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Equalities Office

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**Equal Pay Cases
and Pay Audits**
**A Report for
Government
Equalities Office**
**By Incomes Data
Services**

July 2012



THOMSON REUTERS

IDS

This report was researched and written by Incomes Data Services (IDS) on behalf of GEO, with the legal analysis carried out in Autumn 2011.

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I. Introduction

This IDS research report presents conclusions from the analysis of successful claims for equal pay and of sex discrimination related to pay from the last eight years. It aims to provide context for proposed legislation that would require employers who lose an equal pay case (now an 'equality clause' case under the Equality Act 2010), or a sex discrimination case related to pay, to conduct a pay audit (proposals outlined in the Modern Workplaces Consultation - <http://www.bis.gov.uk/Consultations/modern-workplaces>). The pay audit would be ordered by the tribunal making the finding of liability. However, it is proposed that a tribunal should not be able to order an audit where the employer can show it would not be productive for the order to be made. For example, those who lose a case relating to a pay arrangement that has been replaced following a pay audit should not be made to go to what may be considerable expense to conduct a further audit that would not serve any purpose.

I.1. Key points

- In all of the cases analysed so far, **not one has involved an obvious, unarguable reason why an equal pay audit would be inappropriate or unproductive.**
- On the contrary, **several cases give good reason to think that an equal pay audit could be appropriate** to minimise the risk of future discrimination.
- Were the currently proposed criteria to apply, it seems quite possible that **an equal pay audit would be ordered in the majority of successful equal pay cases in the private sector.**
- However, **this must be considered in the context of the very small number of claims that this affects.** On the assumption that such orders will be considered inappropriate in local government and NHS cases, and in any other case where the employer is already subject to specific equality duties, introducing a power to make such an order would be likely to produce fewer than a dozen orders every year.
- Those few orders would be further reduced where employers, having been found liable, then successfully argue against the productiveness of a pay audit. However, **no obviously winning arguments have been identified based on the facts of the cases analysed**, although there are some that will require careful consideration on the tribunal's part.
- Some cases do raise the concern that **an audit of the employer's entire undertaking might be disproportionate.** This might be a relevant argument against using the power, but only if the power were so general that tribunals could not control the parameters of the audit.
- The **number of audits will be higher if the power is intended to be available in default judgments.** This would, however, raise issues of practicality.
- The power's deterrent effect must also be considered. **Giving tribunals power to order an equal pay audit as a remedy must be thought likely to encourage settlement, even once proceedings are at a late stage.** This may further reduce the number of findings of equal pay liability and, hence, the number of orders.

2. Approach

This research set out to extract details from decided equal pay and sex discrimination cases that might help to anticipate the kinds of reasons that could suggest that an equal pay audit would be unproductive. It also sought to identify other factors that might affect the practicality and justice of making such an order, which might have to be taken into account in legislating on the scope of the tribunal's power to make an order.

It has been assumed that it will generally be considered impractical and unproductive for tribunals to order equal pay audits in NHS and local government cases. This is because the terms and conditions of employment in those sectors are set by 'equality-proofed' collective agreements, which implement extensive pay audits – notably, 'Agenda for Change' in the NHS and the 'single status' agreement in local government. Although those agreements have by no means put an end to equal pay litigation in the NHS and local government, any remaining inequalities in those sectors' pay systems is already under intense scrutiny, and so a further equal pay audit would be unproductive. Accordingly, equal pay case law in these areas has been disregarded for the purposes of this research.

Having excluded NHS and local government cases from the scope of this research, the focus fell mostly on private sector employers. An IDS researcher spent two days interrogating the employment tribunal judgments database at Bury St Edmunds, using a combination of search terms to try to identify relevant judgments in claims of equal pay or sex discrimination in pay. (In this context, 'relevant' cases are those brought against private sector employers, or public sector employers other than local government or NHS, and which met with success at tribunal.) The researcher also looked at tribunal judgments recorded on the IDS in-house database. This is a small stock of summaries and transcripts of tribunal judgments, collected on an on-going basis, for use in research for IDS employment law publications.

The original intention was to confine research to the last three years of equal pay cases, in the expectation that around 50 relevant cases could be identified within that period. That expectation proved optimistic – only 13 relevant cases could be found for the period 2009-11. Given that the tribunal statistics indicate 280 successful equal pay complaints in the 2010/11 reporting year alone, this figure is some way short of what was expected. The main reasons for this small sample are:

- a preponderance of 'irrelevant' cases, i.e. NHS and local government cases. The overwhelming majority of equal pay cases entered on the judgments database were in these areas
- a small number of judgments with no reasons – seven in the research period. Since 2004, tribunals have only been obliged to give written reasons for judgment if requested to do so by the parties. If no reasons are requested, only the result of the claim is recorded. These records are therefore unsuited to any meaningful legal analysis
- a small number of default judgments – nine in the research period. A default judgment may be entered where the employer has failed to enter a timely response to the claim. Such judgments result in success for the claimant without a hearing of the merits of the case. These judgments are therefore also unsuited to legal analysis.

Given the small number of recent cases, the research was widened to consider relevant judgments going back to 2004. This enabled the total sample to be increased to 39 relevant judgments, and two older cases were added later from the IDS in-house database. Although this widens the temporal range of the project past what was originally envisaged, equal pay law has not changed significantly in this time, and so these cases should be as relevant as more recent cases for legal analysis. Of the 41 judgments identified:

- 39 are equal pay claims
- one is a combined equal pay and sex discrimination claim (relating to a contractual and a discretionary bonus respectively)
- one is a sex discrimination claim (discretionary bonus).

These cases have been summarised and the summaries are included in the Appendix. Particular attention has been paid in summarising to the legal and factual issues discussed by the tribunal that might have some bearing on the justice and practicality of imposing an equal pay audit. For example, it may be relevant to consider exactly why the employer has lost. In most of the cases analysed, the employer has put forward a 'genuine material factor' defence – this involves explaining a pay differential by reference to a genuine, relevant and non-discriminatory reason. In finding for the claimant, the tribunal must reject the proposed reason as not genuine, irrelevant or discriminatory. These reasons might, though, shed some light on how the pay disparity arose in the first place, and give some clue as to whether the employer's general pay practices are likely to be infected by discrimination. An analysis of these kinds of issues is set out in Section 3, 'Employers' arguments', below. This analysis considers the reasons that an employer, having lost an equal pay claim in circumstances similar to those of some of the analysed cases, would put forward to argue against the imposition of a pay audit.

It is not only legal and technical issues that tribunals may have to take into account when considering whether to impose an equal pay audit. Other factors, such as the size and composition of the employer's workforce, may affect the productiveness or otherwise of an audit. Some of this information is available from the tribunal judgment, but only sporadically. Where possible, the researcher has supplemented that information through internet research, trying to identify relevant factors. An analysis of these factors is set out in Section 4, 'Policy considerations'. This section also deals with some general issues suggested by the cases that may require consideration at the consultation and drafting stage of the proposed legislation.

3. Employers' arguments

Short summaries of each of the cases analysed so far are set out in the Appendix below. As noted above, none of the judgments shows an obvious, good reason why an equal pay audit would be inappropriate. Indeed, several judgments include comments from the tribunal specifically expressing concerns over pay transparency and the possibility of embedded discrimination – see, for example, case nos. 4, 10 and 25.

However, a few raise some questions over the practicalities and the justice of making such an order. If the tribunal's power to order an equal pay audit is not automatic, it can be expected that employers who lose equal pay claims will raise such questions as arguments against the making of an order. Analysis of the cases set out in the appendix gives some idea of the kinds of arguments that may be deployed in this regard.

Case no.14

This appeared to be a small or micro-employer, a members' club, with four or five employees all doing bar work. The pay difference in question was relatively small – 65p per hour, being about £1,350 per year for the average full-time worker.

Potential arguments against an audit:

- given the small size of the workforce, the cost and time involved in a full pay audit would impose a disproportionate burden, compared to the discrimination found.
- given that the workforce is fairly uniform, being composed of employees all doing more or less the same job, there is unlikely to be any further, hidden discrimination that an audit would flush out. The fact of this successful claim will be enough to alert any other employees to possible pay disparities, which should be enough in itself to guard against further discrimination.

Potential arguments for an audit:

- the cost and time requirements of an equal pay audit vary in proportion to workforce size and complexity. Auditing a small, relatively uniform workforce should be straightforward and relatively inexpensive, being unlikely to involve difficult comparisons of dissimilar roles.

Case no.8

This case involved a large public sector employer. The employer had in fact considered (or at least been alerted to) equality issues when implementing the impugned pay arrangements. There had been a consultation process involving trade union representation and affected employees. The employer had to choose between various methods of amalgamating different jobs onto a single pay structure, including some measure of pay protection, and had got it wrong.

[N.B. This decision was overturned on appeal. The tribunal's judgment is nonetheless included as it illustrates several issues that may still arise for consideration in future cases.]

Potential arguments against an audit:

- the employer consulted and considered equal pay before going ahead with the impugned pay reforms. This suggests a transparent approach to pay and that the current litigation is a one-off, meaning that there is unlikely to be any hidden discrimination for an audit to uncover. The audit would therefore be unproductive.
- the employer is a large public sector organisation, already subject to specific equality duties such as gender pay reporting and monitoring, which would be unnecessarily duplicated by a tribunal order.
- a full equal pay audit would be disproportionately costly, given the large size of the workforce and the wide range of different roles. This claim was focused on a specific amalgamation exercise and does not necessarily indicate a wider culture of pay discrimination.
- that the tribunal's finding against the employer was essentially a difference of opinion on a question of balance. The tribunal indicated that a lesser degree of pay protection might have been considered justified, and the Equality Act 2010 expressly endorses pay protection as a legitimate aim. Given that the employer has to weigh competing interests and is constrained by what it can secure agreement on with the workforce, its failure to strike the right balance can hardly be deemed culpable. Therefore, to impose a pay audit would be to punish it for what is essentially no-fault discrimination.

Potential arguments for an audit:

- the issue of discrimination had been raised in consultation but disregarded, which detracts from the credit that the employer might otherwise be given for its transparent approach.
- the employer's public sector equality duties are neither here nor there, since they clearly have not succeeded in eradicating pay discrimination.
- while the cost of an equal pay audit increases in proportion to the size of the workforce, so too do the employers' resources – the larger the workforce, the larger the HR department. Cost should therefore not be a factor, since larger employers usually have greater means.
- in so far as the power permits the tribunal to do so, it would be proportionate to order an audit only of the particular section of the workforce relevant to the current litigation.
- the extent to which the employer consulted properly has already been considered as part of the tribunal's reasoning on justification, and so should also not count in the employer's favour when considering whether an order would be appropriate.

Case no.12

Catering employees working in a hospital café won the right to claim against porters working in the same hospital, and employed by the same private sector employer, but under a different contract with the hospital. The tribunal rejected the argument that, as the caterers and porters were employed on different commercial ventures, they could not be compared for equal pay purposes.

Potential arguments against an audit:

- an audit would be disproportionately costly and complex, given the diversity of service contracts the employer operates at a variety of different establishments.

Potential arguments for an audit:

- in so far as the power allows it to do so, the tribunal could limit the scope of the audit to the establishment at which the claimants and comparators worked.
- cost and administrative burden are not good reasons for avoiding taking the measures needed to identify and tackle systemic discrimination.

Case no.33

The employer wished to change shift patterns in its factory. Groups of mostly male employees were given a payment for agreeing to the change, while a group of mostly female employees were not. The tribunal decided that the payments were contractual and so female employees' claims for the payments came under the Equal Pay Act 1970.

[N.B. The judgment is only a preliminary point on whether the payments fell within the Equal Pay Act 1970 or the Sex Discrimination Act 1975. There is no final determination of liability. However, it has been included as an instructive example of the issues that tribunals may have to face when considering the new power.]

Potential arguments against an audit:

- this was a clear case of one-off discrimination. The circumstances under which entitlement to the payment arose were unusual and unlikely to be replicated in future. In the absence of any suggestion of a wider discriminatory culture, there is likely to be nothing for an equal pay audit to uncover, and so to order one would be unproductive.

Potential arguments for an audit:

- that it would open the floodgates to allow an employer's defence based on 'one-off' discrimination.
- on the assumption that liability under the Equal Pay Act is eventually established, that would of itself be an indication of a discriminatory culture. Such 'subconscious' discrimination might well be present in the employer's general pay practices.

Case no.39

The claimant discovered a pay disparity, complained to the employer and was given a new contract on the higher pay rate. The discriminatory pay difference lasted for around two months.

Potential arguments against an audit:

- the employer moved to remedy the unequal pay relatively quickly and conceded liability for back pay before the tribunal. A pay audit would therefore be harsh, given the short period during which discrimination was actually ongoing.

Potential arguments for an audit:

- the fact that the employer allowed the case to get as far as the tribunal before conceding liability undermines its claim to have acted quickly to right the wrong.
- the tribunal noted, in its findings, the presence of a working culture that paid 'little or no heed to women's sensitivities', which tends to support the usefulness of an equal pay audit. It also found sex discrimination in relation to non-pay matters.

Case no.16

Claimant paid £20 per day less than her contemporary comparator. There was evidence before the tribunal that predecessor male employees had all enjoyed higher salaries. The employer could give no cogent explanation for the difference in pay and there was no systemic approach to pay awards. However, the tribunal noted that the employer had since begun work on a formal pay structure.

Potential arguments against an audit:

- since the employer has already started work on reviewing its pay arrangements, an equal pay audit would unnecessarily duplicate its work.

Potential arguments for an audit:

- the tribunal could not dispense with the requirement for an equal pay audit unless satisfied that the ongoing pay review is sufficiently analytical and thorough. The employer would have to prove evidence to that effect.

4. Policy considerations

The previous section identified the issues that might be raised by employers who lose equality clause or pay-related sex discrimination claims to argue against the imposition of an equal pay audit. The judgments summarised in the appendix also indicate issues and concerns that, while they may not be relied on by losing employers, may yet pose practical problems for tribunals in the making of an order. They raise questions of scope and the margin of discretion that the legislation ought to allow tribunals. As such, some are questions of policy that may require consideration and consultation before the legislation is drafted.

Sex discrimination in pay

There are generally few claims of sex discrimination in pay that do not come under the Equal Pay Act 1970 (now the equality clause provisions of the Equality Act 2010). Claims of sex discrimination in relation to a discretionary bonus are the only likely area of litigation – only two out of the 41 claims analysed in this research involved such a claim. Case no.11 was a claim of direct sex discrimination and maternity discrimination under sections 1(1)(a) and 3A of the Sex Discrimination Act 1975 (now sections 13 and 18 of the Equality Act 2010). It must be considered whether such cases ought to be covered by the power to make an equal pay audit. On the one hand, a successful claim may indicate a discriminatory culture in which an equal pay audit would be useful – indeed, the facts of case no.11 are arguably in that category. On the other, entitlement to discretionary benefits around maternity leave is a complicated area of law, in which employers who otherwise observe good practice may make mistakes. It may be that the power should be available in such cases but that tribunals should only use it where an inference of discriminatory culture may be drawn.

Case no.32 arose in the banking sector. The claimant succeeded in an equal pay claim with regard to a guaranteed bonus, and also in a sex discrimination claim with regard to a discretionary bonus. The case makes a strong argument in favour of the power to order an equal pay audit covering pay-related sex discrimination as well as equal pay cases. In some sectors, such as banking and financial services, discretionary bonuses make up the major part of employees' annual remuneration. The power to order an equal pay audit covering the award of such bonuses would help to ensure that the process is transparent and non-discriminatory.

It is worth noting in this regard that Sections 70 and 71 of the Equality Act 2010 blur the boundary between 'equal pay' cases and cases of sex discrimination in non-contractual pay. In particular, S.71(2) now permits a claim of sex discrimination to be brought in relation to contractual pay where there is evidence of direct discrimination but no valid comparator to found a classic 'equal pay' claim. A finding of liability under this section can be considered equivalent to a contravention of the Equal Pay Act 1970 or breach of an equality clause, albeit one established via a different route. There is therefore no reason why such claims should not also be covered by the power to order an equal pay audit. While this has the potential to increase the number of claims potentially subject to the audit power, it should be borne in mind that S.71(2) is not expected to produce a significant increase in pay discrimination litigation.

Other forms of pay discrimination

The Equality Act 2010 provides remedies for various other kinds of sex discrimination in pay and benefits. Aside from the protections of the equality clause and the general prohibition on sex and pregnancy/maternity discrimination, the Act makes provision for:

- a maternity equality clause, which ensures that women on maternity leave get the benefit of pay rises that are applied (or would otherwise have been applied) during their absence. It also protects entitlement to certain bonuses that would otherwise not have been paid to women on maternity leave.
- a sex equality rule, which provides a remedy for sex discrimination in access to and benefits under occupational pension schemes.
- a maternity equality rule, which prohibits differential treatment of women on maternity leave with regard to pension scheme access and benefits.

These protections were already part of the law before the Equality Act 2010 came into force. The 2010 Act simply consolidates the relevant sections of the Equal Pay Act 1970, the Sex Discrimination Act 1975 and the Pensions Act 1995 in these regards. However, no relevant cases touching on these areas were identified in the course of this research, and so it has not been possible to analyse the particular issues that might arise for consideration if such cases are subject to the pay audit power.

Default judgments

As noted above, the default judgment regime applies to equal pay. Under rule 8 of the Tribunal Rules, if a respondent fails to present a valid response within the time limit, or responds indicating that he does not intend to resist the claim, an employment judge must issue a default judgment. This determines the claim without a hearing. Until 6 April 2009, the employment judge had a power to issue default judgment in the absence of a response from the respondent. Amendments were made to the Tribunal Rules on that date with the effect that the employment judge is now obliged to give a default judgment, unless special circumstances apply.

It must be considered whether a tribunal will be able – or obliged – to order an equal pay audit following a default judgment. The Tribunal Rules do not restrict the range of remedies available when a default judgment is entered, as opposed to a judgment after full hearing of the merits. However, it might be thought inappropriate or impractical for a tribunal to order an equal pay audit when it has no evidence about the workforce. This might, of course, be remedied with a power for the tribunal to order the employer to disclose information about the size and composition of his workforce.

Settlement and timing of order

It is noticeable from the database of judgments at the employment tribunals office in Bury St Edmunds, and from the tribunal statistics, that a larger number of equal pay claims end in Acas-conciliated settlement than end in success at tribunal.¹ An even greater number² of cases were withdrawn – some of those withdrawals inevitably represent settlements reached between employee and employer by way of compromise agreement (although no figures are available on this).

In this regard, it must be noted that the introduction of an equal pay audit power would be an additional incentive on the employer to settle. For example, an employer who becomes aware during the course of the proceedings that he is likely to lose will find it to his advantage to settle. Even if he thereby ends up paying as much as, or even more than, the tribunal might eventually have ordered, he will thereby avoid the final liability hearing at which an equal pay audit might be ordered. This encouragement to settle might be seen as undermining the transparency that the equal pay audit power is designed to promote. It should also be borne in mind when attempting to predict the number of cases in which the power will actually be used. As noted above, based on the number of successful private sector claims at present, it is expected that the power will be rarely used. Any increase in the incidence of settlement will reduce that number even further.

This projection is based on the assumption that the equal pay audit would be ordered at the same time as the tribunal makes a finding of liability. If, in fact, the audit would not be ordered until the remedies hearing then employers found liable would have a further opportunity to avoid the effect of an equal pay audit. It is noticeable that a significant number of cases do not include remedy, being cases where the tribunal has suggested to the parties that they try to reach agreement between them. If the parties reach agreement and no remedies hearing follows then the tribunal would have no opportunity to exercise its power to order an equal pay audit.

Scope of audit

In several cases – see, for example, case nos.4, 22 and 26 – the claim related to employees performing a support function. So, while the employer's sector might be IT, manufacturing or logistics, the pay discrimination found by the tribunal related specifically to the customer service or sales teams supporting the employer's main business. This consideration applies equally to the public sector. Case no.8, for example, involved a large public sector organisation, where the pay inequality arose from the amalgamation of two jobs of different seniority. It is clear from further research that the

¹ In the reporting year 1 April 2010 to 31 March 2011, 12 per cent (3,000) of equal pay claims disposed of were dealt with by way of Acas-conciliated settlement, compared to just over 1 per cent (280) that resulted in success at tribunal – Employment Tribunals and EAT Statistics 2010-11, Ministry of Justice (2011)

² 60 per cent (15,300) of cases disposed of were withdrawn.

role performed by the claimants was just one of a variety of roles done at that establishment. In addition, the employer would necessarily employ various legal and HR support staff. It is clear, then, that a question arises as to whether a pay audit must cover the employer's entire workforce, regardless of how specific or localised the pay inequality is; or whether the tribunal should be given power to direct the audit to a particular section of the employer's workforce.

This is an issue where employees perform one kind of role in an establishment at which a range of different kinds of work are done. Possibly more complicated is where the employer has a number of different establishments. Several of the cases analysed involved employers running operations at a number of different locations across the UK – see, for example, case nos. 1, 7 and 8. Others involved large and multinational employers, for which a large workforce at a number of locations can be assumed – see, for example, case nos. 24 and 32. Recent case law³ has clarified that separate locations normally count as separate 'establishments' for equal pay purposes. Employees at one establishment cannot necessarily claim equal pay in comparison with employees at another – this depends on whether common terms and conditions apply. Thus, it might be considered unproductive to order an equal pay audit across the employer's entire undertaking, since any differences in pay between comparable employees at different locations would not necessarily amount to actionable discrimination. On the other hand, that might be something that a broad audit could take into account.

Concern over the practicality and justice of ordering an equal pay audit across a number of different establishments may apply all the more strongly when it comes to employers providing outsourced services – see, for example, case nos. 12 and 25. Not only do such employers have a large number of employees employed at various locations, they also tend to employ employees on a wide variety of work. This again raises the issue of how specific a tribunal can be, by reference to job type and location, in ordering an equal pay audit. This issue raises questions of practicality, not least in the sense that the tribunal's ability to make an enforceable order will depend on how much reliable information the employer supplies to it about the nature of its workforce. The tribunal would have to hear argument and make findings to be able to identify the particular establishment at which an audit is to be undertaken, which may not be a straightforward exercise. It also raises a question of policy – the power to make an equal pay audit will have a much greater punitive/deterrent effect if it can be applied to an employer's entire UK undertaking, not just the establishment or job roles where the pay inequality has been found.

³ This is the result of the Court of Session's judgment in *City of Edinburgh Council v Wilkinson and ors* 2011 CS1H 70, overturning the EAT's decision to the opposite effect.

5. Appendix – Case summaries

1.

B v S

25.3.11

Multiple claimants: No.

Facts

B began working for the employer in August 2008 as a customer support advisor. She asked if her salary of £14,762 p.a. (which was set on the minimum point of the pay scale) was negotiable, but was told it was not. In summer 2008 T applied for a job on a salary scale between £22,419 and £24,143. He was not appointed but was asked to consider the job B was undertaking and it was decided to pay him two points above the minimum because of the skills experience he brought to the post. The employer normally started new entrants on the minimum point of the pay scale to avoid them having a higher starting salary than staff already in the role ('anti-leapfrogging policy'), but appointment could be made at a higher spine point where the new entrant added value to the business. In April 2009 B's salary was increased to £14,958, whereas T's salary was increased to £17,114. At that point, B found out about T's salary and raised the matter with the employer. She was told that T was paid more because of his technical experience. B raised the matter again because it was clear to her that they were doing the same job and were both sent on similar training courses. Her grievance was rejected.

LW/WRE/EV

The employer accepted that B and T were employed on like work.

GMF defence

- **Experience:** the tribunal accepted that, at the time of his recruitment, this GMF explained the difference in pay between T and B. However, this ceased to be a significant factor by the time of the pay review in April 2009. By then, they were doing identical jobs and were being sent on identical training courses and they had achieved the same performance review rating. Accordingly, the claim for equal pay succeeded from April 2009.

Compensation: to be assessed at a remedy hearing.

Notes

An equal pay questionnaire was submitted by B and completed by the employer.

This decision has since been overturned on appeal. However, it is included as still giving useful examples of the kinds of issues that tribunals may have to deal with.

Workforce: 48,000 staff across 125 establishments; wide variety of jobs – various support services in addition to prison officer roles; 750 employees at claimant's workplace.

Sector: public sector, executive agency.

Representation: representative for the claimant, counsel for the employer.

Salary structure: Yes.

Union involvement: No.

2.

M v W

21.3.11

Multiple claimants: No.

Facts

H graduated from law school with a 2:1 in January 2000 and became a full-time Lecturer in Law for the employer in September 2000 on spinal column point 10 in the salary scale for lecturers. M graduated with a first and became a part-time lecturer for two semesters. In September 2001 she was appointed a full-time Lecturer in Law. She was offered a salary according to spinal column point 5 on the salary scale, which was raised to 6 due to a pay settlement. Lecturers would automatically progress up the pay scale by one point annually. In determining her starting salary, the employer took no account of her teaching experience or her work in the civil service. By contrast, H was awarded six points for his industrial experience. After one year's full-time employment, M became the course leader for the ILEX course and H the course leader for the HND course.

LW/WRE/EV

The tribunal found that M and H were employed on like work. In this regard, the tribunal did not accept the argument that M and H were not employed on like work because managing the HND course was more onerous than managing the ILEX course. In actual fact, the tribunal found that the reverse was true and that M's responsibilities were more onerous.

GMF defence

- **Qualifications:** the employer awarded an additional spinal column point for degrees and postgraduate qualifications. The tribunal said that this could amount to a GMF. If M had been appointed one spinal column point below H (who had an additional postgraduate qualification), the tribunal would have accepted the employer's defence in this respect. However, the real issue in this case was the six-point difference which supposedly reflected H's industrial experience.
- **Experience and skills:** M and H both had some relevant experience and skills at the time of their appointment that were transferable to the position of lecturer but M's experience appeared to the tribunal to be greater. Further, H's industrial experience, for which he was awarded six points on the salary scale and into which the interview panel had not inquired, was not relevant to the lecturer post. The tribunal concluded that the panel had, consciously or subconsciously, undervalued

M's skills and experience and inflated those of H. The tribunal added that H was an unknown quantity with very little teaching experience (as would have been apparent had this been probed) whereas M was a known quantity and clearly did have relevant experience. In the tribunal's view, the decision-making process was 'highly subjective and lacked transparency'. This reason put forward for the pay differential was a sham (para 8.20).

Compensation: £14,168.

Factors taken into account

The tribunal also thought it important that this was not a case where consideration had to be given to matching an existing salary in order to attract H to the role of lecturer (i.e. this could have been a 'market forces' case). H had not been in employment for some time and he was seeking to enter the legal field (having previously worked in a different area) when he applied for the lecturer post. Accordingly, the employer was in a strong negotiating position with regard to an appropriate starting salary (para 8.11).

The tribunal noted that when H found out that he was being paid more than M he was 'completely shocked because he regarded her as a far more experienced lecturer than he was and had asked her for advice many times' (para 8.17).

Notes

It also appeared to the tribunal that 'the [all-male interview] panel members had an instinctive rapport with [H]' (para 8.19). It noted that, even if it had found the employer's explanation to be a genuine and material factor behind the difference in pay, it would nonetheless have found it to be tainted with direct sex discrimination. It repeated its view that it could readily be inferred from the evidence that 'consciously or subconsciously the panel had identified with [H] and had looked for reasons to value and inflate his experience and, by contrast, had undervalued the claimant's experience' (para 20).

The employer argued that H had misled the interview panel as to his previous experience. However, this argument was rejected as the panel had not asked about his experience at interview.

Workforce: more than 100 employees; teaching staff as well as admin support.

Sector: higher/further education.

Representation: representative for claimant, counsel for employer.

Salary structure: Yes.

Union involvement: No.

3.

G v K

20.12.10

Multiple claimants: No.

Facts

G and B attended the same university. In November 2004, B started working for the employer as an architectural assistant on £15,000 p.a. G worked for two architectural practices before joining the employer as an architectural assistant in January 2007 on £13,000 p.a. In March 2007, B's pay increased to £22,000. G's salary remained the same throughout her employment with the employer.

LW/WRE/EV

The employer disputed that G and B were employed on like work but the tribunal found that there were only fairly minor differences between the duties undertaken by them. Any differences that there were the tribunal found not to be of practical importance.

GMF defence

- **length of service:** the employer argued that B had been employed for two years longer than G by the time she started. However, the tribunal said that when B started working for the employer, as a recent graduate, he was employed on a higher starting salary from the outset. Furthermore, when G was employed she had, by then, gained similar experience to B, as she had worked for two architects' firms. There was no compelling reason as to why G should not have received the same starting salary as B when she began working for the employer.
- **merit increase:** the employer argued that it increased B's salary because he had proven himself to be a useful, competent and well-motivated employee. The tribunal noted that it did not see much evidence from the employer on this point. Given that G and B were employed on like work, G should have received a pay increase after two-and-a-half years with the employer.
- **responsibility:** the employer argued that B supervised G's work, but the tribunal found that they both checked each other's work. The tribunal also noted this GMF was raised at a very late stage in the proceedings. It said that 'if it had genuinely been the case that [B] was the claimant's supervisor that is undoubtedly a matter that would have been advanced by the respondent right at the outset'.

Compensation: £8,527.95.

Workforce: unknown.

Sector: architectural practice.

Representation: family member for claimant, consultant for employer.

Salary structure: No.

Union involvement: No.

4.

B v V

I.II.I0

Multiple claimants: No.

Facts

B, who worked in sales, was employed as a business development manager on £35,000 p.a. The employer then recruited J as business development manager on £45,000 p.a. and V, as channel development manager, on £43,000 p.a. After a year, V became business development manager, earning £50,000 p.a. The employer said that salaries varied for individuals because it did not operate salary scales but negotiated them individually.

LW/WRE/EV

The tribunal found that B and her comparators were employed on like work.

GMF defence

- **Market forces:** the employer asserted that it paid all of them the going rate based on their previous salary. However, the tribunal found that there was no evidence to suggest that it had been unable to recruit suitably qualified candidates to a position similar to that of B's without paying a higher salary than she herself had accepted. Nor did it produce any documents relating to the comparators' previous employments. The tribunal therefore rejected this GMF. In reality, it said, the company's explanation to the effect that it paid employees a salary equal to that which they had previously enjoyed was no more than an assertion that the employee agreed to work for the salary the company offered.

Sex taint

Even if the tribunal had accepted the GMF, it said that it had 'grave concerns' as to whether the employer's procedures were not tainted by indirect sex discrimination (para 74). It appeared that the company simply asked candidates what they were earning and then offered them a new position at that salary. In the absence of a careful inquiry as to how their salary had been set in their previous jobs, the employer was potentially indirectly discriminating against female candidates by perpetuating the gender pay gap.

Factors taken into account

The tribunal found that there was a lack of transparency regarding pay matters. The employer did not tell B how her commission was calculated or how much revenue she had generated.

The tribunal further noted the employer's poorly prepared response to the claim, and the fact that it had launched a character attack on her.

Compensation: £21,003.34.

Workforce: offices in Ireland, US and UK.

Sector: IT.

Representation: claimant in person, counsel for employer.

Salary structure: No.

Union involvement: No.

5.

K v G

10.8.10

Multiple claimants: No.

Facts

K began working for the employer on 17 April 2008 as a commercial co-ordinator on a salary of £27,000 p.a. P, a woman, became a commercial co-ordinator in June 2008 on a salary of £32,000 p.a. K's projects were fewer in number but much more valuable than P's. K complained about the disparity in pay, but was told only that he should raise the matter during his annual appraisal. His employment was terminated due to economic circumstances before that appraisal took place. When he left, P took over his projects.

LW/WRE/EV

The tribunal was satisfied that K and P were employed on like work.

GMF defence

- **Project value:** the tribunal rejected the company's submission that P's projects were more valuable than K's.

- **Responsibility:** the tribunal found that it did not assist the employer to assert that P's higher pay was based on the proposition that she would undertake a senior recruitment role. If that were the case, her salary should have been reassessed upon that role not materialising and her being offered the alternative of commercial co-ordinator.

Factors taken into account

The tribunal believed that the employer acted evasively in not operating its grievance procedure when K complained about the disparity in pay. It said that an employer who had a genuine reason would be expected to respond to the allegation and to advance that reason for the pay differential. The employer failed to investigate his grievance prior to his dismissal.

The tribunal also drew an adverse inference from the fact that the document prepared by the employer for the case set out that P's salary revision took place in March 2008. In fact, it was much later, but K only discovered this when evidence was produced on the first day of the hearing. The tribunal continued that 'the evasions and total lack of transparency cause us to doubt the genuineness of the Respondent's assertions'.

Compensation: £4,166 plus 50% uplift for failure to follow SGP.

Workforce: 35,000 employees in 40 companies.

Sector: telecoms.

Representation: claimant in person, solicitor for employer.

Salary structure: No.

Union involvement: No.

6.

C v F

21.7.10

Multiple claimants: No.

Facts

C was employed as Northern Field Sales Manager, and she sought to claim equal pay with the Southern Field Sales Manager, T.

LW/WRE/EV

The employer argued that there were fundamental differences between what C did and what T did. It argued that T looked after more depots, with more managers, and was responsible for bigger territories. The tribunal found that even though T looked after more depots, they both did the same things. It further accepted T's evidence that it was not so much the number of managers they both looked after but their requirements that was important – i.e. how much support they needed. T had a wider geographical area to look after but, again, that did not amount to a difference in his work compared to C's. The tribunal also rejected arguments that T had a 'bigger role' and more skills and experience. Even if he did some things that C did not, he did them infrequently and they were therefore not sufficient to amount to a practical difference between his and her work. Nor was there evidence that T was more autonomous than C. The tribunal found that C and T were employed on like work. (The same factors were then relied on as GMFs.)

GMF defence

- **number of depots, responsibility for managers and geographical area:** the tribunal did not accept these as GMFs. When the number of depots was decreased from four to three, after C had left, T's salary did not decrease. Nor was his salary reduced when the number of managers for which he was responsible decreased.
- **responsibility:** the employer argued that T had the 'bigger role', e.g., because he was training and mentoring C. The tribunal, however, found no evidence of this.
- **skills:** the employer failed to show that there was a significant difference in skills between C and T.
- **experience:** T did have more experience as a field sales manager than C did. Experience was therefore capable of amounting to a GMF, subject to the question of sex-tainting – see below.
- **autonomous working:** the tribunal found no evidence that T was a more autonomous worker compared with C.

Sex taint

Having found that T's experience was capable of amounting to a GMF explaining the pay differential, the tribunal nevertheless concluded that it was tainted with sex discrimination. The tribunal described the employer's pay practice as 'opaque' (para 52). It was not clear at all to the tribunal how the employer had arrived at C's and T's salary. There was no evidence that the company had ever considered the salary structure of its employees.

The company was specifically asked by the tribunal whether it had an equal opportunities policy and it said that it had. However, the company's answer in the sex discrimination questionnaire was that there was no such policy. The questionnaire also stated that there was no equal opportunities training within the company.

The tribunal also took into account the length of time the company was established (i.e. since the 1970s); the number of employees it employed at the relevant time (i.e. 150) and that it formed part of a group of companies. It also noted that the senior management team was predominantly male and that it had an HR department. All these factors allowed the tribunal to draw an inference that the pay practice was tainted by sex discrimination.

Compensation: not decided.

Notes

Company put into administration in July 2010.

Workforce: sales teams covering all of UK; 125 employees mostly based in Hull.

Sector: food distributor.

Representation: counsel for the claimant, representative for employer.

Salary structure: No.

Union involvement: No.

7.

I v K

21.5.10

Multiple claimants: No.

Facts

I claimed equal pay to a female comparator, B.

LW/WRE/EV

KC Ltd conceded that I and B were doing like work.

GMF defence

- **TUPE:** the employer argued that the difference in pay was because B had transferred to its employment following a TUPE transfer. The tribunal rejected this reason as a sham, as B was employed by the employer after the transfer and it was therefore not bound to pay her on the terms that it did. No other contemporaneous evidence was produced to explain why B had been paid more.

Compensation: £4,326.

Workforce: over 14 establishments nationwide.

Sector: children's homes, caring and support services.

Representation: claimant in person, consultant for the employer.

Salary structure: No.

Union involvement: No.

8.

H and ors v A

3.12.09

Multiple claimants: Yes – 9.

Facts

Following a reorganisation, two roles, IIO and SIO, were abolished and replaced by one new role, ISO. SIO roles were mostly held by men, involved slightly more responsibility, and were better paid than IIO roles, which were mostly held by women. Job-holders were assimilated into the new grade without loss of pay. This had the effect of maintaining the difference of over £10,000 between the highest paid SIOs (who were men) and the lowest paid IIOs (who were women). H, a former IIO, brought an equal pay claim on the basis of the new job role, comparing to men who were formerly SIOs.

LW/WRE/EV

The parties agreed that like work was established.

GMF defence

- **Historical factors**: it was agreed that the employer's policy of maintaining existing pay on amalgamation was effective cause of differential. There was a significant disparate impact as between the sexes, which called for explanation or objective justification. The tribunal found that the employer was unable to rebut the presumption of discrimination. While there was, historically, a justifiable distinction between the SIO and IIO roles, the decision to ring-fence both within the new ISO role amounted to the employer directly and knowingly creating a pay disparity. It did this even though the claimants and HR department had suggested that the policy had equal pay implications.

Compensation: adjourned to remedy hearing.

Notes

It was accepted that there were other ways that the employer could have managed the transition, e.g. by red-circling higher paid former SIOs until lower paid former IIOs caught up. The employer had considered this option and the tribunal indicated that this more limited pay protection could have been justified. So, this might be characterised as a case of the employer considering the issue but choosing the wrong solution. However, the tribunal did note that the concerns over discrimination had been raised, and so the employer's failure to address them is probably not excusable.

This decision has since been overturned on appeal. However, it is included as still giving useful examples of the kinds of issue in play.

Workforce: over 2,000 employees; variety of job roles and areas of expertise, from auditors and inspectors to legal and HR support staff.

Sector: public sector, NGO.

Representation: counsel on both sides.

Salary structure: Yes.

Union involvement: Yes.

9.

M v N

5.11.09

Multiple claimants: No.

Facts

M-G was employed as a part-time taxi driver. After three years in the job, when she worked on a contract taking disabled children to school, she became aware that her husband (who was a full-time taxi driver for the employer) and one of his colleagues were being paid at a higher hourly rate than her. When she raised this issue, the employer immediately increased her salary but it was still lower than her husband's. When the contract was not renewed, and M-G rejected the offer of a fixed-term contract, she was dismissed.

LW/WRE/EV

The tribunal found that M-G and her husband were employed on like work.

GMF defence

The employer failed to put forward a GMF defence.

Compensation: £3,264.11.

Workforce: unknown.

Sector: transport.

Representation: family member for claimant, employer not represented and did not appear.

Salary structure: No.

Union involvement: No.

10.

H v D

22.9.09

Multiple claimants: No.

Facts

H was offered a job as conveyancing paralegal at a salary of £13,000 p.a. in December 2005. On 1 December 2007 she began working under a training contract with a view to becoming a solicitor. Her comparator, A, was a paralegal in the mortgages department, who earned £20,300 p.a. in July 2007, at which time H was earning £17,500 p.a.

LW/WRE/EV

DS accepted that H and A were employed on like work.

GMF defence

- Experience: the tribunal found that, initially, A had more experience but this fell away relatively quickly. The tribunal concluded that it took H nine months' training in the job to match A's experience.
- Qualifications: the tribunal thought that this issue was neutral (i.e. neither in H's nor in A's favour) and, if pressed, it would have said that H was better qualified than A.
- Fee performance: this was again a neutral issue.
- Opening new files/generating new business: H had no say over the number of files given to her, and the tribunal found that A did not generate new business for DS.
- Payroll grades: the employer had payroll grades but it was not clear from the evidence that these were applied. The grading of fee earners was generally lacking in transparency and it was not clear what the arrangements were for setting salaries. In reality, the starting point was the expectation of the prospective employee.

- Targets: these were only operational in one year and, according to the tribunal, were hardly a benchmark, as they were only used for a relatively small proportion of H's time with the employer. Nor had the employer made clear how the targets operated and how they were linked to H's and A's performance.

The tribunal concluded that the GMFs were 'afterthoughts'.

Factors taken into account

While the employer had not consciously gone out of its way to breach the Equal Pay Act, the tribunal said that 'its failure to monitor and control salary in a completely transparent way led it to create the problem of unequal pay in this case. The respondent created an atmosphere whereby it discouraged employees to discuss their respective salaries. The claimant raised the issue of salary... occasionally but in a quiet way. Understandably, the claimant did not want to rock the boat too much as she was keen to retain her training contract in difficult times for the legal profession.' (para 50)

The employer asserted that at all times the claimant was in the appropriate pay band and graded according to her status and criteria. However, the pay grading was applied inconsistently. In fact, A was earning more than his grade allowed. The tribunal commented that 'the thinking of the respondent has been unclear at times and this lack of transparency has caused us real concern. It has been a significant feature in our conclusion that the respondent has failed to shift the burden of proof.' (para 48)

The employer had an equal opportunities policy but did not produce any significant evidence to show that it undertook any monitoring at all or carried out its requirements (para 21).

Compensation: £4,770.97 plus interest and 30% uplift for breach of SGP.

Notes

In the course of the judgment, the tribunal said that the respondent 'found the claim personally difficult to comprehend saying it: 'beggars belief' and was 'unreasonable and vexatious'. This is a mistake on his part and demonstrates a lack of understanding. We do not find that he was malicious in what happened, but his behaviour was unconscious, arising out of a lack of knowledge of the relevant issues, and a failure to adopt and use the systems the respondent said were in place.' (para 49)

Workforce: 46 employees, down from 76 two years previously.

Sector: conveyancing solicitors.

Representation: counsel for claimant, solicitor for employer.

Salary structure: No.

Union involvement: No.

11.

T v H

31.7.09

Multiple claimants: No.

Facts

T was not paid a Christmas bonus while on maternity leave. Her name was on the list of staff presented to the partners for bonus decisions and so they had clearly made a conscious decision not to pay her any bonus. T was eventually paid the bonus 'grudgingly' some seven months later, after raising complaints about it. The employer denied that the reason for non-payment was T's pregnancy. It argued that the bonus was entirely discretionary and that another woman also did not receive a bonus, negating a discriminatory intent.

Tribunal decision

There was enough to draw an inference of discrimination, which the employer had failed to show a sufficient explanation to rebut. Both the initial decision not to pay the bonus, and the 'grudging' manner in which it was eventually paid, indicated discrimination.

Compensation: not yet decided.

Notes

This was a case of direct sex and/or maternity discrimination, under the Sex Discrimination Act 1975, rather than an equal pay claim under the Equal Pay Act 1970. It is relevant only in so far as such cases will be subject to the same power to award a pay audit – see section 4, 'Policy considerations'.

Workforce: small firm of solicitors (3 partners); lawyers and support staff.

Sector: solicitors.

Representation: solicitor for claimant, counsel for employer.

Salary structure: No.

Union involvement: No.

12.

G and anor v I

7.5.09

Multiple claimants: Yes – two.

Facts

The claimants were catering staff working in a hospital café run by the employer. They sought to compare themselves with a porter, also employed by the employer, and also working at the hospital under a service contract. Porters were covered by a collective agreement applying across multiple hospitals. The employer contended that the café was a separate commercial venture to its service contract, and as such a separate and distinct establishment.

LW/WRE/EV

Yet to be determined.

Cross-establishment comparison

Tribunal took into account the degree of integration with which catering staff and porters performed their tasks – in particular, porters often assisted the caterers to move furniture in the café for the purpose of cleaning. It considered that to distinguish between catering and portering activities would be artificial. Both teams were subject to the same management structure and participated in similar workplace schemes. The hospital was therefore the establishment. In the alternative, the tribunal would have accepted that if there were different establishments, there was sufficient commonality of terms and conditions to satisfy the ‘same employment’ test.

GMF defence

- **Different commercial venture:** employer tried to rely on the separate tendering processes for the portering and catering services as a GMF, in particular the fact that the café service was being provided under a PFI model. The employer was negotiating that contract at around the same time that it agreed the collective agreement to be applied to the porters, and was aware that the union wished it to ensure the same terms and conditions for all its future employees at the hospital. The tribunal rejected this approach – nothing in the different commercial considerations detracted from the fact that the employer was the single source responsible for determining pay.
- **Commercial expediency:** linked to previous GMF, argument that the cost of agreeing same terms and conditions for catering staff as for porters would have made the café commercially unviable. Tribunal rejected on basis of insufficient evidence that the commercial constraints had genuinely been explored.

Compensation: n/a.

Notes

The claimants and comparator all came into the employer's employ by virtue of a TUPE transfer.

This case did not result in a finding of equal pay liability, being a pre-hearing review before the equal value hearing. It is included as a useful example of the issues involved for private sector contractors operating in the public sector.

Workforce: 70,000 employees in 40 countries; provide services to over 100,000 UK businesses.

Sector: outsourced hospital cleaning and facilities services.

Representation: counsel on both sides.

Salary structure: Yes.

Union involvement: Yes – union negotiated on collective agreements; union regional organiser gave evidence at the hearing.

13.

A v O

30.3.09

Multiple claimants: No.

Facts

A's and B's individual careers paths largely mirrored each other. In January 2007, the employer first became concerned that it was leaving itself exposed to an equal pay claim because A was underpaid for her job. Her manager made attempts to raise her salary by 30% but this was blocked by a senior manager. In September 2007, A was alerted to a 73% pay difference between hers and B's pay package. A raised a grievance about this. At this point, the pay differential was some £30,000. The employer investigated and proposed that A's salary should be increased by almost £15,000 and that B's pay should be red-circled until A caught up with him. Following an appeal, further adjustments were made to her remuneration.

LW/WRE/EV

The employer accepted that A and B were employed on like work.

GMF defence

- **Mistake:** the employer argued that B's pay should have been decreased in 2004 when he moved to his current job. It submitted that it was merely an error that this was not done. The tribunal rejected this argument. The tribunal accepted that B's base pay reflected his pay journey. There was a policy enforced in 2004 that, if applied to B, would have led to his base pay being reduced to

equate to the base pay of others doing like work. But the tribunal did not accept that the failure to reduce his pay was genuinely a mistake. Other employees' salaries were indeed reduced and all of these changes were noted on the relevant database. Clearly, attention was paid to this when roles changed. This, the tribunal said, 'raised the possibility that it was not a mistake but a deliberate act'. Accordingly, the employer did not prove this GMF.

Compensation: not specified.

Notes

A used the equal pay questionnaire, to which the employer responded. She also submitted a questionnaire under the Sex Discrimination Act 1975 in respect of a victimisation claim.

Workforce: over 75,000 employees in 145 countries.

Sector: software.

Representation: representation on both sides, not specified by whom.

Salary structure: Yes.

Union involvement: No.

14.

F v M

12.3.09

Multiple claimants: No.

Facts

F was a barmaid in a members' club. Along with allegations of sex discrimination, harassment and unfair dismissal she claimed equal pay with U, a barman who began employment in February 2007. The employer accepted that U was paid more but relied on U's willingness to be flexible with regard to hours and his responsibility for cashing up, which F had refused to take on. U left employment in April 2007. F was dismissed in July 2008.

LW/WRE/EV

Tribunal found like work on basis of broad similarity. It made no further reference to the point about responsibility.

GMF defence

- **Flexibility:** it was agreed between the parties that case law was against this as a GMF, so tribunal rejected it.

Compensation: £780 (65p per hour x 16 hours per week x 75 weeks).

Notes

An award could only be made in respect of the period after U joined. F tried to add other comparators who had been employed for longer but the application to amend was made out of time. It is likely that, if the claim had been formulated properly at the outset, F could have secured a bigger award.

The tribunal rejected the respondent's attempt to limit compensation to the period up until F left in July 2007, finding that the breach of the equality clause was ongoing once established.

Workforce: 4-5 employees doing bar work.

Sector: angling club.

Representation: counsel for claimant, solicitor for employer.

Salary structure: No.

Union involvement: No, although claimant has help from CAB in formulating grievance.

15.

C v T

15.7.08

Multiple claimants: No.

Facts

Claimant hired as a sales manager on a starting rate of £54 per day. C, her male comparator, hired at around the same time on £80 per day. Her pay was raised after two years to £60 per day.

LW/WRE/EV

Like work conceded.

GMF defence

None – the employer put forward no cogent reasons for how the two had come to be given different starting salaries. The tribunal had regard to information showing that 18 previous male employees in roles similar to the claimant's had all been paid more.

Compensation: not decided.

Notes

The tribunal refers in its judgment to the beginnings of a formal pay structure, introduced about a year before the hearing, under which the claimant and comparator had been graded differently.

The tribunal referred to the EOC Code of Practice on Equal Pay.

Workforce: over 100 employees, mostly sales and marketing professionals.

Sector: field marketing.

Representation: solicitor for the claimant, employers' organisation representative (EEF) for the employer.

Union involvement: No.

Salary structure: Yes.

16.

S v F

13.5.08

Multiple claimants: No.

Facts

While the claimant was off sick a male employee was taken on. He was employed alongside her after her return until her employment terminated two months later. She became aware that he was being paid £300 per week net instead of the £240 per week paid to female employees.

LW/WRE/EV

This was not specified. The tribunal apparently assumed that the claimant and comparator did like work.

GMF defence

None – there was no appearance from employer.

Compensation: £540.

Notes

The claimant also succeeded in claims for notice pay, holiday pay, expenses and unpaid wages.

Workforce: unknown.

Sector: hairdressing.

Representation: claimant in person, employer did not attend and was not represented.

Union involvement: No.

Salary structure: No.

17.

N v C

8.5.08

Multiple claimants: No.

Facts

The claimant worked in telesales. A male assembly worker from the shop floor was transferred, after a trial, to the sales team and appointed on a salary £2,000 higher than the claimant's. He and the claimant sold a similar range of products but he was out travelling while she was office-based. In May 2004, the claimant was moved to travelling sales as well, by which time there was a £350 difference in their salaries. Her salary then overtook his until December 2004 when he received a significant pay rise. He received further rises in April 2006 and November 2006.

LW/WRE/EV

The employer disputed like work, relying on a difference in the range of products each was selling. The tribunal found that like work was not established between 2001 and April 2004, when the claimant was office-bound and comparator was travelling, but that like work was established thereafter.

GMF defence

- **Experience:** the tribunal rejected the argument that the comparator's shop floor experience was relevant.
- **Pay protection:** the tribunal accepted that the need to preserve the comparator's higher salary, when he moved from the shop floor, was a GMF. However, that was only effective until May 2004.
- **Retention:** the tribunal accepted that the comparator had received a job offer from elsewhere and increased his salary in December 2004 to retain him – that was a GMF, but only for a limited period. The tribunal could find no explanation for the raises in July and November 2006 and so decided that the claimant was entitled to equal pay from then on.

Compensation: not decided.

Notes

The claimant also succeeded in a sex discrimination claim relating to various detriments around her maternity leave, including comments about her pregnancy. The tribunal found a concerted effort on the employer's part not to dismiss the claimant while pregnant or on maternity leave but to persuade her to find another job.

Workforce: includes factory floor and sales positions.

Sector: white goods manufacturing.

Representation: counsel for the claimant; solicitor for the respondent.

Union involvement: No.

Salary structure: No.

18.

P and ors v M

18.7.07

Multiple claimants: Yes – four.

Facts

The employer had two contracts to clean a customer's premises – one for domestic and office cleaning and one for cleaning the factory. All of the people working on the domestic and office contract were women, and they were paid less than the people working on the factory contract.

LW/WRE/EV

The employer argued that the claimants and their comparators were not employed on like work, but the tribunal rejected this. Apart from the different environment, the claimants did the same tasks and used the same methods as the comparators. Nor was there a different skills base. Thus, there were no differences of practical importance.

GMF defence

- **Market forces/third-party pressure:** no GMF was put forward initially but the employer sought to amend its defence at a late stage to put forward a market forces and third party pressure GMF. The tribunal rejected the application but nevertheless went on to state that the GMF would have been unsuccessful. The argument was that the customer placed greater value on the factory as opposed to the office contract (because the former could affect production) and, for this reason, the women were paid the NMW and the men were paid more. If that really was the customer's view, the tribunal said, it was 'far more probable than not tainted by old fashioned ideas of work being 'men's work' and 'women's work'".

Factors taken into account

The claimants' grievance was not replied to and an equal pay questionnaire was served but no answer was given.

Compensation: around £1,600 each plus 40% uplift for breach of the SGP.

Workforce: on facts of case, group of nine employees working on one contract compared to group of nine working on different contract in same location; employer is large company operating many such contracts nationwide.

Sector: outsourced cleaning services.

Representation: counsel on both sides.

Salary structure: No.

Union involvement: No.

19.

H v R

14.3.07

Multiple claimants: No.

Facts

H sought comparison with T, a man with long service who had held a number of different positions within the company at various times but was now doing the same job as her. Although they were notionally in the same pay band, H was paid at the bottom of the range and T was in fact paid in excess of the maximum.

LW/WRE/EV

Like work conceded.

GMF defence

- **Historical service-related pay:** the employer initially asserted that T had received service-related increments over the previous 20 years, which explained his current high salary. However, it could not provide evidence of a service-related pay policy nor any other cogent explanation of T's pay increase. The tribunal concluded that there was simply no reliable evidence to explain the pay disparity.

Compensation: £4,450.

Workforce:

Sector: charity/professional body.

Representation: not stated.

Salary structure: Yes.

Union involvement: No.

20.

C and ors v L

8.8.06

Multiple claimants: Yes – nine.

Facts

The claimants were box office staff and cleaners and their comparators were stage door staff. The claimants and comparators were engaged on terms negotiated by collective agreement and the difference in pay complained of related to the way overtime was calculated in respect of the three different groups of workers. There was a history of national bargaining in relation to pay scales for theatres across the country.

LW/WRE/EV

The tribunal's judgment related solely to the GMF defence. Another hearing to decide whether the claimants were employed on like work or work of equal value was to follow.

GMF defence

- **Collective agreement**: the tribunal found that this was a genuine explanation for, and cause of, the pay differential that was not the difference of sex. However, its implementation did have a disproportionate effect on the female members of staff because there were times when 'it appeared that there [was] a potential that the stage door staff would be paid more for working overtime than would the Claimants, even though the triggers would be the same'. For example, the door staff would be paid time-and-a-half on the sixth day of working but the box office staff paid at standard rate. The tribunal continued that 'in practice, it may be that this rarely, or never, [occurred], but we have no actual information to make any findings in that respect.' (para 14). The cleaners were predominantly and the box office staff were all female. The door staff were all male. The tribunal rejected the employer's argument that it had shown that legitimate and proportionate business reasons had been applied in the collective bargaining process to arrive at the different overtime pay for the different groups of workers. The tribunal said that it was 'wary', and did not simply want to take the view, of accepting that there was no inadvertent discrimination because this was a collective agreement (para 17). The parties concluding that agreement may have been intent on avoiding any discriminatory effect or may not have considered it. The tribunal could not assume

that the agreement did not discriminate against one gender, particularly where it was a national agreement that was applied locally. It therefore found indirect discrimination, but decided to let the employer address it on the question of objective justification only after it had made findings on the question of equal work.

Compensation: not decided.

Notes

An equal pay questionnaire was submitted and answered.

The claim has not been finally determined – this was a Stage I hearing at which the GMF was rejected, subject to objective justification. The case is included as an example of a private sector employer facing the issue of an indirectly discriminatory salary structure, an issue that more commonly arises in the public sector.

Workforce: 19 employees relevant to the claim; three main job types – box office, cleaning and stage door.

Sector: arts.

Representation: counsel for claimants, solicitor for employer.

Salary structure: Yes.

Union involvement: Yes – BECTU negotiated collective agreement.

21.

C v S

3.8.06

Multiple claimants: No.

Facts

The claimant worked in sales/customer relations, working solely on commission. However, she was paid £260 per week, being the average commission she could expect to make over the course of a year.

LW/WRE/EV

The employer disputed that the claimant did like work with her chosen comparator, asserting various reasons, including that other sales staff had more responsibilities or a larger geographical area to cover. The tribunal found that any differences in practice were not significant enough to undermine the likeness of the work.

GMF defence

- **Employment status:** the employer argued that, from 1999 to 2001, the claimant was self-employed and only became an employee later on. In the alternative, if the tribunal were to find that she was in fact an employee during this period, its belief in her self-employed status was genuine and non-discriminatory and so could validly explain the difference in pay. The tribunal found that the claimant was in fact an employee and accepted that the employer could rely on a genuine belief as a GMF.
- **Pension age:** the employer argued that from 2001 the claimant was over the state pension age. The tribunal rejected this on the basis that the state pension age is itself based on sex and so cannot be a sex-free GMF.

Compensation: not decided.

Notes

The claimant submitted a statutory questionnaire. The employer responded – it did not deny that the claimant carried out like work to her proposed comparators, but referred to its GMF based on state pension age.

Workforce:

Sector: stationery supplies.

Representation: counsel for the claimant, solicitor for the employer.

Salary structure: No.

Union involvement: No.

22.

S v A

24.5.06

Multiple claimants: No.

Facts

The female claimant was employed in customer services on £17,000. A male new-starter was appointed on £22,000, being more or less salary he was on at previous job.

LW/WRE/EV

Like work conceded.

GMF defence

- **Market forces:** the employer argued that each was paid what was necessary to attract and retain them, having regard to their different skills and experience. The tribunal rejected that defence in the absence of evidence as to what the market rates really were – it is incumbent on a respondent to provide such evidence if it wishes to rely on a market forces defence. The tribunal noted that, even if it had accepted market forces as a GMF, it would have found it tainted with sex. There was no pay transparency nor any attempt to introduce an equal opportunities policy. Tribunal also relied on the employer's initial attempt to deny presence of like work, and its unfounded assertions about how other pay differences in the company were justified by different skills and experience, as reinforcing a presumption of discrimination.

Compensation: parties to attempt to agree remedy between them.

Notes

The tribunal noted the absence of a systematic wage structure – individuals were appointed at the rate the company considered appropriate, with increases based partly on cost of living and partly on discretion. The tribunal also referred to the lack of an equal opportunities policy or equality training.

The claimant was alerted to the pay disparity by a higher-paid male employee, who informed her of rights under Equal Pay Act.

Workforce: at least two UK sites; claim relates to customer services but clear that most employees would have different jobs, e.g. software development.

Sector: software.

Representation: solicitor for the claimant, consultant (Peninsula) for the employer.

Salary structure: No.

Union involvement: No.

23.

C v T

2.3.06

Multiple claimants: No.

Facts

In 2001 C was promoted to national account manager on a salary of £30,000 p.a. Her predecessor in the job, H, had been paid £34,250. Her salary was decided on based on the manager's experience and knowledge of industry and competitor's rates.

LW/WRE/EV

The employer conceded that C and H had been employed on like work.

GMF defence

- **Merit increases:** the employer argued that H developed into the role more quickly and therefore warranted merit awards. In the tribunal's view, this argument sufficed to show the reason for the difference when C was first promoted in 2001 – the starting salary for both T and H reflected market conditions prevailing at the time. However, two years was the expected learning curve for the role and, by the end of 2003, C's performance appraisals showed that she was developing into that role. By and large, her appraisals were better than those of her predecessor, yet during the entire period up to the date of her tribunal claim, she did not receive a single merit increase. The employer argued that pay was not dependent on appraisals but the tribunal said that it expected to see some kind of relationship where the one is reflected in the other, even if there is no formal linkage. In any event, if merit awards were not based on appraisals, recommendations to the Executive Board for merit awards were based upon subjective considerations. The tribunal found that there was 'an almost complete lack of transparency about the system'. This lack of transparency, the tribunal continued, created a risk that the procedures were open to abuse or misuse, that is either conscious or unintentional but subconscious bias for any reason which might involve unlawful reasons. Inferences could be drawn and the employer did not persuade the tribunal that its award system was free from gender bias.

Compensation: to be calculated by the parties.

Workforce: 400 staff; part of a larger group of companies; claim relates to sales/marketing work but company also employs manufacturing staff.

Sector: manufacture and distribution of shower units.

Representation: counsel for claimant, consultant for employer.

Salary structure: No.

Union involvement: No.

24.

F v L

23.12.05

Multiple claimants: No.

Facts

The claimant was employed in an admin role, which attracted no overtime, shift allowances or bonuses. Her comparator was transferred onto like work with her from an operational role, which attracted several enhancements that had the effect of doubling basic pay. A pay protection arrangement was in place, agreed between unions and management, but the comparator did not fall within its terms. Nonetheless, he asked for and was given a higher salary than usual for the admin role, around £3,500 more p.a. than the usual starting rate.

LW/WRE/EV

Like work conceded.

GMF defence

- **Pay protection:** the employer asserted that the comparator was covered by the pay protection policy when appointed. The tribunal rejected this – the basic pay for the admin role was higher than the basic pay for the operational role (ignoring the additional payments), and so pay protection could not have been applied. The real reason for the higher pay was that the comparator asked for it and the employer gave it to him. The statistics showed a pay disparity in favour of men and so the tribunal concluded that the real reason was sex-tainted. It held that it was not a justifiable business aim.

Compensation: parties to attempt to agree remedy between them.

Notes

The manager with whom the claimant initially raised a complaint about a pay differential did not recognise it as an equal pay issue, although she was aware that the differential arose from red-circling. She was unaware of the requirements of the (then) EOC Code of Practice on Equal Pay. The tribunal noted that, had the employer conducted an equal pay audit as the Code recommends, it would have found the gender disparity that red-circling had created or maintained.

Workforce: large employer, including both administrative and operational divisions; subsidiary company of Transport for London, which is a statutory corporation regulated under local government finance rules.

Sector: transport.

Representation: counsel on both sides.

Salary structure: Yes.

Union involvement: Yes – unions had agreed the pay protection policy that the company sought unsuccessfully to pray in aid as a defence, but had no apparent involvement in the claimant's case or the pay protection that the comparator secured outside that policy.

25.

M v I

15.9.05

Multiple claimants: No.

Facts

M was employed as head housekeeper for a hotel for which the employer provided cleaning and housekeeping services. She claimed that she was entitled to be paid equal pay with D, a male housekeeper, employed at another hotel. The difference in basic pay for the relevant period was £635.

LW/WRE/EV

The employer accepted that M and D were employed on like work.

GMF defence

- **Size of workplace:** the employer said that head housekeepers' pay could vary depending on the size of the hotel. However, the tribunal found there to be no formal system or scale relating pay to hotel size. Further, when D moved from a 390-bed hotel to a 201-bed hotel, his salary stayed the same. The hotel where M worked had 212 beds. The tribunal also noted that there was no evidence of any salary protection arrangements.
- **Service contract value:** the employer also suggested that pay depended on the amount it received under the service contract with the hotel client, but no evidence linking its gross income with the head housekeeper's pay level was produced.
- **Experience:** the tribunal found that there was no evidence to substantiate the employer's argument that the pay differential was due to M's and D's different levels of experience.

Compensation: £635.

Notes

The employer failed to produce any evidence to justify the difference in pay. However, the tribunal said that, given the modest discrepancy in pay, it would have been very hard for the employer to have attributed the differential to some specific cause and believed that the difference in pay owed more to chance than anything else. Nevertheless, M had proved she received lower pay than her comparator and the employer failed to make out the statutory defence.

The tribunal concluded by saying that 'if the Respondents wish to avoid liability of this sort in future they can only improve their chances of doing so by introducing a coherent, transparent, criterion-based system of pay awards' (para 29).

Issues of establishment would clearly arise in any case, given wide variety of locations at which services are provided.

Workforce: 43,000 employees in the UK; 485,000 in 53 countries globally; wide range of services (and hence job types), including catering, cleaning, security and property management.

Sector: outsourced services.

Representation: community centre representative for claimant, solicitor for employer.

Salary structure: No.

Union involvement: No.

26.

W v T

7.1.05

Multiple claimants: No.

Facts

W started work as a sales executive in July 2001 on a salary of £14,000 per annum, rising to £16,995 p.a. in January 2003. She was also entitled to commission. In 2003 the employer employed a further sales executive, S, on £19,000 pa plus commission.

LW/WRE/EV

The employer accepted that W and S were employed on like work.

GMF defence

- **Geographical area**: the employer argued that S was paid a higher basic salary because he worked in a territory that was likely to generate less commission. The tribunal rejected this argument because, from June 2004, S and W swapped territories and W's salary was not increased.
- **Market forces and experience**: the company further alleged that, bearing in mind S's experience, it had to pay him a higher salary to secure his services. The tribunal rejected this argument. The employer did not put forward any evidence as to S's earnings before he joined the company or about the market rate paid by competitors. The tribunal also found that any differences in their CVs were negligible and that, by the time S joined, W had already accumulated two-and-a-half years' experience. Thus, there was insufficient difference in experience to justify the difference in basic pay.

Compensation: £1,252.

Notes

This case dates from before the statutory grievance procedures (SGPs) came in. If they had been in force when S presented her complaint, she would not have been entitled to bring the claim because she did not raise a grievance.

W submitted a sex discrimination questionnaire in which she referred to the equal pay issue. Before the tribunal, it was accepted that she was not bringing a sex discrimination complaint but an equal pay claim.

Workforce: claim relates to sales staff, but reference also made to operations managers; company also employs drivers, warehouse operatives, IT, customer services, etc.

Sector: logistics.

Representation: claimant in person, employer represented by Director.

Salary structure: No.

Union involvement: No.

27.

O v P

21.9.04

Multiple claimants: No.

Facts

The claimant worked for the employer as a tutor. She was paid around £2,000 less than a male tutor who had an almost job description. She in fact had more qualifications than him and was able to assess trainees for NVQ purposes, which he could not do. When the claimant discovered the salary difference the employer remedied it only partially.

LW/WRE/EV

The employer relied on minor differences to dispute the likeness of work. Tribunal found these to be insignificant and found like work.

GMF defence

- **Experience:** the employer claimed the male comparator had more experience. The tribunal rejected this assertion as unfounded, having regard to his CV.

Compensation: £4,171.48.

Notes

The claimant also succeeded in claims of disability discrimination, unfair dismissal and wrongful dismissal.

The claimant discovered the comparator's higher pay when she happened by chance to see his payslip.

Workforce:

Sector: educational services.

Representation: CAB for the claimant, consultant (Peninsula) for the employer.

Salary structure: No.

Union involvement: No.

28.

R v D

7.9.04

Multiple claimants: No.

Facts

The female claimant and male comparator were both employed as underwriting controllers. She was on grade B6 at £22,000 p.a. and he on B7 at £24,500. The pay grades set down a range of salaries, and increases were given according to an annual appraisal, by agreement with the recognised trade union. The claimant first raised the issue of pay inequality in 2003 but the employer initially took no action. She pointed out that her comparator earned over £13,000 more than her in 2002, taking into account overtime payments and bonuses to which she was not entitled. The employer agreed to investigate and the claimant received a pay increase, but issues such as her comparator's entitlement to overtime remained unresolved. Neither she nor her comparator was contractually entitled to overtime payments. She complained that he was being given discretionary payments to reward additional hours worked, even though she also did extra work. She claimed equal pay in respect of basic pay, and sex discrimination in respect of her non-entitlement to overtime and bonus payments.

LW/WRE/EV

Like work conceded.

GMF defence

- **Performance:** the employer based its defence on the difference in performance appraisals, which rated the claimant as a 'safe pair of hands' but her comparator as a high-flyer. The tribunal accepted this factor as a GMF until April 2003. However, an appraisal then resulted in an increase of 4.5 per cent for the claimant and 5.8 per cent for the comparator. The phraseology used in each appraisal was not significantly different and the tribunal could see no objective reason why the comparator should have been marked higher. It therefore rejected the GMF to this limited extent.
- **Retention:** the tribunal accepted that a part of the comparator's pay increase in 2003 was designed to retain him in the face of interest from another employer. It accepted that the GMF was valid for that period.

Sex discrimination defence

The employer argued that the claimant's department was not understaffed to the same extent as the comparator's was and that this was the reason for the difference in treatment. It also pointed out that both were expected to work additional hours as and when necessary as part of their contractual duties. The tribunal rejected that explanation. It found that the claimant was a hardworking woman left to work additional hours without financial reward, while a male employee was substantially rewarded as the result of discretion exercised by a male manager. In those circumstances it felt entitled to draw an inference of sex discrimination and, in the absence of an adequate explanation, to uphold the claim.

Compensation: not decided.

Notes

The claimant submitted statutory questionnaires to which the employer responded with statistical information.

Workforce: over 20 employees.

Sector: insurance.

Representation: counsel for both.

Salary structure: Yes.

Union involvement: Yes – recognised trade union.

29.

P v O

28.7.04

Multiple claimants: No.

Facts

In 1999 P became regional director on a salary of £40,000 p.a. Three colleagues, R, W and H, were all paid more than her, with R earning the highest salary at £55,000 p.a. All four were graded as Level 6 Range 3 on the pay scale.

LW/WRE/EV

The employer conceded that P was employed on like work with her comparators.

GMF defence

- **Market forces:** the employer claimed that it had acted in response to a real business need, but the tribunal saw no evidence of market testing. No steps were taken, at the time of recruitment, to obtain information about the market rate.
- **Responsibility:** the employer argued that R was paid more because he had special responsibility of a project. The tribunal rejected this. There was no evidence that this was reflected in R's salary on appointment and his involvement with the project was not more demanding than work done by P.
- **Complexity:** the employer submitted that W and H's higher salary was largely due to the complexity and demands of the contracts they were responsible for. However, the tribunal found no evidence that greater skills were required to manage an inner-city contract.
- **Experience:** the tribunal also rejected the submission that W and H had more experience than P.

Factors taken into account

The tribunal found that the employer failed to follow a fair recruitment process for the higher-paid positions. Two posts were not advertised externally and internally but the recruiting managers appeared to simply 'handpick' their candidates.

The tribunal also found that, although the company had an equal opportunities policy, it repeatedly disregarded it and thought it was sufficient to demonstrate a business or commercial need in order to ignore its provisions. Instead, it preferred to select candidates for appointment on subjective criteria and fixed salary levels in disregard of its formal pay policy.

The tribunal found that the employer sought to rely on 'anecdotal evidence' to explain the difference in pay (para 33).

Compensation: to be calculated by the parties.

Notes

The tribunal noted that the employer had introduced a salary scheme, based on experience, skills, knowledge and ability, but after a few years it fell into disuse and salaries were again determined on an ad hoc basis. Individuals would know their classification and their own salary but not where they fell within a salary band. According to the tribunal, the employer only operated an objective pay structure for a few years.

It seems that P only looked into the pay issue when she found out that she received a less favourable severance package on redundancy than her comparators. The tribunal found that the employer discriminated against her on the ground of her sex by offering her a less favourable severance package, and awarded her £2,500 for injury to feelings.

Workforce: divided into operational, administrative, technical and finance staff.

Sector: waste management.

Representation: counsel on both sides.

Salary structure: Yes.

Union involvement: evidence at tribunal from union representative, but no apparent involvement in negotiating pay structure.

30.

I v S

19.7.04

Multiple claimants: No.

Facts

The claimant was an office-based administrator, paid £6.33 per hour. A man appointed after her was paid 30p per hour more.

LW/WRE/EV

The employer conceded that there was a broad similarity between the claimant's and comparator's jobs but sought to rely on differences in quality and volume of work, and different qualifications, to negate like work. The tribunal rejected the argument on qualifications as the employer was unable to specify which qualifications were relevant for the job. The suggestion of higher volume was based on a manager's perception, not backed up with objective evidence. And as to quality, the tribunal could not see how this could apply since the difference in pay was present right from the start of the comparator's employment.

GMF defence

- **Quality of work:** the tribunal analysed this factor under the heading of like work, but notes that the employer mentioned it in the context of GMF. The tribunal rejected it for reasons already noted in relation to like work.

Compensation: £3,900 (including award for unfair dismissal).

Notes

The claimant also brought a claim of sex discrimination in redundancy selection, which was dismissed.

The defence based on the dispute over like work gives the impression of the employer opportunistically seizing on minor differences, rather than a genuine belief in the unlikeness of work.

Workforce: at least 27 employees, several locations; office-based roles (like claimant) as well as mobile engineers.

Sector: installing and repairing commercial refrigeration units.

Representation: claimant in person, solicitor for employer.

Salary structure: No.

Union involvement: No.

31.

L v A

16.6.04

Multiple claimants: No.

Facts

L, who is of black Caribbean ethnic origin, began working for the employer as assistant database administrator, deputising for U. When U left, she took over his job. She claimed she should have received equal pay with U after taking over his role. He was appointed in 2000 on a salary of £18,000 p.a. By 2002 L was being paid £16,000 p.a. as database administrator. In summer 2003 the employer sought advice on salaries from independent consultants and was advised that database administrators such as L earned between £18,000 and £22,000 p.a. L's salary was increased to £17,430 p.a.

LW/WRE/EV

The employer accepted that L and U were employed on like work.

GMF defence

- **Experience:** U had previous housing experience, which the tribunal did not believe to be relevant to the database administrator post. In any event, the tribunal found that this did not seem to have played any role at the date of U's appointment and did not have any effect on the setting of his salary.
- **Qualifications:** the employer argued that U was paid more because he was a graduate. However, the tribunal found that this was never treated by the employer itself as an important factor when U was appointed. Furthermore, a graduate's qualifications were not relevant to the database administrator's job.
- **Skills:** the employer also said that U had initiative, was able to prioritise work deadlines, was good at teamwork and socially adept. The tribunal saw little, if any, evidence about this. For example, it did not see any of U's appraisals. The employer also conceded that L had coped well when she moved into U's job prior to being officially appointed as his successor.

Factors taken into account

The tribunal was concerned that, following the salary review, L was still paid below the market rate. In fact, the independent consultants had set the minimum at £18,000 a year, whereas the employer had stipulated that the bottom of the salary range was £16,000. The tribunal said this was 'perhaps an attempt at justifying why the Applicant even at 1 July 2003 was only being paid £17,430, which is still under the minimum of £18,000 as recommended by the consultants' (para 9(ii)).

There was 'a lack of transparency in the pay policy, and decisions about pay were often the subjective and unstructured judgement of individual managers' (para 9(iv)).

The tribunal noted 'the absence of a coherent equal opportunities practice, with no effective monitoring of the rudimentary equal opportunities policy in existence and no equal opportunities training of the board or of its officers (para 9(iv)).

Compensation: remedy hearing was listed.

Notes

An equal pay questionnaire was sent to the employer and answered.

The tribunal also found that the employer discriminated against L on the ground of race in respect of her pay.

Workforce: 18 employees.

Sector: professional association, registered charity.

Representation: counsel for claimant, solicitor for employer.

Salary structure: No.

Union involvement: No.

32.

M v B

15.6.04

Multiple claimants: No.

Facts

Claimant was a banker in an investment bank. She claimed her guaranteed bonus of £125,000 was lower than that paid to several comparators, ranging between £156,000 and £469,000. She also complained of sex discrimination in the failure to pay her a discretionary bonus, which some of those comparators had received.

LW/WRE/EV

Like work accepted.

GMF defence

- **Employee value:** the employer had offered guaranteed bonuses in order to retain staff following a merger. It explained the difference in level and duration of bonus awarded to each employee by saying that it reflected the employer's view of the value of the employee's continued service to the bank. The tribunal accepted that that was a genuine and material reason for the difference, and that it was not a sham, but was not satisfied that the reason was not sex-tainted. It noted that the employer had not provided details of its decision-making process and had refused to answer the questionnaire.

Sex discrimination defence

The employer argued that not everyone got a discretionary bonus and that the statistics did not show a gender-related disparate impact. The tribunal rejected those statistics as irrelevant and drew an inference of discrimination based on the surrounding facts. It noted the employer's argument that discretionary payments were related to individual performance, and did not dispute that that was so, but found against the employer on the basis of lack of transparency. As with the equal pay claim, the employer had failed to give full details of the reasons why individuals had been awarded their respective bonuses.

Compensation: not decided.

Notes

The claimant also succeeded in a sex discrimination claim based on the employer's decision to redeploy her following maternity leave, and victimisation in relation to employer's handling of a grievance.

The tribunal noted the lack of equal opportunities training, equal pay review or monitoring. The employer was unwilling to record reasons for bonus decisions, insisting simply that the process was fair.

The claimant put in two statutory questionnaires seeking details of comparators' bonus payments and appraisals. The employer refused to provide information on the basis that it was confidential.

The remedies hearing never took place. There was a 'without prejudice' offer of compensation which led to further litigation.

Workforce: French company with London branch; 6,600 UK employees, including subsidiaries; 205,000 employees in 80 countries.

Employer sector: banking.

Representation: counsel for claimant, QC for employer.

Salary structure: No.

Union involvement: No.

33.

E and ors v M

4.5.04

Multiple claimants: Yes – 46.

Facts

The employer wished to change shift patterns in its Stockport factory. Various groups of were given a payment of just under £300 in return for agreeing to the change in shifts. These groups, including production line workers, were mostly male. The employer sought to apply the same working hours changes to packing and catering employees without making any payment. These workers were mostly female. They brought claims under the Sex Discrimination Act 1975 and Equal Pay Act 1970. The tribunal had to determine whether the payment were contractual, so as to bring them within the scope of the EqPA. It decided that they were and so the equal pay claims could proceed.

LW/WRE/EV

Did not arise.

GMF defence

Did not arise.

Compensation: did not arise.

Notes

This case did not lead to a finding of liability, considering only the preliminary point of whether the claims were properly brought under the Equal Pay Act 1970. However, the judgments database

indicates that settlements were reached, suggesting some merit in the legal arguments put forward by the claimants. The case is at least an illustration of the kind of situation that may give rise to a successful equal pay claim, in which the tribunal would have to consider the form of order to make, if any.

Workforce: hundreds of employees and dozens of stores nationwide.

Sector: retail.

Representation: counsel on both sides.

Salary structure: No.

Union involvement: Yes – union representatives involved in negotiating on claimants' behalf, raising grievance and seeking solution outside employment tribunal. The tribunal also mentioned the involvement of a works council.

34.

M and anor v P

19.3.04

Multiple claimants: Yes – two.

Facts

The claimants, M and J, were legal advisers/caseworkers in a charitably funded organisation providing advice and assistance in immigration and employment matters. They sought comparison with P, a man who was appointed on the same salary and grade as them but given pay increases when the claimants were not. He was later promoted to a supervisor position. It was accepted that the employer was 'grooming' P – a senior employee was due to leave soon and P had been recruited as a potential replacement. It gave him the salary increases to recognise the fact that he was 'heading upwards'. When P left employment, the two claimants took on his work between them for no extra pay. M then left and J took over the work by herself but still received no pay increase.

LW/WRE/EV

The tribunal found like work, but only in relation to certain periods. Like work was established before P was promoted, but not thereafter. During the time that M and J between them took on P's work after he left, they were still not engaged on like work, since they had split P's work and so neither one was doing like work with P. However, when M left, J was doing like work with P's full role, and so the tribunal found equal pay liability only for that short period.

GMF defence

- **Grooming:** the tribunal accepted that it was legitimate for the employer to pay increases before P was promoted.

Compensation: £766.

Notes

The claimants also argued sex discrimination on the basis that P was entitled to pension contributions and they were not. The tribunal rejected the claim, finding that there were legitimate commercial reasons for the difference in treatment.

The claimants also succeeded in victimisation claims, based on various detriments suffered by reason of having brought the equal pay claims.

Workforce:

Sector: voluntary, registered charity.

Representation: claimants in person, counsel for the employer.

Salary structure: No.

Union involvement: No.

35.

W v G

27.10.03

Multiple claimants: No.

Facts

The senior clerk in the respondent chambers was employed on around £90,000. When she left, the junior clerk was promoted and paid £50,000 and the claimant was hired as administration and practice manager, to take on the more business-oriented aspects of the senior clerk role, on £42,000. She had negotiated up from chambers' opening offer in the range £35-40,000, based on her current higher salary. Chambers essentially paid what it thought it could afford, i.e. little more in total for the claimant and the junior clerk than was paid to the senior clerk. The claimant was told on appointment that she would be considered equal to the promoted junior clerk. She claimed equal pay in comparison with him.

LW/WRE/EV

Equal value accepted.

GMF defence

- **Length of service:** rejected by the tribunal for lack of evidence – the pay records for the two previous years did not show any incremental system based on service. Moreover, having regard to statistics showing that clerking was a male-dominated world, the tribunal thought that the factor would be sex-tainted.
- **Experience:** chambers relied on the fact that the clerking role required on-the-job experience of the legal industry. However, the tribunal noted that the practice manager role required equivalent amounts of business experience, albeit gained in a different environment. Given chambers' acceptance of equal value, the tribunal could not accept this as a significant and relevant material difference.
- **Responsibility for staff:** the tribunal also rejected this as insufficiently material, given that equal value had been conceded.
- **Market forces:** the tribunal accepted that this was a valid GMF for the first three months of the claimant's employment. Chambers came to a compromise between several competing considerations – their budget for replacing the senior clerk; what it would take to retain the services of the junior clerk; and what it would take to attract the claimant as best-qualified candidate. It held that this GMF was not sex-tainted since the same salary would have been given to a male applicant in the claimant's position. However, this no longer applied once the claimant had come to the end of her probation period and her duties were increased to be comparable to those of the clerk.

Compensation: £5,000.

Notes

The claimant had responsibility for payroll and discovered the pay disparity herself.

The tribunal referred to the EOC Code and took into account the 'non-transparency' of the respondent's pay system, noting that the claimant and the clerk would not have been able to understand how their pay was set, as the Code recommends.

Workforce: around 35 employees/barristers.

Sector: barristers' chambers.

Representation: counsel on both sides.

Salary structure: No.

Union involvement: No.

36.

B v C

15.9.03

Multiple claimants: No.

Facts

The claimant was employed as 'International Channel Manager' with responsibility for sales. She and H, her comparator, had the same sales targets and were both struggling to meet them. For almost all the time they were employed together, H's basic salary was £3,000 higher than the claimant's. Both were entitled to receive commission.

LW/WRE/EV

Like work conceded.

GMF defence

- **Market forces/greater experience:** the employer argued that H was on £42,000 including commission when he was recruited and that his higher basic pay was necessary to attract him. Tribunal did not accept, on the evidence, that H's previous earnings were that high. There was no evidence to show that the employer had taken current earnings into account when it employed H, or considered his experience when deciding on a higher salary. Tribunal was satisfied that the figure was not the product of any assessment of H's value in the market place.

Compensation: not decided, parties encouraged to negotiate settlement.

Workforce: 21; part of a US-based group employing around 250 people.

Sector: software.

Representation: counsel on both sides.

Salary structure: No.

Union involvement: No.

37.

T v F

15.8.03

Multiple claimants: No.

Facts

The claimant was a Sales Executive. She went off on maternity leave. During her absence, the company appointed a man, P, to be Sales Manager, who took over responsibility for the claimant's customers. He was also notionally head of the Sales Department, although that consisted of just him. He was paid more than the claimant. During her maternity leave and after her return, the employer was trying to push the claimant into an Internal Accounts Manager role, leaving P with greater responsibility for sales. The claimant argued that this amounted to constructive dismissal and that, since P was doing her old job, she was entitled to equal pay compared to him.

LW/WRE/EV

Like work conceded.

GMF defence

- **greater responsibility:** the employer argued that P had a wider range of responsibilities and it was suggested that he might oversee the claimant's work on her return. The tribunal rejected that assertion, finding that the claimant was equally responsible for the main duties undertaken by P, such as winning large accounts and making management reports.

Compensation: not decided, insufficient evidence.

Notes

Claimant also succeeded in constructive dismissal claim.

Workforce: 11, reduced by redundancies from 28 the previous year.

Sector: printing.

Representation: counsel on both sides.

Salary structure: No.

Union involvement: No.

38.

S v G

31.7.03

Multiple claimants: No.

Facts

The claimant was employed as a bakery supervisor paid £5.34 per hour. She claimed parity with three male supervisors working on different food production in other parts of the factory, paid up to £5.68 per hour. The claimant and her comparators all spent a significant amount of their time doing hands-on, non-supervisory work. The pay system had grown up on an ad hoc basis. Although the trade union USDAW was recognised and negotiated annual minimum rates, employees were often employed at a higher rate.

LW/WRE/EV

The employer denied like work. The tribunal found, despite differences in type of food being produced, that the relevant jobs were broadly similar and so like work was established.

GMF defence

- **Seniority/experience:** the employer argued that longer service and greater experience entitled employees to request ad hoc pay increases. The tribunal found that this did not genuinely explain the pay differentials – even as between the comparators, there was no direct link between length of service and pay.
- **Market forces:** the employer tried to argue that different skills attract different prices in the market place. The tribunal declined to accept that argument in the absence of a consistent rate being applied to those with the same skills.

Compensation: not decided.

Notes

The claimant also argued sex discrimination based on the discretionary bonus. That part of the claim had been withdrawn in error at the directions hearing. The tribunal allowed the claim to be reinstated but adjourned it to a later date.

The claimant discovered ‘by accident’ that one comparator was paid more than her. The tribunal referred to the ‘transparency’ requirement set out in the EOC Code of Practice.

Workforce: several sites, covering a food factory (including the bakery) and several local shops; facts suggest between 50-100 employees in factory; later bought out by Co-Operative Group, which is now the holding company.

Sector: food production.

Representation: counsel for the claimant, solicitor for the employer.

Salary structure: No.

Union involvement: USDAW supported the claimant in pursuing an internal grievance and represented her at a directions hearing.

39.

W v C

11.6.03

Multiple claimants: No.

Facts

The claimant was initially employed as a security guard, then became control room supervisor. She was paid at £5.06 per hour. She discovered that some male supervisors were being paid £6.31 per hour. After she complained she was given a new contract with the higher rate of pay, by which time the difference had persisted for two months.

LW/WRE/EV

Like work conceded.

GMF defence

None – employer conceded liability.

Compensation: £468.

Notes

The claimant also succeeded in sex discrimination claims based on, among other things, being issued a man's uniform, withdrawal of promotion, and sexual harassment. The tribunal noted that the employer operated in a culture that 'pays little or no heed to women's sensitivities'.

Workforce:

Sector: security services.

Representation: claimant and employer both represented, not specified by whom.

Salary structure: No.

Union involvement: No.

40.

W and ors v P

15.1.03

Multiple claimants: No (although brought at same time as non-equal pay claims from eight other employees).

Facts

The claimant asserted that she had been paid less than one of her co-claimants, M, for the same work – her title and responsibility were in fact more senior.

LW/WRE/EV

Like work.

GMF defence

None – employer did not appear.

Compensation: £2,091.35.

Workforce:

Sector: recruitment.

Representation: claimant in person; no appearance by employer.

Salary structure: No.

Union involvement: No.

41.

R v A

31.10.02

Multiple claimants: No.

Facts

The claimant's job title was 'Sales Manager', a post previously held by a man who had been moved into a different role. There was no suggestion of any change in duties between his vacation of the role and the claimant taking it up. She was engaged on £18,500 whereas he had been paid £27,000.

LW/WRE/EV

The employer disputed the equality of work but the tribunal found that like work was established. The job advertisements by which each had been recruited were much the same and the nature of the roles was broadly similar.

GMF defence

- **Experience:** tribunal rejected the defence having examined the CVs of the claimant and the comparator. If anything, the claimant had more experience than the comparator.

Compensation: not decided.


Workforce: subsidiary of large company.

Sector: newspaper publishing.

Representation: counsel on both sides.

Salary structure: No.

Union involvement: No.



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ISBN: 978-1-84987-914-9

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