THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBER: **MS S LANSLEY**
MR G HENDERSON

BETWEEN:

Ms E Pollard

Claimant

AND

Crown Prosecution Service

Respondent

ON: **13 February 2018**
Appearances:
For the Claimant: **Mr R O'Dair, counsel**
For the Respondent: **Ms L Prince, counsel**

JUDGMENT ON RECONSIDERATION

The unanimous Judgment of the Tribunal is that the original remedy judgment of 2 March 2017 is confirmed.

REASONS

1. This decision was delivered orally on 13 February 2018. The claimant requested written reasons.
2. The claimant also requested that we record in our decision "an observation" by one of the panel members (Ms Lansley) during counsel's submissions in relation to Mr Sheehan being on a higher salary because of his entitlement to the OSM. It was an exchange with counsel seeking clarification during the submissions and the claimant's counsel said that the refusal to record this was a breach of the claimant's Article 6 rights. Ms Lansley confirmed that it did not form part of the tribunal's unanimous decision. We reminded

the parties that our decision was not meant to be full note of the entire proceedings and both counsel had kept notes.

3. The claimant requested that we record what the claimant said was concession by the respondent and we have recorded this exchange at paragraphs 65-67 below.

The background

4. By a reserved judgment sent to the parties on 13 January 2017, the claimant Ms Emma Pollard succeeded in her claim for equal pay.

5. The claim succeeded on the sole issue of the appointment of her comparator Mr Dale Sheehan in 2007. We found that the equality clause operated in the claimant's favour in relation to the appointment of Mr Sheehan.

6. We held a remedy hearing on 2 March 2017 and delivered an oral judgment. The claimant requested written reasons which were sent to the parties on 28 March 2017.

7. The claimant presented an appeal to the EAT on 21 February 2017. It was stayed by HHJ Richardson on 2 May 2017 who ordered that within 28 days of the sealing of the Order (3 May 2017) the appellant (to whom we will continue to refer as the claimant) must write to the EAT confirming whether the appeal is pursued and whether any appeal had been brought against our judgment on remedy.

8. On 8 May 2017 the claimant pursued her appeal with the EAT on the issue of remedy. The grounds of the appeal were that the tribunal had erred in its findings and that new evidence had become available which could not have been known at the date of the remedy hearing on 2 March 2017. The claimant's case was that the respondent's witness at the remedy hearing, Mr Myers, had misled the tribunal, albeit inadvertently.

9. The appeal was considered in chambers by HHJ Richardson who stayed the appeal for a period of 35 days to give the claimant the opportunity to submit to the Employment Tribunal with a copy to the EAT, an application, even if out of time, for reconsideration relating to the fresh evidence. The respondent was given a right to respond and the papers were to be restored for further consideration by the EAT.

10. HHJ Richardson said as follows in an Order sealed on 18 July 2017:

> *Ground 7 raises a fresh evidence point. For reasons explained in paragraph 10 of the EAT's Practice Direction such points are generally best taken before the ET which heard the case. It is therefore the normal practice of the EAT to stay an appeal to give an opportunity the such an application to be made. If the ET grants the application there will then be a reconsideration. If it does not, its views will be invaluable to the EAT. The appellant should in any event note the full contents of paragraph 10 of the Practice Direction.*

When this is appeal is sifted again there is a measurable chance that a preliminary hearing will be ordered. If so, the respondent would at that stage be ordered to lodge and serve concise submissions dedicated to showing that there is no reasonable prospect of success for the appeal. I think, to avoid delay and assist the judge who next sifts the case, that it is desirable to order these now.

11. On 19 September 2017 the claimant made an application for a Reconsideration of our Judgment on Remedies under Rule 71. Given the direction by the EAT, no issue is taken by the tribunal on time for the reconsideration application.

The issue

12. The issue for this reconsideration hearing, as identified by the EAT, is the fresh evidence point alone.

13. Paragraph 10 of the EAT practice direction says that as this tribunal is the fact-finding body which heard the relevant witnesses, this is the appropriate forum in which fresh evidence is to be considered, in particular the extent to which if at all, it would have made any difference to our conclusions.

14. The issue for us was identified by the claimant's counsel as follow: "Would Mr Sheehan (the claimant's comparator) have benefited from the OSM (Old Scale Maximum) so as to be on £51,522 in 2016 had he not had the benefit of starting on point 6 of the pay scale, but rather had he not started on point 6 would he have been on the same salary as Ms Fitzpatrick (£44,539)".

15. We asked how this affected this claimant's case and were told that it affected the claimant because (i) her salary was almost the same as Ms Fitzpatrick's and (ii) it must follow that the difference between £51,522 and £44,539 is a benefit accruing from Mr Sheenan's higher starting salary (which we found to be discriminatory) therefore it must be ignored in calculating whether there is a gap between the claimant's salary and Mr Sheehan's actual salary for the purposes of the Equality Act 2010.

Documents

16. We had a Reconsideration bundle of around 210 pages which contained the claimant's application, the respondent's response to the application and the claimant's response to the respondent's position. It also included the liability and remedy judgments and Mr Myers' witness statement for the liability hearing.

17. We had oral submissions from both parties.

Synopsis of our findings on liability

18. We found that there was a lack of transparency in the respondent's appointment of the claimant's comparator Mr Sheehan. We found that the respondent did not rebut the presumption of sex discrimination in appointing Mr Sheehan on 2 January 2007 at point 6 of the twelve-point pay scale. We drew an inference of gender discrimination in the appointment of Mr Sheehan at the sixth point of the pay scale and subsequently not reducing this when he became a permanent employee on 1 July 2007.

19. The comparator in relation to whom the claimant is a Senior Crown Prosecutor in the respondent's Southampton team. Our finding (liability judgment paragraph 27) was that he transferred to his position in 2014 having previously undertaken other roles with the respondent. The parties agree that the backdating period goes back to 1 April 2014.

20. In relation to the Old Scale Maximum (OSM) our finding (at paragraph 66 of the liability judgment) was that when the respondent introduced the 2014 pay scale it had to find a solution for those who were entitled to a maximum level of pay under the 2007 scale. Our finding of fact was that this affected those who became Senior Crown Prosecutors on or before 18 May 2007. It therefore affected Mr Sheehan because his appointment date was 2 January 2007.

21. We found that as the claimant became a Senior Crown Prosecutor on 1 April 2010 she did not and does not qualify for the OSM. We found no gender taint in relation to those who had the right to progress to the OSM (paragraph 95, liability judgment).

The claimant's application for reconsideration

22. The claimant relied upon the evidence of Mr Keith Myers to the effect that an employee's start date was the only thing which affected entitlement to OSM. He said that it was.

23. The claimant relies on new evidence which she says casts doubt upon the evidence of Mr Myers.

24. The claimant asks this tribunal to reverse the finding that Mr Sheehan was entitled to the OSM because he was appointed prior to May 2007 or alternatively to reconvene the hearing to hear further evidence from Mr Myers. In a written submission dated 2 August 2017 counsel for the claimant asks the tribunal to consider either with the benefit of further written submissions or to further hearing the implications for its remedy judgement. The application did not set out what the claimant says those implications should be in precise terms.

The fresh evidence

25. The fresh evidence is an email dated 9 March 2017 (postdating the remedy hearing) in which Ms Bridget Fitzpatrick, one of the claimant's female colleagues, says:

> *"I have been advised that any SCP in post before 17 May 2007 (I was made SCP on 1 May 2007) has actually retained the right to the OSM. If the latter is correct that I should be due to assimilate to the OSM on 1 May 2017…."*

26. The claimant says that Ms Fitzpatrick therefore claims to be in the same position as the claimant's comparator Mr Sheehan.

27. Mr Myers responded on 17 March 2017, this being the date upon which the information came to the claimant's attention, as follows:

> *"As part of the 1/4/15 pay award negotiated with the FDA, the right to progress to OSM ended on 31 March 2015."*

28. The claimant's case is that on the face of it Mr Myers contradicted the evidence he gave to the tribunal and his response represents a "formal pronouncement on his part" in relation to circumstances not materially different from those of Mr Sheehan that the OSM was not applicable.

The law

29. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides that a tribunal may, either on its own initiative or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

30. The EAT's Practice Direction at paragraph 10.3 sets out the relevant law in relation to exercising a discretion to admit any fresh evidence or new document. The EAT will apply the principles set out in ***Ladd v Marshall 1954 1WLR 1489***, having regard to the overriding objective, i.e.:

    30.1. the evidence could not have been obtained with reasonable diligence for use at the Employment Tribunal hearing;

    30.2. it is relevant and would probably have had an important influence on the hearing;

    30.3. it is apparently credible.

31. The Practice Direction says that the evidence and representations in support of the application must address these principles.

32. The authorities, including ***Ladd v Marshall,*** were reviewed by Eady J in the EAT in ***Outasight VB Ltd v Brown EAT/0253/14*** in which she held that the case law under the 2004 Rules remained relevant. In ***Outasight*** the employment tribunal revoked its decision on a reconsideration and allowed the claimant to introduce new evidence of the fact that the respondent's director and sole witness had previous convictions for dishonesty. The EAT set aside the revocation and restored the tribunal's original decision holding that not only had the tribunal been wrong to admit the new evidence when the test for admissibility had not been met, but also that the claimant had sufficient knowledge of the matters which were relevant to the issue of the director's credibility. Even though the claimant was unrepresented at the original hearing in that case, there were no grounds for the tribunal bypassing the ***Ladd v Marshall*** test and interfering with the original decision.

Submissions

33. We set out below a summary of the oral submissions made to us. We also had the parties' written applications and response. This is not intended as a full replication of the submissions that were made to us in writing or orally, all of which were considered.

<u>The claimant's submissions</u>

34. The claimant submitted a table that had been prepared showing a comparison between the salaries of Ms Fitzpatrick and Mr Sheehan.

35. The claimant said this involved the application of the three requirements in ***Ladd v Marshall.***

36. The third test, on credibility was not in issue between the parties. On the first, could the evidence have been obtained with reasonable diligence in time for the hearing? The claimant said that "properly understood" what Mr Myers said in his email 17 March 2017 is relied upon as an admission and a statement contrary to the interests of the respondent. The claimant said this was important when looking at the respondent's response to this application. The respondent says Mr Myers' email is not new evidence because all relevant documents were in the bundle and Mr Myers could have been cross-examined upon it and was not.

37. The claimant submits that whilst Mr Myers was not cross examined on every document, where an SCP started on the scale affected whether they could benefit from the OSM and the extent on whether they could do so.

38. It was submitted for the claimant that in relation to paragraph 50 of the remedy judgment, we should have taken into account on remedy, that Mr Sheehan was appointed on point 6 of the payscale which was discriminatory.

39. It was submitted that there was a "chasm" in legal terms, between pay scales which may or may not disclose the truth. It was submitted that the 17 March 2017 email contained admissions which the claimant could not have had at the time of the hearing (on 2 March 2017) as they had not been made at that point. The correspondence between Mr Myers and Ms Fitzpatrick had not happened at the date of the remedy hearing.

40. Turing to the second test in ***Ladd*** – the email of 17 March 2017 (at page 33 of the Reconsideration bundle) – responding to Ms Fitzpatrick's email on page 34, she said she had been advised that any SCP employed before 17 May 2007 retained the right to the OSM. This is what we found in the remedy judgment, that if in post by 18 May 2007, the right to the OSM was retained. Ms Fitzpatrick asked if that was correct. Mr Myers answered as set out in paragraph 27 above. It was submitted that he was asked a direct question, "*is what the tribunal held correct*" and he said it was not because the right to the OSM ended on 31 March 2015.

41. The claimant submitted that on the second limb of ***Ladd*** the evidence is relevant and would probably have had an important influence on the hearing. It was submitted that this is a threshold test only. The claimant's case was that Mr Sheehan benefited from the OSM only because of his initial and unlawful boost to point 6 of the pay scale and what we have in Mr Myers' email is evidence based on the table submitted by the claimant.

42. It was not in dispute that both Ms Fitzpatrick and Mr Sheehan were both appointed prior to the cut-off date of 18 May 2007. The table shows that in 2016 there is a 13% difference in their salary (in Mr Sheehan's favour). We found that Mr Sheehan's appointment date gave him access to the OSM. The claimant said that it cannot be right an appointment date before 18 May 2007 can be a sufficient explanation of Mr Sheehan's 2016 salary because it begs the question as to why Ms Fitzpatrick's salary is so much lower.

43. The claimant responded to the respondent's submission (at paragraph 15 of that document, bundle page 57) that Mr Sheehan and Ms Fitzpatrick were in different positions and took us to paragraph 23 of Mr Myers' remedy witness statement (reconsideration bundle page 201). This was that as Mr Sheehan was on point 6 of the pay scale he retained his progression date until his salary moved to the OSM on 2 January 2013. It was put that they key words were that "as he was on point 6…" and the answer was as we stated in our liability judgment.

44. The respondent draws a contrast between Ms Fitzpatrick who started at around the same time and who could only progress to the OSM after the 2014/2015 pay agreement came into force and Mr Sheehan had already progressed on to it in 2013. The claimant said that the difference between Mr Sheehan and Ms Myers is the difference in where they started. Mr Sheehan went on to the OSM before the 2014/2015 pay agreement came into force. We looked at this in relation to the claimant's other comparator Mr Sumpter (in respect of whom she did not succeed).

45. The claimant says that the effect of the 2014/2015 pay agreement was that the employee had to have worked to the top of the scale before the "cut off". Mr Sheehan could only go on to the top of the scale because of his discriminatory pay uplift.

46. It was always the claimant's case that the OSM argument only worked and took advantage of Mr Sheehan's discriminatory starting point and that the 17 March 2017 new email is evidence of that. It brings before the tribunal, a person (Ms Fitzpatrick) who had the crucial attribute of a start date which qualified her for the OSM. She asked if that alone "got her home" and Mr Myers replied saying, no it did not.

47. We asked the claimant what the outcome would be if they were correct in their submissions. The claimant said that the outcome would be that she would have her salary increased from £44,539 to £51,522 subject to backdating and pro-rating due to her part time status.

48. The claimant anticipated an argument from the respondent (at page 55 of the bundle, the respondent's response to this application) the case of ***Adegbuji v Meteor Parking Ltd EAT/1570/09*** in relation to fresh evidence, EAT. The remedy judgment at paragraph 41 noted that at paragraph 94 of the liability judgment, we found that Mr Sheehan was entitled to the OSM.

49. We found that it was solely because of the appointment date and the claimant and her other comparator Mr Sumpter were not entitled to it. The claimant submitted that notwithstanding those findings, the extent to which Mr Sheehan had benefited from his higher salary was at issue in the remedy hearing. So far as there were relevant findings at the liability hearing the claimant could not address them in relation to the 17 March 2017 email because she did not have it. The claimant had 14 days to apply for a reconsideration and 6 weeks to present an appeal from the liability decision but at neither point in time did she have the 17 March 2017 email. The claimant said that the application for reconsideration addresses both judgments. The claimant submits that she can succeed on this application without attacking the liability judgment because paragraph 50 of the remedy

judgment shows that the issue was still in play and that we were asked to reconsider our liability judgment in so far as it overlaps with remedy.

50. The claimant submitted that we should regard this as an application to reconsider our liability judgment and that this was within HHJ Richardson's order of 18 July 2017 point 2, but even if it was not, if there was genuine fresh evidence the claimant should be allowed to address it out of time. The question is that there is a body of evidence that had come to light and should this tribunal find that it satisfies ***Ladd v Marshall*** and it was a question of principle that we should not be diverted from by technical issues relating to that which HHJ Richardson was referring to.

51. The claimant dealt with the concession at paragraph 54 of the remedy judgment saying that they were not "knocked out" by this because the argument they rely upon today was that Mr Sheehan would not have got on to the OSM but for the impugned uplift and the claimant says that the email of 17 March 2017 raises a serious and important case for thinking that he would have reached the OSM at all and no stripping out of the OSM would arise.

52. The claimant said that stepping back from the technicalities Mr Sheehan only benefitted from the OSM from a discriminatory position and we now have an email from Ms Fitzpatrick whose question to Mr Myers tested the very proposition that we had accepted and his response made it clear that the proposition was arguably not correct and there should be a full and proper addressing of the doubts raised by the Fitzpatrick email.

<u>The respondent's submissions</u>

53. The respondent firstly addressed us on the claimant seeking to have the liability judgment reconsidered and said that it did not go to HHJ Richardson's Order as this related to the remedy decision and not to liability and that it was significantly out of time.

54. Turning to the ***Ladd v Marshall*** test they conceded limb three but made submissions on limbs one and two.

55. The respondent said that the new evidence introduced into the picture the 2014/2015 "buy out". It is not accepted that Mr Myers misled the tribunal in any way and that the figures in his statement remain correct in respect of the claimant's losses. His evidence was that there is no entitlement to the OSM if not employed before 18 May 2007 and that is correct. Mr Sheehan and Ms Fitzpatrick were both entitled to the OSM. The position with Ms Fitzpatrick is that her entitlement to the OSM was bought out as part of the 2014/2015 pay agreements. This is apparent from Mr Myers' email of 17 March 2017 at page 33 and page 39 which was before the tribunal at the remedy hearing. This is a "Old Scale Maximum (OSM) Buy Out Illustration". The respondent said it was at page 97 of the Remedy bundle which was accepted by the claimant.

56. The table at page 136 of the remedy bundle (which was before us at this reconsideration hearing), employees entitled to OSM employed by 18 May 2007 would go up the scale by one point each year, until they reached £42,730 which was the top in April 2010, those on the OSM would stay at

£42,730 with inflationary increases until they reached the maximum of the pay scale.

57. The respondent's case is that had Mr Sheehan not been entitled the OSM, he would have been stuck at the top of the scale and the claimant would have caught up with his salary. That is how the pay differential is worked out in Mr Myers' witness statement (paragraph 36, reconsideration bundle page 211). Mr Myers charted what Mr Sheehan's salary would have been had he not been entitled to the OSM. This is the "stripping out" of the OSM from the pay differential and Mr Sheehan would not have been subject to the 2014/2015 pay agreement on this.

58. To the extent that the claimant submitted that she should be entitled to the difference between Mr Sheehan and Ms Fitzpatrick's salaries, this could not be right on the respondent's submission. Mr Sheehan also had three more years' service than the claimant and this was dealt with in Mr Myers' statement in paragraphs 46 – 48. This also takes it out of the 2014/2015 pay agreement. Prorating and the claimant's maternity leave also had to be stripped out. The claimant did not dispute those figures at the time of the remedy hearing and the respondent said that no credible alternative has been put forward to those figures.

59. It was also submitted that Ms Fitzpatrick was in a materially different position to Mr Sheehan even though both qualified for the OSM. Ms Fitzpatrick was appointed on 1 May 2007 and Mr Sheehan on 2 January 2007 and he was therefore a year ahead on the pay scale (relative to 1 April).

60. The buy-out illustration at page 39 was in the remedy bundle and could have been put to the tribunal and was not. Mr Sheehan was towards the top point of the SCP scale and transferred onto the OSM, so the 2014/2015 agreement was not relevant to him. Mr Myers gave a hypothetical example in his witness statement of Mr Sheehan not qualifying for the OSM and the 2014/2015 buy-out was also irrelevant.

61. The respondent says that the new evidence email shows that Ms Fitzpatrick was entitled to progress to the OSM, she was due to progress to it in 2017/2018 and had it not been for the 2014/2015 agreement that is what would have happened. Her salary for 2014 in Mr Myers' email of 17 March 2017 is the same as the salary for 2014 in the OSM Buy-Out Illustration which was before the tribunal in the remedy bundle (page 39 reconsideration bundle). This was part of the 2014/2015 pay award agreed with the union.

62. The respondent submits that had the claimant wished to make those hypothetical comparisons, they could have done so at the date of the remedy hearing. The relevant question was what would Mr Sheehan's salary have been had he not been entitled to the OSM.

63. The respondent's case was that this evidence was before the Tribunal, we now have an email about a specific individual and how her pay had progressed and had the claimant wished to make such a comparison she could have done so. The respondent said this was not in any event necessary as it has no impact on the figures in Mr Myers statement because

Mr Myers strips out the entitlement to the OSM and strips out Mr Sheehan's entitlement to the OSM.

64. The respondent says that its case is exactly as set out in Mr Myers statement. It involves a stripping out of the OSM, working out what Mr Sheehan's salary would have been had he not had the right to progress to the OSM.

The claimant's reply

65. The claimant said that in view of a concession from the respondent that Mr Sheehan benefitted because of his starting point at point 6, that entitles the claimant as a matter of law to succeed. It is a concession that Mr Sheehan's ultimate salary was causally linked to discrimination.

66. The respondent did not accept that such a concession had been made and said that the point that was being made was in assessing remedy, the OSM element had to be stripped out and that this was the correct way of making the calculation. Any discrimination between Mr Sheehan and Ms Fitzpatrick was a matter that needed to be dealt with in any claim brought by Ms Fitzpatrick.

67. The claimant responded by saying that we were considering non-discriminatory explanation and the respondent has the burden of proof. Transparency was crucial and the respondent's pay arrangements were as "transparent as mud".

Conclusions

68. We remind ourselves that this is an application for reconsideration of the remedy judgment of 2 March 2017. It is not, despite the claimant's late submission to this effect, an application to reconsider findings made at the liability judgment. We find that based on the wording of the Order sealed by the EAT on 18 July 2017 that time was extended by HHJ Richardson for a reconsideration application against remedy, as this was the scope of the appeal lodged on 21 February 2017 to which the Order relates.

69. We have to consider the impact of Mr Myers' email of 17 March 2017 being the fresh evidence relied upon in this application, as to whether it could not have been obtained with reasonable diligence for use at the remedy hearing and whether it is relevant and would probably have had an important influence on the hearing. It is not in dispute by the respondent that it is credible so the claimant did not have to address this test.

70. The fresh evidence is an email exchange between Mr Keith Myers who was the respondent's witness at the remedy hearing and Ms Bridget Fitzpatrick who is also a Senior Crown Prosecutor. It is not in dispute that her start date as an SCP was 1 May 2007 and as such she qualified for the OSM, unlike the claimant. We have not heard to been taken to the precise circumstances of Ms Fitzpatrick's case. It was indicated to us by the claimant that she may present her own claim against the respondent but we have made no fact finding into the circumstances of her case.

71. Ms Fitzpatrick's email to Mr Myers was sent the week after the remedy hearing. She contends that as she was appointed on 1 May 2007 she should be entitled to the OSM and should assimilate to it on 1 May 2017.

Mr Myers replied that as part of the 1 April 2015 pay award, the right to progress to the OSM ended on 31 March 2015.

72. It is not in contention that the claimant did not qualify for the OSM because of her start date. It is the start date and not a discriminatory reason that gave rise to the entitlement to OSM. A man appointed to SCP on the same date as the claimant would not have received the OSM.

73. It is submitted by the claimant that her salary was almost the same as Ms Fitzpatrick's and had Mr Sheehan not started on pay point 6, he would have been on the same salary as Ms Fitzpatrick. One reason that Ms Fitzpatrick and Mr Sheehan's salaries were not the same was because they were appointed in different financial years which affected the incremental date.

74. We had in front of us a document that was in the remedy bundle titled Old Scale Maximum Buy Out Illustration (page 39). Ms Fitzpatrick was entitled to the Buy-Out under that illustration. The figure quoted in Mr Myers' email of 17 March 2017 for her 2014 salary, is the same as in the document at page 39 (£43,759). The Buy Out of the OSM was part of the 2014/2015 pay agreement which had been negotiated with the union. As part of that pay award, the right to progress to the OSM ceased with effect from 31 March 2015. For those such as Ms Fitzpatrick who became entitled to the OSM in 2017/2018 her basic pay increased in 2014 from £43,157 to £43,759.

75. These documents were before the tribunal on 2 March 2017. The email exchange shows us an illustration of what actually happened to a female colleague by applying the Old Scale Maximum Buy Out Illustration. It could have been cross-examined upon at the remedy hearing for illustrative purposes, if considered relevant, but it was not.

76. We find that Mr Myers' email does no more than apply the policy that was already described in the documents in the remedy bundle. We find that the 17 March 2017 email does no more than explain to Ms Fitzpatrick the effect of the policy on her personal circumstances, incorporating the effect of the collectively agreed pay award. This email, if before us on 2 March 2017 would not have had an important influence, if any at all, on the outcome of the remedy hearing.

77. We understand that the claimant is unhappy to see that Mr Sheehan was paid substantially more than her. However, our findings were that the entitlement to the OSM was non-discriminatory, a man would be disentitled if appointed at the same time as her. She did not qualify for the OSM. It was stripped out when arriving at her award.

78. She seeks to draw in the circumstances of a female colleague whose entitlement to the OSM appears to have been bought out under a collective agreement, the 2014/2015 pay award and argue that this entitles her to a greater (unquantified) award. We find that it does not. Any differences in pay between Ms Fitzpatrick and Mr Sheehan is a separate case.

79. Mr Myers has been consistent with what he said in his evidence to the tribunal on 2 March 2017.

80. We therefore confirm our original remedy judgment and we are aware that the claimant pursues an appeal at the EAT.

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Employment Judge Elliott
Date: 13 February 2018