EMPLOYMENT TRIBUNALS

Claimant: **Miss M Da Silva**

Respondent: **London and Quadrant Housing Trust**

Heard at: **East London Hearing Centre**

On: **17, 18, 19 July 2019 & 5 August 2019 (in Chambers)**

Before: **Employment Judge John Crosfill**

Members: **Miss S Campbell**
Mrs B K Saund

Representation

Claimant: Mr N Clark of Counsel

Respondent: Mr S Butler of Counsel

JUDGMENT

1. **The Claimant's claim of unfair dismissal contrary to Section 94 of the Employment Rights Act 1996 is well-founded and succeeds; and**

2. **The Claimant's claims for equal pay brought under the Equality Act 2010 are dismissed;**

3. **The Claimant's claim for direct discrimination contrary to Sections 13 and 39 of the Equality Act 2010 is dismissed.**

REASONS

1. The Respondent is a substantial housing association. In 2016 it merged with and subsumed a smaller housing association the East Thames Group. The Claimant had started work for the East Thames Group in 2006. She was gradually promoted whilst, at

the same time, studying for and obtaining accountancy qualifications. By 2016 she had risen to the position of a Senior Accountant. Her contract of employment transferred to the Respondent at the point of the merger pursuant to the Transfer of Undertakings (Protection of Employment etc) Regulations 2006.

2. During 2017 the Respondent undertook a restructure during which the Claimant was allocated a role as an Accountant (rather than a Senior Accountant). At about the same time the Claimant asked for her pay to be reviewed. In December 2017, at the point when she was offered the opportunity to move from her existing terms and conditions to the standard terms and conditions available to the Respondent's employees, the Claimant asked again for her pay to be reviewed. At a meeting with her line manager, Colin Chin, the Claimant was told that her pay would not be reviewed until June 2018.The Claimant resigned from her employment effective from 9 February 2018. She says that she was entitled to treat herself as dismissed and brings a claim of unfair dismissal. She also alleges that she has been subjected to direct discrimination because of sex the detriment she relies upon being the failure to consider her for a more senior Finance Manager role during the reorganisation in 2017. Finally, she brings an equal pay claim comparing her pay to that of a number of male accountants.

Procedural matters

3. In these reasons we have exercised our power under Rule 50 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and used the initials of individuals where they did not give evidence and where their identity is unimportant for the decisions that we had to make. These individuals were mentioned only for the purpose of comparing the Claimant's treatment with others. We have done that because we consider that their right to keep details of their salary private is of greater weight than the necessity to ensure that justice is done in public in circumstances where their involvement is almost entirely incidental to what we have to decide.

4. At the outset of the hearing we ascertained that the parties had managed to agree a single joint bundle of documents which contained a list of issues. After some discussion, both parties agreed that those were the issues that we were invited to determine. Two matters arose in our discussions. The Claimant's claim for equal pay relied upon an assertion that 10 named comparators undertook "like work". In his opening note Mr Butler conceded that 5 of those named comparators did undertake like work for the purposes of the legislation. Mr Clark on behalf of the Claimant abandoned reliance upon the other named comparators. We were grateful for the parties' pragmatic and sensible concessions in this regard and it made the task of determining the equal pay claim much easier.

5. The second matter which was the subject of some discussion was whether in fact the Claimant was relying upon an alleged breach of the equality clause as part of her allegation that she had been dismissed for the purposes of her unfair dismissal claim. Mr Butler had not understood that to be the case but accepted that the agreed list of issues could properly be interpreted as including that issue. We proceeded on the basis that the Claimant was arguing that alleged breach of the equality clause was either a serious breach in its own right or her alternative case being that the failure to pay her

the same as other accountants doing the same work was a breach or contributed to a breach of the implied term of trust and confidence.

6. Other than those two matters we dealt with the list of issues as presented to us by the parties and agreed between them and no other matters. That list is not reproduced here but is found at pages 29 to 33 of the agreed bundle.

7. The parties had also prepared an agreed chronology and cast list. Mr Butler had prepared a comprehensive skeleton argument which he referred to as his opening note, within which he set out legal and factual submissions.

8. The tribunal hearing proceeded in the usual way. We spent some time reading the witness statements before hearing from the following witnesses:

8.1. the Claimant on her own behalf; and,

On behalf the Respondent:

8.2. Leslie McDermott, an HR Business Partner who had engaged with the restructure in 2017; and

8.3. Mr Colin Chin, a Senior Accountant and at the material time the Claimant's line manager; and

8.4. Elaine Taylor, Director of Land, Acquisitions and Planning who had met with the Claimant after her resignation to discuss her grievance.

9. The evidence concluded at the end of the second day of the hearing. We invited representatives to make their submissions on the morning of the third day. Mr Butler told us that he had had very little sleep having fallen unwell during the night and spent some time in hospital. We were very concerned to hear this and cautioned him against soldiering on if he felt unable to do so. He assured us that he was able to complete his submissions and indeed did so comprehensively and with consummate skill. He only asked if Mr Clark would object to giving his submissions first. Mr Clark was happy to do so.

10. We had raised with Mr Clark the fact that we had not received any statistics in support of any submission that the Respondent's pay policy was 'tainted by discrimination' which had been alluded to in the course of the hearing. He sought to adduce general statistics covering the entirety of the UK. The Employment Judge questioned whether such general statistics would be of any evidential value. Mr Butler objected to the introduction of such general statistics at that stage in the proceedings. After some discussion Mr Clark elected to proceed on the basis of the evidence we had already heard. Again, we are grateful for his pragmatism. We are grateful to both counsel for the careful and measured submissions in this difficult area of law.

11. The parties' submissions concluded shortly after lunch on the third day. We have not set out those submissions in full but have dealt with the arguments raised in our discussions and conclusions below. We did not consider there was sufficient time left to deliberate and deliver a judgment and so we formally reserved our decision. We met in Chambers on 5 August 2019 and this judgment and reasons are the product of those discussions. The Employment Judge apologises for the delay in providing these reasons.

General findings of fact

12. We make the following general findings of fact relevant to all of the claims that we have to decide. Under headings below we make further findings where they are necessary to determine any particular complaint. We have not dealt with every single matter the parties put before us but having had regard to the totality of the evidence set out our findings on the matters we considered most important.

13. The Claimant started working for the East Thames Group in 2006. She initially worked as a Service Charge Assistant and later a Service Charge Officer. At the time she was studying for her AAT accountancy examinations. In 2010, she applied for one of two Assistant Accountant roles and was successful in gaining promotion. She was successful in that role and she was later promoted into the role of Accountant. Finally, during a restructure that took place in 2016, the Claimant was appointed as a Senior Accountant, a new role created as a consequence of the restructure. She received a pay rise when she took on that role. Her salary at this point was £40,136.00.

14. Under the East Thames terms and conditions of employment employees were entitled to be paid in accordance with pay scales established after a Hay review. Accountants fell within the 'Professional Job Family' which was divided into 5 pay bands P1 to P4 (with an additional P3B band taking the total to 5). By the time the Claimant was working as a Senior Accountant she was on the P2 band. Each band was subdivided into 3. The divisions were expressed as 'developing', 'experienced' and 'expert'. We were provided with the pay rates for the year 2017/2018. Within band 2 the developing sub-division went from £32,831 to £36,771, Experienced from £36,771 to £43,338 and expert from £43,338 to £45,963. Progression up a pay scale was described in the Claimant's contract of employment dated 25 September 2006 as follows:

> *"progression through this band is made by achieving required performance standards and is not automatic"*

15. Whilst we did not have any later terms and conditions we find that the system of progression based on performance targets remained the same when she was promoted. When she performed the Senior Accountant role at East Thames an Accountant, JF, reported to the her. This was a contentious matter before us and we reach that conclusion for the following reasons. Whilst we noted that Lesley McDermott asserted in her witness statement that JF had been a Senior Accountant she stated that she was working from HR records and not from any personal knowledge. We noted that a document prepared by the Respondent for the purposes of these proceedings, and we presume from the same records, showed that JF had been an Accountant and not a Senior Accountant. Lesley McDermott could not explain the discrepancy. Finally, we considered the Claimant to be an honest and straightforward witness who was entirely

confident that JF had reported to her. We find that he would not have done so if he had also been a Senior Accountant. The Claimant said that in her view he struggled with some aspects of his work.

16. By 2016 JF was paid at a rate at or very close to the top of the P2 pay band. Because Lesley McDermott was working from HR records she did not profess or claim to have any personal knowledge of the reasons for that but she said in her witness statement that JF had been CIMA qualified since 1999. By 2014 he had been undertaking a role which was paid on the P3 pay band. She said that following a restructure he was redeployed into the role of Accountant. She said that, as a consequence of an East Thames policy his pay was protected for a period of 1 year and thereafter he was placed at the top of the P2 band. That aspect of Lesley McDermott's evidence was not challenged by the Claimant and, whilst we were concerned not to be provided with any documentary evidence supporting what we were told (such as the policy said to have been followed), we accept what Lesley McDermott says about this.

17. In 2016 the Respondent, which is a substantial housing association, decided to merge with the East Thames Group which was a smaller association. As a consequence, a proposal was made to merge the accountancy function of the two organisations. The Claimant made a significant contribution to this project. The merger took effect from 6 December 2016. It was common ground before the tribunal that the Transfer of Undertakings (Protection of Employment) Regulations 2006 acted so as to transfer the employment of the Claimant to the Respondent.

18. Following the transfer, a number of the Claimant's senior colleagues from East Thames decided to leave the organisation. In April 2017 the Claimant received a pay rise having exceeded all of her performance targets. The Respondent had accepted that the Claimant was entitled to the benefit of her existing, East Thames, terms and conditions which included annual reviews based on performance. The Claimant received a salary increase taking her salary to £42,166.88.

19. On 18 May 2017 a meeting took place to inform the employees that the Respondent intended a restructure of its finance function. Following that meeting a letter was sent to all affected employees setting out the process. The Respondent had proposed a new structure. What was proposed was that a new role would be created 'Assistant Director of Finance (Business Partnering)'. As far as is material, below that role sat two new positions of Senior Business Partner. In turn 2 new Finance Managers each specialising in a particular area would report to each Senior Business Partner (making 4 Finance Managers in total). Below them, and reporting to them, were a number of accountant roles and some analyst roles.

20. On 1 June 2017 the Claimant met with Terrence Wong, the Director of Financial Services together with Katherine Mitchell a HR Business Partner for Finance in a 1-2-1 consultation meeting. In terms of what happened at this meeting we had the Claimant's oral evidence but also a hand-written note of the meeting taken by Katherine Mitchell. In addition, immediately after the meeting, the Clamant sent an e-mail, copied to both Terrence Wong and to Katherine Mitchell, in which she summarised what had been discussed at the meeting. The oral account of the Claimant was entirely consistent with

her e-mail and broadly with the handwritten notes and we accept her evidence on this matter.

21. We find that the Claimant was told that the Respondent considered that she should be given one of the available Accountant roles. She was unhappy about this. She expressed her concern that, as she was currently a 'Senior Accountant', the proposal amounted to a demotion. The Claimant expressed an interest in the Finance Manager role. We consider that it would have been clear to Terrence Wong that the Claimant was saying that she believed that that role was closer to her own than the Accountant's role she was offered. The response of Terrence Wong was to say that the Respondent would usually expect a Finance Manager to have 2 years of post-qualification experience ('PQE'). The Claimant complained that that was acting as a bar to her progression. The Claimant accepts that, in the course of this meeting, Terrence Wong told her that she could apply for the Finance Manager role if she wanted to.

22. The Claimant asked what the effect of the change would be on her salary. She was told that it would not change. The Claimant went on to ask what the applicable pay bands were. She was told by Katherine Michell that the Respondent did not disclose its pay bands but that she was 'within the band' for her grade. In the meeting and in her follow up e-mail she said that in the absence of this information it was difficult to 'benchmark' her salary. We find that it would have been clear to Terrence Wong and Katherine Mitchell that the Claimant was questioning the transparency of the pay structure. The Claimant told us that she did not know 'formally' what the other accountants earned. It was clear that she had some informal knowledge and had concerns about her pay. The Claimant engaged constructively throughout the meeting and made suggestions as to how the new structure might be improved. At the conclusion of the meeting she was told that the decision to assimilate her to an Accountant's role would be reviewed and that a further 1-2-1 meeting would take place.

23. Contrary to what had been promised there was no follow up meeting to discuss the Claimant's concerns raised with Terrence Wong and the question of whether the Claimant's role was correctly assimilated to that of Accountant was not revisited. We find that the Claimant, whilst unhappy, decided that she would undertake the Accountant role if that was all that was offered, but that she would apply for the Finance Managers role as and when they were advertised. The Claimant was sent a letter dated 29 June 2019 which told her that she had been job matched to the role of an Accountant (Portfolio). That led to the question of which portfolio the Claimant would be offered. She was initially put forward for a role in Maintenance and Services.

24. On 20 July 2017 the Claimant met with Colin Chin. The principle matter to be discussed was the precise role the Claimant would be offered. She had no interest in Maintenance and Services and expressed a preference in working in care and support. Colin Chin was able to agree to that and the Claimant was given the role of 'Accountant, L & Q Living'. There was a significant conflict of evidence about what other matters were discussed in that meeting. In particular, there was a dispute about whether Colin Chin advised the Claimant that her pay would be reviewed at the point that she was offered the opportunity to move over to the L & Q terms and conditions. In his oral evidence Colin Chin at one stage was adamant that pay was not discussed at all in that meeting. He said "it is entirely incorrect, we never discussed East Thames terms and conditions or L&Q terms and conditions". Later he said "pay and terms and conditions were not

discussed at that meeting". That is inconsistent with his witness statement when he says; *"I explained to the Claimant if she was able to make the job her own then the business case for a salary and role review would be self-evident in 12 months' time"*. It seems to us that that statement could only have been made in the context of a discussion about pay.

25. On 19 December 2017 the Claimant wrote to Colin Chin asking for a meeting. She said *"I have now been given the opportunity to move over to L & Q T & C's, you mentioned when you asked me to take on L & Q Living that we would review my salary when I move over to L & Q T & C's. Can we please meet and discuss"*. The Claimant's account of what was said by Colin Chin needs to be seen in the light of a 'FAQ' document produced by the Respondent at the time of the Transfer. That suggested that a change to L & Q terms would not result in an increase of salary. That said, there is nothing to suggest that the change might or might not be the point at which salary was reviewed. The fact that a salary could be reviewed at any time was confirmed by Elaine Taylor during the grievance investigation and by Terrence Wong in an e-mail to the Claimant following her resignation. As such we find that there was nothing in the Respondent's usual policies or procedures that undermines the Claimant's evidence that she was told that her pay would be reviewed at the point she moved to L & Q terms. Looking at the evidence as a whole we find that the issue of pay, and a pay review, was a matter that was discussed by Colin Chin during the meeting of 29 July 2017. We consider that Colin Chin's attempt during his evidence to distance himself from his own witness statement mean that we can have little confidence in his evidence on the point. We should stress that we do not find that he was deliberately misleading us but find that he has, ever since the Claimant first raised her complaints, adopted a defensive stance that has damaged his ability to give accurate evidence. The Claimant's version of events is consistent with her later e-mail and is unsurprising given that the Claimant had consistently raised concerns about her pay.

26. We find that the Claimant was told, and could therefore expect, that at the point when she could move onto L & Q terms and conditions her concerns about pay would be formally addressed. We do not consider that that meant that she would be given a pay rise but just that the position would be reviewed. When viewed against the fact that the Claimant was aware or believed (correctly) that her pay was less than some others doing like work, and that she had expressed concern about the loss of her 'Senior Accountant' status we find that a statement that her pay would be reviewed in the near future could and was reasonably perceived as an important reassurance.

<u>The recruitment of the Finance Managers</u>

27. In August 2017 the Claimant was working 2 days per week from home and 2 days from an office situated in West Ham Lane. The main finance office was situated in Grove Crescent in Stratford. As such she was isolated from the rest of the accountancy department. The reason for that working pattern was to accommodate the Claimant's childcare responsibilities. Her work made it convenient to work from the West Ham Lane office.

28. On 4 August 2017 an email was sent from Vanessa Robins to Kate Mitchell in the HR Department but copied to Mark Seabrook and Ross Stone who had themselves just been appointed to roles as Senior Finance Business Partners (having previously been

at the level of Finance Managers). The subject line of the e-mail says *'Pls can you circulate to the Finance team on 11 August'.* Attached were job descriptions for two Finance Manager jobs. It was common ground before us that the expression 'finance team' would have included the Claimant. There was no evidence before us of any 'circulation' by e-mail or any other means.

29. On 10 August 2017 an e-mail was circulated throughout the finance team from Katie Mitchell. The first sentence of that e-mail said*: "As the new structure is now live please find below the final appointment update and important information relating to vacancies and recruitment going forward"*. Under a heading 'Recruitment Update' was written *'Please be advised that as of Monday 14th August 2017 we will revert to our normal recruitment process. This means that any vacancies will be advertised on L & Q job vacancies page in the normal manner'*. A further e-mail was sent by Vanessa Robins on 15 August 2017 to another employee but copied to the two recruiting managers again this attached the Finance Manager Job descriptions. It set out a timetable for the recruitment process which had a deadline of 25 August 2017 for applications. It also included the sentence *'Internal only'*. Lesley McDermott says that this shows that the advertisement was placed on the website.

30. The Claimant told us, and we accept, that during this period she had been looking at the L & Q external website waiting for the Finance Manager jobs to be advertised. We accept her evidence in that regard because she was able to tell us that she found a vacancy that appeared suitable for her sister. She did not know, because nobody had told her, and she had only recently been given access to the L & Q intranet, that there was also an internal webpage where jobs were advertised. There is no evidence that the job was actually advertised internally. We find that it is more likely than not that the existence of these vacancies was disseminated by Mark Seabrook and Ross Stone to their various team members all of whom worked at Grove Crescent. Two members of that team, SM and KM, who Mark Seabrook and Ross Stone had previously managed, applied for and were appointed into the Finance Managers role. The Claimant told us, and we accept, that the day before the interviews were to take place she asked Ross Stone when the positions were to be advertised. He told her that they already had been and that interviews were due to take place. We find that the Claimant was deeply disappointed by this. We consider that she could reasonably feel that she had been kept in the dark about an opportunity.

31. On each of the Finance Manager job descriptions was the words *"In line with our promise to encourage more women into senior roles at L&Q whilst all applications will be judged on merit, we would encourage applications from females as women are underrepresented at Senior Levels at L&Q".* In evidence Lesley McDermott suggested that 'senior roles' was intended to mean roles at the very highest level in the organisation. As a matter of fact, having only had applications for two men, appointments were made without questioning why there were no applications from women or ensuring that the Claimant, who had expressed an interest in applying, was aware of the vacancy.

32. Between August and December, the Claimant simply made the best of things and worked hard on the L&Q Living role. She was rewarded for her hard work by being given a spot bonus of £250 in November 2017.

33. On 7 December 2019 James Kirk from the Respondent's HR Department wrote to the Claimant informing her that if she wished she could transfer to L & Q terms and conditions. In his e-mail he included a comprehensive summary of the differences. That e-mail does not say anything about salary. On 12 December 2017 the Claimant sent an e-mail to Kattie Mitchell asking for the L & Q grade/Scale for her job. Katie Mitchell responded to the Claimant on 18 December 2017. She said *'On the L & Q system the Accountant role is a grade Finance 10. Although we don't disclose salary bands I can confirm that the salary band for Finance 10 is comparable to your current ET grade, which is P2 - £32,831 to £45,963. For clarity the Finance 10 grade is not less favourable than your current ET grade'.* In fact, the Finance 10 pay scale started at £37,000 and went to £61,500. We consider that there were some very real differences in the pay scales. The Claimant was towards the top of P2 but in the bottom quarter of the Finance 10 scale. The only explanation for why the Respondent was unwilling to disclose its pay scales was given by Lesley McDermott who said that it was a companywide decision and because pay bands overlapped, it was felt to be confusing. We do not consider there is anything confusing about the pay bands despite their width.

34. By December 2017 the Claimant had been headhunted and had secured the possibility of another job. We find that she was motivated by the failure to address her concerns about demotion, pay or to give her an opportunity to apply for the finance manager's post. Her evidence was, and we accept, that if matters could have been resolved she would have stayed with the Respondent.

35. We have already set out the fact that the Claimant sent an e-mail to Colin Chin on 19 December 2017 seeking a meeting to discuss her pay. We have found that she reasonably believed that the transfer to L & Q terms was the opportunity to have a pay review. We consider it more likely than not that the Claimant was aware that she was paid less than many colleagues doing similar work.

36. Colin Chin met with the Claimant shortly after her e-mail was sent. There are no notes of that meeting. It is common ground that the Claimant suggested that the transfer to L & Q terms was the opportunity to address her concerns about her salary. It is also agreed that Colin Chin said that he did not believe that to be appropriate and suggested that any salary review wait until her performance appraisal in June. Colin Chin told her that newly qualified Accountants start at the bottom. The Claimant says that she was bitterly disappointed by this and we accept her evidence on that. She believed, reasonably in our view, that she had been made a promise which was now being broken. It is again common ground that after the discussion about a pay review Colin Chin said to her words or words to the effect that 'if you wake up in the morning do not relish going to work, life is too short to keep beating yourself up, there are other employers'. The Claimant has construed that remark as equating to Colin Chin saying, 'if you do not like it you can go'. Colin Chin says that he was passing on some common-sense advice previously given to him by a manager. We considered what an objective interpretation of that phrase being used in that context would be. The Claimant and Colin Chin were not friends. Colin Chin had, whether he recognised it or not, just broken a promise he had made to the Claimant. In that context the Claimant could quite reasonably have felt that Colin Chin was telling her either put up with things or leave.

37. We accept the Claimant's evidence that it was only then that she sought to progress the possibility of alternative work and, having obtained a job offer, handed in her resignation on 10 January 2018 giving 1 months' notice. She said that she had no

choice but to wait until she found alternative employment before resigning because of her childcare responsibilities but, after her meeting with Colin Chin, 'she really wanted that job'. Whilst the job was better paid than her L & Q position and more convenient we accept that she explored the possibility of alternative employment and ultimately accepted it because of her dissatisfaction with her treatment by the Respondent. Her resignation letter is addressed to Sukhi Gill her line manager. It is pleasant in tone and makes no complaint about her treatment. She explained, and we accept, that she had no personal difficulties with Sukhi Gill and wanted her departure to be as smooth as possible.

38. By 26 January 2018 the Claimant had seen an advertisement for her replacement and noted that the advertised salary was at a starting rate of 45,000 for a qualified accountant or part qualified finalist. The Claimant sent an email to Colin Chin and Terence Wong complaining that her replacement was to be paid more than she had been and stating that if she had been paid the market value for her role she would not have considered leaving the company. Colin Chin responded and asked to meet the Claimant asking whether she was reconsidering her resignation. The Claimant responded on 29 January 2018 stating that she was not prepared to reconsider but was raising the matter with the hope that future employees would not be treated in the same way. Terence Wong replied to that email and sought to persuade the Claimant to meet with Colin Chin. He said that whilst the Respondent's policies did not include publishing salary bands there *"has and will always be opportunities for individuals to discuss personal circumstances with their line manager or above, particularly around building a business case for aligning to market"* he said *"I would be concerned if this has happened to you and you still felt disappointed".* He stated that he had believed the Claimant had resigned because she wanted to work closer to home. We find that Terrence Wong's e-mail makes it clear that it had been open to Colin Chin to review, or ask others to review, the Claimant's pay in December had he chosen to do so.

39. The Claimant promptly responded to Terence Wong's email replying on the same day to both Terence Wong and Colin Chin. She starts by saying: *"Firstly my main reason for leaving is not to be closer to home, I decided to leave once I felt that promises made were not being delivered…".* She then set out over 10 numbered points her complaints about her treatment by the Respondent. Her e-mail sets out the matters which she has relied upon in these proceedings to support her contention that she was entitled to treat herself as being dismissed by the Respondent. This e-mail was forwarded by Colin Chin to Kate Mitchell. He attached the Claimant's email and added a commentary which included a denial that in the course of the meeting that took place in July 2017 there was *"any discussion regarding "L & Q T & Cs"*. His email was somewhat defensive and his email included him speculating that the Claimant would have been interviewed for her new job before his conversation with her on 19 December 2017. Colin Chin also emailed the Claimant expressing his *"disappointment that you have decided to take your own interpretation of certain events and conversations since last May"*.

40. The Claimant met with Kate Mitchell on 6 February 2018. No notes were made at that meeting but the gist of the conversation was recorded in an email from Kate Mitchell to the Claimant. The Claimant had sought a redundancy payment in compensation for what she perceived as the improper treatment she had received. Kate Mitchell declined to offer such a payment. Kate Mitchell stated her position in respect of the Claimant's assertion that she had not been paid fairly as follows:

> *"In relation to your pay queries; I can advise your current salary, as well as a salary advertise on the job advert, are within the salary band for the role, which has been benchmarked against external sources. I appreciate you may have been disappointed not been awarded the pay increase during your time with L & Q however I do not believe this is due to any unfair treatment."*

41. In response to Kate Mitchell's email the Claimant decided to bring a formal grievance. In her grievance letter dated 7 February 2018 she repeated the points that she had earlier made and which she relied upon in these proceedings. Elaine Taylor the Director of Land, Acquisitions and Planning she met with the Claimant on 15 March 2018. We were provided with notes of that meeting which were accepted as an accurate summary. During their meeting they discussed the Claimant's concerns and in particular the fact that she had not been given a Senior Accounting role, the lack of opportunity to apply for Finance Manager role and the fact that the Claimant's pay had not been reviewed by Colin Chin.

42. Elaine Taylor then spoke to both Colin Chin and Terrence Wong. Again we were provided with notes of those meetings. Elaine Taylor discussed each of the Claimant's complaints with both. Colin Chin is recorded as having maintained that the Claimant was properly assimilated to the role of an Accountant. He said that he had not been involved in advertising the Finance Manager roles. He was asked by Elaine Taylor whether or not it was normal for managers to give employees a heads up when roles are advertised and said that that was not the case. He did however go on to say that *'Line managers will be having career talks with their team members'.* He went on to say that in his view the Claimant was unsuitable for the role as a Finance Manager because she lacked two years post qualification experience. Colin Chin suggested that the fact that the Claimant work from home three days a week *"didn't help with integration*". He suggested that the proper process was to review pay in line with the appraisal process. At one stage he said that he believed that the Claimant's own perception of her ability was higher than it actually was. We heard no evidence that would justify that comment.

43. When Terence Wong was interviewed he said that the Claimant had been "quite vocal" after the consultation process. He also suggested she was not suitable for the Finance Manager role because she did not have two years' experience but he accepted that he had told her that she could apply although she may not get the job. Elaine Taylor is recorded as saying during the interview that she was not aware that the jobs were advertised. Terence Wong said that the posts would go onto the intranet and that people would need to take responsibility to look for them roles themselves. He said that he would not tell to apply and would leave people to look for themselves. There was a discussion about the appropriate time for a pay review and it was agreed both by Terence Wong and by Elaine Taylor that it was not a fixed policy only to undertake such reviews at an appraisal stage. Terence Wong expressed his view that it could not be done without "knowing the individual. He then went on to suggest that in the ordinary course of events an appraisal might be the appropriate point for a pay review.

44. Elaine Taylor wrote to the Claimant on 5 April 2018. She dismissed all of the Claimant's grievances. She did acknowledge some lack of clarity in respect of the pay scales. In respect of the Finance Manager opportunity she asserted that the jobs were placed on the Internet and found *"My investigations have found that individuals were expected to take responsibility to look for the roles themselves and that no one was*

singled out was specifically encouraged to apply". She deals only briefly with the Claimant's complaint that she had been paid less than others saying that the salary advertised for the Claimant's replacement was consistent with previous external job advertisements. That goes no way towards explaining to the Claimant why she had been paid less than doing the same job.

The legal framework – unfair dismissal

45. Section 94 of the Employment Rights Act 1996 (hereafter 'the ERA 1996') sets out the right of an employee not to be unfairly dismissed by her or her employer.

46. For the Claimant to be able to establish her claim of unfair dismissal she must show that she has been dismissed. Dismissal for these purposes is defined in Section 95 ERA 1996 and includes in Sub-section 95(1)(c) *'the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct'.*

47. ***Western Excavating (ECC) Ltd and Sharpe*** **1978 IRLR 27** established that in order for the circumstances to entitle the employee to terminate the contract without notice, there must be a breach of contract by the employer, secondly that that breach must be sufficiently important to justify the employee resigning; the employee must leave in response to the breach, not some unconnected reason; and that the employee must not delay such as to affirm the contract. The breach relied upon can be a breach of an express or implied term.

48. In ***Mahmood v BCCI*** **1997 ICR 607** it was confirmed that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is implicit in the case of ***Mahmood v BCCI*** that any breach of the implied term will be sufficiently important to entitle the employee to treat himself as dismissed as it is necessary to show serious damage to the employment relationship. That position was expressly confirmed in ***Morrow v Safeway Stores Ltd*** **2002 IRLR 9**.

49. Where the breach alleged arises from a number of incidents culminating in a final event, the tribunal may, indeed must, look at the entire conduct of the employer and the final act relied on need not itself be repudiatory or even unreasonable, but must contribute something even if relatively insignificant to the breach of contract see ***Lewis and Motor World Garages Ltd*** **[1985] IRLR 465** and ***Omilaju v Waltham Forest London Borough Council*** **[2005] IRLR 35**. In ***Omilaju*** it was said:

> *'19. … The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*

> *20. I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.*
>
> *21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.'*

50. The test to be applied in assessing the gravity of any conduct is an objective one and neither depends upon the subjective reaction of the particular employee nor the opinion of the employer as to whether its conduct is reasonable or not see ***Omilaju v Waltham Forest London Borough Council*** and ***Bournemouth University Higher Education Corpn v Buckland*** **[2011] QB 323**.

51. There is no general implied contractual term that an employer will not breach some other statutory right such as the right not to suffer discrimination ***Doherty v British Midland Airways*** **[2006] IRLR 90, EAT**. However, the same facts that might support a finding of unlawful discrimination or any disregard of such a statutory right may, depending on the facts, suffice to establish a breach of the implied term of mutual trust and confidence see ***Green v Barnsley MBC*** **[2006] IRLR 98** and ***Amnesty International v Ahmed***.

52. Once there is a breach of contract that breach cannot be cured by subsequent conduct by the employer but an employee who delays after a breach of contract may, depending on the facts, affirm the contract and lose the right to treat him/herself as dismissed - ***Bournemouth University Higher Education Corpn v Buckland***.

53. The breach of contract need not be the only reason for the resignation providing the reason for the resignation is at least in part because of the breach ***Nottinghamshire County Council v Meikle*** **[2004] IRLR 703**.The employee need not spell out or otherwise communicate her reason for resigning to the employer and it is a matter of evidence and fact for the tribunal to find what those reasons were ***Weatherfield v Sargent*** **1999 IRLR 94**.

54. The proper approach, in the main distilled from the cases set out above, has been set out by the Court of Appeal in ***Kaur v Leeds Teaching Hospitals NHS Trust*** **[2018] EWCA Civ. 978** per Underhill LJ at paragraph 55.

> *'it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?*

55. If dismissal is established sub-section 98(1) ERA 1996 requires the employer to demonstrate that the reason, or if more than one, the principal reason, for the dismissal was for one of the potentially fair reasons listed in sub-section 98(2) of the ERA 1996 or for 'some other substantial reason'. If it cannot do so then the dismissal will be unfair.

56. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then the Employment Tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996 which reads:

> '*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> > *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> >
> > *(b) shall be determined in accordance with equity and the substantial merits of the case.'*

57. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *'any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.'*

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

Discussions and conclusions – unfair dismissal

58. Applying the law set out above to the facts of this case we have come to the conclusion set out below.

59. As the Claimant was relying upon a course of conduct of which the events of the meeting on 19 December 2017 were said to be a "final straw" it is appropriate for us to ask the questions identified in the case of ***Kaur v Leeds Teaching Hospitals NHS Trust***. Having identified the final straw, we ask ourselves whether the Claimant has affirmed the contract before her resignation. There was no dispute before us that the Claimant resigned on 12 January 2018, just under a month after the last act upon which she relies. He resigned giving contractual notice. The wording of Section 95(2)(c) precludes a finding that giving contractual notice is an act of affirmation. The Claimant continued to work between 19 December 2017 and 12 January 2018 when she gave notice; she continued to have all of the benefits of her contract of employment during that time including of course a salary. We have accepted the Claimant's evidence that because of her responsibilities towards her children she had little option but to remain in employment until she had fully secured alternative employment. The Respondent, through Colin Chin, would have been aware that following the meeting on 19 December 2017 the Claimant remained dissatisfied.

60. ***Bournemouth University Higher Education Corpn v Buckland*** provides authority for the proposition that an employment tribunal must look carefully at all of the facts before concluding that an employee has affirmed a contract. Economic pressure on an employee has been recognised as a material factor, see for example ***Waltons and Morse v Dorrington*** **[1997] IRLR 488**. We do not consider that a period of delay of just under one month in those circumstances amounts to an affirmation of the contract.

61. We then ask whether or not the acts or omissions of 19 December 2017 were by themselves a fundamental breach of contract. We remind ourselves that any breach of the implied term of trust and confidence is a serious or fundamental breach. As made clear in ***Morrow v Safeway Stores Ltd*** an employee needs to demonstrate that the employment relationship will, without reasonable cause, suffer serious damage.

62. We have found above that the Claimant quite reasonably relied upon a reassurance given by Colin Chin that her pay would be reviewed at the point in time that she transferred to L & Q terms and conditions. We fully accept that this would not have automatically been the case but on the other hand there was no fixed time for considering pay reviews. When the Claimant attended the meeting on 19 December

2017 she could have expected Colin Chin to keep his promise. We do not suggest that Colin Chin has deliberately gone back on his word. Quite possibly the matter was of far less concern to him than it was to the Claimant and it is very likely he had simply forgotten what he had said some months previously. The fact that he did not intend to damage the employment relationship is beside the point as made clear in ***Bournemouth University Higher Education Corpn v Buckland***. The same point goes for his remarks that the Claimant might consider alternative employment. It matters not what he intended those remarks to convey, the question is an objective one. We have found that in the context of the relationship between Colin Chin and the Claimant the Claimant could rightly believe that she was being told that if she did not like the way she was being treated she could just leave.

63. We consider that the failure to review the Claimant's pay as promised needs to be seen in the context of everything that had happened before. Taken in isolation we would accept that the events of 19 December 2017 would not amount to a serious or fundamental breach of contract. We consider that on the facts of this particular case some overlap between the third and fourth questions posed in ***Kaur v Leeds Teaching Hospitals NHS Trust*** and that it is appropriate to answer them together.

64. We have found that the Claimant could quite properly complain that she was no longer a "Senior Accountant". Until the point that that title was removed she was recognised as being in a more responsible position than others including JF whom she had previously managed. A breach of the implied term of trust and confidence requires that the employer act "without reasonable cause". Following the transfer, the Respondent did not have any equivalent position to that previously occupied by the Claimant. Whilst for the first few months the Claimant's job title was not formally changed, matters came to a head at the stage of the reorganisation. At that stage a perfectly sensible structure was identified which did not recognise any distinction between Accountants and Senior Accountants but instead differentiated between Accountants and the next role up which was that of a Finance Manager.

65. We accept that the Respondent reasonably expected their Finance Managers to have a high level of experience. Ordinarily it is clear that they would have expected two years of post-qualification experience. The fact that the Claimant had worked whilst she qualified meant that she had gained a lot of experience "on-the-job" before she finally qualified. Nevertheless, we do not think there is anything unreasonable about the decision not to automatically offer the Claimant the role of Finance Manager.

66. We do however consider that Terence Wong was utterly thoughtless when he failed to follow up on his promise to have a further one-to-one meeting with the Claimant having listened to her representations as to why she should be offered one of the Finance Manager roles. The Claimant had explained precisely why she thought she should be offered that job. Even if Mr Wong ultimately disagreed with her, he had promised to review the matter and a responsible manager would have reverted to the Claimant as he had promised. We find that there was no reasonable cause for this failure and that this act contributed to what we find cumulatively was a serious breach of contract.

67. We turn to the question of the recruitment process for the two Finance Manager posts. It was clearly the intention that the existence of these posts should be circulated amongst the Finance Team, this was not done. We had no explanation of why that was the case. It is said that the vacancies were advertised on the intranet despite the paucity of evidence we accept that was the case. In dismissing the Claimant's grievance Elaine Taylor thought that that provided an answer to the Claimant's complaints. We disagree. The Respondent, through Terence Wong and Katherine Mitchell, knew that she wanted to apply. The day before the interviews the Claimant had asked about the posts and no steps were taken to ascertain why she had not applied, she was simply told that the interviews were to take place the following day with the implication being that it was too late to do anything about it. The Claimant's working arrangements meant that she was isolated from the team. We have accepted the Claimant's evidence that she was not told of the internal vacancies page on the Respondent's intranet. There was nothing in the e-mail of 10 August 2017 to alert her to the distinction between the internal and external job vacancies pages.

68. We have found above, and below in our findings in respect to the direct discrimination claim, that the two employees ultimately appointed to the roles of Finance Managers were recruited by their previous direct line managers whom they knew. Given the paucity of evidence that the vacancies were ever circulated around the finance team we find it more likely that those employees were given a heads up by their managers. It seems very unlikely that the employees would be checking the vacancies page just in case a vacancy had arisen. We accept that the Claimant might have had some difficulty persuading the Respondent that her practical experience was sufficient. We consider that it is neither here nor there whether she would in fact have got the job. We believe she might have done as she has demonstrated by her most recent employment that she is quite capable of taking on more responsibility. What she has been excluded from through the failure to circulate news of the vacancy and/or to properly explain where internal vacancies were placed is the opportunity to try to convince the Respondent that she was suitable for the job. We consider that this was a serious failure and one which contributed to a serious breach of contract.

69. The Claimant has relied upon a breach of the equality clause as amounting to a serious breach of contract in its own right. We repeat our findings in respect of the equal pay claim. We have not found that there is a breach of the equality clause. In any event, we consider that the Claimant might have been in some difficulty in relying upon any breach because she had limited knowledge of the pay received by others prior to her resignation.

70. There is no implied term that employees will be paid fairly. That said a disparity in pay that is manifestly unfair or capricious might be a matter capable of breaching the implied term of mutual trust and confidence. That is not the basis on which we have decided the case.

71. We have inferred that the Claimant was alive to the fact that she was paid less than many of the other Accountants. We have concluded below that had the Claimant's pay been fixed by the Respondent she would have been paid significantly more. Her pay had been fixed by the East Thames Group, a smaller organisation. However, by the time of the reorganisation in 2017, the Claimant was expected to undertake a responsible role in a much larger organisation. The fact that there was a transfer of

undertakings did not preclude reviewing the Claimant's pay to ensure that she was paid in line with other employees. She sought such a review when she spoke to Colin Chin in July. At various times she pressed for clarity in the pay arrangements and was told that the Respondent's policy was not to disclose its pay scales. No justification for that lack of transparency was put forward during the hearing. The Claimant could reasonably and we find did consider that she was being treated unfairly. Given that the Claimant was paid significantly less than others doing the same work and carrying the same responsibility, the promise to review her pay in December was one which had particular importance. The failure to carry out a review as promised some six months after Colin Chin was first asked to do so amounts to a very serious failure and one which was without any reasonable cause and which by itself was conduct likely to seriously damage trust and confidence.

72. We consider that when all of these matters are considered together there were several acts or omissions that taken cumulatively and reviewed objectively were without any reasonable cause and which were likely to, and did, seriously damage the relationship of trust and confidence.

73. Mr Butler argued forcefully that the Claimant had not resigned in response to any breach but had resigned in order to take up a much more attractive job that was closer to home and accommodated the Claimant's childcare responsibilities. We agree that the job that the Claimant obtained was very attractive to her. That said we have accepted as a matter of fact that had the meeting of 19 December 2017 taken a different turn the Claimant would not, or at least would not have necessarily, proceeded to explore the alternative employment.

74. The fact that an employee secures employment before resigning does not mean that a breach of contract was not a material reason for the resignation. We have found as a matter of fact that the breach of contract was a material reason for the resignation. As such the Claimant was entitled to treat herself as dismissed by the Respondent.

75. The Respondent has, quite sensibly in our view, not suggested that there was a potentially fair reason for dismissal in this case. For the avoidance of doubt, we find that there was not. It therefore follows that the dismissal is unfair and that the claim for unfair dismissal is well-founded.

76. Given that the Claimant immediately moved into better paid employment this claim has little value other than to confirm for the Claimant that she was, as she suggested, treated unfairly by the Respondent. We hope that the parties are able to agree all issues of remedy between them. Whilst we note that the Claimant did not appeal the outcome of her grievance we consider that, given the fact that the employment had ended, and given the fact that the grievance was dismissed in its entirety, she did not act unreasonably in not pursuing an appeal. We would not therefore make any adjustments to compensation in respect of any failure to appeal.

Equality Act Claims – general

The burden and standard of proof – discrimination cases

77. The standard of proof that we must apply is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.

78. The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

> "*136 Burden of proof*
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*"

79. Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ. 1648** Lord Justice Underhill reviewed the case law and said:

> *"17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ. 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ. 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision*

was overturned by this Court in Ayodele v Citylink Ltd [2017] EWCA Civ. 1913, [2018] ICR 748, and Madarassy remains authoritative.

18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

> *'(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):*
>
> > *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
> >
> > *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"*
>
> *(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:*
>
> > *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*
>
> *He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.*'

80. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

81. Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow *City Council v Zafar* [1998] ICR 120**. That may not be the case if the conduct is unexplained ***Anya v University of Oxford*** **[2001] IRLR 377, CA.** Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference in treatment see ***Madarassy v Nomura International plc*** **[2007] ICR 867** 'without more', the something more *"need not be a*

great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred" see ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ. 1279** per Sedley LJ at para 19.

82. Where there are a number of allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be taken into account in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation ***Anya v University of Oxford***.

83. The burden of proof provisions need not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008] EWCA Civ. 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said:

> *"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race""*

Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

Equality Act 2010 - Statutory Code of Practice

84. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code was laid before Parliament and came into force on 6 April 2011. Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

> "*The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.*"

Direct Discrimination

The legal framework

85. Section 13 of the Equality Act 2010 contains the statutory definition of direct discrimination. The material part of that section read as follows:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age then A does not discriminate against B if A can show that A's treatment of B is a proportionate means of achieving a legitimate aim."

86. In order to establish less favourable treatment, it is necessary to show that the Claimant has been treated less favourably than a comparator not sharing her protected characteristic. Paragraphs 3.4 and 3.5 of the code say:

3.4 To decide whether an employer has treated a worker 'less favourably', a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer's treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.

3.5 The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.

87. Section 23 of the Equality Act 2010 provides that any comparator must be in the same, or not materially different, circumstances. What is meant by 'circumstances' for the purpose of identifying a comparator, it is those matters, other than the protected characteristic of the Claimant, which the employer took into account when deciding on the act or omission complained of see - ***MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School*** **[2003] IRLR 512, HL**. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances. Paragraphs 3.22 – 3.27 say (with some parts omitted):

"*3.22 In most circumstances direct discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'.*

Who will be an appropriate comparator?

3.23 The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

Hypothetical comparators

3.24 In practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.

3.25 In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless their treatment may help to construct a hypothetical comparator.

3.26 Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant, but not the same. Looking at these elements together, an Employment Tribunal may conclude that the claimant was less favourably treated than a hypothetical comparator would have been treated.

3.27 Who could be a hypothetical comparator may also depend on the reason why the employer treated the claimant as they did. In many cases it may be more straightforward for the Employment Tribunal to establish the reason for the claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.

88. The proper approach to deciding whether the treatment was afforded 'because of' the protected characteristic is to ask what the reason was for the treatment. If the protected characteristic had a significant influence on the outcome then discrimination will be made out see - ***Nagarajan v London Regional Transport*** **[1999] UKHL 36; [1999] IRLR 572.**

Direct Discrimination – Discussion and Conclusions

89. The agreed list of issues sets out just one allegation of direct discrimination. The less favourable treatment is described as follows:

"denied opportunity of applying for the role of Finance Manager role (August 2017) - two L & Q male accountants were allowed to apply and were appointed – [KM] and [ST]…"

90. The agreed list of issues further records that the Respondent's position is that the alleged less favourable treatment never took place. We find that there is a distinction between 'denied' in the sense that there was a refusal and the facts of this case where the Claimant did not have the practical opportunity to apply for the role that she wanted.

91. The Tribunal has made findings of fact in respect of this and they are set out above. In our discussions and conclusions when we consider the unfair dismissal claim we have set out our findings that the Claimant could quite properly feel badly let down by the Respondent in circumstances where she had quite clearly expressed an interest in applying for the Finance Manager's role but had not been informed when the roles were advertised internally. We have no hesitation in concluding that failure to let her know that the roles were advertised amounted to a detriment for the purposes of the legislation. It simply does not matter for these purposes whether or not the Claimant

would ultimately have been appointed. She could rightly have anticipated that she would be given the opportunity to show why she ought to have been. Accordingly, insofar as the Respondent's defence to this claim relies upon the Claimant not being able to show that the treatment complained of never occurred we reject that.

92. The Claimant has identified as comparators the two male members of staff who were ultimately appointed. The first point to note about those two individuals is that they work closely with the managers responsible for the recruitment exercise. If, we do not necessarily accept, the vacancies came to their attention through the internal vacancies page, then they had an advantage over the Claimant in that they knew of its existence. We have no evidence that the email prepared for circulation to the finance team was ever circulated. We have set out above our findings that it is more likely than not that the two successful candidates learnt of the vacancies from the appointing managers. It is in our view important that the Claimant did not work in the same geographical location as the managers responsible for the recruitment exercise.

93. We consider that the proximity both geographically and in terms of their connections within their team and in respect to any advert placed on the intranet, their knowledge of the organisation raises a question as to whether the named comparators are in the same material circumstances. This is a case where looking at the circumstances of the comparators involves the same consideration as asking the reason for the treatment complained of. We consider that we are in a position to identify the reason for the treatment complained of (on the assumption that the burden of proof falls on the Respondent).

94. We place no weight whatsoever on the 'mission statement' in the advertisement that women are encouraged to apply for the vacancy. That might have been more relevant if the advert had been circulated. We do however note that the gender balance in senior management positions within the Respondent shows no hint of discrimination. Lesley McDermott gave unchallenged evidence that of 18 Finance Manager posts within the Respondent's organisation 12 were held by women. The Respondent's Equal Pay statistics give a gender pay gap below the national average. There is no evidence of any systemic discrimination.

95. The evidence before us is that the only reason why the Claimant was not informed of the vacancy was that the information was only circulated to those who worked alongside the recruiting managers rather than by e-mail which would have come to the Claimant's attention. The Claimant's lack of knowledge of the intranet pages was not related in any way to her gender but to the fact that she was a newish employee unfamiliar with the system. We find that the reason for the treatment complained of was the geographical and managerial isolation of the Claimant and not in any sense her gender. The treatment was incredibly thoughtless but that does not mean that it was discriminatory. We pause to note that as the Claimant's isolated working arrangements were made to accommodate her childcare requirements a claim of indirect discrimination might (and we do not decide) have provided a different outcome.

Equal Pay

The legal framework

96. The statutory framework governing the right to equal pay is contained in Chapter 3 of Part 5 of the Equality Act 2010. In summary:

96.1. By Section 66 of the Equality Act 2010 the terms of a woman's contract are treated as including a clause that has the effect of modifying any term of her contract where the term that applies to her is less favourable than that which applies to a man to eliminate any less favourable effect.

96.2. Section 64 states that for that Section 66 to apply the woman must identify a man doing 'equal work'. Section 65 sets out the circumstances in which work is treated as 'equal work'.

96.3. Section 69 provides that it is a defence to any claim for the employer to show that the difference in treatment is because of a material factor which is not itself discriminatory.

97. The material parts of the sections referred to above are set out below:

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.

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.

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).

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.*

98. Section 136 of the Equality Act 2010 applies to equal pay claims. The effect of this section is that it falls to the Claimant to show that she is engaged on terms less favourable than a man doing equal work. If she can do that then the burden shifts to the Respondent to show that the difference in treatment can be explained by a material factor. If the Respondent succeeds in that, the claim will progress only if the Claimant can show that the material factor is tainted by indirect sex discrimination ***Bradley v Royal Holloway & Bedford New College, University of London*** **UKEAT/0459/13/SM**. If she does that then again, the burden shifts to the Respondent to show that any such material factor is objectively justified as a proportionate means of achieving a legitimate aim.

99. As in this case the parties have agreed which of the Claimant's comparators were engaged on 'like work' it is unnecessary for us to set out the law in that regard.

100. For a claim based upon the equality clause implied by Section 66 Equality Act 2010 it is necessary to show a pay disparity with a real, as opposed to hypothetical comparator. A predecessor may be a proper comparator but there is authority binding upon this tribunal that a successor is not an appropriate comparator Walton Centre for ***Neurology and Neuro Surgery NHS Trust v Bewley*** **2008 ICR 1047, EAT**.

101. In order for any matter or reason for a disparity in pay to amount to a 'material factor' it was held in ***Glasgow City Council and ors v Marshall and*** **ors [2000] ICR 196, HL** per Lord Nichol that:

> *"The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a 'material' factor, that is, a significant and relevant factor. Third, that the reason is not 'the difference of sex'. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within section 1(2)(c), may be a 'material' difference, that is, a significant and relevant difference, between the woman's case and the man's case."*

Whilst ***Marshall*** was decided under the Equal Pay Act 1970 the reasoning is equally applicable to the Equality Act 2010 the wording of which codifies some parts of that decision. The 'rebuttable presumption' of sex discrimination remains the position under

the Equality Act 2010 see ***CalMac Ferries Ltd v Wallace and anor*** **[2014] ICR 453, EAT.**

102. A 'material factor' that is neither directly or indirectly discriminatory need not be justified by the employer. In other words, a material factor can be unfair and/or senseless and yet provide a defence to an equal pay claim. See ***Marshall*** and ***Strathclyde Regional Council and ors v Wallace and ors*** **[1998] ICR 205, HL** and ***Villalba v Merrill Lynch and Co Inc and ors*** **[2007] ICR 469, EAT**.

103. All that is required of the employer at the first stage of the enquiry is to have a factual explanation, good or bad, as to how the state of affairs came about **Bury Metropolitan Borough Council v Hamilton and ors; Sunderland City Council v Brennan and ors [2011] ICR 655, EAT.**

104. To establish the defence afforded by sub-section 69(1) the 'material factor' must be the actual cause of the pay disparity – see ***Marshall***. Where the employer relies on a historical matter to justify a differential in pay it will be a question of fact for the Tribunal whether or not that matter is still operative see ***Skills Development Scotland Co Ltd v Buchanan*** **EATS 0042/10**

Equal pay further findings of fact

105. As set out above the Claimant accepted the Respondent's concession that 5 of her named comparators did 'like work' to her. She abandoned her reliance on any of the other employees she had named as a comparator. The comparators relied upon were:

105.1. SA, recruited by the Respondent, who after the 2017 reorganisation held the role of Accountant (Portfolio) for which he was paid £51,000 at the point the Claimant joined the Respondent. He was later being promoted to Group Financial Reporting Manager. He had qualified as an accountant in 2009.

105.2. KM who after the 2017 organisation was, briefly, an Accountant (Care and Support) for which he was paid £50,500 before his promotion to Finance Manager. He qualified as an accountant in December 2013.

105.3. ST, recruited by the Respondent, who was the 2017 organisation was, briefly, the Accountant (Property Repairs and Maintenance) for which he was paid £47,434 before his promotion to Finance Manager. He qualified as an accountant in June 2014.

105.4. JF, recruited by East Thames, who had the role of Accountant (Portfolio) for which he was paid £44,475.61. He had qualified as an accountant in 1999.

105.5. DR, recruited by the Respondent, who had the role of Accountant (Capital and Maintenance) for which he was paid £46,500. He qualified in 2017.

106. The Claimant's successor GS had 4 years of post-qualification experience and was recruited on a salary of £48,000.

107. We accept the Respondent's explanation as to how it sets pay scales. Ms McDermott told us and we accept that the Respondent undertakes a benchmarking exercise for each role which is similar but not identical to a Hays evaluation. The salary range for each role is then set having had regard to the market rates. Colin Chin told us, and we accept that the Respondent has to have regard to high rates of pay offered by nearby financial institutions in the City of London. Given the breath or the pay scales it is far less clear to us how individual salaries were set. We were told and accept that there may be some negotiation and that experience would be an important factor.

Discussions and conclusions – Equal Pay

108. Mr Butler accepted that SA, KM, ST, JF and DR were proper comparators and that the Respondent had the burden of showing that the admitted differences in pay were not tainted by sex.

109. The Claimant had also relied upon her successor GS as a comparator. Section 64(2) of the Equality Act 2010 would tend to suggest that it is open to a woman to compare her pay to any other employee regardless of when they started work. It is settled law that a woman can compare herself to an employee who had left the employers prior to her starting work. Mr Butler quite properly referred the Tribunal to the case of ***Neurology and Neuro Surgery NHS Trust v Bewley*** and argued that that authority precluded reliance upon a person who takes up the post after the Claimant has left. We note some academic criticism of ***Bewley*** and consider that it appears to run counter to the express words of section 64(2) but nevertheless accept that it is a decision binding upon us. Mr Clarke was unable to say otherwise. We should say that in any event had the Claimant been able to rely upon her successor as a comparator we would have found that the difference in pay was not tainted by sex for the same reasons that apply to the other employees recruited by L & Q.

110. The Respondent's principal argument was that the reason for the difference in pay between the Claimant and all of her comparators with the exception of JF was the fact that the Claimant had been transferred into the Respondent's employment whereas her comparators had not.

111. At various times Mr Butler argued that the reason for the disparity in pay was the 'TUPE' transfer. He referred us to the case of ***Skills Development Scotland Co Ltd v Buchanan*** **EATS 0042/10** in support of the proposition that where a differential in pay is explained by the fact that there has been a transfer of undertakings, and that reason remains operative, then that will provide a defence to an equal pay claim. In ***Buchanan*** both the Claimants and their comparator had been the subject of separate transfers of undertakings. The effect of the TUPE regulations was that the new employer could not

vary the terms of either the Claimant's or their comparator, at least to their disadvantage, for a reason related to the transfers. The comparator's contract of employment gave him an initial contractual right to pay increases. Whilst the Claimant received some pay rises a pay disparity persisted. The Employment Tribunal accepted an argument that the Respondent should have taken steps to equalise their pay. That finding was reversed by the Employment Appeal Tribunal. The reason for the differential was the circumstances of the transfers of undertakings and the EAT held at paragraph 22 that:

> *"If the employer establishes a subsisting causal link between a non-gender - related explanation in the difference in pay complained of, the defence is made out. Normal principles of causation applying so, if there is no supervening fact to break the causal chain the link will be established"*

112. The parties before us, and particularly the Claimant, had not distinguished between the various periods of employment. This is an essential step in an equal pay claim – see ***Buchanan*** para 13. To do justice to the case as presented we have considered the following periods:

112.1. In respect of the reliance on JF, the period from when the Claimant was appointed as an Accountant by East Thames; and

112.2. In respect of SA, KM, JF and ST the date of the transfer to the Respondent; and

112.3. In respect of SA, KM, JF and ST, the date of the reorganisation circa June 2017; and

112.4. In respect of SA, KM, JF and ST, the position in December 2017 when we find that Colin Chin declined to review the Claimant's pay; and

112.5. In respect of DR the date of his appointment in January 2018.

113. It is appropriate to deal with the claim based upon JF as a comparator first of all. He was paid significantly higher than the Claimant whilst at East Thames and thereafter with the Respondent. If the reasons for that differential were discriminatory, then it would be no defence for the Respondent to say that it had not been responsible for any decisions anything done by East Thames would, by reason of Regulation 4(2)(b) of the Transfer of Undertakings (Protection of Employment etc) Regulations 2006 be deemed to have been done by the Respondent.

114. We have remarked above that there was not much direct evidence to explain why JF was paid at the top of the East Thames pay scale. We have accepted the evidence provided by Lesley McDermott which she in turn ascertained from the records provided by East Thames. That evidence is supported to a degree by the fact that JF had 19 years of post-qualification experience. We have therefore accepted that the reason that his pay was set at the top of the pay scale was that he had been downgraded as a

consequence of a reorganisation, offered a brief period of pay protection, and was then placed at the top of the relevant pay scale. Such pay protection policies in our experience are a common feature of public-sector or quasi public sector organisations. On that basis we were prepared to accept the Respondent's explanation.

115. The fact that JF had the benefit of pay protection is sufficient to explain the otherwise surprising state of affairs that she reported to the Claimant and yet earned a sum far in excess of what she did.

116. Pay Protection upon demotion is, we find, a material factor in that it provides a complete explanation why JF was paid as he was. We are entirely satisfied that the reason he was paid more than the Claimant was in no sense because of sex. The reason was because of the application of a gender neutral policy. As such there is no direct discrimination within section 69(2)(a) of the Equality Act 2010.

117. The Claimant did not suggest that there was any indirect discriminatory reason for the differential in pay between herself and JF. She identified no PCP nor did she provide any evidence that women were disadvantaged by any PCP. In the same vein the Claimant did not provide any evidence that she and JF were in different "groups" of employees nor that there was any evidence of the sort of discrimination by numbers recognised in an ***Enderby v Frenchay Health Authority*** type of case.

118. For the reasons above we are satisfied that during the Claimant's employment with East Thames there was no breach of the Equal Pay provisions that has been demonstrated using JF as a comparator.

119. We then turn to the period immediately after the transfer of undertakings which took place on 6 December 2016. At this point the Respondent employed the Claimant and SA, KM, ST and JF all of whom were paid more than the Claimant.

120. The fact that the Claimant had been transferred to the Respondent did not of itself prevent the Respondent from increasing her pay see ***Regent Security Services Ltd v Power*** **[2007] ICR 970.** That said, the issue is not whether the Respondent could or should have increased the Claimant's pay to match the pay of others but to look at the reason for any pay differential.

121. Our findings above show that the Respondent pay accountants at the Claimant's level more than was paid by East Thames. East Thames paid its most experienced accountants at the P2 grade £45,963. The Respondent advertise the Claimants position at a starting salary of £45,000 for an accountant with two years of experience. None of the Claimant's comparators whose pay had been set by the Respondent were paid less than the very top of the Thames P2 pay scale. In short, the Respondent paid its Accountants more than East Thames did. It is unnecessary to make a finding as to the reason why but we consider that the relevant factors would include the size of the organisation and the fact that it perceived or actually had to compete for accountants with city financial institutions.

122. We find that at the point that the Claimant joined the Respondent the reason for any differential in pay between the Claimant and JF remained exactly the same as it had done when both were employed by East Thames.

123. In respect of the other accountants employed at that time we are satisfied that the differential in pay is fully explained by the fact that the Respondent paid more than East Thames. The reason for the differential was the merger of the organisations. The Respondent has satisfied us that that is a material reason which is in no sense whatsoever because of the Claimant's gender. That can easily be tested by asking whether a male Accountant transferred at the same grade would have experienced the same differential. We find the answer is yes. As such there is no direct discrimination within section 69(2)(a) of the Equality Act 2010. The Claimant did not adduce any evidence or suggest any PCP which was operative at the point of the transfer which placed women at a disadvantage in comparison to men. Neither did she point to any grouping or statistics that would suggest any Enderby type of discrimination. We find that there was a material reason for the pay differential, namely the fact that the Claimant's pay was set by East Thames and that that was in no sense whatsoever tainted by sex discrimination.

124. We deal with the matter at the point of the reorganisation because that is the point at which the Claimant first raised the question of her pay. By that stage we have found she had informal knowledge that she was paid significantly less than at least some of the male accountants undertaking like work.

125. The Claimant did raise her pay with Colin Chin during their meeting on 20 July 2017. We have found that Colin Chin assured the Claimant that her pay would be reviewed at the point that she changed to L & Q terms and conditions. If it is not implicit from our findings above we accept that the context of that promise was that Colin Chin thought that the Claimant's request for a review of her pay was premature. We accept that he believed she would be in a better position to negotiate a pay rise when she had her feet under the table and had demonstrated proficiency in her new role.

126. We do not consider that this conversation broke the chain of causation in the sense recognised in ***Buchanan***. In reaching that conclusion we have considered whether it might be said that the decision not to review the Claimant's pay at that time was itself tainted by sex discrimination. Assuming that the Respondent for the burden of showing that it was not, we are satisfied that Colin Chin was not influenced in any way by the fact that the Claimant was female. Whilst he and the Claimant might have disagreed as to the appropriate time to discuss a pay rise we accept that his view that it was premature was the only reason why he did not entertain that discussion at that point. His genuine view was in no sense irrational. The Claimant was a relatively new employee and had been given a new post. It was almost certainly the case that she would strengthen her hand in any pay negotiations by establishing herself in her new role. Those factors support our factual conclusion that Colin Chin acted with no discriminatory motivation.

127. Having rejected the suggestion that the refusal to negotiate pay was itself discriminatory the reason that the Claimant was paid less than her colleagues remained that her pay had been set by East Thames and not by the Respondent. For the reasons

set out above, we consider that to be a material reason and one in which gender played no part whatsoever.

128. We then turn to the situation which arose on 19 December 2017. We have found that Colin Chin went back on a promise that he had made in his earlier meeting. We have also found that he behaved in a thoughtless manner where objectively at least he could be perceived as saying 'if you don't like the way things are you can leave'. However, if it is not implicit in our findings above, we should make it clear that we do not believe that Colin Chin deliberately went back on what he had said earlier or that he intended to cause the Claimant any offence in the course of that meeting. The Claimant did not argue that Colin Chin had been influenced in any way by her gender. Even if she had done so we would have been satisfied that whilst Colin Chin had behaved badly during this meeting his actions were in no sense whatsoever because of the Claimant's sex. We accept that he genuinely forgot what he had promised and that he believed that the more appropriate time to review pay was when appraisals were done. We accept that what we have found was a thoughtless remark was not intended as such. Indeed, it was intended kindly. There is no evidence from which we could draw any inference that a man in the same situation would not have been treated in exactly the same way.

129. We need only consider whether his refusal to reconsider the Claimant's pay severed the link in the sense identified in ***Buchanan***. We do not consider that the refusal to consider a pay rise at that stage did break the chain of causation linking the pay back to the original cause, namely the fact that the pay was set by East Thames. We would accept that had the refusal been discriminatory that may not be the case we have found that it was not. As such the reason for the difference in pay remained the fact that the pay had been set by East Thames and not by the Respondent.

130. The Claimant did not adduce any evidence or suggest any PCP which was operative at either of the meetings that she had with Colin Chin which placed women at a disadvantage in comparison to men. Neither did she point to any grouping or statistics that would suggest any Enderby type of discrimination. As such we are satisfied that the two refusals to discuss the Claimant's pay were neither directly nor indirectly discriminatory nor were they tainted by numbers in the Enderby sense.

131. Finally, we consider the position when DR is appointed in January 2018. There was no effective challenge to the Respondent's position that DR's salary was set by reference to the Respondent ordinary criteria. DR had slightly less post qualification experience than the Claimant. His salary was set at £46,500. This is consistent with the Respondent's position that it paid accountants at that level salary of around £45,000 depending on experience. This highlights the fact that the Respondent habitually paid more than was paid at East Thames. For what it is worth, it underlines the unfairness identified by the Claimant in her unfair dismissal claim.

132. The question for us is whether the Respondent has satisfied us that there was a material reason for the difference and whether that reason was untainted by any sex discrimination. Consistently with our findings above, we have concluded that the reason that the Claimant was paid much less than the employees recruited directly by the Respondent was that the Respondent paid more than East Thames. There was no supervening event that broke the link between the original reason for the pay differential

and the state of affairs that was in existence at the time that DR was appointed. For the reasons set out above, we consider that the Respondent has established a material factor that subsisted throughout the Claimant's employment which was in no sense whatsoever tainted by sex discrimination.

133. Notwithstanding our conclusion that the pay system as it applied to the Claimant was manifestly unfair the reasons for that unfairness were not in any sense discriminatory and as such the claims for equal pay fall to be dismissed.

Employment Judge John Crosfill

1 December 2019