



THE EMPLOYMENT TRIBUNALS

Claimant

Ms A Evans

v

Respondent

Pure Recruitment Group Limited

Heard at: London Central

On: 6-7 April 2017

Before: Employment Judge Baty

Representation:

Claimant: Mr J Crozier (Counsel)

Respondent: Mr S Healy (Counsel)

PRELIMINARY HEARING JUDGMENT

1. In relation to the claimant's equal pay complaints:

- 1.1. the claimant was employed on like work in relation to her two comparators, Mr Matt Simmons and Mr James Sayer;**
- 1.2. the respondent has not establish a material factor defence in relation to the differentials between the claimant's salary and (a) Mr Simmons' starting salary and (b) his pay increase to £90,000; and**
- 1.3. the respondent has established a material factor defence in relation to the differentials between the claimant's salary and (a) Mr Simmons' pay increase to £100,000 and (b) Mr Sayer's salary; and**
- 1.4. the respondent has established a material factor defence in relation to the difference in the commission schemes which applied respectively to her and to Mr Simmons and Mr Sayer.**

REASONS

Background

- 1 By a claim form presented to the Employment Tribunal on 25 October 2016, the Claimant brought complaints of equal pay, victimisation, discrimination

because of sex and unfair dismissal for asserting a statutory right. The Respondent defended the complaints.

2 The case was pre-listed for a 5 day hearing from 18-24 April 2017. However, at a preliminary hearing on 12 January 2017 before Employment Judge Goodman, the Claimant withdrew the claim of unfair dismissal under the Employment Rights Act 1996 and it was agreed at that hearing that, although the case would remain listed for the existing 5 day listing on 18-24 April 2017 in relation to all the other remaining claims, it was better that certain issues in relation to the equal pay complaint were decided at a preliminary hearing in public. A one day preliminary hearing in public was duly listed for 14 March 2017.

3 In addition, the issues under the equal pay complaint were agreed as being:-

“7.1 Was the Claimant’s work like the work of the comparators James Sayer and Matt Simmons? - Equality Act 2010 Section 65(1)(a), and 65(2) – (3).

7.2 If yes, how should the terms of her employment be modified?

Note: The respondent clarified that while like work is denied, it does not advance an argument that if the claimant was engaged in like work any difference in pay was because of the material factor (section 69).”

4 It should be noted that the claim form, in relation to the equal pay complaint, pleaded the difference in pay as being in relation to the respective commission schemes of the Claimant and her comparators only (and not, for example, in relation to basic salary).

5 However, by email of 28 February 2017 to the Tribunal, the Respondent through its solicitors applied for an amendment to the Response to include material factor defences. A telephone preliminary hearing was listed before Employment Judge Goodman on 7 March 2017. In discussion, it emerged that the Respondent’s representative believed that the comparators’ base salaries differed from the Claimant’s, as well as the commission schemes. Whilst the note of the case management summary from that preliminary hearing does not specifically state that permission was granted for the Claimant to amend the claim to include an equal pay complaint in relation to salaries as well, a reading of that note indicates that that is what happened at the hearing (and, on asking the representatives directly at today’s hearing, both representatives confirmed that that was the case). In any event, Employment Judge Goodman envisaged that the Respondent may wish to amend the Response further to plead material factor defences in relation to salary, if different. Permission to amend the Response as per the Respondent’s original application to amend was also granted.

6 In addition, the date of the preliminary hearing to hear the equal pay issues was changed and it was relisted for 2 days on 6-7 April 2017 (this hearing). It was noted by Employment Judge Goodman that the like work and material

factor defence issues would be decided at this hearing. It was also noted that it was not possible to accommodate a later date for the preliminary hearing by postponing the 5 day hearing of the other complaints due to start on 18 April 2017 because the Tribunal could not list it before September 2017 which was unsuitable because the Claimant was now expecting a baby. Employment Judge Goodman noted it was particularly important therefore that the timetable for preparation for the 6-7 April 2017 hearing did not slip and that, given the increased complexity of the issues, the preliminary hearing had been relisted for two days to allow evidence and submissions to be completed in one day with an additional day to allow time for deliberation and judgment.

7 The Respondent duly served its re-amended Response on 21 March 2017.

The Issues

8 At the start of today's hearing, I sought to agree the issues for determination by me with the representatives.

9 Mr Healy confirmed that the material factor defences relied on by the Respondent for the purposes of the "salary" equal pay complaints were those set out at paragraph 45 of the re-amended Response and that the material factors relied on in relation to the "commission" equal pay complaints were those at paragraph 47 of the re-amended Response.

10 Furthermore, I asked Mr Crozier whether or not, in relation to the material factor defence, the Claimant would be contending that there was indirect discrimination which required justification by the Respondent. He thought about this whilst I was reading the statements and, when the hearing reconvened, confirmed that the Claimant would not be maintaining this.

11 The issues for me to determine, as agreed between the representatives and myself, were therefore as follows:-

Like Work

1. Was the Claimant employed on like work to her comparators, Mr James Sayer and Mr Matt Simmons, in that their work was the same or broadly similar and such differences as there were between their work were not of practical importance in relation to the terms of their work?

Material Factor

2. Does the Respondent show that the difference between the Claimant's terms and those of her comparators were because of a material factor or factors reliance on which did not involve treating the Claimant less favourably because of the Claimant's sex than the Respondent treated the comparators?

3. The material factors relied on by the Respondent in relation to the differences in salary only are as follows:-

“The salary range for a Director (Managing) as of January 2015 at the Respondent was between a range of £55,000 - £90,000, and was increased due to market conditions to £60,000 - £110,000. The agreed salary on appointment is dependant on a number of variables, namely the market sector, the role and the maturity of the platform the employee works in, seniority, experience, level of management responsibility and previous salary. Further, salary increases are dependent on individual billings, team billings and level of management responsibility together with bench marking against the external market.”

4. The material factors relied on by the Respondent in relation to the difference in commission schemes are:-

“(i) the Claimant’s role in the market sector she was working in;

(ii) the scheme was more favourable in earnings than her comparators;

(iii) it was consistent with the scheme applied to her team.”

The Evidence

- 12 Witness evidence was heard from the following:-

For the Claimant:

The Claimant herself (the Claimant produced two statements - a witness statement and a supplemental witness statement).

For the Respondent:

Mr Charles Ferguson, the joint CEO and joint founder of the Respondent.

- 13 An agreed bundle numbered pages 1-305 was produced to the hearing.
- 14 I read in advance the witness statements and any documents in the bundle to which they referred.
- 15 At the start of the hearing, and especially in view of the particular importance of ensuring that evidence and submissions should be completed as such that an oral judgment could be given to the parties within the two day hearing, a timetable for cross examination and submissions was agreed between the representatives and me. The timetable was substantially adhered to.
- 16 Both representatives made oral submissions on the issues.

- 17 I then adjourned to consider my decision and, when the parties returned on the second day of the hearing, gave them my decision orally with reasons. Mr Healy then asked for written reasons.

The Law

- 18 The following sections of the Equality Act 2010 (“the Equality Act”) are relevant:-

“64 Relevant types of work

(1) Sections 66 to 70 apply where—

(a) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;

...

(2) The references in subsection (1) to the work that B does are not restricted to work done contemporaneously with the work done by A.

65 Equal work

(1) For the purposes of this Chapter, A's work is equal to that of B if it is—

(a) like B's work,

(b) rated as equivalent to B's work, or

(c) of equal value to B's work.

(2) A's work is like B's work if—

(a) A's work and B's work are the same or broadly similar, and

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—

(a) the frequency with which differences between their work occur in practice, and

(b) the nature and extent of the differences.

69 Defence of material factor

(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—

(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's."

- 19 I was not referred to any specific case law by either representative, although both made reference to extracts from Harvey on Industrial Relations and Employment Law ("Harvey") in relation to these issues.
- 20 In particular, in relation to like work, there are two stages to the test under Section 65, firstly under Section 65 (2) (a) and then under Section 65 (2) (b).
- 21 The first stage is a question of fact for the Tribunal and the Tribunal should look at the matter in broad general terms. The Tribunal should look at what the relevant employees actually did as opposed to what they might have been required to do under their contract. It is a broad judgment and the Tribunal should not get involved in the fiddling detail or take a too pedantic approach.
- 22 At the second stage of the test, the emphasis is not so much on the nature of the jobs done by the Claimant and her comparator but on the differences (if any) in the tasks and duties that they respectively perform. Again the facts of the Claimant's circumstances and those of her comparators are key. If there are differences, the question is whether they are of practical importance.
- 23 The burden of proof is on the Claimant to establish as a matter of fact that she was employed on like work to her comparators.
- 24 As regards the material factor defences, the burden is, by contrast, on the Respondent. If a material factor defence is made out, the equality clause will not operate.
- 25 Mr Healy again referred me to the summary of Harveys in relation to what the employer will need to demonstrate. This in fact summarises the position set out by Lord Nicholls in Glasgow City Council & Others v Marshall & Others [2000] ICR 196, HL. In that case, Lord Nicholls stated that the material factor defence will succeed if the employer can show that the factor put forward as the reason for the pay differential at issue is:-

1. Genuine and not a sham or pretence.
2. A material factor – i.e. is significant and relevant and caused the variation.
3. Not due to sex discrimination, whether direct or indirect, and
4. A material difference – i.e. a significant and relevant difference between the woman's case and the man's case.

26 As noted already, indirect discrimination is not relevant in this case.

Findings of Fact

- 27 I make the following findings of fact. In doing so, I do not repeat all of the evidence, even where it is disputed, but confine my findings to those necessary to determine the agreed issues.
- 28 The Respondent is an international search and selection firm or recruitment consultancy. It was founded in 1999 by Mr Ferguson and by Mr Chris Nelson, who are its joint CEOs.
- 29 Its services cover both search (headhunting) and contingent (flow) work. Its clients are in the following sectors: financial services; industry and commerce; and professional services.
- 30 The Respondent's original focus when it was founded was in tax, but it has developed to other areas since then.
- 31 It currently covers the areas of tax, legal, finance, risk, compliance and global markets. Legal, compliance and risk cover the back office area of organisations and there are synergies and overlaps between these areas in recruitment. Placing individuals in these areas commands smaller fees than, by contrast, in global markets, which is the front office side of organisations and where recruitment will be of, say, traders, whose remuneration is higher than those in back office and where, correspondingly, the Respondent will obtain higher fees, as the fees for placing individuals are generally set on the basis of a percentage of the recruited individuals' starting salary.
- 32 The Respondent's managerial structure at its London Office, which is the one relevant to this case, is as follows. Other than the joint CEOs, the highest level is managing director; below that are directors, either directors (managing) or directors (billing); then associate directors; consultants; and associate consultants. Some teams also have a research consultant, which is a more junior level still.

- 33 The Respondent has two types of director job title, namely director (managing) and director (billing). A director (managing) has management responsibility for staff and the teams. A director (billing)'s primary function is to generate placement fees and has no management responsibility (apart from in some cases, a research consultant to support them).
- 34 The Respondent has a "three levels of director (managing)" programme. These levels are:-
1. "Level 1 Director" – criteria is to "manage a team of two to three (including support) in existing business with revenues of circa £500,000.
 2. "Level 2 Director" – criteria is either "management of a business with revenues of circa £500,000 - £800,000 or new start up business.
 3. "Level 3 Director" – criteria is "management of a business with £800,000 - £1.5 million revenues (at least 15% profit) or new office."
- 35 Commission structures apply at the Respondent, including for directors (both managing and billing).
- 36 In April 2013, the Respondent acquired Correlate Search ("Correlate"), a specialist financial markets head hunter firm with a focus on compliance and global markets recruitment. Mr Gavin Bonnet and Mr Simon Head, who were employees of Correlate, came across to the Respondent at that point. At the times relevant to this claim, their job titles were "managing director", Mr Bonnet in compliance and Mr Head in global markets. The acquisition of Correlate gave the Respondent a mature (i.e. established) platform in both compliance and global markets within the Respondent.
- 37 In January 2014, Mr Bonnet and Mr Head negotiated with the Respondent for a change in the commission scheme which they had originally been offered and the Respondent accepted this proposed change. Mr Bonnet and Mr Head had felt that the new scheme better represented their markets and aligned with the scheme they had previously had at Correlate. The new scheme gave greater earning potential with greater revenue success. That was certainly the case if an individual was a high biller. However, as the threshold billings at which one started to earn commission were relatively high, at two times salary, it was particularly adverse to lower billers.
- 38 This commission scheme was implemented for all employees in compliance and global markets and I have been taken to documents in the bundle evidencing this. This included employees such as Richard Legget, an Associate Director in compliance, and Colleen Quilty, a Director (Billing) in Global Markets.

- 39 By contrast, other areas of the Respondent had different commission schemes. This included legal, which had a scheme which had been in place for a few years prior to the events relevant to this claim.
- 40 The Claimant is a recruitment consultant with 14 years experience, with particular experience in compliance and risk.
- 41 Mr Bonnet had discussions with the Claimant about the possibility of her joining the Respondent. She attended interviews in September and October 2014. Mr Bonnet was the only person at the Respondent to explain the role to her.
- 42 In emails to the Claimant on 17 and 18 September 2014 respectively, Mr Bonnet stated that Mr Matt Simmons had joined the Respondent recently “with a similarish remit for legal FS and so to also jointly work/leverage legal and compliance that Matt will be developing and building on” and “Matt ... has a similar mandate but to own and build out the legal FS in house practice both perm/search and interim”.
- 43 Mr Simmons had joined the Respondent on 18 September 2014 as Director (Managing) in the Respondent’s legal financial services business. His salary at his previous employer was £75,000. His starting salary at the Respondent was £85,000. He reported to Mr Bonnet (albeit Mr Bonnet sat in compliance rather than legal). The historic legal team commission scheme applied to Mr Simmons. The Claimant in fact knew Mr Simmons from earlier in her career.
- 44 The Respondent maintains that Mr Simmons was a “Level 2 Director”. However, there is nothing in the documentation which has been presented to me which denotes him (or other relevant directors) as Level 1, 2 or 3, which is surprising if there was a clear distinction drawn here. The Respondent relies on figures set out in a table at page 305 of the bundle, which include a figure that Mr Simmons’ team contribution for 2015 was £739,812 and his personal contribution in terms of billings for 2015 was £213,622, as evidence that he was managing a business with £500,000 - £800,000 revenues, a qualification for “Level 2 Director”.
- 45 Mr Crozier suggested that these figures, because they were produced by Mr Ferguson, and those on page 304 of the bundle, because they were produced by the Respondent’s HR Manager, and because both sets of figures were produced relatively late in the disclosure process, are therefore questionable. However, I have no other reason other than assertion to doubt their validity or Mr Ferguson’s credibility in respect of them, and I therefore accept them. This is not withstanding the Claimant’s evidence that she had heard that Mr Simmons was not doing so well for that year, which, whilst she may have heard this, is second hand evidence in any event.

- 46 However, Mr Simmons' figures for 2015 came later on, so the revenues he later generated could not have designated him as a Level 2 Director from the start of his employment with the Respondent in September 2014.
- 47 Mr Simmons inherited a team of two consultants and a researcher. In 2016 he added another administrator to the team. However, the requirement for a Level 2 Director in terms of staffing levels is that there be 3/5 direct reports with at least two associate directors, one of which is identified as a successor. That was not the case in relation to Mr Simmons' team so he could not be designated as a Level 2 Director for this reason either.
- 48 Therefore, to the extent that Mr Simmons was indeed designated a Level 2 Director at all, it could only have been once it was established by the end of 2015 due to the sales figures which put him in the Level 2 bracket.
- 49 Mr Simmons was tasked to expand and develop an existing mature business, namely Legal Financial Services.
- 50 The Claimant commenced employment with the Respondent on 9 February 2015 (and was employed until 30 September 2016). She was also employed as a Director (Managing). Her starting salary was £80,000. Her salary at her previous employer had also been £75,000. She was on the commission scheme which applied in compliance and global markets. She was tasked to expand and develop an existing mature business, namely compliance. She reported to Mr Bonnet.
- 51 The Respondent maintains that the Claimant was really a Director (Billing) rather than a Director (Managing). However, I do not accept this. Before the Claimant started, she was told that she would be managing Mr Legget, the Associate Director in compliance. However, after she commenced employment, Mr Bonnet confided in her that Mr Legget had not been happy about her recruitment and that he did not want to report into her as he had been covering for Mr Bonnet in compliance during Mr Bonnet's extensive sickness absence prior to the Claimant joining. Mr Bonnet told the Claimant that Mr Legget would resign if she were to manage him and he thought it better that she did not and that the two of them should then make up their minds if they wanted to keep Mr Legget or not going forwards. The reality, however, was that the Claimant was managing Mr Leggett, albeit not formally, as she was managing the team in compliance (albeit it was Mr Bonnet who, having consulted with the Claimant, did Mr Legget's appraisal). However, in the end Mr Leggett resigned of his own accord at the end of the third quarter in 2015. At that point the Claimant began a search to find a replacement for him and interviewed several potential candidates. At the start of December 2015, she learned that Mr Bonnet had resigned from his position with the Respondent. Eventually, in terms of a replacement for Mr Legget, an offer was made to Ms Charlene Cox who commenced with the Respondent as an Associate Director in February 2016.

- 52 In addition, the Claimant hired a researcher, Sophia Winter, on the Claimant's first day of employment, and developed Ms Winter until she was promoted to Associate Consultant.
- 53 The Claimant therefore always managed a team of two. She was therefore de facto a Director (Managing) and not a Director (Billing), because she was in practice managing a team, as well as a Director (Managing) as stated in the written documents relating to her appointment. The distinction between the two titles was to do with whether or not the individual managed a team.
- 54 In addition, whilst there was at the start of the Claimant's employment no separate "risk" team, the Claimant in practice did and developed risk work using her contacts. Of the work which the Claimant did at the Respondent, she estimated that it was roughly 60% compliance and 40% risk.
- 55 The Claimant worked very closely with Mr Simmons, who had the same remit to build out the legal brand and so they tactically mapped the market and worked out who to approach together and where they could cross sell. As noted, there was overlap between compliance, legal and also risk, as all comprised back office services in the Respondent's clients.
- 56 The Claimant's job was very similar to Mr Simmons' job, the main difference being that they were in different markets, namely compliance and legal, albeit with the overlap already described. Other similarities included: they both recruited roles at a similar level, from VP (salaries of £70,000 upwards), a mix of contingent (flow) non retained as well as exclusive and retained mandates; they attended the same internal meetings, they worked closely as counterparts for their two businesses and regularly attended external meetings together when selling the compliance and legal businesses of the Respondent to financial services institutions; they were both actively involved in the recruitment process for each others' teams as well as the wider business; they were both involved with the induction of new employees to the Respondent from other teams; they both attended the same management and leadership training courses; they both regarded themselves as peers, and regularly caught up, both formally and informally, to discuss their challenges, share ideas and be a confidante to each other.
- 57 The Claimant never had a salary increase during her employment from her £80,000 starting salary.
- 58 As noted, Mr Simmons' starting salary was £85,000. His salary was increased to £90,000 in March 2015. The only reason given by the Respondent for this is that at that time he hired a consultant to focus on interim placements and was tasked with rebuilding the interim legal business. I have not seen any documentary evidence to support this reason other than the assertion of the same in Mr Ferguson's statement.

- 59 In January 2016, Mr Simmons' salary was increased to £100,000. The reason given for this by Mr Ferguson in his statement is that it was due to his team billings for 2015 of £739,812.
- 60 It is agreed that, although the Claimant was never at any stage made aware of her categorisation as Director (Managing), she would fall into the category of Level 1 Director (Managing).
- 61 Mr James Sayer joined the Respondent on 1 February 2016. His previous salary at his last employer was £106,000. His starting salary at the Respondent was £105,000. He moved from the Midlands to join the Respondent, the Respondent was keen to attract him and that was the salary agreed upon.
- 62 Mr Sayer was employed as Director (Managing) within the professional services – risk team. Again, there is no reference in his contractual or associated documentation to what level director he was.
- 63 Whilst risk did not have the required revenues to make the position Level 2, the Respondent asserts that Mr Sayer was Level 2 because it was a new business start up. However, that is only partially true. Whilst risk was from that point designated as a new team, which Mr Sayer was tasked to develop, it was not a new activity to the Respondent as the Claimant had been carrying out a reasonable amount of risk work. Indeed she was told to and did pass on her existing risk mandates to Mr Sayer when he arrived. I do not therefore accept that, in accordance with the Respondent's own categorisation system in relation to director levels, that Mr Sayer was Level 2; rather he was Level 1.
- 64 Mr Sayer reported to Mr Barrie Sanderson, a managing director.
- 65 The commission scheme Mr Sayer was on was not the historic compliance/global markets one which applied to the Claimant. The scheme Mr Sayer was on had a lower threshold of £75,000 before commission was earned and in this respect appears to be more akin to the commission schemes in place in the legal team. However, Mr Sayer did not sit in either compliance or global markets.
- 66 When Mr Sayer joined, he inherited a researcher who was moved from another team. In addition, at some point in mid 2016 he hired a consultant, Mr Paul McSweeny, to join his team.
- 67 Mr Sayer had similar years of recruitment experience to the Claimant.
- 68 As was the case with the Claimant and Mr Simmons, Mr Sayer: was tasked with building out his own business; went to the same director meetings; was given the same level of responsibility for managing his team and business;

reported to a managing director; and treated the Claimant and Mr Simmons as peers.

69 When the Claimant was hiring Ms Cox in March 2016, she asked HR what commission scheme Ms Cox should be placed on. This was at a time after Mr Bonnet, who had been one of those who brought in and negotiated the commission scheme for global markets and compliance, had left the Respondent. The Claimant did not know about other commission schemes at that point and found out about the other schemes at the Respondent in this way when she asked HR about the appropriate scheme for Ms Cox. HR was not clear as to which scheme Ms Cox should go on.

70 The Claimant raised the issue of her own commission scheme with Mr Head after her conversation with HR. Mr Head spoke to Mr Ferguson. In an email of 1 April 2016 to the Claimant, Mr Head stated:-

“Hi – yes I caught him before he went away over Easter. He agrees with me you should be on the same scheme as Matt, but he apologised he has not done anything about it yet. ...”

71 In a subsequent email of 13 April 2016 to the Claimant, Mr Ferguson stated:-

“You have enquired about your fee earning commission scheme and I have outlined my thoughts to you about this. We have had a quick run through the different schemes and why they are in place, I gather you have also had a conversation with Simon Head, but I am very happy to discuss and finalise this with you. ...”

72 The topic was therefore at that point left up for discussion. Although it is not necessary for me to make any further findings on what happened next, and I am disinclined to do so as that is likely to form the subject of evidence at the upcoming full merits hearing in relation to this case, it is enough to say that there was no insistence at that point that the Claimant remain on the existing scheme but also no decision by the Respondent that, prior to the Respondent discussing it with the Claimant, the Claimant should automatically move to a different scheme.

73 Other than the Claimant and her two comparators, the table at page 304 of the bundle also contains data concerning the four other directors in the Respondent’s London Office at the time of the Claimant’s employment. Mr Crozier asked Mr Ferguson a number of questions about them.

74 One female director in Finance (CH) has the highest salary of all seven directors, at £106,200. That director’s salary at her previous job was £120,000. However, she had been out of the market for a while before she joined the Respondent. She had seven line reports, which made her a Level 3 Director.

75 A male director, TM, who was on a salary of £80,000 when the Claimant started at the Respondent but had a pay increase to £85,000 (said to be due

to an increase in his personal billings) was a Director (Managing) in a separate part of the legal team to Mr Simmons and reported directly to Mr Ferguson.

- 76 UW, a female Director (Managing) at Level 1 in tax, started on £60,000 and had her salary increased to £64,000 due to increased responsibilities and billing. Her previous salary before joining the Respondent was £50,000.
- 77 LB, a female Director (Managing) at Level 2 in tax, started on £60,000 at the Respondent and had her salary increased to £75,000 due to increased billings. Her salary at her previous employer was £45,000.
- 78 However, both of these employees worked in tax, which was a very mature platform (being the Respondent's original business). They did not have any of their own business when they arrived at the Respondent and the Respondent had to train them up. This contrasts, for example, with TM, who brought business with him.
- 79 I have included the above information as Mr Crozier has asked me to draw inferences from it. However, it should be noted that the information above, other than what is specifically set out on page 304 of the bundle itself, came from a brief period of cross examination at the end of Mr Ferguson's evidence and not from any detailed analysis of the circumstances of these four other directors, which was understandably not provided in the statements of either the Claimant or Mr Ferguson as none of these four directors were the focus of the comparisons which the Claimant is making as the basis for this case.

Conclusions on the Issues

- 80 I make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Like Work

- 81 I turn first to the issue of whether the Claimant and her comparators were employed on like work and firstly the first part of that test, whether their work was the same or broadly similar.
- 82 I conclude unhesitatingly that it was. All three were recruited as Directors (Managing) to develop a particular area of the Respondent's business but they were all doing recruitment work; they reported to managing directors (the same managing director in the case of the Claimant and Mr Simmons); they managed, recruited and developed staff; they were paid by reference to a salary and commission (albeit the schemes varied); their areas of the business overlapped as they were all concerned with back office roles and they worked together and collaborated as a result; they went to the same

director meetings; sometimes they presented to clients together; and, importantly, they regarded each other as peers. This is all backed up by the initial emails to the Claimant from Mr Bonnet describing her remit as “similarish to Legal FS” and that Mr Simmons had a “similar mandate to own and build out the legal FS in house practice”.

- 83 The roles were certainly therefore the same or broadly similar.
- 84 Turning to the second part of the test for like work, the question is what differences there were and whether they were of practical importance.
- 85 First, the director level. As per my findings, I found that in fact Mr Sayer was, like the Claimant, a Level 1 Director (Managing), as was Mr Simmons until such point at the end of 2015 when his team earnings took him to Level 2. There was therefore no difference between the Claimant and her comparators at all in this respect.
- 86 However, even if I was wrong on this and Mr Simmons and Mr Sayer were Level 2 Directors from the start, I do not consider the difference to be one of practical importance. They still carried out the same role (albeit in different sectors) and managed similar teams.
- 87 Secondly, much store has been set on the risk business being a new role and the legal business being a mature one to distinguish them from the Claimant’s role in compliance. It is I would note in this respect difficult for the Respondent to argue this both ways in any case.
- 88 However, in the case of Mr Sayer, I found that the risk business was not a new role as the Claimant had been doing risk work anyway. Furthermore, even if it had been new, I do not consider it a difference of practical importance; at the end of the day, the Claimant and Mr Sayer were carrying out the same or similar roles with similar management responsibilities.
- 89 Similarly, if the legal role was more mature than the compliance role, I do not consider it a difference of practical importance; the Claimant and Mr Simmons were still carrying out the same or broadly similar roles with similar management responsibilities.
- 90 It was suggested that one difference of importance was that the Claimant “came under the wing of” Mr Bonnet in compliance. However, firstly, Mr Simmons also reported to Mr Bonnet and it has not been suggested that he could not rely on Mr Bonnet to the same degree, albeit that Mr Bonnet sat in compliance, and Mr Sayer reported to another managing director in any event. Secondly, I have accepted that the Claimant was indeed managing the compliance team herself anyway, so there is no difference here, let alone one of practical importance.

91 Therefore, as there were no differences of practical importance, I find that the Claimant was employed on like work to both Mr Simmons and Mr Sayer over the whole of the periods when their respective employments overlapped.

Material Factor

92 Despite the plethora of alleged material factors set out in the re-amended ET3 and consequently the agreed list of issues, not all of these were in the end relied on by the Respondents at the Tribunal. I therefore only deal with the ones which were.

93 However, I turn first to the fact that Mr Crozier asked me to draw various inferences from the primary facts and whether or not I should do this.

94 Firstly, Mr Crozier asked me to infer that the information at pages 304/305 of the bundle was not to be trusted. I have dealt with this already in my findings of fact and concluded that, on the balance of probabilities, I was prepared to accept that evidence and I do not repeat my reasons for that conclusion here.

95 Secondly, Mr Crozier asked me to infer in particular from the information about the other four Directors in the London Office, that the Respondent had a pattern of paying female directors less than male directors and that this should impact on any assessments of the alleged material factor defences.

96 However, I do not draw such an inference. As noted, any information about these individuals other than page 304 itself came out of a brief period of cross examination of Mr Ferguson, during which he set out reasons for any pay differentials. There was no detailed analysis by either party of the circumstances of these individuals and the reasons for any differences, in the witness statements or otherwise. Certainly CH, a female director, was the highest paid, but only just ahead of Mr Sayer, and her starting salary was proportionately lower than her previous salary at her previous employer than Mr Sayer's was in relation to his previous salary at his previous employer and CH had a larger team to manage. However, Mr Ferguson gave reasons for these differences. Mr Crozier described these reasons as "ad hoc", but that is hardly surprising as Mr Ferguson was never asked about them before and, quite reasonably as they were not the focus of the case, the individuals' circumstances were not addressed in his statement (or the Claimant's statement). The same applies in relation to TM, UW and LV.

97 In the context of Mr Ferguson's replies and in the absence of more detailed evidence, I do not accept that there was a pattern of paying female directors less, for discriminatory reasons or otherwise, and I draw no inference in relation to the alleged material factor defences from this. To be clear, I am not saying that there was no such pattern and that to the extent there was such a pattern it was not sex discriminatory; I am merely saying that in the

light of the evidence before me I am not prepared to come to that conclusion and not draw relevant inferences from that conclusion for the purposes of the material factor defences.

- 98 Thirdly, however, Mr Crozier alluded to the Respondent's case on material factor defences generally being rather ad hoc (as indeed it was on like work) and I would add my own observations on this. Initially, although the equal pay case was at that stage concerning the commission schemes only and not salary as well, no material factor defence was pleaded at all in the ET3 and this was confirmed at the first preliminary hearing. Only after that did the Respondent seek to amend to bring material factor defences; it then set out three material factor defences, albeit only one of these was in the end relied on at this hearing.
- 99 When the case came to incorporate allegations in relation to salary as well as the commission structure, the Respondent added a whole range of alleged material factor defences in relation to salary, albeit these have been narrowed down considerably in terms of what has been put forward at this hearing by way of material factor defences.
- 100 This pattern seems possible to me to indicate an after the event attempt to seek out plausible justifications for discrepancies, when clearly pleaded justifications for each discrepancy from the start would have seemed far more plausible. This, in the absence of more compelling evidence to the contrary, therefore, is a factor to be considered in judging whether the material factor defences actually relied on are genuine or the real reason for any discrepancy.
- 101 I turn now to the individual factors.

Salary – Mr Simmons

- 102 From the start of her employment, the Claimant was paid a lower salary than Mr Simmons. He started in September 2014 on £85,000; she started in February 2015 on £80,000. Both had had previous salaries of £75,000 at their previous employers, so there was no distinction between them in that respect. Furthermore, as noted, they were employed to do similar jobs.
- 103 No reason is put forward clearly by the Respondent as a material factor defence as to why Mr Simmons was paid more at the start of his employment compared to the Claimant at the start of her employment. To the extent that there is any suggestion that it is anything to do with the maturity of the legal business in comparison to compliance, the teams managed, or Mr Bonnet being available to the Claimant and not Mr Simmons, I have already dismissed these as not being differences at all or differences of practical importance in relation to the like work test and I do not repeat my reasons in this respect here. Suffice it to say, however, on that basis they cannot be material factors either.

- 104 There was therefore no material factor for the salary differential at the point when the Claimant joined the Respondent on 9 February 2017 and her equal pay complaint will therefore succeed at that point.
- 105 Mr Simmons was then given a pay rise to £90,000 in March 2015. Mr Ferguson says this was because he hired a consultant to focus on interim placements and was tasked with rebuilding the interim legal business. No other detail is given and there is no contemporaneous documentary evidence which I have been taken to which evidences these reasons. It is not even specifically set out as an alleged material factor in the re-amended ET3 outside the generalised alleged material factors that that document sets out.
- 106 I therefore find on the balance of probabilities that this is an after the event justification and not a genuine reason for the pay rise. It is the Respondent's burden to prove the material factor and it has not done so. The alleged material factor fails under the first of the principles in the case of Glasgow City Council v Marshall.
- 107 That therefore disposes of this alleged material factor. However, I would add that, for the same reasons as above and the lack of detail about this alleged material factor, I also do not find that this alleged material factor was significant and relevant and caused the variation, in other words the second principle in Marshall, which it is for the Respondent to prove; or a significant and relevant difference between Mr Simmons' case and the Claimant's, the fourth Marshall principle, which again is for the Respondent to prove. Therefore, the attempt to posit this as a material factor by the Respondent would have failed for these reasons to.
- 108 In the absence of an established material factor defence, the Claimant's equal pay complaint will therefore succeed in relation to Mr Simmons and his increase in salary to £90,000 from March 2015.
- 109 Finally, Mr Simmons received a pay rise in January 2016 taking his salary to £100,000. This is said to be due to his team billings of £739,812 for 2015. These are the billings that made him a Level 2 Director and they are significant. They contrast with the Claimant's team billings of £107,898 for the same period, notwithstanding that the Claimant's team was slightly smaller than Mr Simmons. I have seen evidence in the bundle at page 305 of these figures which, as noted earlier, I have accepted. Furthermore, the timing of the pay increase in January 2016 coincides with the achievement of these figures for the calendar year 2015.
- 110 Therefore, despite my misgivings about the Respondent's scattergun approach to material factor defences, I find that the Respondent has proved that this alleged material factor was genuine and not a sham or pretence; was a material factor (i.e. is significant and relevant and caused the variation); was not due to sex discrimination; and was a material difference,

as is evident from the large difference between Mr Simmons' 2015 team billings and those of the Claimant.

111 As this material factor defence is proven, the Claimant's complaint of equal pay in relation to Mr Simmons' January 2016 pay rise will not succeed.

Salary – Mr Sayer

112 Mr Sayer only started in February 2016.

113 First of all, to the extent that they are pleaded, any alleged material factor defences on the basis of Mr Sayer's role being "new", or the Claimant being under the wing of Mr Bonnet or team management cannot succeed, for the same reasons why they were not differences or differences of practical importance under the like work test. I do not repeat my reasons here but, in the light of them, none of these can amount to a material factor defence.

114 The remaining alleged material factor defence, and the one focused on most in Mr Healy's submissions, was the fact that Mr Sayer's salary with his previous employer was £106,000 which, in conjunction with the Respondent wanting to attract him and his having to move from the Midlands, meant that the Respondent needed to pay the higher salary to attract him.

115 As noted, I have accepted the documentary information regarding Mr Sayer's previous salary level. It is unsurprising that, even if the Respondent had negotiated hard, Mr Sayer would be unwilling to accept a substantial salary cut to move (notwithstanding that in other cases such as CH, whose circumstances were different, the Respondent was able to agree a salary which was quite a bit lower than her previous salary, after she had been out of the market for a while).

116 I therefore accept that the genuine reason for Mr Sayer's recruitment at £105,000, a cut of just £1,000 on his salary with his previous employer, was because that was what it took to attract him. The level was still within the Respondent's range for directors. The factor is significant; relevant and caused the variation; it was not due to sex discrimination; and was a material difference from the Claimant's case, as she had a £5,000 salary increase on her salary from her previous employer when she joined.

117 This material factor defence is therefore made out and the Claimant's equal pay complaint in relation to Mr Sayer's salary will fail.

Commission

118 The only material factor relied on here at this Tribunal was that the commission scheme the Claimant was on was that which was applicable to her team. That is true. Others in compliance were also on this scheme, as

were those in global markets. This is because it was the scheme Mr Bonnet and Mr Heard negotiated and implemented for compliance and global markets long before the Claimant arrived.

- 119 Therefore, notwithstanding any misgivings about the potential for after the event justification which I have, I find on the facts that this was a genuine reason for the Claimant being on that scheme. It was material in that it was significant and relevant and caused the variation. It was not related to sex as it applied to the whole team, including Mr Bonnet and Mr Legget (who are male). Finally, it was a material difference; it was a significant and relevant difference to Mr Simmons' circumstances, as he was in legal and therefore went on to the legal commission scheme; and to Mr Sayer's circumstances, as he was in risk (not compliance or global markets) and was also therefore not within the remit of the scheme which applied to the Claimant.
- 120 Whether the Claimant's scheme was suitable or reasonable is a different matter, but not one of relevance to this decision. Indeed, the evidence suggests that the Respondent may have been prepared to discuss with the Claimant and potentially apply a different scheme to her. However, it is enough for the purposes of the establishment of the material factor defence that the above factors are satisfied in accordance with the test set out in Marshall.
- 121 The Claimant's complaints of equal pay in relation to the commission scheme will therefore fail.

Employment Judge Baty
12 April 2017