



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107602/2017**

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**Held in Glasgow on 16 and 17 January 2019**

**Employment Judge: Laura Doherty**

10 **Mrs J Shanks**

**Claimant**  
**Represented by:**  
**Ms A Martin -**  
**Legal**  
**Representative**

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**Ross Fire Protection Ltd**

**Respondent**  
**Represented by:**  
**Mr M Carlin -**  
**Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the claimant and her comparator were not employed in like work in terms of section 65 (1) of the Equality Act 2010.

**REASONS**

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1. The claimant presented a claim to the Employment Tribunal on 22 December 2017 under a number of jurisdictions, including a claim of equal pay in terms of the Equality Act 2010 (the EQA)

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2. At a Preliminary Hearing to consider case management issues held in May 2018, it was determined that a Preliminary Hearing (PH) should be fixed to determine whether the claimant and her comparators were engaged in like work in terms of section **65 (1) A** of the EQA.

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3. The claimant was represented at this PH by Ms Martin, her legal representative, and the respondents by their solicitor, Mr Carlin. The claimant

**E.T. Z4 (WR)**

gave evidence on her own behalf and for the respondent's evidence was given by Mr Ross McVicar, the senior manager responsible for running the company.

- 5 4. The parties lodged a joint bundle of documents.
5. The claimant identified four comparators in her ET1. At the PH in May, it was confirmed that the claimant relied upon three comparators, Andrew Ferguson, Martin McVicar, and Nathan Craig.
- 10 6. At the commencement of this PH, Ms Martin confirmed that the claimant was no longer relying upon Mr McVicar or Mr Craig, and her comparator is Andrew Ferguson.
- 15 7. There was also discussion at the commencement of the PH about the period during which the comparison is to be made. The claimant commenced employment in 1994 and her employment came to an end in October 2017. At the outset of the PH, Ms Martin indicated that the period during which the claimant was comparing her work with that of Mr Ferguson, was from 2013  
20 when he commenced employment, until the date the claimant's employment came to an end.
8. During the course of the PH, after a comfort break, approximately three quarters way through the claimant's evidence in chief, Ms Martin indicated  
25 that the period during which the claimant seeks to compare her work with that of Mr Martin, ran from 2013 when he commenced his employment, until February 2016, where it was accepted that Mr Ferguson obtained a Grade 4 Fully Hydraulically Calculated Design Exam Grade (FHC).
- 30 9. After the claimant finished giving her evidence in chief, and after Mr McVicar for the respondents had given his evidence in chief, and part way into his cross examination, Ms Martin indicated that the period for comparison should in fact run from 2013, to the date that the claimant's employment came to an end.

10. There was objection to this by Mr Carlin given that he had cross examined the claimant and led the respondents witness evidence in chief on the basis of the position stated by Mr Martin, in the course the claimant's evidence in chief.
- 5 11. The Tribunal was not satisfied that it was consistent with the overriding objective in the Tribunal Rules to alter the period of comparison for the purposes of the like work claim when it was raised by Ms Martin. The claimant had been cross examined, and the respondent's witness had already given his evidence in chief and had commenced cross examination on the basis of the position earlier outlined by Ms Martin. In those circumstances there would be prejudice in terms of delay, in having to recall a witness, and take further evidence from the respondent's witness.
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12. The position was made clear by Ms Martin as to the comparative period which was being relied upon, and there was discussion about this at the time when it was raised by Ms Martin after evidence had been heard. The claimant is still able to rely upon Mr Ferguson as a comparator for the period prior to February 2016, which mitigates any prejudice to her in refusing Ms Martin's application to alter again the period during which the comparison between the claimant and Mr Ferguson's work is to be made.
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13. The issues for the Tribunal in this case are to consider:
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- (i) whether the claimant and her comparator Mr Ferguson's work are the same or broadly similar; and
  - (ii) if it is satisfied that it is the same or broadly similar, to consider if such differences as there are between their work are not of practical importance in relation to the terms of their work.

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### Findings in Fact

14. The respondents are a company engaged in the design and installation of fire sprinkler systems. They supply a range of systems to commercial businesses. The company is owned by Mr John and Mrs Lilian McVicar, who are Director of the company. Their son, Martin McVicar, was employed until August 2015, as a Design and Project Manager (FHC) (fully hydraulically calculated design). Their son, Mr Ross McVicar was also employed by the company and he was responsible for the sales and marketing and day to day running of the company. Mr Martin McVicar left the company in 2015, when Mr Ross McVicar took over as the overall manager of the company.
15. The work which the respondents do is the design and installation of fire sprinkler systems. This type of work is regulated by the LPCB. Certain levels or grades of qualification that are available to design engineers, designing fire sprinkler systems. These are:
- (i) Grade Level 1 – standard grade
  - (ii) Grade Level 3 – intermediate grade.
  - (iii) Grade Level 4 – fully hydraulically calculated design exam grade (FHC).
16. Qualification in grade 1 and 3 enables engineers to produce designs on an automated or pre-calculated basis.
17. An FHC system is a bespoke sprinkler system, which do not depend on automated calculations and is not designed on a pre-calculated basis.
18. Where LPCB certification is required for an FHC system, the level 4 HFC qualification allows the engineer to certify the drawings produced for the system designed are in compliance with LPCB regulatory standards. A design engineer who does not have a Grade Level 4 cannot certify drawings for the installation of an FHC system which is LPCB regulated, even if he/she is technically able to perform the work of designing the system.

19. The majority of the work carried out by the respondent's work (around 80%) involves the design and installation of bespoke sprinkler systems. In addition to the FHC jobs which are LPCB regulated, the respondents also carry out FM work (Foam Systems), and client specification work, both of which involve the design engineer designing a bespoke system. This requires the engineer to design a site-specific system, by creating drawings which show the calculations and measurements of the pipes, the number of sprinkler heads, and to produce specific tide and flow calculations for the system with reference to the particular site. The engineer has to have specialist knowledge of FHC systems to carry out this work.
20. Specialist knowledge of FHC systems is not necessary for the production of designs for automated or pre-calculated sprinkler systems, which are designed using figures contained in the LPBC book, which specifies the number of sprinkler heads which can be fed off one pipe.
21. The claimant commenced her employment with the respondents in September 1984 as an administrative assistant. In 2002, the claimant moved into the design office. She was not issued with a contract of employment or given a job description. She was not provided with a job title when they moved.
22. The claimant learned about the design of sprinkler systems from the engineers who were employed in the design team at that time, primarily Martin McVicar and Mr Tony Ring, both of whom had a Grade 4 FHC qualification. The claimant obtained a Grade 1 qualification in August 2006, and a Grade 2 qualification in February 2010. The claimant could design pre-calculated sprinkler systems, but not FHC systems, or bespoke systems.
23. From around 2010 the job duties which the claimant carried out on a regular basis were as follows. She opened files and prepared relevant paperwork. She prepared drawings as per LPCB rules, and designed fire sprinkler systems for pre-calculated systems. She also checked colleagues' drawings (as did all the design engineers) before they were issued. The claimant was

responsible for issuing health and safety paperwork as required by the main contractor and attending site induction meetings. The claimant ordered materials and oversaw deliveries on site. She hired equipment as required on site. She did weekly checks of the site progress and marked drawings accordingly, and she checked installations. The claimant attended sprinkler systems tests on site and filled in the necessary paperwork. The claimant also attended internal weekly or monthly design team meetings. The claimant took and distributed team meeting minutes. She carried out preparatory work in advance of the audit of the respondent's paperwork by the LCPB, twice a year

24. In 2013 Mr Ring left the respondents employment which meant they were short of an Engineer with the skills and knowledge to design FHC, or bespoke systems, and who had a Level 4 Qualification. The respondents decided to recruit Mr Andrew Ferguson. Mr Ferguson had been working a number of years for another company, Compco, which was also engaged in the business of design and installation of fire sprinklers systems.

25. At the point when Mr Ferguson was recruited, he had Grade 1 certification, but did not have intermediate, or Grade 4 certification. Mr Ferguson had however been trained by Compco in the design of FHC systems and was able to do preparatory work necessary for the design and installation of these systems, albeit he could not certify the drawings in compliance with the regulatory requirements. He also had the skills and knowledge necessary to carry out work on FM systems, and perform client specification work, which required the design of the bespoke systems (i.e. not automated or precalculated systems).

26. Mr Ross McVicar spoke to one of the managing directors of Compco whom he knew, regarding Mr Ferguson's experience before recruiting him and was satisfied that Mr Ferguson had had this training and had these skills before the respondents employed him.

27. It was not uncommon in the respondent's industry for companies to train their engineers to this level, but not have them obtain the Grade 4 qualification, as the acquisition of a Grade 4 qualification could result in the requirement to pay additional salary.

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28. When Mr Ferguson joined the respondents in 2013, he carried out all the duties which the claimant performed, other than he did not prepare and distribute meetings of team meetings or carry the preparatory work for the six monthly LPCB audits.

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29. However, because of his training and knowledge of FHC systems, in addition to the work which the claimant performed, Mr Ferguson also carried out the design and calculation for FHC sprinkler systems required at the Tender stage of bidding for FHC LPCB regulated jobs. He also carried out work designing and overseeing the installation of FM, and client specification systems which required bespoke design. This work accounted for approximately 50% of his time.

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30. In 2014, Mr Ferguson obtained a certificate which allowed him to Test and Commission systems (page 145), and from November 2014, this was a function which he carried out in addition to his design work. In effect this meant that Mr Ferguson could certify the systems were functioning upon completion and issue the necessary certification for the purposes of completion certification. Albeit this was an important function it did not take up a great deal of his time.

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31. In February 2016 Mr Ferguson acquired a Level 4 certification which meant that he could then also certify LHPC drawings. The FHC element of his work then increased further.

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32. The respondent's training records for the period in 1/1 2014/ to 31/12/2014, indicate that the claimant and Mr Ferguson had the same qualifications (page 154). Mr Ferguson's Competency Assessment Record for 2104 (page 161) contained an entry against Design category A and noted that Mr Ferguson

*'was working within the scope of his LPBC certificates- other aspects of contract by M McVicar'*. The claimant's Record (158) contained the same statement and contained an entry against Design category B.

**Note on Evidence**

5 33. There was a conflict in the evidence as to the expertise and knowledge which Mr Ferguson had and the work which he performed, in comparison to the claimant.

10 34. It was the claimant's position that she and Mr Ferguson were doing the same work, other than some testing work which he carried out, and the additional administrative duties which she carried out.

15 35. The claimant accepted that she could only and did, only design precalculated systems.

20 36. It was Mr Mc Vicar's position that Mr Ferguson had significantly more knowledge than the claimant. Her work was confined to the design of pre-calculated systems which pre-determined the number of sprinkler heads to be fitted off one pipe and used the figures contained in the LPCB Book, and she oversaw some elements of installation. Mr Ferguson had the skills and knowledge which enabled him to perform more complex work, in particular the design of FHC systems, and the design of bespoke (FM and client specification work) systems.

25 37. In resolving this conflict, the Tribunal had regard to the evidence of both the witnesses. The Tribunal found Mr Ferguson to be a credible and reliable witness. It was fortified in this conclusion in that he did not seek to embellish the position, for example accepting that Commissioning and Testing would take no more than a day, and that this would only be performed at the conclusion of a job, which would therefore be entirely depended on the number of jobs which were competed over a certain period. While he emphasised the importance of the function, he did not seek to suggest it took up a significant amount of Mr Ferguson's time.

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38. The Tribunal was satisfied that the claimant genuinely considered that she performed the same as the work Mr Ferguson, and it did not conclude that she deliberately sought to mislead the Tribunal. However, the Tribunal formed the impression that she diminished the significant of the HFC, FM and client specification bespoke work which Mr Ferguson carried out. An example of this was when asked in evidence in chief if there was anything Mr Ferguson did, which she did not do (other than the testing), to which she responded there was nothing.
39. In reaching the conclusions which are set out in the Findings in Fact on the matter, the Tribunal was satisfied that it was credible that the respondents recruited Mr Ferguson because he had FHC training and knowledge, even although he did not have the Grade 4 certification. At the point when Mr Ferguson was taken on, Mr Ring had left, and given the makeup of their work the Tribunal was satisfied that it was likely the respondents had a requirement for an engineer who could do FHC and bespoke work, and therefore it was credible that Mr Ferguson was recruited because he had the requisite skills and knowledge. It was also credible that he used these skills and knowledge, albeit he was unable to certify the LPCB drawings for regulatory purposes until February 2016. Mr Mc Vicar gave evidence as to the design work which Mr Ferguson did for the purposes of Tendering, and which designs were used if the respondents work was won, albeit the drawings could not be certified by Mr Ferguson before February 2016. He also gave convincing evidence about the drawings and designs which Mr Ferguson produced for FM and client specification work which were not pre-calculated designs.
40. Ms Martin suggested that Mr McVicar's position on this was incredible, as there was no evidence to support the fact that Mr Ferguson had been trained in FHC work. The Tribunal however accepted Mr McVicar's evidence that Mr Ferguson was previously employed by Compco who carried out similar work to the respondents, and that he had spoken to one of their Directors about Mr Ferguson's training, and he was satisfied as to the training which Mr Ferguson had been given by Compco.

41. In reaching this conclusion the Tribunal also had regard to the training and competency assessment records, which were referred to by Ms Martin in her submissions. The respondent's training records for the period in 2014, indicate that the claimant and Mr Ferguson had the same qualifications (page 5 154). This was correct, as they had the same qualifications in the period from 1/1/14 to 31/12/14 to which this document relates. That however was not inconsistent with Mr McVicar's evidence, in that he accepted that Mr Ferguson was unable to certify the FHC drawings for LCPB purposes, until he acquired the necessary qualification, which he obtained in 2016. The same applied to 10 the Competency Assessment Record, as Mr Ferguson was not certifying FHC drawings in the period before he obtained his FHC qualification in 2016; and therefore the Tribunal did not consider that too much turned on the content on these records.

15 42. The Tribunal also accepted Mr McVicar's evidence that prior to 2016 when he obtained the Grade 4 qualification around 50% of Mr Ferguson's time was taken up with designing FHC, FM, and client specification systems. In reaching this conclusion the Tribunal took into account the evidence which Mr 20 McVicar gave in support of this. He gave evidence as to the list of sites which Mr Ferguson had attended over the last three years and was able to identify which of those were FM contracts, and client specification contracts. This was in addition to his evidence that Mr Ferguson provided drawings for inclusion in the Tender process for FHC work. Taking these matters together 25 the Tribunal was satisfied that 50% of Mr Ferguson's time was taken up prior to 2016, with the design of FHC, and the design of FM, and client specifications systems, which involved him specifically designing systems and carrying out the technical work associated with that, as opposed to producing systems on an automated basis.

## Submissions

### Claimant's Submissions

- 5 43. Ms Martin helpfully produced written submissions and referred to section 1 of the Equal Pay Act 1970, and section 65 of the EQA. She also referred to the European Directive 2006/54/EC.
- 10 44. Ms Martin submitted that the facts showed that the claimant and her comparator carried out like work between 2014 and 2016.
- 15 45. She rejected Mr McVicar's evidence in relation to Mr Ferguson's training, and questioned his credibility on this point. She questioned why qualifications for Mr McVicar had not been included in the bundle. She asked the Tribunal to infer from this that the qualifications did not exist. Ms Martin submitted that given there was no factual evidence that the comparator was trained in FHC, Mr McVicar's evidence should be disregarded as incredible. She further relied in this regard on the respondent's training record, produced at page 154 which states that Mr Ferguson was working within the scope of his LPBC certificates, and that there were other aspects of the contract that were being carried out by Martin McVicar.
- 20 46. In relation to Mr Ferguson's testing and commissioning certificate, Ms Martin submitted that it was not significant, as he would have spent time engaged in this task on an average five days per year.
- 25 47. Ms Martin also submitted that any differences between the claimant and Mr Ferguson's work were not of practical importance and were not sufficient to justify difference in pay.
- 30 48. Ms Martin referred to the duties which the claimant performed and submitted the respondent's system was sex-specific and the demands were similar but the respondents had different value to those demands made of Mr Ferguson,

when compared to the claimant. She submitted that the work which the claimant did in carrying out internal audits, and minutes of meetings should have been taken into account.

- 5 49. Ms Martin emphasised the Tribunal should consider the content of the jobs performed and not the job title or category. She submitted the claimant and Mr Ferguson, both in terms of the quality of their work, and knowledge of their skills and their physical and mental effort, that experience and responsibility were the same.

10 **Respondents Submissions**

50. Mr Carlin referred the Tribunal to a textbook (paragraph 387) on the provisions of a like work. He submitted that the claimant and her comparator were not engaged on like work.

- 15 51. There were, he submitted, four areas of difference. These were the calculation work for non-automated systems, the design work for non-automated systems, commissioning and testing, and project management. The differences were such that the work was not like work but failing that then the differences were in any event of such practical importance, and carried out with such frequency, that it satisfied the test in sections **65(3)**.
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**Consideration**

52. The issue before the Tribunal here is whether, for the purposes of invoking the equality clause in her contract of employment the claimant and her comparator, Mr Ferguson, are engaged in like work.

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53. The relevant statutory provisions are contained in section **65** of the EQA, which states:

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

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- (a) like B's work;*
- (b) related 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.*

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

(a) *the frequency with which the differences between their work incur in practice; and*

(b) *the nature and extent of the differences.*

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54. The first issue therefore is whether the claimant's work and that of her comparator are the same or broadly similar.

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55. Ms Martin submitted that the claimant and Mr Ferguson were doing work which was the same or broadly similar. Mr Carlin submitted that was not the case; Mr Ferguson carried out project management work, whereas the claimant was not. He accepted however that the claimant and Mr Ferguson both carried out the duties which the claimant had given evidence about, in connection generally with the design of sprinkler systems, and work associated with overseeing the installation of those systems.

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56. In determining the question of like work, the test the Tribunal has to apply is whether the work is *broadly* similar. Regardless of whether or not Mr Ferguson was more involved than the claimant in taking projects to completion, or had a more complex role in terms of the design and installation of the systems, the Tribunal was satisfied that both he and the claimant were in broad terms, engaged in work which involved the design and installation of the fire sprinkler systems, and was therefore satisfied that the claimant and Mr Ferguson did perform work which was the same, or broadly similar.

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57. Having reached that conclusion, the Tribunal then went on to consider the second element of the test, which was whether such differences as there were between the work performed by the claimant and Mr Ferguson were not of practical importance in relation to the terms of their work

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58. In considering this, the Tribunal took into account the provisions of section **65 (3)** which was set out above.

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59. The Tribunal was satisfied that a considerable element of Mr Ferguson's work, even prior to his obtaining his Grade 4 Qualification in 2016, involved him in the design and installation of FHC systems, and the design and installation of FM, and client specified systems. It was satisfied that in doing this work he exercised more knowledge and skill than the claimant did, in the design of precalculated systems. The design of HFC systems, FM systems, or client specified systems required Mr Ferguson to create drawings which showed the calculations and measurements of the water pipes, and number of sprinkler heads, and to produce specific tide and flow calculations for the system with reference to the particular site. Mr Ferguson required specialist knowledge of FHC systems to carry out this work.

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60. The Tribunal accepted Mr McVicar's evidence that this was work which the claimant could not do, and that she designed smaller systems, which were produced on an automated pre-calculated system, which did not require bespoke calculations. Indeed, it did not seem to the Tribunal that this was in issue as far as the claimant was concerned, and she did not seek to suggest that the position was otherwise in terms of the work which she carried out.

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61. The Tribunal also considered the frequency with which difference in the work which the claimant and Mr Ferguson performed occurred in practice. Mr Ferguson acquired a Testing and Commissioning certificate in 2014. The Tribunal concluded that Testing Commissioning did not take up a significant amount of Mr Ferguson's time. It did however conclude that the performance of work in the design and overseeing the installation of FHC, FM and client specification systems took up 50% of Mr Ferguson's time prior to 2016 when

he obtained his Grade 4 Qualification, after which it increased further. In reaching this conclusion the Tribunal took into account that 80% of the respondent's business was in the design and installation of bespoke, not pre-calculated systems, which rendered this assessment of Mr Ferguson's workload credible

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62. The Tribunal also took into account Ms Martin's submissions to the effect that the claimant performed other work, which should attract value, but which the respondents had not given proper account to. This however is not an equal value claim, and the Tribunal is concerned with the work which was actually performed by the claimant, and her comparator.

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63. The Tribunal was satisfied that the work which Mr Ferguson performed in the designing FHC systems, FM systems, and client specified systems, required more knowledge and was more skilled than the work which the claimant performed in the designing pre calculated systems, and that this type of work accounted for 50% of his workload in the period from 2103 when he commenced his employment up until February 2106 when he obtained his Level 4 Qualification, after which it increased. On this basis the Tribunal was satisfied that there were differences in the work which the claimant and Mr Ferguson performed, and that they were differences which were of practical importance in relation to the terms of their work.

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64. The effect of this conclusion is that the Tribunal did not conclude that that her comparator carried out like work within the meaning of section **65 (1) A** of the EQA.

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65. There are other claims before the Tribunal in this case, and the parties should confirm within 14 days whether they consider a further case management PH is required, or whether the case should now be listed for a Final Hearing.

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10 **Employment Judge: Laura Doherty**  
**Date of Judgment: 28 January 2019**  
**Entered in register : 28 January 2019**  
**and copied to parties**