a meeting of 31 August 1995 to be found at tab 25, p. 425 of the trial bundles. The first thing to be noticed is that this is a meeting not of the Council of two sides but of the "Chief Executive's Working Party on Job Evaluation and Staff Inspection/Organisational Review". (The defendants rely on the fact that such working parties continued after the conclusion of an alleged agreement as indicating a lack of the necessary certainty for a contract). Mr O'Hara points out that at paragraph 3.6.1 there is a reference to a further minute of the personnel representatives minutes of 9 August which stated that : "During the course of the rolling programme staff initiated applications for job evaluation or the promotion of officers (referred to as upgrading of officers in the Job Evaluation Code) will not be permitted.

> 3.6.2 It was acknowledged that staff who are compelled to wait for an evaluation during the appropriate stage of the rolling programme would not be disadvantaged since the settlement date for any regrading as a result of job evaluation would relate to the date when the additional duties/responsibilities were first undertaken. Members were reminded that retrospective payments would not be made prior to 1 January 1995."

[44] I note that. I note also that the plaintiff did not claim that she had sought such an individual job evaluation and been refused. There was no evidence that that happened to her or any other classroom assistant. But in addition one notes that this is a minute recording the view of personnel representatives. It is not a meeting of the Joint Council. If, as the plaintiff must contend, there was a legally binding agreement the terms of which are to be found in the guide and Council minutes then any amendment of the terms of that agreement must also have legal effect. It seems to me that the mere assertion in these minutes cannot have legal effect. If in fact individual persons had sought job evaluations subsequently, and there is no evidence that they did not, they or the union representative would be entitled to say that this minute was of no effect at all. They could rely on the guide which had been agreed by the union side as well as the management side. One has considerable sympathy with the classroom assistants who had to wait so long for their job evaluation. Indeed it is right to record that despite their

dedication, which I readily accept, they were driven to industrial action to protest about this delay in 2005. But there appears to be no suggestion that the wish to test the system by individual evaluations was refused. For these reasons (and leaving to one side the validity or otherwise of retrospective consideration) I therefore find that there was in law no consideration for the promise made by the employer to evaluate and back date pay arising from a positive evaluation. This was an upwards only step by the employers. It was not in the nature of a bargain where one party gave something in return for a concession by another.

[45] Was there an intention to be legally bound? I have grave doubts about that proposition. It is does not spring from the nature of the documents seen by the court nor from the evidence of the witnesses. Furthermore the submissions of plaintiffs counsel inevitably accepted that the plaintiff is not obliged to accept the offer that emanated in 2007 from the Joint Negotiating Council i.e. of upgrading but with back pay reduced to allow for a devisor of 36 hours per week rather than 32.5 hours. It seems to me that I did not have any convincing reply to the observation that the agreement, such as it was, of 1995 was therefore contended by the plaintiff to be binding on the Board but not binding on the employee. The court finds that the agreement did not in law say what the plaintiff wishes it did say. But that does not compel her, it is agreed, to accept the offer of 2007. She can still continue with her existing terms and conditions of employment but she will not get the element of back pay. The fact that an agreement is binding on one party and not another is clearly invidious and points strongly to the conclusion, at which I arrive, that the agreement, such as it was, was not intended to have legally binding effect either on the employer or on the employee.

[46] If I am wrong in all those findings the defendant's counsel would rely on the decision of the Joint Negotiating Council in 2007 as a legally binding amendment of the 1995 agreement. Here I am with the plaintiff. If I were wrong in my earlier conclusions she would have accrued a right to the back pay on the basis of a 32.5 hour devisor. I find that the Joint Negotiating Council would have no power in law to interfere with such an accrued right. However for the various reasons stated above I consider that she did not accrue a right to back pay on that basis. I therefore find for the defendant.