EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr A O'Regan		**Aberystwyth University**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
OPEN PRELIMINARY HEARING

HELD AT Aberystwyth **ON** 15 & 16 January 2018

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **In Person**
For the Respondent: **Mr R Kember (Counsel)**

JUDGMENT

The judgment of the tribunal is that:

1 Pursuant to Section 69(1)(a) of the Equality Act 2010, the difference between the claimant's terms of employment and those of his comparators is because of a material factor reliance on which does not involve treating the claimant less favourably because of his sex.
2 Accordingly, the claimant's claim pursuant to Section 120 of the Equality Act 2010 for equal pay pursuant to Chapter 3 of the Act is dismissed.

REASONS

Introduction

1 The claimant in this case is Mr Anthony O'Regan who has been employed by the respondent, Aberystwyth University, as a Lecturer since 1 September 1992. His employment is continuing.

2 By a claim form presented to the tribunal on 8 August 2016, the claimant claims that the respondent is in breach of an *equality clause* to be included in the terms of his employment pursuant to Section 66 of the Equality Act 2010 (EqA).

3 The claimant names three female comparators: Ms Margaret Ames; Ms Megan Williams; and Dr Nerys Fuller-Love. The claimant is employed as a lecturer; the comparators are employed as Senior Lecturers.

4 The respondent denies that the claimant is employed on work which is equal to that of his comparators. In addition, the respondent argues that, even if *equal work* as defined in Section 65 EqA could be established, there is nevertheless a *material factor* accounting for any difference in pay between the claimant and his comparators such that, pursuant to Section 69 EqA, an equality clause as required by Section 66 EqA has no effect.

5 At a Closed Preliminary Hearing conducted by Employment Judge Cadney on 27 February 2017 it was ordered that the respondent's material factor defence pursuant to Section 69 EqA should be determined at an Open Preliminary Hearing before me today. If the material factor defence fails, I will make Case Management Orders for the trial and determination of the substantive issues of equal work/equal pay. If the material factor defence succeeds, that is a complete defence to the claimant's claim, and the claim will be dismissed.

The Evidence

6 I heard evidence from two witnesses called on behalf of the respondent: Mrs Elizabeth Merriman - HR Manager employed by the respondent since 2005; and Mrs Heather Hinkin - Deputy Director of HR employed by the respondent since 2009. The claimant gave evidence on his own account: there were no other witnesses.

7 In addition to the oral evidence, I was provided with an agreed trial bundle running to approximately 200 pages: I have considered the documents within the bundle to which I was referred by the parties during the hearing.

8 I found all three witnesses to be truthful and honest: essentially, there is no dispute as to the facts in this case - the dispute lies in the proper interpretation of the National Framework Agreement for the Modernisation of Pay Structures in Universities; and the application of that agreement by the respondent.

The Facts

9 The claimant has been employed by the respondent as a Lecturer since 1992. In common with all Lecturers, he is remunerated at Grade 8; he is at Spine Point 43 on a 51-Point pay scale. (Lecturers are all Grade 8 and are covered by Spine Points 37 – 43: the claimant is therefore at the highest Point on the scale available to a Lecturer.) The comparators are all employed as Senior Lecturers; all at Grade 9 (Spinal Points 45 – 49).

10 Since 2003, the claimant has also been responsible for the delivery by the respondent of the Farm Business Survey (FBS) which is an annual research project currently funded by the Welsh Government. Prior to 2003, the Director of

FBS was a Senior Research Associate (a role which no longer exists) - equivalent in Grade to a Senior Lecturer. The role of Director of FBS is what is described as a non-stipend role: it attracts no additional remuneration; the post-holder is given protected time away from other duties to fulfil the project. When the claimant became the Director of FBS in 2003 he did not receive any increased remuneration as a result.

11 The respondent and many other universities in the UK have developed from the amalgamation of many different educational institutions including original universities; polytechnics; and other colleges. For example, the claimant was originally employed as a Lecturer with the Welsh Agricultural College which amalgamated with the respondent in the 1990s. The result of this non-organic development over many years was that universities had many different job titles; job roles; and pay scales. In the years prior to 2007 there was an attempt to negotiate with the relevant trade unions a single national pay structure for universities in the UK: the outcome was the National Framework Agreement for the Modernisation of Pay Structures (the Framework Agreement) which came into effect in March 2009 and was backdated to 1 October 2007.

12 In readiness for the implementation of the Framework Agreement, in 2008, all staff of the respondent below professorial level were required to undertake the Higher Education Role Analysis (HERA) process; this was intended to grade and align numerous university pay structures into one. It is altogether unclear on the evidence before me why the respondent required academic staff to undertake HERA – because, as the respondent's witnesses explained, there was no analysis of academic roles; it had been agreed with the relevant trade unions that academic staff would simply translate across from their old roles into new Grades. All those employed as Lecturers translated across as lecturers at Grade 8; those employed as Senior Lecturers translated across as Senior Lecturers at Grade 9. These special arrangements were seen to be beneficial to academic staff whose grading and status would not be disrupted by HERA. For those staff whose grading was affected by HERA, there was an appeals procedure. Thus, when the framework agreement was implemented, the claimant translated across as a Lecturer Grade 8.

13 From 2003 onwards, after the claimant became responsible for FBS, he had made requests for additional remuneration; these requests had always been refused because of the non-stipend nature of the role. It was the claimant's hope that the HERA process would provide a formal mechanism to redress what he regarded as a long-standing pay injustice; he was disappointed therefore when all Lecturers simply retain their existing grade status.

14 It is very much part of the claimant's case that there is nothing in the Framework Agreement to prevent academic staff from appealing against their grading under the HERA process and successfully achieving a higher grade as a

result. The claimant pursued such an appeal: it resulted in a job evaluation exercise focusing very much on his FBS responsibilities; the HERA scoring grid produced a score of 698 for the claimant; which would have placed a non-academic member of staff into Grade 9.

15 The respondent realised when it was too late that the claimant should not have been permitted to submit a HERA appeal - because of the special arrangements which had been agreed for academic staff. The only way for a member of the academic staff to achieve promotion was through a system known as Academic Promotion (AP) - this was available to all academics each year; the claimant fully understood the process.

16 When the outcome of the HERA appeal process did not result in the claimant achieving promotion to Senior Lecturer Grade 9, he pursued a grievance. The grievance was unsuccessful: because it was simply not possible to promote a Lecturer to the position of Senior Lecturer other than through AP. Throughout the grievance and appeal process, the claimant was encouraged to apply for AP but he has never done so. An alternative potential solution was also proposed: that the claimant, focusing on his FBS duties, could request that his role be re-designated from an *Academic* role to an *Administrative, Management and Professional* role. If this was done, the HERA appeal score would be relevant; and the claimant may well then have secured appointment in a non-academic role at Grade 9. However, it was universally agreed that this would not necessarily be advantageous to the claimant because academics enjoy considerably enhanced working conditions particularly regarding working hours; supervision; holidays; and the like. There was no guarantee that an application for re-designation would succeed. In any event, the claimant did not apply.

17 When the Framework Agreement was implemented, the claimant's three comparators were all employed as Lecturers and translated across as Lecturers Grade 8 in the same way as the claimant. Each of them have since been through the AP process and have been successful: Mrs Ames in December 2013; Mrs Williams in October 2014; and Dr Fuller-Love in December 2014.

18 The claimant accepted without hesitation that he had every opportunity to apply for AP; and that the outcome of such applications is wholly unaffected by, and unrelated to, the gender of the applicant.

The Law

19 **The Equality Act 2010**

Chapter 3 - Equality of Terms - *Sex Equality*

Section 64: Relevant types of work

(1) Sections 66 to 70 apply where—

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

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

Section 65: Equal Work

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

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

(2) A's work is like B's work if—

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

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

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

(4) A's work is rated as equivalent to B's work if a job evaluation study—

(a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or
(b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.

(5) A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women.

(6) A's work is of equal value to B's work if it is—

(a) neither like B's work nor rated as equivalent to B's work, but
(b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.

Section 66: Sex Equality Clause

(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.

(2) A sex equality clause is a provision that has the following effect—

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

(3) Subsection (2)(a) applies to a term of A's relating to membership of or rights under an occupational pension scheme only in so far as a sex equality rule would have effect in relation to the term.

(4) In the case of work within section 65(1)(b), a reference in subsection (2) above to a term includes a reference to such terms (if any) as have not been determined by the rating of the work (as well as those that have).

Section 69: Defence of Material Factor

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

(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

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

disadvantage when compared with persons of the opposite sex doing work equal to A's.

(3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.

(4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex.

(5) “Relevant matter” has the meaning given in section 67.

(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.

20 **Decided Cases**

Waddington -v- Leicester Council for Voluntary Services
[1977] IRLR 32 (EAT)

Usually the material difference will not be the differences between the things the claimant does and things the comparator does.

Rainey -v- Greater Glasgow Health Board **[1987] IRLR 26 (HL)**

A difference between a claimant’s case and the comparator’s must be “material”, which means “significant and relevant”.

Redcar & Cleveland Borough Council -v- Bainbridge (No 2)
[2008] IRLR 776 (CA)

A tribunal must find what the reason was for the pay differential and, if necessary, should look at the underlying reason and not merely the immediate reason or criterion for inclusion/exclusion. It is right to examine the underlying or historical position where that will throw light on the reason why one person is receiving an advantage and another is excluded from it.

The Claimant’s Case

21 Essentially, the claimant’s case is that the HERA appeal process valued his work at Grade 9: and it has therefore been rated as equivalent to a Senior Lecturer’s work pursuant to Section 65(1)(b) EqA. It is on this basis that he claims entitlement to be paid at the same rate as a Senior Lecturer: in fairness to

the claimant, he has never sought actual promotion to that grade; and does not seek the addition of the word *Senior* to his job title.

The Respondent's Case

22 As stated earlier, the respondent does not accept that the effect of the HERA appeal process is to rate the claimant's work as equivalent to a Senior Lecturer. But, more fundamentally, the respondent's case is that the reason for the pay differential between the claimant and his comparators is clearly attributable to a material factor other than sex; namely, their successful applications for AP; and his failure ever to make such an application.

Discussion & Conclusions

23 I remind myself that the burden is on the respondent to establish the material factor defence. The respondent must satisfy me that, on the balance of probabilities, the reason for the pay differential between the claimant and the comparators is due to a material factor unrelated to sex.

24 I am in no doubt that the respondent has discharged that burden: the comparators are paid more than the claimant because they are Senior Lecturers Grade 9; and he is a Lecturer Grade 8. This has nothing to do with gender. The reason that the comparators are Senior Lecturers is that they have made successful applications for AP; the reason that the claimant remains as a Lecturer is that he has never made an application for AP despite encouragement to do so.

25 In the circumstances, the material factor defence is made out and the claimant's claims for equality of terms are accordingly dismissed.

_____
Employment Judge Gaskell
21 March 2018

Judgment sent to Parties on

_____22 March 2018_____

_____