EMPLOYMENT TRIBUNALS

Claimant
Miss A. Parkinson

Respondent
Ainscough Crane Hire Ltd

v

Heard at: Watford

On: 4-8 March 2019
(11 March 2019 in chambers)

Before: Employment Judge Heal,
Mr. I. Bone,
Mrs. A. Brosnan.

Appearances
For the Claimant: in person
For the Respondent: Ms. N. Newbegin, counsel.

JUDGMENT

1. The complaints of equal pay and sex discrimination are dismissed.

2. We order that the identities of the comparators and other employees of the respondent whose salaries are disclosed in this judgment shall not be disclosed to the public in any document entered on the register or forming part of the public record and we anonymise these written reasons accordingly.

REASONS

1. By a claim from presented on 27 December 2017 the claimant made complaints of sex discrimination, including equal pay and victimisation.

2. At a preliminary hearing on 12 June 2018 the claimant confirmed that she was not pursuing complaints of victimisation or indirect discrimination.

3. We have had the benefit of an agreed bundle running initially to 674 pages. Page 121A was added to this at the outset by consent. To this was added pages 675 to 797, a colour set of diary print outs provided by the respondent. The respondent also supplied us with R4, a set of colour

photographs of mobile cranes and associated equipment. The claimant supplied a bound unpaginated set of documents in addition, of which the most significant document was the front page: a photograph of a document dated August 2017 which showed the number of visits undertaken by the claimant and her comparators in the year to that date.

4. A further bound bundle of documents was provided by the claimant on 6 March 2019, day 3 of the hearing. We gave the respondent time to read these documents, after which the respondent did not see the relevance of them but did not object to our admitting them.

5. The respondent supplied us with a chronology and opening note.

6. Both parties produced written submissions to support their oral closing submissions.

7. The respondent supplied us with a bundle of authorities.

8. We have heard oral evidence from the following witnesses:

Ms Angela Marie Parkinson, the claimant;
Ms Anna Kingan, formerly Operations Director for the respondent's south east region;
Mr. Ian Carradice, Commercial Manager for the respondent's south east region;
Mr. Darren Thompson, Human Resources Business Partner.

9. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement which we read before the witness was called to give evidence. A supplemental statement was also produced for Mr Carradice. Each witness was then cross examined and re-examined in the usual way.

10. By consent of both parties we will anonymise the comparators and other employees whose salaries are mentioned here, because, as both parties accepted, they have not chosen to be comparators, nor for their salaries to be made public in this way.

Respondent's application to amend

11. In the afternoon of the second day of this hearing, it became clear that the respondent relied additionally as part of its material factor defence on an argument that the Beckton depot had a lower budget than the Hayes depot. This had not previously been pleaded.

12. Evidence about the lower budget already appeared in the witness statements of Anna Kingan and Ian Carradice. No application to amend had been made however at the time of exchange of witness statements or at the outset of this hearing. Ms Newbegin for the respondent confirmed that there were no documents in the bundle to support the allegation.

13. Ms Newbegin made an application to amend to add the budget factor to the material factor defence. The claimant objected to that application.

14. After hearing submissions on the application, we refused it. What follows are the reasons we gave at the time. We considered the principles set out in the *Selkent Bus Co Ltd v Moore [1996] IRLR 661*. We considered that this was a new allegation and not already covered by the factor of market forces, which has been pleaded. We think that market forces are factors which arise outside the respondent's control and decision-making processes. A budget however is set internally. Therefore, we considered that it was necessary for the respondent to make an application to amend if it was to rely upon this new factor.

15. We regard this amendment as more than a minor amendment. We consider that it is significant because it is part of the defence. It is far too early to know whether it would be decisive, however it has the potential to be decisive and the potential to be a complete answer to the claim.

16. We take into account the timing and manner of the application. It was made on the second day of the hearing and part way through the claimant's cross examination. It was not made as a specific application at the outset of the hearing in advance of the hearing when witness statements were drawn up although it does appear in the witness statements. It was made only because the tribunal's questions prompted the application.

17. So, it is a very late application, even given that it could have been made at the same time as the exchange of witness statements. It must have come to the respondent's attention as a possible defence at least at that time.

18. We look at the balance of hardship. We considered that the claimant is more prejudiced in the circumstances than the respondent. We take into account that she is a litigant in person: she does not greatly understand even the discussion that we have been having about whether we should permit an application to amend. We consider that she is disadvantaged in her ability to understand the case made by application at this late stage. At present the proposed amended case is based on mere assertion by witnesses: we are told that there is no supporting evidence in the bundle. A bare assertion of a budget decision without being supported by documents which are likely to exist is unlikely to succeed. Conversely if we permit the amendment then there is a likelihood of late disclosure documents during the course of hearing which will cause yet another delay to the hearing and yet further confusion for the claimant.

19. If we do not permit the amendment however the respondent continues to have other defences which have been pleaded and which have potential for success.

20. Weighing those matters up we refuse the application to amend.

Issues.

21. The issues were identified by Employment Judge Manley on 12 June 2018.

22. These are as follows:

Equal Pay

22.1. Was the claimant engaged in like work with one of her four male colleague Southern Contract Lift Managers? That is, was her work and theirs the same or broadly similar and such differences as there were between their work were not of importance in relation to the terms of their work? (At the preliminary hearing the claimant named as her comparators A, B, C, D and E.)

22.2. If so, should the claimant's contract be modified so as to include a sex equality clause? The claimant's case is that she was paid £35,000 per year and D, who started four weeks before her, was paid £45,000 per year as was E who replaced her when she left.

22.3. Can the respondent show facts that constitute a material factor defence? The particulars of the material factor defence were set out in the respondent's amended grounds of resistance dated 10 July 2018. The factors said to amount to a material factor defence were as follows:

22.3.1 The claimant had no experience of the crane industry or of the Contract Lift Manager role, prior to joining the respondent;

22.3.2 The claimant was recruited on a lower salary than her named comparators because each of those comparators:

22.3.2.1 Had greater industry experience, knowledge and/or skills than the claimant (for example, D and E each had 15-20 years' experience of operational lift managing);

22.3.2.2 Had previously worked in other areas of the respondent's business (for example, A was previously a Refinery Depot Manager for the Respondent);

22.3.2.3 Had a longer length of service than the claimant (for example C originally joined the respondent as a crane operator in 2001 and had held a number of other roles within the respondent since before becoming a contract lift manager); and/or

22.3.2.4 Were recruited at a salary level necessitated by market forces in their geographical area at the time of their appointment (for example, B was recruited from a competitor); and/or

22.3.2.5 had additional responsibilities, such as conducting lift management for the Heavy Crane fleet.

22.4 The respondent carries out annual pay reviews and implements any increases in July each year (if applicable); and

22.5 The claimant's performance was not of a sufficient standard to warrant an increase in pay during her employment. The claimant was placed on a performance improvement plan in May 2017 due to her poor performance in her role.

Sex discrimination

22.6 Has the claimant proved facts from which the tribunal could conclude that there was less favourable treatment of her because of her sex?

22.7 The claimant relies on the following matters:

i. On 3 May 2017 Ian Carradice informed the claimant that she would work from the office until further notice because the job had gone wrong on 29 April 2017;

ii The claimant was based in the office but given no or very little work and no guidance or training for about 4 weeks;

iii The claimant was required to return to the office, for example on 11 May 2017, when her male colleagues could work from home;

iv Ian Carradice made a phone call to the claimant about a job on Saturday, 20 May 2017 and he was abrupt and disrespectful;

v The claimant was required to take a work colleague who was working on reception with her on a site visit on 22 May 2017 which was unusual;

vi Ian Carradice asked D if he was 'influencing' the claimant with respect to a request for PPE equipment on 26 May 2017;

vii The claimant was missed off a number of group emails unlike male colleagues as follows- a) not included in the Southern Contract Lift Manager group email until November 2016; b)- not included in bonus scheme group email until August 2017; c) not included in Regional Contract Lift Manager group at all.

viii The claimant's resignation was because she believed there had been sex discrimination.

22.8 The comparators are specifically B who the claimant alleges made an error that led to a potential £100,000 loss and C who made a mistake over crane mats, neither of whom received the treatment she complains of. She also compares her treatment to all four of her colleagues.

22.9 If so, can the respondent show that the less favourable treatment was not because of sex?

Concise statement of the law

Equal pay

23. This is a complaint of like work only, so we will outline only the provisions of the 2010 Act relevant to that area.

24. Section 66 of the Equality Act 2010 provides for a 'sex equality clause' in a contract of employment. That modifies a provision in A's contract to make it no less favourable than a corresponding term in B's contract. B is a comparator of the opposite sex to A where A is employed on work that is equal to B's work. A's work is equal to B's work if it is like B's work. A's work is like B's work if A's work and B's work are broadly similar and if such differences as there are between their work are not of practical importance in relation to their work.

25. The claimant's chosen comparator ('B', as the Act calls him) has to be a real person and not a hypothetical one, and he need not be employed at the same time as the claimant. A claimant may not compare herself with her male successor however because such a comparison is too hypothetical: *Walton Centre for Neurology & Neurosurgery Surgery NHS Trust v Bewley [2008] IRLR 588.*

26. To make the comparison, it is necessary to have regard to the frequency with which the differences between their work recur in practice and the nature and extent of the differences.

27. In a like work claim, having chosen her comparator(s), it is for the woman to demonstrate that they are both engaged on like work. At this stage, it is only the nature of the work done which is relevant. The principle of the Act is that people should receive the same pay and contractual conditions for the same work without discrimination on the grounds of sex. If the woman cannot show that she does the same work, then she has not established even an initial case of sex discrimination. It is only when she has proved that she gets less pay for roughly the same work that there is any case for the employer to answer.

28. Having heard the evidence, it is only when it has either been decided (or, often, assumed) that the work done by the woman is equal to the work done by the man that any question arises whether the discrimination can be justified under the 'material factor' defence found in section 69 of the Act.

29. The issue must first be narrowed to the nature of the work done. The test is the similarity of what was done, and the similarity of the skill and knowledge required to do it.

30. It is a question of fact for us whether the man's work and the woman's work are of the same nature or of a broadly similar nature. Things can be of the

same nature even when they are different (the common example is cheese and yoghurt) and that allows for some initial flexibility in the definition. Work will be like work where the work is of a 'similar' nature, and such similarity need only be broad.

31. It is, however, the nature of the work done which is in issue. That means we look at the work done, not the work that might be done under the contractual terms of employment. On the other hand, it is only the work that is done under contract that is relevant, since if regard was had to all work actually done, there could be no useful comparison made.

32. It is necessary to assess the similarity of the nature of the work, as opposed to the similarity of the tasks performed. There is not, however, a complete separation between the 'like work' and 'material factor' elements in an equal pay claim.

33. If the claimant and her comparator do the same sort of work on the test of 'broadly similar nature' *then* we go on to the second part of the test and investigate more closely what they did. Did they perform the same tasks? And if not, are the differences in what they do of any practical importance in relation to the terms and conditions of employment? In other words, does the difference in what they do justify their being given different terms of employment? Are they, in that sense, different jobs? What is in issue here however is the tasks performed, and that is only part of what makes up a job.

34. The 'things done' by an employee may include the exercise of responsibility. For example, a senior clerk and a junior clerk are not necessarily engaged on like work even if they carry out apparently similar tasks.

35. If the woman can show that she does the same sort of work as a man in the same employment, and that the differences (if any) in the things they respectively do are not so significant as to justify different terms and conditions of employment, then, as pointed out above, it is still open to the employer to disprove sex discrimination by proving some other material factor distinguishing the two cases.

36. In effect therefore proof of like work requires an explanation of some kind from an employer if it wishes to avoid the operation of the equality clause.

37. The burden therefore passes to the respondent to establish its defence under section 69. When the burden passes, it gives rise to a three-stage process, per Lord Nicholls in *Glasgow City Council v Marshall [2000] IRLR 272:*

38. *"The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this*

sense, the factor must be a "material factor", that is, a significant and relevant factor. Third, that the reason is not "the difference of sex". This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, the factor relied upon is […] a "material difference", that is, a significant and relevant difference between the woman's case and the man's case."

39. The distinguishing feature might be seniority, greater experience, or greater merit or skill or anything else which demonstrates that in comparing this male employee with this female employee, you are not comparing like with like, quite apart from the difference in their sex. It must also be shown in the second place that the discrimination was due to that material difference.

40. It is for the employer to identify the factor he says justifies the difference in pay, and he must show that it is not a sham or a pretence. Further he must show that it is causative of the difference in pay, that it is material (in the sense of being significant and relevant. It is for the claimant to show that the facts are such as to indicate potential indirect discrimination. This may involve the identification of a rule or practice operated by the employer which impacts disproportionately on the claimant and other women, or, in the absence of anything that can be identified as a discrete rule or condition for which the employer is responsible, statistical evidence which shows the same disproportionate impact.

41. In this case the claimant has not put forward in the issues or otherwise any suggestion that the material factors relied on by the respondent indicated any direct or indirect discrimination.

Sex discrimination

42. We have reminded ourselves of the principles set out in the annex to the Court of Appeal's judgment in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] IRLR 258. The annex is so well known that we do not set it out here.

43. It is the claimant who must establish her case to an initial level. Once she does so, the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if she had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of sex. What then, is that initial level that the claimant must prove?

44. In answering that we remind ourselves that it is unusual to find direct evidence of unlawful discrimination. Few employers will be prepared to admit such discrimination even to themselves.

45. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can *properly and fairly* infer discrimination.

46. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the *'same, or not materially different'* as those of the claimant.

47. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove the facts on which he or she places reliance for the drawing of the inference of discrimination, actually happened. This means, for example, that if the complainant's case is based on particular words or conduct by the respondent employer, he or she must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

48. If unreasonable conduct therefore occurs alongside other indications that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.

49. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding *'the reason why'*. Some cases arise (see *Martin v Devonshire's Solicitors* [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

Facts

50. We have made findings of fact on the balance of probability. To do this, we listen to and read the evidence placed before us by the parties. Where there are disputes of fact, then on the evidence before us and only that evidence, we decide what is more likely to have happened than not.

Credit

51. We have not found the claimant an entirely reliable witness. We found her somewhat evasive. She was resistant to accepting that she had made errors, although she has made admissions of mistakes in the contemporaneous documents. However, we found Ms Kingan to be an impressive, thoughtful witness and Mr Carradice to be reliable and restrained. When he realised that documents had been referred to incorrectly, he was ready to say so. We have in general set out below why

we have resolved disputes of evidence as we have. Otherwise, where there are disputes between the evidence of the two sides, we prefer the evidence of the respondent.

The respondent's business

52. The respondent is a limited company dealing in crane hire services. The respondent supplies cranes and skilled crane-operatives to its clients from its depots.

53. The respondent provides services for different prices and with differing levels of complexity.

54. At the simplest level, it hires out a crane and a crane operator, but the hirer is responsible for assessing its own site and assessing its risks. This is a basic contract lift. We were given the example of installing a hot tub in a garden to illustrate such a lift.

55. At a more complex level, a contract lift involves the hire of a crane and crane operator, but the respondent also takes responsibility (and charges for) the assessment of the site and the risk assessment as well as provision of a method statement for the lift. When the lift is carried out, the respondent also provides a lift supervisor.

56. There are yet more complex variations of contract lifts which might involve road closures, railway closures, lifts at airports, working in confined spaces, lifts using more than one crane ('tandem lifts'), lifts involving very large size cranes or self-erecting cranes or lifts in central London which involve management of people and heavy traffic.

57. The risks involved in simple lifts and complex lifts are not the same. In the example of installing a hot tub in an open space, the environment is very different from, for example, a lift involving a heavy wind blowing through a populated area. Anna Kingan compared being a CLM to having a driving licence. Everyone who drives has the same basic licence but the insurance premium is higher for 17 year olds because of their lack of experience. Experience or lack of experience is reflected in the salary paid to CLMs by the respondent even though they are all CLMs. We accept this evidence.

58. Under Anna Kingan's management, the respondent was trying to develop the contract lift side of its business because it was more profitable. The more the respondent adds value to its services and takes the 'headache' away from the customer, the more the customer will pay.

59. Nationally, the respondent's business is divided into regions. Each region has its own hire centre and in the claimant's region, this was the London Hire Centre. The hire centre was responsible for the paperwork and administration of the lifts. Each region also had one or more depots where most of the cranes themselves were based.

60. A distinction is made between regional cranes and depot cranes. In general, smaller more frequently used cranes (up to 350 tons) are based at the depots but there are also larger and less frequently used cranes which might be deployed anywhere in the region, or indeed nationally. These are known as regional cranes because they are managed through the region, but they can be based at any particular depot. A regional crane has a capacity of 200-350 tons and there are bigger cranes with a capacity of 500 to 1000 tons. Generally (there may be exceptions) the respondent can charge higher fees for bigger cranes.

The claimant's role and background

61. The claimant was employed at all relevant times as a Contract Lift Manager. This is a job title specific to the respondent although other companies trading in the same field employ individuals to do the same type of work but under different job titles. Sometimes the expression used is 'Appointed Person'.

62. Under the claimant's job description job purpose/objective was:

'*To carry out site visits at the request of the customer in order to convert every site visit into a Hire Contract, thereby maximising utilisation and stability of the Depot*.'

63. The claimant had to hold a current Blue CPCS card. ('CPCS stands for 'Construction Plant Competence Scheme'.) Blue and red CPCS cards are achieved through the NVQ system. A blue card is achieved at a higher level than a red card, the blue card being level 6. The bearer of a red card must have someone else present on site to give assistance and guidance. The bearer of a blue card does not need to have another supervisor present on site.

64. The claimant's duties also involved liaising with customers to achieve the best lifting solution for the customer. She had to produce high-quality site surveys including job specific method statements, technical drawings and risk assessments that met and exceeded industry regulations and guidelines. She had to ensure that the highest standards of health and safety were met and maintained regardless of commercial pressures. She was expected to 'take ownership' of all her work from start to finish, to promote the company at every opportunity, to ensure that all work was prioritised and therefore delivered in a timely manner. She was to provide her depot with technical expertise and to assist with general duties. She was expected to seek to improve the way in which the role operated within the business, to be fully conversant with company products and to undertake such other duties as requested by management.

65. The claimant achieved her red CPCS card in September 2013 and her blue CPCS card on 8 June 2015.

66. The claimant is a qualified plumber and she practised as a plumber from April 2007 to July 2014, latterly running her own business.

67. From July 2013 she was employed by the Toureen Group. From July 2013 to May 2014 this involved work at the anaerobic digestion plant at Baldock. This was a safety critical role involving site tours, safety checks and strict quality control procedures.

68. Dealing with cranes and lifting was a very minor part of this work. The claimant was involved in producing lift plans but the subcontractor responsible for the lift would carry out the lift management. The claimant could not in any event have been dealing with lifts unsupervised because she did not at this period possess a blue card.

69. From that role, the claimant moved to City Basements, still as part of the Toureen group.

70. There the claimant did have some involvement in lifting and mobile cranes, however the cranes and the crane operators were provided by subcontractors and they would carry out the management and lift supervision.

71. Even so, the majority of the claimant's lifting work at this stage involved static and not mobile cranes. The owner of static tower cranes would arrange for the installation and removal of the crane; the claimant as site manager would have some responsibility for safe working on site as this was done.

72. Before the claimant started work for the respondent, she had never been employed as a contract lift manager, contract supervisor, or crane operator; she had never been employed by a crane hire company or worked at a crane depot before.

The comparators

73. While Anna Kingan was the respondent's operations director for the south-east, she held a vision of the ideal career path for a contract lift manager. In her view, such a person would begin his or her career as a crane operator by originally driving smaller cranes. In this role, the individual would drive from depots to the place of work, rig the crane, do the work and go home. He or she would then develop to driving larger machines. This would often involve a lot of overtime so that the operator would have higher earnings and accumulate many hours of experience. The person would, in doing this, have executed (that is, followed or implemented) a large number of method statements and risk assessments. The individual would then become a supervisor and from there could be appointed as an ideal contract lift manager.

74. The practical reality however was that contract lift managers were 'like gold dust'. They were very hard to come by through external recruitment and so the respondent tried to grow its own CLMs.

75. The claimant not dispute the experience of her comparators. She accepted also that pay would vary because of experience. She relies on the following as her comparators for the purposes of equal pay.

A

76. A had at least 20 years working in the crane industry. He has an HNC in mechanical engineering. He started work for Grayston, White and Sparrow as a contracts assistant. The respondent then acquired GWS and A left the business to work for Emerson Crane Hire as a Heavy Cranes Manager 2003 to 2004. He then re-joined the respondent as site supervisor, site manager and ultimately manager of lifting operations for the respondent's oil refinery from 2004 to 2012. When the oil refinery closed, A joined the respondent's Beckton depot as a Contract Lift Manager in September 2012. A continued to occupy this role at the time claimant was employed and during the course of her employment. A tends to run the more complex lifting operations. We do not have exact evidence about what 'tends' means: but it is evidence to us that the general run of or overall part of his work is in complex lifting. On broadly the same number of jobs as the claimant (140 to her 150), A generated more profit than she did because his jobs were more complex than hers. He also produces excellent CAD drawings and RAMS. He has extra responsibilities, including training and as part of that responsibility he acted as the claimant's 'buddy' to assist her learning during May 2017 after she was not allowed to work from home.

77. As at 15 February 2018 A's salary was £48,366.45.

78. The claimant accepted that A had vast experience and was able to run the most complex operations. She agreed in cross examination that it was right that he was paid more than her to reflect his experience.

B

79. B worked in a number of different roles, which do not appear to us to be relevant, until in August 2002 he began work at Marsh Plant Hire Ltd as an Appointed Person, Lift Supervisor and Crane Operator. He remained in this role 4 years, three months until October 2006.

80. B then began work with King Lifting as a Sales and Technical Manager, carrying out site surveys for the correct placement of cranes. He was a lifting operations Appointed Person and as such was responsible for arranging the lift, method and risk assessments and other items connected to a successful crane lift. He did this work until March 2012, so for five years and six months. The respondent had to pay a premium to persuade B to leave King Lifting and join the respondent.

81. B began employment with the respondent in March 2012 as a Contract Lift Manager. He remained in this role at the time of the claimant's employment with the respondent. He is one of the respondent's best CLMs and works in Greater London where a greater degree of expertise in needed.

82. On broadly the same number of jobs as the claimant (130 to her 150), B generated more profit than she did because his jobs were more complex than hers.

83. B's salary as at 15 February 2018 was £39,431.76.

C

84. C was employed from 1995 to 2000 as a Managing Director of a haulage company, which we do not regard as relevant experience. In 2000 however he was employed by the respondent and became a crane operator, lift supervisor and multi role operator involving cranes of 25 to 100 tonnes. In 2007 C became a Contract Lift Manager driving depot cranes and heavy cranes up to 500 tonnes. He worked for large infrastructure projects including Network Rail possession work with highly detailed planning and execution. He worked in the City of London in restricted and hazardous environments. This background gave him, 'excellent skills'.

85. He had an ability to conduct Contract Lift Management for the Heavy Crane Fleet and the respondent relied upon him to run high-value and complicated jobs.

86. His salary as at 15 February 2018 was £42,742.32.

87. The claimant accepted that C been a contract lift manager since 2007, that he did complex jobs in London and that he had significant experience of contract lift management. She questioned his competence and suggested that with his experience had come complacency, however she did not explore this with the respondent's witnesses. We do not find that C was complacent or lacked competence.

D

88. D has over 20 years' experience in crane industry. From February 2004 to March 2011 he worked for the respondent as a lift supervisor. He then left that role in order to work in Afghanistan, in part as a trainer, and the respondent found that it had to pay a premium on his salary to persuade him to start work for the respondent again: at his interview, D told the respondent how much he was earning at the time.

89. D began work again for the respondent in May 2016 as a Contract Lift Manager. He was able to conduct Contract Lift Management for the large cranes in the Regional Fleet. These cranes require a greater and more detailed planning process, with more considerations to take into account than with the depot cranes. Setting up and rigging large regional cranes is more complex than for depot cranes and may involve the use of two cranes

working together, depending on the client's requirements. D had the skill set to enable him to perform that work.

90. On many jobs fewer than the claimant (45 to her 150), D generated more profit than she did because his jobs were more complex than hers.

91. D was also able to use his experience and knowledge of the crane industry as a trainer and to develop other employees through the 'Buddy scheme'. Indeed, D took the claimant out as a 'buddy' as part of her training. In doing so, D was in the same position (CLM) as her, but he was also training her. She told us that he 'had an unbelievable amount' of experience with the fleet and the cranes, the tackle and the accessories. He had a lot of knowledge. His training was of 'huge assistance' to her.

92. D earned £45,000 per annum.

93. The claimant accepted that D had *'amazing on the ground experience in respect of cranes*.' She accepted that he had been a lift supervisor albeit on a temporary basis. She accepted too that practical experience setting up cranes helped when an individual moved into planning crane set up.

E

94. E was the claimant's successor. E's relevant experience started as a depot supervisor for Baldwins Industrial Services, supervising the depot and workforce of 14 crane operators. He did this work from 2000 to 2001. From 2001 to 2005, E became a crane driver and Appointed Person for R J Crane Hire Ltd. Thereafter he spent two years as a transport manager and environmental supervisor and then, with more relevance, from 2007 to 2010 was a Crane Sales Representative for Huntington Plant hire. This role included making customer and site visits to provide lift plans to cost and secure new accounts. He was also an appointed person, crane operator and fitter.

95. In 2010 to 2012 E became a Workshop Manager for a Plant Hire company and then in January 2012 became a workshop manager for Liebherr GB Ltd. This role included a training element for crane engineer apprentices. In July 2013 E became a Business Development Manager for Manager for A Lift Crane Hire. The respondent regarded this role as the equivalent of a Contract Lift Manager role. In it, E was line manager for 12 crane drivers and appointed persons, he was responsible for the fleet workload planning maintenance, accountable for health and safety matters and was a field representative responsible stations, method statements and customer service.

96. E was a CPCS appointed person, a CPCS crane supervisor, a CPCS crane driver and a CPCS slinger/signaller.

97. When recruited by the respondent, E initially wanted a higher salary than he eventually agreed but finally accepted the role at £40,000 per annum because the depot was located close to where he lived. He left the

respondent in November 2018 and is now semi-retired. No new Contract Lift Manager has since been recruited for the Beckton depot.

Recruiting the claimant

98. The CLM role at the Beckton depot was advertised for a long period of time before the claimant was employed. Many of the applicants were either unsuitable or were experienced CLM's with very high salary expectations.

99. The claimant applied for the position and Mr Carradice met with her on 10 June 2016. He noted that the claimant lacked experience, but she was enthusiastic, and he thought that the respondent would be able to train her up for the role. She had no experience in the crane industry but had worked in the construction industry and therefore he thought that she might have some transferable skills. She lives in the London area which was a benefit because the respondent did not want its contract lift managers to spend too long travelling. Most of the work from the Beckton depot was within London.

100. Ms Kingan and Mr Carradice agreed to offer the claimant the role of CLM. Before doing so, they discussed the salary level.

101. The respondent does not have a fixed grading structure. It determines salaries on an individual basis when it makes offers.

102. Mr Kingan and Mr Carradice decided that the claimant should start on a 'basic salary' because she lacked experience and she needed training. If she performed well, she could then be considered for pay increases. They set her starting salary at £37,000. There is no formal basic salary, but this was what they viewed as basic. In doing so they compared the claimant to other similar employees.

103. In particular, another CLM, 'F' had been given a salary of £38,378.03 in 2015/16. He was an established CLM having been in the role since April 2012. In the June 2016 salary review his salary was increased to £39,721.27. (The claimant started working in July 2016.)

104. In setting the claimant's salary, Ms Kingan was aware of the range of salaries for CLMs. She knew F's salary and she knew too that the range of salaries went up to around £48,000. She took into account the 'pecking order' of experience represented in those salaries. She considered that a salary of £37,000 for the claimant would not disrupt that 'pecking order', albeit she felt that she paid a high rate for the claimant given the claimant's own background. She was impressed by the claimant's personality, drive and ambition; she felt that the claimant would make a good working partner for a Claire Crane. Ms Kingan was pleased to be increasing the diversity in the company.

105. Ms Kingan had herself had set D's salary and had been involved in increasing A's salary to prevent him from leaving.

The course of the claimant's employment

106. The claimant began her employment with the respondent on 26 July 2016. In July and August 2016, she received training on CAD (computer assisted design) and RAMS (risk assessment method statements). She also received Mandatory Ainscough Safety Training ('MAST'). As part of her training, the claimant went out on site visits, buddied up with D, Ian Carradice, Saul Marchant and A. The claimant accepts that a lot of the training she was given was because of her lack of experience in mobile cranes.

107. The claimant told us that if the respondent had said to her, at the time she started employment: '*you need training and do not have much experience, so we will pay you less salary and review it after six months'*, she would have felt fine about that.

108. The claimant began to go on site visits on her own on 8 September 2016. The claimant was allocated jobs based on her skill level. She was not allocated jobs involving tandem lifts, regional cranes or complex lifts. Ian Carradice verbally briefed the London Hire centre about her skill level, for this reason.

109. Unfortunately, between August 2016 and January 2017 a number of matters came to the attention of Mr Carradice which led him to have concerns about the claimant's performance. He did not as a result of this consider formal capability proceedings, but he did consider that they reflected very real training needs which were the result of the claimant's lack of experience. Without making findings about the minute detail of each incident, we find as a fact that the respondent genuinely had material grounds to be concerned about the claimant's performance. These matters included making errors with RAMS including incorrect lifting dates and incorrect equipment to lift; producing an elevation drawing with a jib the wrong way round; producing a drawing with the main boom the wrong way round; not providing lifting points and providing a lifting beam which would crush the unit being lifted; placing a hook block in the wrong position repeatedly, and producing a drawing which showed a lift taking place *next to* a railway line when in fact the lift was to take place *over* a railway line.

110. There were also occasions when customers complained about the problems caused by some of the claimant's work. We find as a fact that the respondent genuinely had material grounds to be concerned about these problems. These included failing to measure space accurately where a crane was to be placed so that it was unable to self-rig; specifying the wrong lifting equipment because the claimant had not assessed equipment required correctly; incorrectly assessing a job so that a crane was unable to set up in the area specified; specifying an incorrect crane type and failing to survey a site properly. In all these cases, the mistakes caused damage to customer relationships so that the respondent had to issue credit notes or agree part payment for the job.

111. Between November 2016 and April 2017 there were a further six different incidents in which the claimant failed properly to survey the

customer site so that the respondent was unable to complete the job in question. For these, respondent took the decision not to submit an invoice to the customer at all.

112. There were a further three situations where the claimant made mistakes which were picked up by a colleague before they caused damage to a customer or customer relationship.

113. We find that the mistakes made by the claimant are themselves evidence of her lack of experience and knowledge of the equipment, how it operates, and how cranes interreact with the built environment in which the respondent was working.

114. One of the incidents to which we have referred above took place on 29 April 2017. The claimant failed to measure a space for a crane at a site in Ruislip. The crane was unable to access the site because there was insufficient space for the crane to manoeuvre into the site. Furthermore, the claimant failed to identify overhanging cables directly above the position she had specified for the crane. The result of this was that the customer said that it would not use the respondent again. The financial cost to the respondent was £7048.

115. Although the claimant said that she had sent the documents relating to this site to Mr Carradice and Mary Duffy to cast their eyes over; we find that without visiting the site, they would not have been able to discover her mistakes.

116. Mr Carradice had become concerned about the number and frequency of the claimant's mistakes. Therefore, on 3 May 2017, prompted by the latest incident on 29 April, he suggested that she work from the office for a period of time so that she could receive help and support. He considered that both he and Mary Duffy would be available in the office to give the claimant additional training on the CAD system. From a commercial point of view, it was important to reduce the number of mistakes made by the claimant because they would have an effect on company profit. Mr Carradice has also taken this approach with other employees on other occasions, including the claimant's male successor.

117. He decided that in the short term the claimant should not conduct any site visits on her own. During the claimant's time in the office, she went out buddied up with D on site visits and Mr Carradice reviewed as many of the claimant's jobs as possible to discover where any mistakes might have been made.

118. The claimant was based in the office for her work from 3 May until 2 June 2017. During this time, she was not allowed, as she had been previously, to work from home after a site visit had been completed. From 2 June she was permitted to go out unaccompanied on visits again, although she was restricted to simpler jobs. Mr Carradice thought that the claimant needed improvement in CAD and RAMS; primarily however he focussed training on whatever job she was working on at the time.

119. The claimant was resistant to Mr Carradice's efforts to improve her work and, at the time felt that she was being punished. (In evidence to us, she agreed that she was not being punished.) We consider that the claimant's perception of the work she was given at this time was coloured by her approach to the situation. She was in fact being trained and was being given work.

120. On 11 May 2017 on completing a visit, A, with whom the claimant had undertaken a site visit, was able to go home, but the claimant had to return to the office. This was because of the earlier decision made by Mr Carradice on 3 May.

121. On 12 May 2017 the claimant attended a meeting with Mr Carradice as the beginning of a Performance Improvement Plan. Mr Carradice produced a document showing that he required an overall improvement in the standard of the claimant's work, better and more detailed planning of listing operations and for the claimant to ask assistance if and when required. He told the claimant that she would be buddied up with a CLM to carry out site visits until the next review.

122. The claimant disputes the document recording this meeting and disputes that her signature appears on the document. However, the document itself is entirely consistent with the changes that Mr Carradice had put in place and so whether or not the signature is the claimant's, or is there to show agreement, we find on the balance of probability that this document does accurately record the meeting.

123. 20 May 2017 was a Saturday. The claimant was not at work and was, as it happened, in Cornwall, although Mr Carradice did not know her exact whereabouts. A problem arose at a site which the claimant had visited and to which a crane could not achieve access because the claimant's plans had not taken into account some hoarding on the premises. It has been disputed before us whether that hoarding was present when the claimant first visited the premises. We do not have to resolve that dispute.

124. The issue before us is not whether the claimant was at fault, but why Mr Carradice reacted as he did to the customer's concerns. When the matter was brought to his attention, Mr Carradice telephoned the claimant on the Saturday.

125. Mr Carradice said to the claimant words broadly to the effect of,

'*What happened at Bow? The crane can't rig. It should be able to rig. It should be absolutely fine*…'

126. We find that Mr Carradice telephoned the claimant and – whatever exact words he used - spoke to her as he did because a customer had drawn a problem to his attention, and he needed to speak to the CLM responsible for the job to start to sort out the problem. He was concerned

that the claimant may have made another mistake. These were the reasons why he reacted as he did. We find that Mr Carradice would have telephoned any CLM in the same circumstances. The respondent's business operates 24 hours a day, seven days a week. It provides its CLM's with mobile telephones so that they can be contacted at any time.

127. On the balance of probability, we consider that Mr Carradice was not rude or abrupt to the claimant. From the evidence in the documents and his own demeanour in oral evidence we consider that Mr Carradice operates with restraint and did so on this occasion.

128. On 22 May 2017 claimant was asked to take Mary Duffy on a site visit. Mary Duffy was not a receptionist but was the contract lift coordinator. She had an ambition to become a CLM and it was to help further this that Mr Carradice asked the claimant to take Ms Duffy on a site visit. The claimant accepted in cross examination that this was not to her disadvantage; the highest she put it was that it was unusual. In any event, we find that the reason why Mr Carradice asked the claimant to do this was to further Ms Duffy's career, consistent with the respondent's policy of growing its own CLMs. Ms Duffy also went on site visits with B on 2 October and 24 October 2017.

129. We find that on 26 May 2017 Mr Carradice did not ask D whether D had been influencing the claimant to make a request for PPE equipment. We find this because the claimant herself says that she knows about the allegation only from D: she did not herself witness it. D has not given evidence about it to us. Mr Carradice says that it did not happen. Weighing that evidence up, on the balance of probability, we accept Mr Carradice's evidence.

130. On 25 September 2017, the claimant had a planned meeting with Mr Carradice. She told him that she had plans to leave the respondent to take a career break and travel. She did this to give him the opportunity to have an extra few weeks to find a replacement. He asked her to put the matter in writing by the end of October 2017. The claimant did not say that she was leaving the company because of sex discrimination or differences in pay between herself and her male colleagues.

131. We find that there was no Regional Contract Manager Group email list. The claimant was not left off a list that did not exist.

132. There was a Southern Contract Manager Group list. Mr Carradice put the claimant on that email list himself on 24 November 2016. However, Mr Carradice tends to write out the names of email recipients, rather than using a pre-set list, so it is sometimes possible to leave a CLM off by mistake.

133. There was also an email about the bonus scheme. The claimant was left off both of those email address lists, as she alleges. Darren Williams, a male CLM at the Cardiff depot was also left off the bonus email from Lee Sixsmith dated 18 August 2017.

134. When in November 2017 Mr Carradice realised that the claimant had been left off an email list, he acted straight away to correct the mistake.

135. On the balance of probability, the reason the claimant's name does not appear on the email lists was by mistake.

136. On 23 October 2017 the claimant sent a letter of resignation to Ian Carradice. She said:

'*Dear Ian,*

Please accept this letter as notice of my resignation from the position of Contract Lift Manager, East London Depot at Ainscough Crane Hire.

As per the terms of my employment contract, I will continue to work for the company for the next month, completing my employment on Friday, 24 November 2017. I intend on using the last remaining holiday entitlement to take me till the end of the paying month 27th & 28th November 2017.

I have enjoyed being a part of the team and am thankful for the opportunities you have given me during my time here. If there are any areas in particular you would like me to focus on during my notice period, please let me know.

I hope that business will be fruitful and you continue to succeed.

Yours sincerely

Angela Parkinson'

137. On 30 October 2017, however the claimant sent a letter to the respondent addressed, 'to whom it may concern' saying that she wished to lodge a grievance '*under the following reasons:*

The Equality Act 2010,
Discrimination
Victimisation/unfair treatment
Stress.'

138. As part of that letter the claimant gave 8 pages of detail to support her grievance.

139. The claimant continued to work for the respondent until she went on sick leave on 2 November 2017. She did not thereafter return to work for her termination date on 24 November 2017.

140. She flew to Canada on 30 November 2017. We find that she had a long-standing dream of emigrating to Canada. We are struck by the lack of complaint and by the evident goodwill in her resignation letter. We find it more likely that she brought her complaints of discrimination, having already

decided to leave, than that she decided to leave *because* of a perception of discrimination.

Comparators B and C

141. The respondent did investigate an incident involving B. On 6 September 2017 B was the appointed person for a lift of a steel structure weighing 3.6 tonnes. The load twisted and cut through nylon sound swings causing the structure to fall and cause damage. The investigation concluded that B needed further assessment and training. The claimant herself volunteered in evidence that the incident involving B was not his fault, but in any event, there was no evidence of any other mistake or incident involving B. The respondent did not have about him a history of concerns. The B incident was dealt with formally. However, with B the respondent was not concerned about his overall lack of experience as it was with the claimant. So, it took one approach with B which was a response to the severity of a single incident, and a different line with the claimant, which was tailored to her lack of experience. This is why the two were treated differently.

142. The claimant also made an allegation that C made a mistake in that he failed to specify some crane mats for a particular job. She only knew about this as hearsay, because she said A had told her about it. We have not heard evidence from A. On cross examination it appeared that any such mistake would have been that of the hire desk, not C. In any event, there was only one issue in relation to C, yet in relation to the claimant the respondent had many concerns. We accept the evidence of Mr Carradice: that the respondent accepts that there will be an element of human error in the work of its CLMs however Mr Carradice had no experience of another CLM, apart from the claimant and the single incident in relation to B, making errors which caused significant loss to the respondent.

Analysis

Equal Pay

143. The claimant did work of a broadly similar nature to all of her comparators: they were all involved in running crane lifting operations.

144. Thereafter we have looked at each comparator separately.

A

145. A was paid £13,366.45 a year more than the claimant. The claimant accepted and we find, that A had ‘vast’ experience and was able to run the most complex operations. We have found - without exact figures - that this was the general or overall flow of his work. The claimant did not have experience and could not run complex operations. A had therefore more responsibility than the claimant as well as more experience. He did not do

'like work' with her: they actually did different tasks because his more complex tasks had more responsibility.

146. If we were wrong about that, the claimant agreed that it was right that A was paid more than her to reflect his experience. Even if they did 'like work' to each other, this difference of experience is a material factor other than sex. It was genuinely the reason A was paid more than the claimant. The claimant makes no allegations that there was indirect discrimination involved. The claim involving A as a comparator must fail.

B.

147. B was paid £2,431.76 per annum more than the claimant. We have not been told that he had responsibilities that were different to hers. We find that B and the claimant were employed on like work. B had over 4 years more experience as a Contract Lift Manager with the respondent than the claimant and nearly 10 years prior relevant practical experience. The respondent had to pay a higher salary to attract B to join. We find that this together with B's experience was the reason why he was paid more than the claimant and paid at the level he was. This is a material factor other than sex. There is no complaint of indirect discrimination. This part of the claim fails.

C

148. The claimant accepted and we find that C had significant experience of contract lift management and that he did complex jobs in London. He had an ability to conduct Contract Lift Management for the Heavy Crane Fleet and the respondent relied upon him to run high-value and complicated jobs. Although we consider that C did broadly similar work to the claimant, the complexity and value of the lifts he did meant that he was not in fact engaged on like work. He had considerably more responsibility than her. If we were wrong about that, this additional responsibility, together with his experience, is also a material factor other than sex: it is the reason for his pay being set at a higher level than hers. There is no evidence before us of the respondent adjusting pay downwards if an experienced employee becomes complacent, nor of the respondent sharing the claimant's view of C's complacency. In any event we do not have sufficient evidence of the alleged complacency to make findings about it, even if it had any materiality.

D

149. D earned £45,000. D's responsibilities were far greater than then claimant's: he had responsibility for the larger cranes in the regional fleet. He was not therefore employed on like work to the claimant. In any event, as the claimant accepted, he had very considerable experience. He had been a lift supervisor for 10 years even though he had only been a Contract

Lift Manager since a couple of months before the claimant joined the respondent. The respondent had had to pay a premium to persuade him to re-join in 2016. There were therefore genuinely material factors other than sex which justified the difference in pay between D and the claimant.

E

150. E was the claimant's successor and is therefore not a relevant comparator. He was nonetheless more experienced than the claimant, which, were he a proper comparator would be a material factor other than sex. His salary level at £40,000 is some corroboration for the respondent's case that it set the salaries of the claimant's valid comparators as it did because of their experience.

151. The claimant herself told us that if she had been told at the outset of her employment that she was being paid less because of her experience, but her salary would be reviewed after 6 months, she would have accepted this. There was a material reason however that the claimant's salary did not increase as time passed and her experience increased, and that is her history of errors. At the time she left she had not yet accumulated enough experience to improve her performance and so increase her pay upon review.

152. As we look at the different levels of pay for the claimant and her comparators, we see that the size of the difference in responsibility and/or experience is reflected in the difference of pay. This corroborates to us that the employer's explanations are genuinely causative. For all these reasons the equal pay claim fails.

Sex discrimination

153. Has the claimant proved facts from which the tribunal *could* conclude that there was less favourable treatment of her because of her sex?

154. The claimant relies on the following matters:

i on 3 May 2017 Ian Carradice informed the claimant that she would work from the office until further notice because the job had gone wrong on 29 April 2017;

155. Our findings of fact show that the 'reason why' Ian Carradice did this was because of the incident on 29 April 2017. He had become concerned about the number and frequency of the claimant's mistakes and wanted her to work in a place where she could receive help and support.

ii The claimant was based in the office but given no or very little work and no guidance or training for about 4 weeks;

156. We have not found that the claimant was given no or very little work or guidance during her time based in the office from 3 May to 2 June 2017. She was being trained and was given work, however her own negative view of why she was being based in the office has coloured her perception of the experience. She has not proved the primary facts of this part of her claim.

iii The claimant was required to return to the office, for example on 11 May 2017, when her male colleagues could from home;

157. This point is simply an aspect of Mr Carradice's decision that the claimant work from the office. We have found the 'reason why' for that above.

iv Ian Carradice made a phone call to the claimant about a job on Saturday, 20 May 2017 and he was abrupt and disrespectful;

158. Our findings show that Mr Carradice was not abrupt or disrespectful to the claimant on 20 May, so this part of the claim fails for this reason. In any event, he made his call to her because a customer had raised concerns with him that a crane could not get access to premises that the claimant had visited and assessed. He had to speak to her to try to find out what might have happened. This was the 'reason why' he made the call. It was not because the claimant is a woman.

v the claimant was required to take a work colleague who was working on reception with her on a site visit on 22 May 2017 which was unusual;

159. This was not to the claimant's detriment and the claimant did not assert that it was. She simply said that it was unusual. She agreed that she was not disadvantaged by it, and indeed we consider that no reasonable worker would consider herself disadvantaged by it. If the claimant does feel that she has a grievance on this basis, then that sense of grievance is unjustified. In any event, the 'reason why' was that Mr Carradice asked the claimant to do this to further Mary Duffy's career. Ms Duffy also went on site visits for the same reason with B. The reason was not because the claimant is female.

vi Ian Carradice asked D if he was 'influencing' the claimant with respect to a request for PPE equipment on 26 May 2017;

160. Our findings of fact show that Mr Carradice did not do this.

vii The claimant was missed off a number of group emails unlike male colleagues as follows- a) not included in the Southern Contract Lift Manager group email until November 2016; b)- not included in bonus scheme group email until August 2017; c) not included in Regional Contract Lift Manager group at all.

161. There was no regional contract lift manager group email list, so the claimant was not left off it. She was left off the other lists by mistake, an

incident which also befell Darren Williams. This was the 'reason why' and it did not happen because the claimant is female.

viii The claimant's resignation was because she believed there had been sex discrimination;

162. This issue is now academic because our findings of fact show that there has been no sex discrimination. In any event we have found that the claimant brought her complaints having decided to leave, not that she left because of perceived discrimination.

163. The comparators are specifically B who the claimant alleges made an error that led to a potential £100,000 loss and C who made a mistake over crane mats, neither of whom received the treatment she complains of. She also compares her treatment to all four of her colleagues.

164. Our findings of fact show that the two comparators were not valid comparators for the claimant within the meaning of section 23 of the 2010 Act. They each differ from her in the material respect that the respondent had a significant series of concerns about the claimant's lack of experience. It did not have those concerns in relation to B and C or in relation to any of the other 'four of her colleagues'. The claimant has not therefore made out the primary facts of her complaint of sex discrimination in relation to her comparators. In any event, there is no evidence from which we could conclude that the difference in the respondent's treatment of her as compared to its treatment of her colleagues was because of her gender.

165. In any event our findings above have either shown us the 'reason why' or have been such that the claim must fail on its facts.

If so, can the respondent show that the less favourable treatment was not because of sex?

166. The respondent has done so where necessary, as set out above.

167. Accordingly, all the claims of equal pay and sex discrimination are dismissed.

_____

Employment Judge Heal

Date: ……28.05.19……..

Sent to the parties on: ....30.05.19....

....
For the Tribunal Office