EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs V Hawkins	**v**	**Squad Security**

Heard at: London Central
On: 9 – 17 October 2017

Before: Employment Judge Hodgson
Ms S Samek
Ms E Flanagan

Representation
For the Claimant: in person
For the Respondents: Mr M Delaney, solicitor

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 22 February 2016 the claimant brought claims of direct discrimination, victimisation, and equal pay.

The Issues

2.1 The issues in this case were clarified and set out in the case management hearing before Employment Judge Hodgson on 3 April 2017.

2.2 There are three remaining claims: the equal pay claim; allegations of direct sex discrimination; and allegations of victimisation. The specific issues as identified in that case management discussion are as follows:

> **2.5 There is an equal pay claim. It is the claimant's case that the work she undertook as a retail security guard was exactly the same as the work**

undertaken by Edition security guards. The claimant confirmed that it is no part of her case that the jobs were different, but should be treated as of equal value or rated as equivalent. It was therefore agreed that the matter should proceed on the basis that the claimant undertook like work to her comparator.

2.6 One comparator was identified, Mr Gashi. On the first day of the liability hearing, Mr Delaney conceded that there was no issue in relation to establishment. At this case management discussion on the 6th day, Mr Delaney suggested that if the claimant relied only on Mr Gashi, there may be an issue as to the establishment. I confirmed that no such argument could now be raised unless there was a specific application to amend the response and an application to withdraw the concession. I also noted the claimant would be free to identify a different comparator, who worked as an Edition security guard.

2.7 The respondent's defence is twofold. First, it is alleged the Edition security guard was not like work. Second, there was a genuine material factor explaining the difference in pay which in no sense whatsoever was because of sex.

2.3 The case management discussion recorded the allegations of direct discrimination and victimisation as follows:

2.9 The allegations of direct sex discrimination are as follows:

2.9.1 Allegation 1: by removing the claimant from the Edition guard roster on about 15 or 17 April 2015. It being the claimant's case that she had already been appointed as an Edition guard in March 2015. The claimant accepts that she made no application to be a security guard in April 2015.

2.9.2 Allegation 2 by Mr Ali Chadry denying the claimant breaks on 8 July 2015. [1]

2.9.3 Allegation 3: by the respondent failing to investigate the claimant's complaint of 9 July 2015 concerning Mr Ali Chadry's actions. The complaint was made by email to the control room, Mr Bailey, Ms Duffy, Mr Joyce, and Mr Shermer.

2.9.4 Allegation 4: by the respondent's panel of three (Ms Duffy, Mr Shermer, and Mr Joyce) failing to appoint the claimant as an Edition guard on about 19 October 2015, it being the claimant's case she applied in September 2015.

2.9.5 Allegation 5: by not being permitted to act as an Edition security guard on 13 April 2015.

2.10 The claimant alleges victimisation. The respondent acknowledges that the claimant made protected acts as follows: the claimant's letter of 13 April 2015; the claimant's complaint of 9 July 2015; the claimant's complaints of 23 and 29 October 2015.

2.11 The specific allegations of victimisation are as follows:

2.11.1 Allegation 6: by refusing to appoint the claimant as an Edition guard on 19 October 2015.

[1] The original issues were corrected by consent during the course of the hearing from 9th to 8th.

2.11.2 Allegation 7: by Mr Joyce giving the claimant a warning about lateness on 19 November 2015, when he alleged the claimant had been late by 1 minute that day.

2.11.3 Allegation 8 by Ms Duffy sending an email on 20 November 2015 refusing the claimant's request to have a witness at all meetings she attended with Mr Joyce.

2.11.4 Allegation 9 by the respondent starting disciplinary action against the claimant on 23 October 2015 (it being the claimant's case that the disciplinary action did not start on 21 December 2015).

2.11.5 Allegations 10: the specific allegations identified on 23 December 2015 are said to be invented and untrue.

2.4 The case proceeded before us on the basis of the issues as identified above.

Evidence

3.1 The claimant relied on her original statement; she had had no supplementary statement.

3.2 For the respondent we heard from the following: Mr Nick Joyce (he relied on his original statement and a supplementary statement); Mr Simon Bailey (he relied on his original statement); Ms Kerry Duffy (she relied on her original statement and a supplementary statement); and Mr Alec Shermer (he relied on his original statement).

3.3 In addition, we received a statement (but the witness was not called) from Mr Ali Hassani.

3.4 We received a bundle.

3.5 The respondent relied on written submissions.

Applications and conduct of hearing

4.1 At the commencement of the hearing, we clarified the claimant had filed no supplementary statement. The respondent relied on two additional supplementary statements, which had been filed in compliance with the case management order of 3 April 2017.

4.2 Both parties introduced further documentation which were included in the bundle by consent.

4.3 We considered the timetable. The respondent requested a total of one day to cross examine the claimant and her witnesses. The claimant requested one hour to cross examine Ms Duffy, 40 minutes for Mr Joyce, 30 minutes for Mr Sherman, and 40 minutes for Mr Bailey. The timetable was agreed.

4.4 The tribunal clarified that it would not reopen findings of fact made at the original hearing, and that it could have regard to all evidence given at the original hearing.

4.5 The respondent had amended its response; the application was approved on 1 June 2017.

4.6 On day one, the claimant indicated she wished to call a reluctant witness, Mr Gashi.

4.7 An application to summons Mr Gashi was made and considered on day two. It was noted that his attendance had been ordered previously by Employment Judge Snelson, and that order remained current. The respondent's HR was asked to ensure that Mr Gashi was aware. On day three Mr Delaney confirmed that the respondent's HR had contacted Mr Gashi, but he had refused to attend.

4.8 Cross examination of the claimant was completed around 14:30 on day two. The claimant's witness, Mr Hassani was not available, as he had childcare responsibilities. Following discussion, and by consent, it was agreed that the respondent should start its case and Mr Joyce was called. The claimant was given permission to call Mr Hassani the following day, and he would be interposed after the respondent's witness. He never attended.

4.9 The claimant's request to call a witness Ms Lulyeye was refused, as there was no good reason not to call her before the respondent started its case and her evidence was insufficiently relevant. Full oral reasons were given on the day.

4.10 The claimant's request to extend the agreed timetable for cross examination was refused, albeit, with the agreement of the respondent, extra time was agreed, and the claimant completed cross examination of all witnesses in the time agreed by consent. Full oral reasons were given at the time.

The Facts

5.1 We have previously decided claim number 2206603/2016, which was largely concerned with the dismissal claim. The facts as decided in that claim remain binding between these parties. It is convenient to set out the relevant facts, as found in that claim, below:

> **5.1 The respondent company provides security related services to corporate clients in the retail sector. The company's business is predominantly based in the United Kingdom and Europe. The respondent has a contract with Apple. The claimant was involved in delivering security services to Apple.**
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> **5.2 On the Apple contract, the respondent employs two types of security guard known as retail security guards and Edition security guards. Edition security guards were introduced by the respondent, at the request of Apple, in April 2015. They had specific duties which revolved around the retail of the expensive Edition watches which retail between £8,500 and**

£13,500. The Edition guards had specific responsibilities for accompanying staff to obtain the watches from safes and show them to prospective customers. The Edition security guards were paid £11.64 per hour, as compared to the retail security guards who were paid £8.95 per hour. The claimant does not accept the respondent's reason for the differential in pay. The claimant brought proceedings alleging breach of the equality clause and discrimination on 22 February 2016.

5.3 There was an initial round of recruitment for the Edition security guards, for which the claimant did not apply. There was a second round of recruitment in September 2015. The claimant did apply, but was unsuccessful in her application.

5.4 It is apparent that the claimant raised a number of matters of concern with the respondent. It is also clear that allegations were made against her. These allegations are the subject of separate proceedings, but we need to make some limited findings of fact.

5.5 It is apparent there was particular tension between the claimant who is Russian, and another member of staff, Mr Revel, who we understand is Polish. On 14 July 2015, the claimant sent an email to senior managers, Mr Nick Joyce and Mr Alec Shermer. The first paragraph says "report about Robert Revel's behaviour." It then specifically states it is not a complaint and finishes by saying it is the "private opinion" of the claimant. She reported an alleged comment by Mr Revel on 12 July 2015. She described a discussion about her allegedly hating Mr Revel. She alleges he said, "maybe she does not like this, she hates this fact and she did not want to be born in Russia, so she hates the people from Eastern Europe."

5.6 There were a number of other concerns about which we need make no findings. On 17 July 2015, the HR manager, Ms Kerry Duffy, sent an email to the claimant concerning a number of emails and potential complaints received from the claimant. She offered to meet with the claimant informally. They did meet on 31 July 2015. The claimant specifically confirmed that her letter of 14 July 2015 was not a grievance.

5.7 Following various complaints, the respondent took a decision to commence disciplinary proceedings against the claimant. This decision was taken before 23 December 2015. An investigation interview was scheduled for 23 December 2015 to be undertaken by Mr Nick Joyce, the account director. The allegations concerned alleged refusal to follow work-related instructions, her attitude about the work environment, not behaving professionally or respectfully, and alleged bullying. The claimant was invited to the investigation meeting on 23 December 2015. The claimant had contacted ACAS prior to this, and no later than 15 December 2015. ACAS telephoned the respondent on 23 December 2016. It is clear that the disciplinary proceedings had been contemplated, and put in motion, prior to this call.

5.8 The claimant was invited to attend a disciplinary meeting by letter of 7 January 2016. It stated that the outcome may be a "disciplinary warning." The meeting was rescheduled from 12 January to 15 January 2016. The claimant attended the meeting with a union representative, Mr Eddie Elum-Smith. At the start of the hearing, Mr Elum-Smith referred to the claimant's email of 14 July 2015 referring to it as a grievance and asked if it remained outstanding. The claimant did initially refer to it as a report in the meeting. A copy of the email was produced by the claimant and her representative. It was given to Kerry Duffy who was conducting the disciplinary. The copy produced to Ms Duffy had been materially altered, intentionally, by the claimant. She had removed three sentences: "present report is not a complaint about this particular cause", "as I mentioned above present

report is not a complaint about this particular cause", and "but it is my private opinion." The effect of these deletions was to remove content from the email which demonstrated, on its face, that it was not a grievance. The claimant stated that the subject matter was very serious. There was further discussion about the document. Mr Smith stated specifically that he wished to adjourn "until this grievance which is 6 months old" could be dealt with. Ms Duffy agreed to the adjournment and stated that she needed to check the position, but that she believed the grievance may already have been dealt with. At this time, the claimant knew that the letter of 14 July 2015 was not a grievance, and that she had specifically confirmed this in the meeting of 31 July 2015. However, she failed to bring to Ms Duffy's attention that the email supplied had been materially altered, or that there had been a previous discussion when the claimant had specifically stated it was not a grievance.

5.9 The disciplinary hearing was adjourned to deal with the grievance. That initial disciplinary hearing has never been completed, as it was overtaken by the matters which concern us.

5.10 A grievance hearing was convened which proceeded on 29 January 2016. During the course of that meeting it became clear that the claimant had removed words from her email of 14 July 2015. The grievance was dismissed by letter of 19 February 2016, and it was recorded that the letter of 14 July 2015 was not written as a grievance. The claimant appealed on 26 February 2016.

5.11 On 1 March 2016, the respondent, through Mr Joyce, interviewed the claimant concerning the production of the amended email of 14 January 2015, and her assertion it was a grievance, which led to the adjournment of the 15 January 2016 disciplinary. The claimant alleged that she had removed irrelevant material.

5.12 The grievance appeal took precedence and was heard by Mr Simon Bailey, the respondent's chief operation officer. That hearing proceeded on 16 March 2016. By letter of 24 March 2016, Mr Bailey dismissed the claimant's various grievances. At the hearing, the claimant supplied to Mr Bailey a copy of a timesheet from 23 November 2015. One of the claimant's allegations concerned alleged discrimination against her on 23 November 2015. The document itself was essentially inconsequential. Details of the shifts worked are kept by central office. In addition, guards are required to complete a written timesheet. The projected roster times and the actual times of attendance are recorded on the timesheet. Each security guard signs to demonstrate the accuracy. It should be completed on the day. It is a helpful administrative tool kept on site, in a lever arch folder. Periodically the timesheets are collected. Failure to complete the timesheet may result in a reminder, but there is no suggestion it would lead to disciplinary action.

5.13 The timesheet produced by the claimant on 16 March 2016 had been signed by her and recorded the times she was on duty. There is no dispute, and there was never a dispute, that she had worked on that day. The fact of her working was recorded centrally. Proof of that did not depend on the timesheet.

5.14 As part of the general investigations concerning a number of complaints, copies of the timesheets had also been obtained by the respondent on 10 February 2016. As part of his investigation, Simon Bailey noted that there was a discrepancy between the timesheet as held by the respondent and the one produced by the claimant on 16 March 2016. On the 10 February 2016 timesheet, her timings did not appear, and she had not signed it. This discrepancy was noted in Mr Bailey's appeal decision.

5.15 Following further adjournments, Mr Joyce resumed the investigation into the claimant's conduct. He asked the claimant about the apparent discrepancy on the timesheet of 23 November 2015. These investigations led to new disciplinary proceedings which, effectively, superseded the original disciplinary proceedings, which remained in abeyance. By letter of 15 April 2016, Mr Bailey required the claimant to attend a disciplinary hearing. There were three allegations put. They were set out in detail in the letter. The first allegation was that the claimant and her trade union representative had deliberately and wilfully misled Ms Duffy at the disciplinary hearing which took place on 15 January 2016 (mistakenly referred to in the letter as 12 January 2016) that there was an outstanding grievance from 14 July. The letter clarified the allegation was one of deliberate falsification of the email to engineer the adjournment. The second allegation was that on 16 March 2016 the claimant produced a timesheet which she had deliberately falsified. All parties understood the falsification to be the addition of the claimant's times and signature. The third allegation concerns the claimant's assertion that there had been a breakdown in mutual trust and confidence. Ultimately, no reliance is placed on this in the dismissal reasons. Following adjournments, the disciplinary hearing proceeded on 5 May 2016. The claimant admitted that she had removed three references in the email of 14 July 2015 which referred to it not being a grievance. The claimant refused to accept that her action caused the adjournment of the hearing on 15 January 2016.

5.16 Mr Bailey referred to Mr Joyce's investigation of 8 April 2016. During that meeting, when asked by Mr Joyce to account for the discrepancy in the timesheet, the claimant had stated that the version of the timesheet produced by the respondent was a fake. When questioned further by Mr Joyce the claimant went on to say, "you removed my name and I ask right now to ask supervisor." She was specifically asked whether, after her shift on 23 November 2015, she had amended the timesheet in any way. The claimant said "no." She stated that she took the copy some time in January. When pressed on the point, the claimant prevaricated and asked "how can I change it?" The claimant repeated "it's fake, I got this January, [and] February you got another one."

5.17 It follows that at the investigation stage the claimant's position was that she had obtained the original in January 2016 and that the version obtained by the respondent in February 2016 must have been altered by someone else to remove her details. At no point did she admit that she had amended the document after 23 November 2015.

5.18 In the disciplinary in May, Mr Bailey specifically asked the claimant to account for why her name was not on the document that the respondent obtained in February 2016, but was on the one used on 16 March 2016. The claimant was unable to give any explanation. She did not repeat the allegation that it had been faked by the respondent. She prevaricated, and asked for an explanation as to the nature of the photocopy produced by the respondent. She suggested that the blue colour on the squad security logo was clear, but the lines were not clear. There appears to be some suggestion that the claimant was indicating falsification by the respondent. The claimant had produced other timesheets she had taken, without permission, apparently for the purpose of comparison, from Covent Garden; she refused to give those to Mr Bailey, albeit she agreed to return them to Covent Garden.

5.19 During her oral evidence to this tribunal, we sought to ascertain the circumstances relating to the signing of time sheet. Her sworn evidence was that she could not be certain she had signed the timesheet on 23 November 2015, but she was able to confirm she had signed it by no later

than 30 November 2015. She stated that the copy she had obtained, which she used on 16 March 2016, had been supplied to her by her line manager, Mr Idris, approximately 3 days before the hearing on 16 March, when she had asked for it. She stated that she used the copy supplied by him. During her submissions, the claimant appeared to suggest that she may have amended it after 30 November 2015. On being asked to clarify, the claimant stated that she could not be certain that she had signed it by 30 November 2015, and thereby resiled from her sworn evidence. We should note that we can find no reference at all in the contemporaneous documents to an allegation that she obtained the 16 March 2016 copy on or around 13 March 2016. The contemporaneous evidence was that she had the document in January 2016. It is that contemporaneous evidence which dictated the nature of, and the scope of, the investigation.

5.20 Mr Bailey sent a written decision on 18 May 2016. He did not rely on allegation 3. He found that the claimant had deliberately and wilfully altered the email of 14 July 2015 with the intention of deliberately halting the disciplinary hearing by alleging, falsely, that there was an outstanding grievance. He found the claimant had falsified the timesheet used on 16 March 2016 and then had continued to mislead the respondent as to her action. He considered that the deliberate falsification of documents and reliance upon them at hearings amounted to a course of conduct demonstrating the willingness to falsify material and use it. He considered this to be gross misconduct and dismissed the claimant.

5.21 The claimant appealed by email of 20 May 2016. She relied on the following points: she made some general complaints about the documents relied on and alleged the decision was made on the basis of prejudice and had taken place after her complaint to ACAS and subsequent employment tribunal claim; she alleged a review of the documents she had submitted would show that the reasons for dismissal were "far-fetched;" and she stated that Mr Bailey usually made his decisions by only considering the managers' side and would ignore employees. The appeal was undertaken by Mr Bullimore on 26 May 2016. In preparing for the hearing, Mr Bullimore read all of the claimant's emails and other correspondence from July 2015 in order to ascertain whether any grievances had not been dealt with or remained outstanding. The disciplinary hearing had lasted over 5 hours. The appeal lasted over 4.5 hours. Mr Bullimore describes it as an entire re-hearing of the case, and this is a fair description. We accept his evidence that he could reach any decision and could discharge the allegations or impose any sanction, up to and including dismissal. He considered all the evidence and reached the same conclusions as Mr Bailey concerning the claimant's deliberate falsification of her email and her unjustified allegation that a grievance had remained outstanding for six months. He reached the same conclusion as Mr Bailey concerning the claimant's falsification of the timesheet.

5.22 Mr Bullimore sent his decision by letter of 21 June 2016. This is a comprehensive letter running to 21 pages. He considered each of the grounds of appeal. He reviewed all the relevant documents and specifically set out the documents he had looked at. He concluded that all grievances had been dealt with, and gave specific reasons. He found that the claimant had supplied an edited version of the email of 14 July 2015 with the intent of deliberately suspending the disciplinary hearing and that she had materially misled Ms Kerry. With regard to allegation two, he could not understand why the claimant had falsified the timesheets, as it had no direct relevance to any matter, but he did consider the fact of the deliberate altering of the timesheet by the claimant to be a serious matter which itself amounted to gross misconduct. He found the claimant had deliberately lied about signing the form on 23 November 2015. He therefore upheld the dismissal on grounds 1 and 2.

> **5.23 He made no specific findings on ground 3 but stated "it is clear that the trust and confidence in the working relationship has clearly broken down and would have resulted in you being dismissed anyway."**

5.2 It can be seen from the above that the original finding of fact was concerned largely with matters that led to the dismissal. The claimant was dismissed for gross misconduct because of falsification of evidence which occurred whilst the original disciplinary allegations were being investigated. The claim now before us is largely concerned with the background matters leading up to that original disciplinary process, which was never completed.

5.3 To the extent that we need to find further facts, we can conveniently deal with those facts whilst considering each of the allegations.

The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

Section 13 - Direct discrimination

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> "employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was." (para 10)

6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept that there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.4 Victimisation is defined in section 27 of the Equality Act 2010.

Section 27 - Victimisation

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because -
>
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

6.5 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act or the respondent believes that he has done or may do the protected act.

6.6 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases may still be helpful. It is not in our view necessary to consider the second question, as posed in Derbyshire below, which focuses on how others were or would be treated. As we are now concerned with unfavourable and not less favourable treatment, it is not necessary to construct a comparator: one focuses on the reason for the treatment.

6.7 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others 2007 ICR 841**. However as noted above there is no requirement now to specifically consider the treatment of others.

> "37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the terms of the Directive, 'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental… Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment"'.
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> 40. The second question focuses upon how the employer treats other people…
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> 41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a 'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan*'s case [2001] IRLR 830, 833, paragraph 29, this
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>> 'does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'"

6.8 The need to show that any alleged detriment must be capable of being objectively regarded as such was emphasised in **St Helens Metropolitan Borough Council v Derbyshire 2007 IRLR 540**. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285** was cited and it was confirmed an unjustified sense of grievance cannot amount to detriment. That in our view remains good law. In **Derbyshire**, Lord Neuberger confirmed the detriment should be viewed from the point of view of the alleged victim. Rather than considering the 'honest and reasonable test as suggested in Khan' the focus should be on what constitutes a detriment. It is arguable therefore that whether an action amounts to victimisation will depend at least partly on the perception of the employee provided that perception is reasonable. It is this reasonable perception that the employer must have regard to when taking action and when considering whether that action could be construed as victimisation. Detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. The detriment cannot be made out simply by an individual exhibiting mental distress, it would also have to be objectively reasonable in all the circumstances.

Reasons for unfavourable treatment.

6.9 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. Of course, the questions of reason and detriment are often linked. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.

6.10 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason such as absenteeism or misconduct the victimisation claim will fail. The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. **Chief Constable of West Yorkshire Police v Khan 2001 IRLR 830 HL** is authority for the proposition that the language used in the Sex Discrimination Act 1975 is not the language of strict causation. The words by reason that suggest that what is to be considered, as Lord Scott put it, is "the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified." This in our view remains good law.

6.11 It is not necessary for a person claiming victimisation to show that unfavourable treatment was meted out solely by reason of his or her having done a protected act.

6.12 Lord Nicholls found in **Najarajan v London Regional Transport 1999 ICR 877**, HL, that if the protected act has a significant influence on the outcome of an employer's decision, discrimination will be made out. It was clarified by Lord Justice Gibson in Court of Appeal in **Igen and others v Wong and others 2005 ICR 931** that in order to be significant it does not have to be of great importance. A significant influence is an influence which is more than trivial.

Subconscious motivation

6.13 The House of Lords in **Nagarajan** rejected the notion that there must be a conscious motivation in order to establish victimisation claims. Victimisation may be by reason of an earlier protected act if the discriminator consciously used that act to determine or influence the treatment of the complainant. Equally the influence may be unconscious. The key question is why the complainant received the treatment.

6.14 Section 23 refers to comparators in the case of direct discrimination.

> Section 23 Equality Act 2010 - Comparison by reference to circumstances
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

6.15 Section 136 Equality Act 2010 refers to the burden of proof.

> Section 136 - Burden of proof
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> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
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> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
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> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

6.16 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

> **Appendix**
> **(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant**

which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will

need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Equal pay

6.17 Section 64 Equality Act 2010, relevant types of work, provides:

(1) Sections 66 to 70 apply where--

(*a*) a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;
(*b*) a person (A) holding a personal or public office does work that is equal to the work that a comparator of the opposite sex (B) does.

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

6.18 Section 65 Equality Act 2010, equal work, provides:

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

(*a*) like B's work,
(*b*) rated as equivalent to B's work, or
(*c*) of equal value to B's work.

(2) A's work is like B's work if--

(*a*) A's work and B's work are the same or broadly similar, and
(*b*) such differences as there are between their work are not of practical importance in relation to the terms of their work.

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

(*a*) the frequency with which differences between their work occur in practice, and
(*b*) the nature and extent of the differences.

(4) …

6.19 Section 66 Equality Act 2010, the sex equality clause, provides:

(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.
(2) A sex equality clause is a provision that has the following effect--

(*a*) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;
(*b*) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.

(3) …

Conclusions

Direct discrimination

7.1 We will now consider each of the alleged allegations of direct discrimination.

Allegation 1: by removing the claimant from the Edition guard roster on about 15 or 17 April 2015. It being the claimant's case that she had already been appointed as an Edition guard in March 2015.

7.2 In March 2015, Apple approached the respondent seeking additional guards for a new project in Selfridge's. It was assumed by the respondent's managers that this would be a further retail outlet. Initially, they were given no information about the Edition watches. The claimant was happy to work in Selfridge's. It was necessary to have an induction. A short Selfridge's induction was completed by the claimant and others. The claimant signed a confidentiality agreement on 9 March 2015. This was not a new contract. It was not a contract specific to being an Edition guard.

7.3 On or about 7 April 2015, Mr Chris Lane of Apple contacted Mr Bailey. There was a discussion which clarified there would be a need for Edition guards who would have specific duties in relation to the Edition watch launch. It became clear that Apple envisaged that it would be necessary to have specific guards who would deal with the Edition watches in the way we have described previously. They would be paid £11.64 per hour. The claimant could have applied for that role. She chose not to. There was no reason why she could not apply. That was her decision.

7.4 The claimant was, on occasions, required to cover the role of Edition guard. When covering the role of Edition guard, she was paid £11.64 per hour. However, this was always a temporary arrangement.

7.5 The claimant complains that she was removed from the Edition guard rota of 15 and 17 April 2015. We have seen the rota for that week. The email of 8 April 2015 from Ms Duffy to the claimant is an amendment to the rota which requires the claimant to work as an Edition guard during that week. She did perform the role as Edition guard that week. She was paid £11.64 per hour.

7.6 This allegation must fail. The claimant was never employed as an Edition guard in April 2015 because she failed to apply. In any event, she did work as an Edition guard during that week and therefore was not removed from the rota during that week, but instead was required to provide cover for the Edition guard role. It follows that the claim fails because the alleged circumstances said to constitute a detriment never occurred. Further, the respondent establishes a non-discriminatory explanation. First, the claimant was not an Edition guard because she did not apply. Second, it follows there is no right to be rostered with the Edition guards. Third, she was asked to provide cover, and agreed to provide cover.

7.7 We next consider allegation two.

Allegation 2 by Mr Ali Chadry denying the claimant breaks on 8 July 2015.

7.8 It is clear that there were problems with the breaks on this day. There was some form of mistake on the rota. More people attended work than required. This then led to confusion whereby the claimant had to work approximately seven hours before she took a break. She then had a break of one hour. She had been given an earlier time to take her break, but as result of confusion had missed her slot.

7.9 The reason for the failure to let the claimant have a break earlier was the confusion caused by the extra staff attending. There is no fact from which we could conclude that the treatment occurred because of sex. In any event, the explanation has been established on the balance of probability. The failure to give the claimant a break earlier arose out of confusion, and nothing else. This was a one-off matter and there is no suggestion at all there was any other conscious or subconscious motive.

7.10 We next consider allegation three.

Allegation 3: by the respondent failing to investigate the claimant's complaint of 9 July 2015 concerning Mr Ali Chadry's actions. The complaint was made by email to the control room, Mr Bailey, Ms Duffy, Mr Joyce, and Mr Shermer.

7.11 This allegation is one of a failure to investigate complaints. This allegation is not made out on the facts. The claimant did complain. It was investigated.

7.12 Ms Kerry Duffy specifically considered the claimant's complaint. She had an email from Mr Shermer, the account manager to Apple, he recorded his conversation with Mr Chadry which set out the basis for the confusion on 8 July 2015 at the Regent Street branch. Mr Chadry had explained that the claimant had not attended her break at the duly appointed time. There had been some confusion. Hence why her break was delayed until she had worked seven hours.

7.13 Ms Duffy was initially on holiday. She sent an email to the claimant on 17 July 2015 requesting they meet. By that time she received a further email from the claimant on 14 July. They agreed to discuss the matter, informally, over coffee. They met on 31 July. The claimant raised a number of matters. The claimant decided at that meeting not to raise, as formal grievances, her complaints of 9 and 14 July 2015. Therefore, it was not investigated further at that time. The contention that there was no investigation is without merit, and the allegation must fail.

7.14 We next consider allegation four.

Allegation 4: by the respondent's panel of three (Ms Duffy, Mr Shermer, and Mr Joyce) failing to appoint the claimant as an Edition guard on about 19 October 2015, it being the claimant's case she applied in September 2015.

7.15 The claimant did apply to be an Edition guard. The post was advertised on 21 August 2015. It would be at the rate of £11.64. The claimant applied. She was shortlisted. The interview took place on 8 September 2015. The interview panel consisted of three people, Mr Nick Joyce, the account director, Mr Alec Shermer, the account manager, and Ms Kerry Duffy, the HR manager. It was a competency based interview. All candidates were asked the same questions. They were scored out of a possible 150.

7.16 The claimant, in cross examination, challenged Ms Duffy. She did not challenge Mr Shermer and made little if any challenge to Mr Joyce. The essence of her case was that she was marked unreasonably low.

7.17 We have seen the notes from the various interviewers. We have seen reference to the questions asked and we have received explanations as to why each of the managers thought the claimant gave a poor interview. We accept that it was the genuine perception of all of the panel members that the claimant's answers were poor and lacked good examples.

7.18 Ms Duffy gave evidence that the claimant did not appear to understand the first question and it had to be explained to her on three occasions. She also notes the claimant did not give direct answers to questions. The claimant struggled to give examples. Moreover, when asked about building relationships, the claimant asserted she had good relationships with most members of staff, but described Mr Revel as being strange and being a troublemaker. She said she would try to avoid him. Her answers indicated she had difficulties with some colleagues.

7.19 Out of a possible 150, the three panel members scored the claimant as follows: Ms Duffy - 80/150; Mr Joyce - 64/150; and Mr Shermer - 72/150.

7.20 Out of the 14 people interviewed, the claimant was in the lower quartile. Only the top three were appointed.

7.21 There is no evidence which would be consistent with an assertion that the claimant was unreasonably marked down. Each witness has given proper and reasonable grounds for marking the claimant lower than other candidates. We can identify no fact from which we could find that the respondent has discriminated. In any event, the respondent has established a reason which, in no sense whatsoever, is because of sex. The reason is that the respondent followed a fair process. The interview was based on competencies. The claimant did badly. She was in the bottom quartile. Only the top three were appointed. That explains why the claimant was not appointed and that is the reason which no sense whatsoever is because of sex.

7.22 We next consider allegation five.

Allegation 5: by not being permitted to act as an Edition security guard on 13 April 2015.

7.23 There is no material difference between this allegation and allegation one. The claimant did work in Selfridge's as an Edition guard during that period. She was providing temporary cover. Any difficulty that there had been with her performing the full duties of an Editions guard, including accessing the watches, had been resolved by no later than the previous day. It follows that the allegation fails factually.

7.24 In any event, there is no fact from which we could draw any inference of discrimination.

7.25 Further, the respondent's explanation as to how the Edition guards are organised, how the role was put together, and the reason why the claimant was not a permanent Edition guard, is made as on the balance of probability. No sense whatsoever was any treatment received by the claimant, in relation to her being, or not being, an Edition guard anything to do with her sex.

Victimisation

7.26 We next consider the victimisation claims.

7.27 The respondent acknowledges that the claimant made protected acts as follows: the claimant's letter of 13 April 2015; the claimant's complaint of 9 July 2015; and the claimant's complaints of 23 and 29 October 2015. We need consider these no further. We note that in order for there to be a claim of victimisation, it is necessary first to identify that the factual circumstances alleged to be detriments in fact occurred. Second, if the events did occur, they must be detrimental. When considering that, we should consider whether a reasonable employee, fully apprised of the relevant circumstances, would consider the actions to be a detriment. Third, it is necessary to make out the causational link between the protected acts and the alleged detriments.

7.28 We now consider the first allegation of victimisation, allegation six.

Allegation 6: by refusing to appoint the claimant as an Edition guard on 19 October 2015.

7.29 We have already considered the reason why the claimant was not appointed as an Edition guard 19 October 2015. The explanation revolves around the fact the claimant performed badly at interview. She achieved one of the lower scores, and was not appointed. Those who did best at interview were appointed. There is no fact from which we could conclude that the claimant's scores were depressed because of any protected act. The respondent's explanation is made out for the reasons already given. That explanation is an answer to the victimisation claim, as much as it is an answer to the direct discrimination claim.

7.30 We next consider allegation seven.

Allegation 7: by Mr Joyce giving the claimant a warning about lateness on 19 November 2015, when he alleged the claimant had been late by 1 minute that day.

7.31 Mr Joyce attended at the Stratford site on 19 November 2015. This was soon after terrorist attacks in Paris. He wished to stress to all employees the need for vigilance.

7.32 The claimant was late onto the floor. As part of his discussion, he raised it with her. It was advisory. It was a mild admonishment. It was not a formal warning. We reject the claimant's evidence that in some manner he indicated that it was part of a process which would lead to dismissal. He did not.

7.33 The claimant's evidence on this point has been inconsistent. The allegation is clear that she was warned for being one minute late. In her evidence she admitted this was untrue. There had never been reference to her being one minute late. The reference was to her being five minutes late. Her inconsistent account leads us to find that, on the balance of probability, Mr Joyce is right. It follows that the specific allegation fails factually.

7.34 However, whether it is one minute or five minutes, we should consider the explanation. The explanation is that she was told not to be late in the future, because she was late. We have considered whether there are any facts from which we could find that the reason was because of a protected act. There are no such facts. Moreover, the explanation has been established on the balance of probability. The explanation is that she was advised that she was late and requested to be on time in the future. That is an explanation which in no sense whatsoever was because of a protected act. This allegation fails.

7.35 We next consider allegation eight.

Allegation 8 by Ms Duffy sending an email on 20 November 2015 refusing the claimant's request to have a witness at all meetings she attended with Mr Joyce.

7.36 We have considered email 20 November 2015. The relevant section of the email reads as follows:

> **You do not have the right to be accompanied during site inspections and any meeting that you do have this right you will as always be informed of in writing.**

7.37 It is true that Ms Duffy denied the claimant's request that she should never meet with Mr Joyce alone. The email confirms that the claimant may have a witness present when it was appropriate having regard to her statutory

rights. However, Ms Duffy refused to extend that right further to include general, normal, managerial meetings.

7.38 If follows that the treatment is made out. The next question is whether the treatment is detrimental. There is no general right to have a witness present during normal workplace interactions. A manager should be permitted to discuss normal work activity with an employee, without the need for some form of witness. There is nothing to suggest that Mr Joyce acted inappropriately at any time. It may be that the claimant disliked Mr Joyce. However, the claimant's dislike of Mr Joyce does not make any continuing management by him detrimental. We therefore find that the refusal to allow her a witness during all meetings was not a detriment.

7.39 Further, the respondent's explanation is made out. There are no facts from which we could conclude that the reason for not allowing the claimant to have a witness during every meeting with Mr Joyce was because of a protected act. The reason advanced is the claimant was allowed a witness during any meeting where there was a normal requirement to have a witness; she would not be permitted a witness during normal workplace interactions; that would be unnecessary and unduly onerous. The explanation is established on the balance of probability. In no sense whatsoever was it victimisation.

7.40 We next consider allegation nine.

Allegation 9 by the respondent starting disciplinary action against the claimant on 23 October 2015 (it being the claimant's case that the disciplinary action did not start on 21 December 2015).

7.41 It is difficult to understand what the claimant envisages to be the basis of this claim. It is clear that disciplinary action was started against the claimant. This began with an investigation following a complaint made by Mr Revel on 18 November 2015. Mr Joyce started the investigation. A number of people were interviewed. The claimant was requested to attend an interview on the 23 December 2015, as we have previously found. The allegations concerned her alleged behaviour towards Mr Revel; a failure to respond to management instructions in emails; not displaying her SIA badge; and exhibiting a poor attitude to those working in the control room.

7.42 It is clear that there was evidence supporting these allegations. Mr Revel had made a complaint. The claimant had failed to respond to management instructions and particularly had failed to answer an email when requested. The claimant had not displayed her SIA badge in her armband. (The fact the claimant may have had an explanation to the effect that the armband was faulty, does not mean it was wrong to investigate.) She had been late for work and there was clear evidence that she had a poor attitude towards a number of individuals.

7.43 We find there are no facts from which we could conclude that the reason for the treatment was a protected act. We find that the respondent has established its explanation on the balance of probability. The reason

disciplinary action was started is because there were proper and legitimate grounds which warranted an investigation.

7.44 We next consider allegation 10:

Allegations 10: the specific allegations identified on 23 December 2015 are said to be invented and untrue.

7.45 The claimant did not pursue this allegation in cross-examination. The claimant was asked on a number of occasions to clarify what she meant by saying the allegations were invented and untrue. She was also asked to clarify against whom the allegations were made. However, no explanation was forthcoming.

7.46 The claimant's evidence falls short of suggesting that Mr Revel invented allegations because of any protected act by the claimant. When taken as a whole, the claimant's suggestion is that the respondent's managers, including Mr Joyce, invented allegations because the claimant made complaints, and particularly because the respondent was contacted by ACAS. (We have already considered the factual basis for this.) Mr Joyce investigated the allegations because they were raised and there were proper grounds for investigating them. The claimant's belief that Mr Revel was malicious does not make it an act of victimisation to pursue the investigation. If it is the claimant's intention to say that Mr Revel victimised her, that has not been pursued, or alleged at any point in the proceedings.

7.47 If follows that the respondent's explanation is an answer to this allegation. The disciplinary investigation started because there were legitimate and appropriate grounds.

7.48 We have considered whether it could be said that if Mr Revel's action was an act of victimisation that the investigation itself would be an act of victimisation. We cannot accept that there is any such argument in this case. We do not accept that a legitimate investigation itself would be tainted by discrimination when the very purpose of it is to determine truth and fault. It cannot be assumed that the outcome of the investigation of the disciplinary would be one which would fail to identify any discriminatory allegation. We therefore reject this allegation.

Equal Pay

7.49 We now consider the equal pay claim.

7.50 It is the claimant's case that she performed like work with her comparator, Mr Gashi. This is not a claim of work rated as equivalent or work of equal value.

7.51 The respondent has a contract with Apple. It supplies security services. The rate of pay for each security job is dictated by the contract agreed between Apple and the respondent. At the material time, all retail security guards were paid £8.95 and supervisors were paid £11.64 per hour.

7.52 In or around April 2015, Apple launched its Edition smart watch range. The Edition watches were expensive largely because of the watch casings rather than any specific functionality; the most expensive watch was in the region of £13,000.

7.53 Those watches were not kept on general display, albeit replicas may have been put on display. It was envisaged that Apple customers, as part of their purchase experience, would view the watches in a restricted area. The watches would be retrieved from a safe. The Apple sales representative, and a security guard, would stay with the customer whilst the watch was viewed.

7.54 It was recognised that customers may find the presence of security guards intimidating or off-putting. As part of its philosophy, Apple wished to enhance the experience as much as possible, presumably to maximise the likelihood of achieving a sale. Thus, it was necessary to have a guard to retrieve the Edition watches, to escort the product from the safe, and to remain with the customer until the watch was purchased or returned.

7.55 Apple envisaged that it would be necessary to have that Edition guard liaise directly with the retail staff and Apple's management. The Edition guard would have an interaction with the customer which was closer and more direct than the normal retail guard role. The Edition guard would behave in such a way that the customer saw it as a indication of valued status rather than being off-putting or intimidating. Therefore, Apple wanted individuals who had the requisite skills, such that they would recognise the role of enhancing the purchasing experience.

7.56 We have considered the job descriptions applicable to the retail security guard and the Edition security guard.

7.57 The duties of the Edition security guard are described as follows:

- **Self-management with direct liaison with head office including ascertaining and dealing with any problems with the security officers within the team, ensuring that they are doing what is expected of them.**

- **Directly deal with specialist Apple management.**

- **Provide consistent, visible and accessible physical presence in a nonintrusive manner.**

- **Maintain a vigilant observation on sales transactions through partnering with sales professionals to manage and avert suspicious activity.**

- **Enhance the customer's experience by being aware of, and support all product initiatives, merchandise initiatives, visual initiatives and events by providing an elevated/exceptional experience in all customer interactions.**

- **At some sites the site has specific guidelines and they must be adhered to.**

7.58 The retail security officer role is described as follows:

- **to provide a safe and secure workplace for all staff through supporting the store management team**
- **to be able to detain and deter shoplifters in line with ACONE**
- **Keep a visible presence on the shop floor at all times, acting as a visual deterrent**
- **Write reports of daily activities and irregularities, such as equipment or property damage, theft, presence of unauthorised persons, or unusual occurrences**

7.59 Retail security guards did not function as Edition guards, unless specifically requested to do so in order to cover absences.

7.60 It is clear that both were involved in safeguarding the retail outlet. When the Edition guards were initially appointed, Apple could not know how many Edition watches it would sell. It could not know what the demand would be. It appears, in fact, the product was not as popular as Apple had hoped and we understand it has been withdrawn and the role of Edition guard abandoned. However, we must consider matters as they applied at the time. It could not be known how many customers would ask to view the watches each day. The specific role of the Edition guard was entirely dependent upon having a customer who wanted to view an Edition watch. If there were no customers, the Edition guard would, as we understand it, perform normal retail guard duties. That would involve being a visual presence which would act as a deterrent. However, when there was a customer, the specific role of the Edition guard would then be activated. It would be necessary to retrieve the watch from the safe, escort it to the viewing area, and then stay with the customer, whilst exercising appropriate diplomacy in order to enhance the experience.

7.61 The claimant has suggested that the role of the Edition guard is equivalent to a retail guard in that the retail guard would accompany staff when collecting money on the floor. That may be so, but to the extent to which that occurred, it was common to both the retail guard and the Edition guard when not performing the specific Edition role with a customer.

7.62 All Edition guards had a supervisory function. They were required to liaise with Apple management. They were required to perform the specific guarding role when Edition watches were viewed.

7.63 Mr Gashi performed the role of Edition guard from 11 April 2015. By July 2016 he was undertaking a significant number of shifts at Regent Street as an Edition guard. In July 2016 the Regent Street Apple Store was refurbished and there were not enough shifts available for him to work at Selfridge's or Covent Garden as an Edition guard. He therefore reverted to working as a retail guard and was paid a lower rate. When

refurbishment was completed, he returned to Regent Street and worked, predominantly, as an Edition guard.

7.64 In order to be like work, the work must be the same or broadly similar and such differences that there are between their work should be of no practical importance in relation to the terms of their work.

7.65 It is necessary to consider each of those stages separately.[2] The first stage involves a consideration of the nature of the work actually done, as opposed to the theoretical contractual terms. It is the nature of the work actually done, as opposed to any contractual terms, that is to be considered, such consideration being in general terms without too minute an examination. The two jobs do not have to be identical.

7.66 It may be possible to say that there is some similarity between the two roles in that the overall purpose is to provide a deterrent and thereby promote security. However, it is necessary to take into account the whole of the job. As well as considering common duties, it is appropriate to consider those duties actually performed which the roles do not have in common. Ultimately, it is a question of fact for the tribunal.

7.67 In order to find that these jobs were the same or broadly similar work, it would be necessary to ignore, or find as irrelevant, the fact that the Edition guard had specific duties in safeguarding the Edition watches, escorting the watches from the safe to the viewing area, and being part of the overall interaction with the customer in order to enhance the customer's experience; however, these matters cannot be ignored as they are the essence of the Edition guard's role and a clear difference. We reach the conclusion that these roles are not the same or broadly similar. Whilst they do have the commonality of being security roles, there are significant differences between them and the ways they were performed, which are fundamental. Most importantly, the role of the retail security guard is to stay in the background as a deterrent. The retail guard does not get involved directly with the customer, unless there is a specific incident which warrants it. The role of the Edition guard was to directly liaise with Apple's staff and with the customer. Whilst this may not have been the entirety of the role, it was the most important function of the Edition guard when it was called upon.

7.68 We do accept that the claimant could be asked to act up as an Edition guard and that Edition guards such as Mr Gashi could be given shifts as a retail guard. However, the fact that there was some flexibility in deployment tells us nothing about the roles themselves and whether they were like work. It is clear that when an employee was acting in either role, the appropriate rate of pay was applied. Further, the fact that individuals may have had the capability to work in different roles still tells us nothing about whether the roles were the same or broadly similar work.

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[2] See, e.g., *Waddington v Leicester Council for Voluntary Services* [1977] IRLR 32, [1977] ICR 266, EAT.

7.69 It is necessary to look at the work actually performed. The key role of the Edition guard involved specific interaction with the customer and the retail staff. It was fundamentally different to the key role of the retail guard.

7.70 We do accept that both positions carried responsibility. We do accept there may have been some escorting duties for the retail guard when cash was collected. However, that does not mean that the differences should be ignored.

7.71 If we were wrong in saying that the work was not the same and was not broadly similar, it would still be necessary to consider the second part of the test which is a consideration of whether such differences as existed between the work was of no practical importance. Here the difference is clear. The Edition guards were involved in dealing directly with the customer and the retail staff both by retrieving the Edition watches in the safe and thereafter remaining with the customer in the private viewing area. The difference was not only a practical importance, it was the essence of the role. When the Edition watches were withdrawn, the role was withdrawn.

7.72 It follows that we conclude, in relation to both elements of the test, that the two roles were not the same or broadly similar work. If we were wrong about that, we would need to consider the material factor defence.

7.73 It is necessary to identify the material factor. Here, there is a material factor. Apple wished to create the role and to pay at a supervisor's rate. The Edition guard role came about because of the need envisaged by the client, Apple. The Edition guard role was part of the purchasing journey that it wished to provide to its customers. It was specifically required pursuant to the contract between Apple and the respondent. Apple were looking for guards who would take on specific responsibilities for dealing with the Edition watches and who had the specific skill set to ensure appropriate interaction with the retail staff and customers.

7.74 The role was open to all security guards. When the role was initially advertised, all those who applied internally were appointed on presentation of their CVs. Had the claimant applied, there is no credible evidence indicating she would not have been appointed. After 4 April 2015 the post was advertised externally.

7.75 When the claimant applied in September 2015 there were fewer places and more competition. It is clear that the claimant failed on the merits of her application.

7.76 We find there is a material factor which led to the creation of the Edition guard role. That role was open equally to men and women on merit. There is no fact from which we could conclude that the material factor involved the respondent treating the claimant less favourably because of her sex than it would treat any man.

7.77 We do not need to consider whether the material factor was a proportionate means of achieving a legitimate aim because there has been no suggestion that the material factor put the claimants, or women in general, at any particular disadvantage.

7.78 In the circumstances we find that, should we be wrong about the question of same or broadly similar work, there is a clear material factor defence.

Employment Judge Hodgson on 13 February 2018