



EMPLOYMENT TRIBUNALS

Claimant: Ms N Jackson

Respondent: Speedy Asset Services Ltd

Heard at: Carlisle

On: 17 and 18 June 2019

Before: Employment Judge Holmes
Ms H D Price
Dr B Tirohl

REPRESENTATION:

Claimant: Mr Walker, Solicitor

Respondent: Mr Moore, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

- 1.The claimant and her comparator were engaged on like work;
- 2.The respondent's material factor defence is not made , and fails.
- 3.The parties were to consider the effects of this judgment upon the claimant's remaining claims, and, having done so the same have been resolved, and are the subject of a dismissal judgment.

REASONS

1. In this case the claimant brings claims of constructive unfair dismissal and/or or equal pay arising out of her employment by the respondent, which ended with her resignation on 3 April of last 2018. Her unfair dismissal claim is based upon the respondent being in fundamental breach of her contract of employment , by breaching the equality clause implied into her contract of employment by virtue of

Section 66 of the Equality Act 2010. The claimant complains of the disparity and pay between 2014 and 2017 when she was paid less than her chosen comparator, a Colin Greer who was, she claims, employed on like work to her. She was in fact given a pay increase in January 2018, but she brought a grievance about the period between 2014 and 2017 in January 2018. Her grievance was rejected and she appealed. Her appeal was rejected and the claimant resigned by letter dated 3 April 2018, which was accepted on 6 April 2018.

2. It has been agreed the Tribunal will determine the like work claims first, and the parties will then take stock and consider the implications of the Tribunal's judgment on those claims, in terms of the remaining claims in respect of the constructive unfair dismissal, or a potential alternative claim for equal pay on the basis of equal value.

3. The claimant was represented by Mr Walker, Solicitor and the respondents by Mr Moore, Solicitor. She has given evidence and the respondents have called Mr Nathan Floyd – Simpson, Area Manager, and Stacie Smith of the respondent's HR Department.

4. There has been an agreed bundle, a chronology has been provided as indeed has an agreed List of Issues.

5. Having heard the evidence and considered the documents in the bundle and the submissions made on behalf of each party the Tribunal unanimously finds the following facts.

5.1 The respondent is a large national supplier of equipment for use in the construction and allied industries, and has a number of related products, both big and small, which it both hires out and sells in the form of tools or other equipment, such as Access Platforms and lifting equipment and things of that nature. Its customers are commercial and private individuals, and the respondent company in fact came to acquire a previous company, Hewdens, which was the company in which the claimant was originally employed until her employment transferred to the respondents. The claimant had been employed in a role with Hewdens in the Barrow area since 2005. She has been a Hire Controller working out of one of the Barrow sites. There were at one time three Barrow sites, but one was closed and thereafter there remained two for some of the time with which the Tribunal is concerned.

5.2 The respondent has two aspects to its business, there is the hire side and there is the sales side. In terms of sales there are two types of sales, there are consumables which are items that are often sold alongside the hire business, because they are items that are used by the equipment that the respondent hires out to its customers, but there are also sales of equipment, and in some cases some quite substantial pieces of equipment, on the longer term basis which is a separate source of revenue for the respondent. Originally the claimant worked in the hire side, and had done so since 2005. By the time of 2014 however the hire side of the business in the depot where she was based had been reduced, there was no hiring of the tools, and in due course the remaining hire of larger equipment, platforms and things of that nature also was discontinued. Further, there was at one point a Service

Engineer based in the depot where she worked , whom she supported as part of her role , but he too left and was not replaced . The functions he carried out were then carried out by her manager. So the position was that over the years the hire side of the business , as far as the claimant was concerned was reduced , which meant that at the time with which the Tribunal is concerned she was involved solely in relation to sales , and sales of what could be termed larger pieces of equipment such as Access Platforms and things of that nature.

5.3 The claimant was not provided with a contract of employment initially, by the respondents , but in 2013 they carried out a job evaluation exercise , which at is before the Tribunal in the bundle at pages 28 to 37 . In terms of how that exercise was carried out , there has been no direct evidence but the Tribunal has the documents that were produced at that time in November 2013. There is a question and answers page at page 28 of the bundle, where the question “how was the grading determined” is answered. What is then set out is how each role, not person, had been tested against six factors that make up all job roles The factors are then set out as:

Knowledge to be able to do the job

Specialist skills required to carry out the role

People skills required to carry out the role

External customer skills required

Planning and Strategic requirements

Decision Making skills required

That was the basis upon which the respondents , with the assistance of PWC, (Price Waterhouse Coopers it is presumed

5.4 That is how the respondent went about that exercise in 2013, and in terms of its outcome , on page 30 , in answer to the question “what roles sit at what grades?” the authors set out that the respondents had some 250 or more roles , and then set out some 9 grades of the various roles that were going to be then affected by this exercise. In relation to those the bottom three are grades 3, 2 and 1, 1 being Apprentice, grade 2 covered (and the Tribunal appreciates these are by way of examples given the number of roles there were) Driver, Administrator, General Assistant, Test and Run Technician, and Workshop Operative. For grade 3 , the examples given there are of Assistant Manager, Hire Controller, Account Manager, Engineer and Credit Controller. Thereafter, the roles go , as it were up , and ascend to grade 9.

5.5 In terms of that exercise being carried out in 2013 , there has been no direct evidence from anyone who was actually involved in it , but that document is in the bundle and one can see in it how the Hire Controller role was a grade 3.

- 5.6 On 9 April 2014 Colin Greer was offered the position of Hire Controller. A letter was sent to him (at page 39 of the bundle) offering him that role. He had been a Driver, but he had expressed some ambition to achieve a higher role, and in response to that he was indeed promoted to the position of Hire Controller. That letter was sent to him, but no one who was involved in that decision directly has given evidence before the Tribunal, neither have the respondents called any witnesses who were involved in that. In terms of who took that decision, why and upon what basis, the Tribunal has no direct evidence. The upshot of it was that Mr Greer was made a Hire Controller, and was issued with a Grade 3 employee statement of main terms and conditions of employment which starts at 40 of the bundle.
- 5.7 The claimant was not working at that time alongside Mr Greer, and indeed had no direct knowledge of his pay or anything of that nature, and so she was unaware of these things at the time.
- 5.8 Along with the contract of employment, or statement of terms, that the respondents provided to Mr Greer it seems likely that at the time, or soon thereafter, he will have been provided with, or had seen, a job description which is at page 59 of the bundle. That is a job description for a Hire Controller, it refers to this being a Grade 3 post, and in that description the "purpose" is said to be "to have responsibility for receiving orders and requests for collections/contract termination (off - hires) and planning transport for deliveries and collections whilst ensuring that all opportunities to maximise the depot and the Group's sales to customer are attained." The document then sets out three columns, the first of which is Key Accountabilities, the second is Key Measures of Performance and the third is Person Specification. In each column, there are a number of bullet points, and the Key Accountabilities is the column which sets out in most detail the actual duties that a Hire Controller, in this instance Mr Greer, was expected to carry out.
- 5.9 The employments of both Mr Greer and the claimant continued. The respondents reorganised, and whereas there were, at the beginning of Mr Greer's appointment as a Hire Controller, two Barrow depots, in due course in October 2016 they were merged, and there was then only one depot which was numbered 0802. So from that time Mr Greer and the claimant in fact worked from the same depot.
- 5.10 In terms of their functions, (dealing with this briefly at this stage before returning in due course to more details of their jobs), at that time were, in Mr Greer's case the hire side of the business, and in the claimant's case, the sales side, and sales of Lifting Platform equipment of that nature. The actual physical layout of the building was such that the hire side had a customer bench or desk, that type of thing, Ms Jackson however in her sales role had an office without a public enquiry desk, people would come into that office and she would run the sales from there. That is how the two departments were laid out. It is perhaps unfortunate that the Employment Tribunal has not seen any representation of the actual layout of the buildings, or images of what the premises look like, or indeed of any catalogue or anything of the respondent's products, but there it is, we have had them described to us.

- 5.11 The position from October 2016 that was that as between Mr Greer and the claimant, they were working, as it were, alongside each other in the same depot. No issues at that time were taken about the difference in pay between the two of them, but in April 2017 the respondents wanted to ensure that their documentation was in order, particularly in relation to contracts of employment. Stacie Smith of HR was engaged in communications with the claimant and indeed, her colleague in the same department Cheryl Simpson. There is an email trail between those parties, between pages 49 and 58 of the bundle in which Ms Smith starts communicating with both those ladies in terms of their job titles, and how they should be regarded in the organisation.
- 5.12 That gave rise to something of a dispute, because the term Hire Controller was that which the claimant had been using, and was the title that which, as far as she was concerned, was the appropriate one, notwithstanding that at that time, and indeed for quite some time beforehand, there was no longer any hire aspect to her job. Consequently, along with her colleague Miss Simpson, there was discussion as to what was the appropriate title and job description.
- 5.13 The suggestion was that because the claimant was no longer a Hire Controller a more appropriate job description for her would be that of Service Co-Ordinator, and indeed a job description at page 60 of the bundle was produced and proposed for the claimant. That was, in fact, a grade 2 post, and there was discussion between the claimant and Miss Smith in this email trail, as to whether that would be appropriate.
- 5.14 The position that emerged was that the claimant considered that neither of these two job descriptions and titles actually was suitable for her. She was no longer involved in hire, but equally in terms of the Service Co-Ordinator's role at page 60, that too had largely gone, because that was a support role for a Service Engineer, who had previously operated from the claimant's branch but who no longer did so. Those functions had now been taken over as part of a manager's function, so she made the point in this email trail that neither seemed to be appropriate.
- 5.15 She and her colleague continued to dispute this issue, which eventually came to a head in May 2017 when Mr Floyd - Simpson, who is the Area Manager, became involved and effectively sought a resolution of this matter which had been going on for some months or so at that time.
- 5.16 Consequently, a statement of main terms and conditions of employment for a Service Co-Ordinator was produced for the claimant, and indeed in due course she did sign such a document. Importantly, however, it was made clear to her in this email exchange that her role would remain the same, and indeed that was the case, as indeed was the case in relation to her pay, so notwithstanding that the Service Co-Ordinator's job description was (as indeed the job evaluation exercise would confirm) a grade 2. The claimant continued on in her previous remuneration, notwithstanding that this was a grade 2 post. The assurance was given that the claimant would remain doing exactly the same as she did.

- 5.17 It should be added that just add there were issues in relation to the Hire Controller role, which involved the claimant's fears , and indeed her colleague's fears, that accepting such a document might have led to them working again in hire, when in fact by that time they were both working in sales. There were also particular personal reasons why the claimant did not want to do, which need not concern the Tribunal, but there were other reasons why the claimant did not want to accept the Hire Controller's job description, quite apart from the fact that she was no longer a Hire Controller.
- 5.18 In terms of her duties at that time, helpfully for the purposes of the proceedings before the Tribunal , on 4 April 2017 the claimant sent an email to Miss Smith in which she set out in bullet points her normal daily activities, to the extent that there is a job description that the claimant has done for herself for the Tribunal and appears in her witness statement that the Tribunal has found was a helpful snapshot as at April 2017 of what her duties were, and that is at pages 56 and 57 of the bundle and in fact it may also be elsewhere.
- 5.19 Thereafter matters proceeded, the claimant and Mr Greer continued to work in their respective roles, and it was not until December of 2017 that an issue arose in relation to Mr Greer's pay when the claimant became aware, in fact from Mr Greer, of the discrepancy in pay between himself and the claimant. The claimant has set out , as she then later discovered, in her witness statement and other documents, which are not in dispute , that there was throughout the period 2014 to 2017 a difference in pay between herself and Mr Greer. Each of them got increases , but the position was that they never, during that period, were paid the same, the claimant being persistently underpaid in relation to Mr Greer, in amounts that are agreed which need not be set out in the great detail at this stage in the judgment.
- 5.20 Having made that discovery the claimant then brought it to the attention of her employers in an email of 20 December 2017, which starts at page 97 of the bundle in which she says she wished to raise a pay rise enquiry . She referred to the last three years, and although that was about a pay rise, she also set out in this email that she believed that she had been underpaid in relation to another employee , Mr Greer, who had done the same job as her for the last three years. She considered this was a distressing situation and indeed had sought legal advice upon it.
- 5.21 The following day the 21 December Mr Floyd - Simpson actioned a pay rise for the claimant. Whilst that was actioned by him on 21 December 2017, it was in fact was something which was outstanding from a previous manager, Neil Spark.
- 5.22 In terms of the reasons why that pay rise was authorised at that time Mr Floyd - Simpson had signed a document, a contract amendment form which is at pages 86A to 86B of the bundle . In that document, as indeed was his evidence, he explained the rationale for recommending the claimant for what was a substantial pay rise at that time. That document is dated by him 21 December of 2017, but in the justification he explains how the claimant,

who he regarded as being exceptional at her job, had contributed substantially to a busy and profitable depot, particularly in relation to her successful contracts with BAE Systems and BNFL . On the basis of her contribution in relation to sales to those customers he put her forward for this pay rise, making the observation in the relevant box on page 86B of the bundle that Neil Spark, who was the previous manager, was looking into this but had left, and that there had been something of a delay. So these were matters which in fact had gone on “un - dealt with” for a little while, but that was the basis why on 21 December 2017 he was putting the claimant forward for this rise , which indeed she was awarded.

5.23 The claimant’s document of 20 December 2017 was treated as a grievance , and acknowledged by the respondents . In due course her grievance was heard by Mr Russell, after Ms Smith’s involvement. The hearing was on 12 February of 2018, the notes are at pages 113 to 115 of the bundle , and the outcome letter dated 6 March 2018 is at pages 116 to 117.

5.24 In that grievance the claimant in fact raised three matters, two of which are not directly before the Tribunal , one in terms of another employees who were paid only slightly less than her, Mr Clarke, and in relation to the third aspect this is to do with a pay rise. In terms of the issue before the Tribunal , it was the second (and possibly the third) grievance which was summarised as “why have I been paid less than another male colleague despite us both holding the same job title at the same time”. That, in essence, is the matter before the Tribunal and that was item two of her grievance.

5.25 The outcome letter is at page 117 of the bundle, and Mr Russell there sets out the company’s justification in relation to the difference between the two pay rates . In some three paragraphs there he sets out what the company was then saying in relation to it. In the middle paragraph he says this:-

“Colin was employed initially as a Driver in the depot prior to your move to the second depot in the area. Hire Controller duties were undertaken by the Assistant Manager and Depot Manager, a need for a dedicated Hire Controller was identified and the promotion to this role was offered to Colin with effect from 1 April 2014. To incentivise him into taking the role (which incorporated all elements of the Grade 3 Hire Controller Role) and to reflect his performance levels at the time he was offered an increase in salary within the band for that role. Put simply as I can whilst we are short overlapping a short period of time you may have had the same job title as Colin you are not carrying out the same role as reflected in the retraining that took place at your insistence in 2007. It is also clear to me that the reason for any pay differential is not and has never been gender and whilst there are many varied reasons why one individual may be paid more than another these are not discriminatory against any particular gender”

5.26 The claimant appealed against that outcome and that appeal was subsequently referred to Gavin Benson, he heard it on 20 March 2018, notes were at pages 124 to 129 of the bundle and his outcome letter is at page 130 to 131 of the bundle. In essence, he rejected the claimant’s grievance, it appears that she was shown a document in the course of her grievance

appeal meeting which isn't before the Tribunal but appears to be a document in which various salaries and gender information were contained but in essence he rejected her grievance and the appeal was concluded on that basis.

- 5.27 Having received that outcome letter dated 27 March 2018 , the claimant then by letter of 3 April of 2018 resigned . In her resignation letter(pages 132 to 133 of the bundle) she says this: *“Notwithstanding the Company’s’ response to my grievance I remain of the view that I have bene paid less than a male colleague for doing either the same work or work of equivalent value. In paying me less than the male colleague I believe that the company has acted contrary to equal pay legislation, I also believe the company has fundamentally breached my contract of employment. It comes with great sadness after twelve years continuous service my employment has come to an end in this manner however as I have previously explained to you to find I am being paid less than the male counterpart has caused great distress to me and having a detrimental effect on my health and wellbeing”*.
- 5.28 She goes on to say a little bit more, but in essence she explains that was the reason why she resigned , and the company acknowledged that by letter of 6 April 2018, pages 134 to 135 of the bundle.
- 5.29 In terms of the respective jobs that Miss Jackson and Mr Greer carried out there has been much evidence in relation to page 59 of the bundle which is the job description for a Hire Controller. The Tribunal has not (perhaps surprisingly) heard from Mr Greer himself , who one would have thought would have been the best witness to actually explain what his role was, but that evidence has been given from other sources. In terms of the respondent’s case , and the evidence put before the Tribunal through Mr Floyd – Simpson, primarily the job description at page 59 has featured very much , and indeed the respondent’s case is that these are the job duties indeed that Mr Greer carried out . The respondents have elaborated upon that description in terms of precisely how he went about that role, and what duties , in addition, he carried out.
- 5.30 In terms of the claimant’s job, she having been provided with no accurate job description, she rejects the Service Controller’s job description is that which she was doing , which the respondents also appear to agree would not be appropriate. The claimant’s position has been that the Hire Controller’s Job Description could just as well have applied to her, effectively removing the references to Hire but substituting references to “Sales”. The point is made on her behalf by Mr Walker that in this particular job description there are a number of instances where the term “Hire/Sale” is referred to . There are sales aspects to this job as well, but in essence the claimant’s claim is that she in a sales context carried out much the same of the key accountabilities as applied to Mr Greer in the hire role.
- 5.31 The respondents , particularly in the evidence of Mr Floyd - Simpson take issue with that, and say that , in fact, the two jobs were different. Mr Greer carried out different duties to those which the claimant carried out and in particular because he was working in hire he had a number of additional

responsibilities that he carried out which she did not have in the sales role that she carried out. In particular, this is claimed by the respondents and indeed not disputed by the claimant that in addition to the larger items in relation to hire, the nature that the claimant was selling, platforms and lifting equipment and things of that nature that the hire department also hired out tools, smaller equipment than that which the claimant was exclusively involved in selling, so there were different types of product that Mr Greer was responsible for hiring that the claimant was not involved in selling.

5.32 In terms of other differences between the two roles , Mr Floyd - Simpson in his evidence has highlighted , at paragraphs 7 to 14 of his witness statement , the aspects of Mr Greer's role which he considers are different from that which the claimant carried out in her sales role. In particular he focusses upon the need for Mr Greer to check for damage to returned hire items, to getting parts for them to be repaired or replaced, his liaison with customers with hire equipment out on site, the need to source equipment, the need to ensure that it was returned , and to be involved in the purchase of equipment for hire, and matters of that nature. It also is part of the respondent's evidence that , Mr Greer having been a driver and having the necessary qualifications to load and unload certain large items of specialised equipment on to vehicles, which is a particular skill for which a particular qualification is required, did that , and continued to do that when he was appointed to the Controller's position. Indeed that he continued to drive , as it were relieving absent drivers when they were on holiday , and things of that nature . At those times it would be that his manager would then deputise for him in his Controller role, but this remained an aspect of Mr Greer's duties that he was able to carry on when he was made Controller.

5.33 It is contended Mr Greer deputised for his manager , and that he was a key holder , but in relation to that aspect the claimant says the same was so in relation to her sales role and Mr Floyd - Simpson has no direct knowledge of that. In terms of the claimant's position she says that that was just the same for her in the sales role, and that consequentially Mr Greer had no additional responsibilities in that regard.

5.34 Explaining the basis upon which the respondents paid Mr Greer additional sums, and in 2014 promoted , and put him a little higher on the scale that would have been at the entry point, the respondents have in their List of Issues , very much taken from Mr Floyd - Simpson's evidence, set out a number of factors that they say are relevant to why he was given this particular remuneration.

5.35 The first is to incentivise him to move from being a Driver , and then to reflect the change in his position on promotion, to reflect the fact he did carry out driving duties, to reflect that he was a key holder and to reflect that he was the only employee who could deliver the Pop Up or Aerial Work Platforms in the area. Again reference is also made to the duties that he had in terms of signing equipment off as safe and appropriate for hire, his knowledge of the hire products, checking for damage on returned equipment, raising charge orders, arranging parts to be delivered to site, replacement of damage items, sourcing of hire equipment and arranging delivery of equipment. Additionally,

reference is made to him drafting the business case to purchase new equipment, it being the respondent's evidence that in hire a business case had to be made to purchase items to be let out on hire. The hire profit is worked out on depreciation. The business case had to be made, the respondents would need to work out "was it worth it", colloquially, buying a particular piece of equipment in terms of the hire revenue that would be generated by it. That was part of Mr Greer's duties, Mr Floyd - Simpson says and indeed, was quite a frequent one.

5.36 Turning to the claimant's duties, she says in effect that she did much the same thing, albeit in a sales context. She accepts that she did not drive, she did not deliver, personally, the goods that were sold by the respondent, she did not carry out perhaps the same hands-on maintenance checks and the sort of things that Mr Greer would do in terms of hire equipment upon its return. She was, however, responsible for ensuring that when goods were sold they did meet the necessary health and safety requirements, and had the necessary manufacturer's certification. There was a degree of after sales involved in terms of customers coming back for a service, or indeed for further sales in relation to what might be regarded as accessories rather than consumables, consumables being rather more appropriate to hire, but in terms of an ongoing relationship and continuing to service a client's requirements Miss Jackson says that in a sales context she did very much the same as Mr Greer did in the hire context and indeed, in overall terms, going through page 59 her evidence was that much of what is set out in the key accountabilities column could be said to apply to her by the substitution of the sales for hire, but in terms of what she actually did that list in terms of the emails I have referred to is a summary of what the Tribunal considers very useful one of her duties and of course she has added to that in her evidence before the Tribunal.

5.37 Finally, there was evidence that the respondent's drivers were all men, and that it was they who sought roles as Hire Controllers, as the claimant had done.

6. So that, in summary is the evidence before the Tribunal. It should be remarked that nothing turns upon the credibility of any witnesses, all of whom the Tribunal accepts have given honest evidence to it. In terms of reliability and weight, the Tribunal has to observe that the respondent's evidence, coming mainly as it did from Nathan Floyd – Simpson, whose lack of prior involvement at the point when Mr Greer was promoted, and rather limited first hand knowledge of the Barrow operations, was rather limited on crucial details of the two roles that the Tribunal has had to compare.

Submissions.

7. The parties have agreed that the like work point will be decided first, and both the solicitors for the parties have made their submissions in relation to the issues that we have to decide. Of course, in relation to the first of those in the Tribunal's List of Issues the first is whether on a general consideration of the type of work done, and the skills and knowledge needed, did the claimant perform work that was the same or broadly similar to the work carried out by Mr Greer? Mr Walker for the

claimant does not seek to say that the work was the same, but he does say that it was broadly similar. In terms of the distinctions that the respondents have sought to draw between the work done by Mr Greer and Miss Jackson, he has effectively invited the Tribunal to find that they are not made out, but they have been given a greater prominence than in fact was the case in reality. Standing back, as it were, the Tribunal should be satisfied that the differences that there may have been are not significant ones, and so not sufficiently significant to entitle the Tribunal to conclude that the work was not broadly similar to the work carried out by Mr Greer.

8. The respondents through Mr Moore submit to the contrary, and emphasise the differences in the roles, in essence highlighting that the hire business is different from the sales business, that the need for Mr Greer to be involved in a somewhat hands-on perhaps it may be said, way is far greater than that which Miss Jackson had to perform in the sales role, highlighting the fact that he continued to use his driving skills, and indeed his unique qualification to load and deliver certain items of equipment. These and the overall responsibilities he had in the hire regime are all significant differences that would entitle the Tribunal, indeed require it, to find that this was not broadly similar work.

9. In the alternative, it is contended on behalf of the respondent that if the claimant does satisfy the Tribunal that the work was broadly similar, so as potentially to amount to like work, the Tribunal should consider then the differences and consider whether these differences are of practical importance so as to prevent the Tribunal finding that the work was indeed broadly similar, so as to amount to like work. He relies upon indeed many of the same factors that were relied upon in the material factor defence in support of a contention that the work is not to be regarded as like work in the first place, but in the alternative, if the Tribunal finds against the respondent on that those matters are relied upon in the alternative as part of its material factor defence. There was some discussion of the potential for the material factor defence to be "tainted" by sex discrimination, which both representatives addressed, Mr Moore contending that there was no relevant "PCP", and no statistical evidence to support an argument that there was such a sex taint to the material factor defence advanced by the respondent.

Discussion and findings.

10. So those, in summary, are the facts and the competing submissions. In terms of the Tribunal's task, its first one is to decide whether the work is indeed broadly similar. At first blush, perhaps particularly if one walked into the Barrow depot where both Mr Greer and Miss Jackson worked leaving aside the fact that one was in an office and one was behind a counter anyone looking at them and dealing with them, particularly as a customer may well have got the impression that they did do work that was broadly similar, they were for want of a better word even charged with dealing with customers, taking orders, making sure that their requirements were met, whether it be through hire or sales, providing the necessary information to their employers in terms of accounting processes and ensuring that people paid for the goods that were hired or sold and that their roles in their respective remits were indeed at first blush broadly similar. The distinctions that are referred to seem to the Tribunal to be those which derive from the difference in what might be termed the product that they handled, and the fact that one was working in hire and one was working in sales. The Tribunal accepts, as indeed Mr Floyd - Simpson's evidence

was clear, as one would expect with hire work, the hire business is cyclical, by definition hired goods go out and come back in again. That is a repeat process, and a constant process. There are doubtless many functions that are repeated time and time again in respect of hired goods, great and small, in relation to both tools and of course much larger items of equipment. We learnt, for example, that a six month hire period for a large piece of equipment would have a requirement that there would have to be a review as to whether that equipment had to be brought back for certification, and things of that nature, so there is an ongoing requirement in relation to hire which the respondents highlight, in contrast to the, as it was put, "one off" nature of sales.

11. That, however is perhaps a slight oversimplification on Miss Jackson's evidence, because it is not always a "one off" in terms of sales, because there is some after sales activity as well, there are accessories, there is possibility of things coming back, enquiries, things of that nature, and so maybe that is not quite as clear cut as would first appear. We can, however, appreciate that in general terms the hire business is different from the sales business, and consequently by virtue of that very fact the duties and the actual work done by Mr Greer and Miss Jackson were different in those respects for those obvious reasons. So, whilst the work is potentially broadly similar, we do consider that we then need to look at the differences and consider whether those are of "practical importance". It is the differences in our view that are the important thing in the determination of this aspect of the case, and in approaching that we are reminded of the guidance given to Tribunals in two cases, one of which is **British Leyland UK Limited -v- Powell [1978] IRLR 57** and **Coombes Holdings -v- Shields [1978] IRLR 263** which in fact Mr Walker and Mr Moore have both referred to in their submissions.

12. In terms of this particular aspect, we are reminded that in looking at the differences, one of the things that we can consider is whether or not the differences are such as would put the two employments into different categories or grades in an evaluation study. **British Leyland v Powell** is authority for the proposition that this is an appropriate approach for Tribunals to take, and that was approved by the Court of Appeal in Coombes.

13. So, notwithstanding those differences, what we have looked at, and in fact have carried out, is an exercise that was not carried out at the time, but we have looked at what job evaluation would have been likely to have resulted if actually carried out. Whilst appreciating that we have not heard from anybody who carried out the 2013 job evaluation, we do have the benefit of the paperwork that went with that, and can glean from that what we consider would be the approach of the respondents, had they carried out, in good faith, a job evaluation of the claimant's job in 2014 and indeed going forward in 2017.

14. Looking at that, we do go back to section 2 (page 28) and those six factors which were referred to previously in this judgment as to what would be taken into account in grading each of the roles. We also look at section 12, (page 30) and the nine grades that are set out there. We have considered where the claimant would have featured were that exercise to have been carried out in 2014. In doing so we note, in terms of these grades, that three and two are the lowest bar Apprentice, that these are not (with respect to anyone who holds them) high grades, they are the two lowest in the organisation, only above Apprentice. Consequently, the difference

between a Grade 3 of a Hire Controller and a Grade 2 Operative in terms of their roles is the only relevant difference that we can take into account. When one looks at the examples (and we appreciate they are only examples of the roles that were assigned to the various grades) we note that in the Grade 3 along with the Hire Controller are also Credit Controller, an Accounts Manager, an Assistant Manager and an Engineer. By contrast, the Grade 2 jobs are Driver, Administrator, General Assistant, Test and Run Technician and Workshop Operative, and as indicated the grade below that is only Apprentice. So in terms of the two grades two and three, two is in effect the lowest fully qualified role that gets a grade at all, and grade three is the one grade above it, but clearly that grade has a degree of responsibility to it that takes it above the grade two, and has obviously, by the inclusion of Assistant Manager, Account Managers, some degree of managerial function.

15. It seems to us, looking at the job description on page 59, and having heard everything that the claimant did, and having looked at how the respondents applied the grading in the criteria in Section of this document, that if the claimant's job was recognised as a Sales Controller job at that time the Tribunal's overwhelming conclusion is that it would have been a Grade Three. (Indeed, there was a discussion about such a title in 2017, but it was rejected as not fitting the respondent's existing range of job titles). It clearly was above a Grade Two. The level of responsibility and the duties of the Sales Controller role the claimant in effect had, it seems to us, would have been graded the same as those others in Grade Three, including the Hire Controller.

16. So, to the extent that page 59 may not be totally interchangeable with the claimant's duties, a job description for her at that time on what she actually did would in our view would have resulted in her being evaluated at a Grade Three. On that basis therefore on the authority of **Powell** as approved in **Coombes**, though aware these differences might have prevented this being work that was like work, they do not in fact do so, when we take that line of cases into account, and consequently we are satisfied that for those reasons that this does indeed amount to like work and so find.

17. That then brings us on to the respondent's alternative argument, which is the material factor defence. As Mr Moore had pointed out, clearly the respondents in many ways adopt the same arguments in relation to that defence as they advance in relation to the like work, but they do need to be considered separately in this context. As far as the law is concerned in relation to the material factor defence Section 69 of the Equality Act 2010 does place the burden of proof upon the respondent i.e. it is up to the respondent to establish a material factor defence. In relation to aspects of any discriminatory taint in terms of anything relied upon, there the burden of proof as was touched upon in Mr Moore's submissions, is perhaps less clear cut but it does seem likely that if there is to be any indirect sex discrimination taint relied upon by the claimant, there would be an evidential burden upon her to raise that and then the burden would then revert back to the respondent. But in overall terms the burden of establishing the material factor defence rests upon the respondents say in that particular respect.

18. Looking at the factors advanced at Section 4 of the list of issues, the first of those is to incentivise Mr Greer who had been a Driver for the respondent to undertake what was a new role at that time. In relation to that the Tribunal has to

observe that there has been no evidence of that whatsoever, not least of all because we have not heard from anybody who actually took the decision to offer him the role and to decide to offer it to him at the particular rate of pay that he was offered. Indeed, in terms of the need to incentivise Mr Greer, the evidence appears to be to the contrary, since we heard from Mr Floyd Simpson that if anything Mr Greer was champing at the bit to get promotion, was working very hard to impress his employers and was obviously very keen to progress. So it seems unlikely that he needed to be incentivised by a yet further increase in his pay, so in terms of the evidence of that factor there simply is not any before the Tribunal. In any event we would not regard as material, similarly in relation to 4(b) of the List of Issues, "to reflect the change in position for Mr Greer being a promotion", his promotion itself would have been a change in position. Further even starting at the bottom of the pay band, rather than being given an enhanced amount from the beginning, would also have done the same thing, so we cannot regard that either as a material factor.

19. In relation to 4(c), this is "to reflect that Mr Greer had to carry out driving duties in times of resource shortage". Pausing there we are not satisfied that there is any evidence of "resource shortage" in any event. What appears to have happened is that if drivers were off, Mr Greer deputised for them and went back to driving as he had before. That is not a "resource shortage" that is people going on holiday, there are other ways of dealing with that, such as taking on temporary drivers or assigning other drivers and having a rota to cover absences. There is no evidence to the Tribunal of resource shortage, such that there were not enough drivers all the time, this is simply Mr Greer providing cover when it was convenient to do so, so we do not consider that was something that arose out of resource shortage. Further, we are not entirely sure that it was material in any event. If anything Mr Greer was going back to doing what he did before, he had been a driver, he had been promoted but, instead of leaving those duties behind, he could and did keep them, and it was convenient that he went back to doing that. That is not an argument for paying him more as a Controller, it might be an argument, if anything, for taking him back down because he is not carrying out those Controller duties whilst he is driving. Indeed, the evidence was that his manager actually then had to deputise for him, so he was not doing this in addition to his other Controller duties, he was doing it instead. Given that, if anything, this is a return to a lesser paid role, we do not consider that is a material factor either.

20. In relation to 4(d) "to reflect the fact that he was a key holder", well, so was Miss Jackson and in terms of that in itself being a potential material factor it seems to us so minor that it would not begin to get off the ground as an argument of a material factor, being very very minor.

21. In relation to 4(e) this is his ability "to deliver Pop Ups and Aerial Work Platforms," that again reverts really to his driving role. He did that as a driver, he had the qualification and, again, doubtless it was convenient for the respondents that he could carry on doing it, but frankly he was then a Controller, arguably he should not have been doing that, someone else should have been trained up to do it. But if anything it was him going back to what he did before, and the idea that he should be paid more because he was doing what he used to do seems to us not to be a material factor.

22. In relation to 4(f) and the roman numeral headings thereunder then as Mr Moore acknowledged in the course of his submissions these are really facets of the fact that Mr Greer carried out his role in relation to hire. They are merely aspects of the hire job, that they should thereby attract some sort of premium seems to us to fly in the face of our finding in relation to the like work, if we consider, as we do that the claimants work would have been properly evaluated as being of equal value in the sales context, we cannot consider these matters as being legitimate material factors justifying paying Mr Greer more for the responsibilities that we do not consider were any more onerous , or required anything more than the claimant would have had to bring to her role.

23. In relation to the ninth of those we do appreciate that there may be something more to be said in drafting the business case to purchase new equipment for hire, and we can see that potentially may have some weight, but there has been very little evidence of what exactly that entailed, the claimant herself would do something similar in terms of sales , although we appreciate not to the same degree, but in terms of how onerous this was and how specialised it was , we have no direct evidence and this perhaps again is a consequence of the fact that no one has called Mr Greer. So whilst we can see that there may be something to be said in relation to 4(f) (ix), we are not satisfied that the respondent has done enough to show us that that is indeed a material factor.

24. In terms of the material factor defence there is the issue as to the taint of sex discrimination , which perhaps in the light of those findings is not necessary to determine, but if we did, then to the extent if we were wrong in relation to the driving roles and the delivery role, in relation to the claimant's expertise in that field we would be satisfied on all the evidence (because the Tribunal does consider all the evidence) but on the evidence , we think from Ms Smith, Hire Controllers were drawn from Drivers. Indeed we consider is likely because most of the respondent's drivers doubtless do more hire deliveries and collections than they do sales, and the natural progression would be as indeed Mr Greer went from driving to Hire Controller. Drivers being , the evidence was , exclusively male , the likelihood is that practice was indeed potentially indirectly sexually discriminatory , because it would be less likely that a woman would be a driver and hence therefore in a position to become a Hire Controller than a male, the pool therefore would be all drawn from men, so to the extent that there may be sex discrimination taint we would find that there was.

25. Thus, even if we are wrong on the material factors that we have already found, there is potentially a sex discriminatory taint in relation to those aspects which we consider the respondents have not begun to justify , and so they would fail on that ground as well. That is very much an alternative finding, and perhaps one that is not necessarily in the light of our major findings on those factors in any event.

26. For all those reasons Tribunal does indeed find that the claimant's like work case is made out. The parties are invited to consider how to proceed in the light of our findings.

Dated: 26 June 2019

JUDGMENT SENT TO THE PARTIES ON

8 July 2018

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