



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104559/2018

5

Held in Glasgow on 1 & 2 May 2019

Employment Judge S MacLean

10 Mrs A Devanny

Claimant
Represented by:
Mr D Fairley QC

15 The Scottish Ministers

Respondents
Represented by:
Mr C McNeill QC

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Employment Tribunal is that the claimant is not undertaking and has not undertaken like work as her comparator in terms of Section 65(1)(a) of the Equality Act 2010.

REASONS

Introduction

- 25 1. The issue to be determined at this preliminary hearing is whether the claimant and her comparator, Dr Morrow perform and have performed like work in terms of section 65 of the Equality Act 2010 (the EqA).
2. Before the preliminary hearing the claimant requested additional information of the differences of practical importance that the respondents says exist between the work of the claimant and that of Dr Morrow. The respondents
30 advised as follows:
- a. Dr Morrow is the senior figure within an independent tribunal. The claimant is the President of a Chamber within the Scottish Tribunals

system and is subject to the oversight of the President of the Scottish Tribunals.

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- b. The Lord President, as the Head of the Scottish Tribunals exercises functions in relation to the Scottish Tribunals and in particular is responsible for making and maintaining appropriate arrangements for the training, guidance and review of ordinary and legal members, including the claimant. Such responsibilities for the members of the Mental Health Tribunal Scotland (MHTS) fall to Dr Morrow who is not subject to a judicial oversight process.
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- c. The claimant is subject to the oversight of the President of the Scottish Tribunals who is required to make a recommendation to the respondents as to whether the claimant should be reappointed on the standard five yearly cycle. Dr Morrow is not subject to the same oversight provisions.
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- d. The jurisdictions dealt with by the claimant and Dr Morrow and their respective Tribunals are and have throughout the period to which the claim relates been, different.
- e. The types of cases deal with by the claimant and Dr Morrow and their respective Tribunals are and have throughout the period to which the claim relates been, different.
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- f. Recruitment for the Housing and Property Chamber (HPC) is undertaken by the Judicial Appointments Board for Scotland (JABS) and recommendations must be approved by the Lord President. The claimant has a limited role in this process. Dr Morrow is required to oversee all processes for the recruitment of members to the MHTS.
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- g. Dr Morrow is required to deal with people in the medical profession, both in terms of medical members of the MHTS, Responsible Medical Officers and expert medical witnesses. He also has to deal with social workers in their capacity as mental health officers. The claimant does

not deal (at least not as a matter of course) with such individuals or medical or social work matters.

- 5 h. Dr Morrow is required to work with general members who may have experience of a mental disorder and using services provided in relation to mental disorder or is a carer for a person having such experience. These members have significantly different characteristics and needs to those professional members which the claimant oversees.
- i. Dr Morrow has a supervisory role over Sheriffs in relation to restricted patient cases. The claimant has no such supervisory role.
- 10 j. Only the President (Dr Morrow) and shrieval conveners may preside over MHTS hearings which concern restricted patients under paragraph 7(4)(2) of Schedule 2 of the Mental Health (Care and Treatment) Scotland Act 2003 (the MHA). Dr Morrow is therefore responsible for cases involving a compulsion order with a restriction
- 15 order (CORO). Such cases involve issues of public protection. The claimant is not involved in cases which can result in the deprivation of an individual's liberty or where a party to the application represents a risk to public safety.
- k. In CORO cases, Dr Morrow deals with applications in which the
- 20 respondents have an oversight role. The claimant does not deal with such cases.
- l. Dr Morrow deals with applications concerning children which require special arrangements to be made for the child. The claimant is not involved in cases where a child is party to the claim.
- 25 m. Dr Morrow presides over a much larger Tribunal than the claimant in terms of the number of applications received, the number of members and the number of staff. His duties and responsibilities in that respect are more extensive than those of the claimant and have been so for the duration of the period to which the claim relates.

- n. Dr Morrow produces and lays an annual report before Parliament. The claimant contributes to a report by the President of the Scottish Tribunals.
- o. A temporary chamber president can be assigned by the President of the Scottish Tribunals from the existing legal membership of the Scottish Tribunals if the claimant resigned or retired. If Dr Morrow were to retire or resign then a full recruitment process would be required to replace him. If he resigned or retired before such time as a successor was appointed the tribunal would be unable to sit as this is not for in primary legislation.
3. At the preliminary hearing Mr Fairley QC represented the claimant. Mr McNeill QC, who was instructed by Ms Keys, Solicitor represented the respondents.
4. The claimant gave evidence on her own account. Dr Morrow gave evidence on her behalf. They provided witnesses statements and supplementary witnesses statements along with oral evidence at the preliminary hearing, which was treated as their evidence in chief. The claimant and Dr Morrow were cross-examined and re-examined in the usual way. No witnesses were called for the respondent.
5. The parties provided a joint set of productions extending to four lever arch files to which the claimant added additional documents at the preliminary hearing.
6. The representatives gave oral submissions and provided written copies for which the Tribunal was grateful. The respondents accepted that considering the evidence items (n) and (o) in paragraph 2 above were not differences of practical importance.

The Law

7. Section 65(2) of the EqA provides that A's work is like B's work if (a) A's work and B's work are the same or broadly similar; and such differences as there are between their work are not of practical importance in relation to the terms of their work.

8. Section 65(3) of the EqA provides that on a comparison of one person's work with another's for the purposes of section 65(2) it is necessary to have regard to the (a) the frequency with which the differences between their work occur in practice and (b) the nature and extent of the difficulties.
- 5 9. This is a two-stage test. The stages must be considered separately: see *Waddington v Leicester Council for Voluntary Services* [1977] ICR 266.
10. At stage 1 the question to be considered is: "is the work carried out by the claimant and the comparator of the same or broadly similar nature?". Consideration of the work should be in general terms, looking at the type of work involved, and the types of skill and knowledge required to do it. The Tribunal should focus on the work actually done under the contract rather than what might be theoretically done: see *Capper Pass Limited v Lawton* [1977] ICR 83 and *Dance v Dorothy Perkins Limited* [1978] ICR 760). The fact that a woman undertakes more duties (or more responsible duties) than her male comparator cannot result in a conclusion that the two are not undertaking like work: see *Sita UK Limited v Hope* UKEAT/0787/04 at paragraph [13].
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11. If the stage 1 question is answered in the affirmative a practical and evidential burden of showing differences passes to the respondent: see *Morgan v Middlesborough Council* EAT/0375/04) at para. [7].
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12. At stage 2 bearing in mind section 65(3) of the EqA the amount of time spent by a comparator on different tasks alleged to be of practical importance may be significant see: *Redland Roof Tiles Limited v Harper* 1977 ICR 349.
- 25 13. Kilner Brown J noted in *Dance* (above): "it is vitally important to reiterate...that it is no part of a tribunal's duty to get involved in fiddling detail or pernicky examination of differences which, set against the broader picture, fade into insignificance...If ever there is a realm of law in which practical common sense ought to apply it is in this field."

14. In *Morgan* (above) the EAT cautioned that: “At both stages, a minute examination of detail and trivial differences not likely in the real world to be reflected in the terms and conditions of employment ought to be avoided.”
15. In *Capper Pass*, Philips J stated: “if ...the work is of a broadly similar nature,
5 it is then necessary to go on to consider the detail and to inquire whether the differences between the work being compared are of “practical” importance in relation to terms and conditions of employment. In answering that question the industrial tribunal will be guided by the concluding words of the subsection. But again, it seems to us, trivial differences, or differences not
10 likely in the real world to be reflected in the terms and conditions of employment, ought to be disregarded. In other words, once it is determined that work is of a broadly similar nature it should be regarded as being like work unless the differences are plainly of a kind which the industrial tribunal in its experience would expect to find reflected in the terms and conditions of
15 employment. This last point requires to be emphasised... The only differences which will prevent work, which is of a broadly similar nature from being “like work” are differences which in practice will be reflected in the terms and conditions of employment.”
16. The Tribunal should look at the work actually done under the contract or what
20 is required by the terms and conditions under which the comparator rather than what work might theoretically be done. See: *Shields v E Coomes (Holdings) Limited* 1978 ICR 1159.
17. An employer who seeks to found upon alleged differences must show not
25 only that differences exist, but also that any such differences are of practical importance in relation to the terms of their work. The employer must satisfy the Tribunal that any such differences are likely to be the actual explanation for the *actual* differential in terms and conditions, and not simply that those differences might hypothetically justify some notional differential (see: *Sita* (above) at para. [12]).
- 30 18. A practical guide is frequently for the Tribunal to ask itself whether or not any differences are such that they would result in the claimant and the comparator

being put in a different category following a formal job evaluation exercise.
See: *British Leyland (UK) Limited v Powell* [1978] IRLR 57 and *Eaton Limited v Nuttall* [1977] ICR 272.

Findings in Facts

5 19. The Tribunal makes the following findings in fact.

The Claimant

20. The claimant was admitted as a solicitor in 1980 working in private practice and then for local authorities latterly as a Principal Solicitor.

10 21. The claimant continued to work as a Principal Solicitor when following a public appointment process in May 2010 she was appointed for five years as President of the Private Rented Housing Panel (PRHP) to execute the functions conferred on her by the Rent (Scotland) Act 1984, the Housing (Scotland) Act 1988 and the Housing (Scotland) Act 2006. The claimant worked approximately two days per week as President of PRHP and received
15 a daily fee.

22. The PHRP is an independent judicial body with three members: a legally qualified chairperson, a surveyor member and a housing member.

23. As President of PRHP the claimant's main activities were:

- a. Developing PRHP's reputation within the private rented sector.
- 20 b. Identification and implementation of PRHP's policy and procedure to achieve outcomes.
- c. Overseeing the progress of cases to hearing and decisions.
- d. Chairing three Private Rented Housing Committees per year and keeping up to date with issues.
- 25 e. Ensuring the efficient, economic and effective running of the Panel.
- f. Developing and managing capability issues of members of the Panel and clerks

- g. Consulting and involving the Vice President in decision making and liaising with the sponsor team within the Scottish Government.
- h. Preparing annual reports.
- i. Chairing and determining cases as a judge.

5 24. The Property Factors (Scotland) Act 2011 created a Home Homeowner Housing Panel (HOHP) on 1 October 2012. The HOHP was an independent judicial body with three members: a legally qualified chairperson, a surveyor member and a housing member.

10 25. On 1 October 2012 by reason of her appointment as President of the PRHP the claimant took on the functions of President of the HOHP and her appointment was extended to 31 July 2017. From 1 August 2012 the claimant was expected to devote 16 days per month to her functions. She was paid a daily fee. The claimant's main activities were the same but applied to her joint role.

15 26. Between 2013 and November 2016 the PRHP and the HOHP had approximately 76 legal members and 46 ordinary members. The annual case load was approximately 600 cases.

20 27. The Tribunals (Scotland) Act 2014 (the TSA) created the office of President of the Scottish Tribunals and established a new, two-tier structure for Scottish Tribunals, which have jurisdiction in relation to devolved subject matters. Its First-tier Tribunal and Upper Tribunal are known collectively as the Scottish Tribunals. The Lord President in Scotland is responsible for training, welfare and conduct of the Scottish Tribunals. He delegated various responsibilities to the President of the Scottish Tribunals, who has responsibility for the efficient disposal of business in the Scottish Tribunals, policies for the assignment of the ordinary, legal and judicial members within each of the
25 First-tier Tribunal and the Upper Tribunal for Scotland and review of the ordinary and legal members, including, where appropriate, continuing review of professional competency and development.

28. The First-tier Tribunal comprises several specialist Chambers. A Chamber President of the First-tier Tribunal for Scotland must be a legal member of the First-tier Tribunal for Scotland. The appointments are renewable at five-year intervals.
- 5 29. On 1 December 2016, the PRHP and HOHP were both transferred into the First-tier Tribunal for Scotland. The Housing and Property Chamber of the First-tier Tribunal (HPC) now discharges their functions. The claimant transferred to the office of Chamber President for the HPC of the First-tier Tribunal for Scotland.
- 10 30. The claimant's duties as Chamber President for HPC are:
- a. Playing a key leadership role in developing the Chamber's reputation within the private rented sector.
 - b. Identifying appropriate outcomes for the Chamber and implementing processes and procedure to achieve the outcomes.
 - 15 c. Overseeing the progress of cases towards hearing and decisions to secure the most efficient disposal of business.
 - d. Ensuring the efficient and effective running of the Chamber.
 - e. Chairing and determining cases as a judge.
 - f. Responsibility for developing, guiding and managing performance of
20 members assigned to the Chamber.
 - g. Issuing directions as to practice and procedure in the Chamber.
 - h. Liaising with the sponsor team within the Scottish Government.
 - i. Assisting the President of the Tribunals in the preparation of the annual report to the respondent.
 - 25 j. Sitting in the Upper Tribunal as required.
31. In her judicial role the claimant chairs and manages cases that call before the HPC. She has legislative responsibility for sifting applications to the HPC that

do not meet the statutory tests, which she may delegate to a legal member. The claimant is eligible to sit in the Upper Tribunal provided there has been no previous involvement, but she does not do so. She does provide training to the Upper Tribunal

- 5 32. The claimant's terms and conditions of appointment are issued by the respondents. Her appointment is renewable at five-year intervals. The claimant is part-time (not less than 180 days per year) and paid a daily fee for work performed. The President of the Scottish Tribunals requires to make a recommendation to the respondents as to whether the claimant should be reappointed on the five-yearly cycle. The claimant was re-appointed on 10 August 2017 until 31 July 2022.
33. Before December 2017 there was no eviction jurisdiction in the HPc or its predecessor. On 1 December 2017 the jurisdiction to hear civil cases related to the private rented sector transferred to the HPC from the Sheriff Court which includes applications relating to eviction and recovery of possession. 15
34. On 31 January 2018 the registration of letting agents became compulsory and compliance with a statutory code of practice for all registered letting agents became mandatory. The HPC has jurisdiction in relation to letting agent code of practice disputes.
- 20 35. At 31 March 2018 the HPC comprised 71 legal members and 52 ordinary members. The case load between 1 December 2016 and 31 March 2018 was 1,352 cases.
36. The HPC can consider 50 types of applications of application involving 12 statutes. The HPC can issue orders including recovery of possession and eviction. 25

The Comparator

37. The Mental Health Tribunal for Scotland (MHTS) established by the Mental Health (Care and Treatment) (Scotland) Act 2003 (the MHA) became operational in October 2005. Previously the Sherriff Court had jurisdiction to hear mental health cases. 30

38. The respondents appoint the President of the MHTS. The first President was Eileen Davie. From November 2007, Ms Davie was absent from work. Dr Morrow performed the role of Acting President of the MHTS during which he took on the management functions but not the statutory functions of the President of the MHTS.
39. Around April 2008 Ms Davis indicated her intention to leave. Following a public appointment process in October 2008 Dr Morrow was appointed President of the MHTS.
40. Dr Morrow's terms and conditions of appointment are issued by the respondents. His appointment is renewable at five-year intervals. His appointment has been renewed on two occasions. He is currently in his third five-year period. The conditions for renewal are that that work he requires to do still exists and there is no impediment for him continuing as President. Dr Morrow is part-time and paid a daily fee for work performed. He has an anticipated time commitment of 180 days per year which equates to 10 to 15 days per month. He is entitled to a pension.
41. The MHA sets out the main powers and duties of the MHTS. It is the independent judicial body responsible for granting and renewing compulsory measures of the care, treatment and detention in hospital of people with mental disorders. The MHTS can deal with cases concerning children and adolescents.
42. As President of the MHTS Dr Morrow's duties are:
- a. Partner relationship management promoting the MHTS, its role and culture including regular meeting with psychiatrists, social workers and users of mental health services.
 - b. Securing that the functions of the MHTS are discharged efficiently and effectively.
 - c. Issuing directions as to practice and procedure.

- d. Convening MHTS panels to hear cases including restricted patient cases.
 - e. Holding case work surgeries; overseeing cases and giving guidance on case management.
 - 5 f. Almost weekly chairing and determining the more difficult cases.
 - g. Responsibility for developing, guiding and managing performance of members including leading with specialist training.
 - h. Interviewing new members of the MHTS.
 - i. Preparing the annual report to the respondent.
 - 10 j. Being involved in legal reform and/or implementation of new legislation.
43. Dr Morrow is on duty daily for compulsion restriction orders and on two delegated days he is on "box duty". Due to the volume of interlocutory decisions he delegates some interlocutory work to two in-house legal
- 15 convenors but retains responsibility. There is a legal secretary who is a qualified solicitor but does not sit as a legal member.
44. The MHTS not only reviews orders made by medical professionals or the courts but makes orders (known as compulsory treatment orders) authorising
- 20 the detention and compulsory care and treatment of patients for up to six months, which can be extended and kept under review by the MHTS. All cases before the MHTS involve a careful balance of public protection and possible deprivation of liberty for persons with a mental disorder who may pose a risk to public safety.
45. In cases concerning mentally disordered offenders who are subject to a
- 25 compulsion order and a restriction order (CORO) the criminal court has imposed a CORO over potentially dangerous and seriously ill patients. The respondents have a duty to monitor these patients whose offences include murder and violent sex. Decisions depend on careful assessment of factual and expert evidence from specialists. The focus is on the treatment of an

individual and, if necessary, balancing his or her interests against the public interest

46. Only the President of the MHTS, Sheriffs and part-time Sheriffs can convene tribunal panels hearing restricted patient (CORO) cases which involve assessing evidence including expert evidence from psychiatrists, psychologists, social workers and others and the treatment of the patient. Dr Morrow also has a judicial leadership role with sherial convenors who are given bespoke training and mentoring. Dr Morrow deals with all interlocutory work relating to COROs. In his absence a sheriff is appointed to deal with this work.
47. The MHTS holds approximately 4,500 hearings per year at 80 hospitals and community centres across Scotland. When a MHTS panel sits to hear a case, it sits as a three-member panel comprising a general member, a medical member and convened by a legal member. Generally, the hearings involve several people including the patient and their carer. Sometimes medical practitioners and persons of interest ('victim' groups) attend the hearings.
48. Approximately 380 applications per year relate to COROs where the convenor of the three-member panel is the President or a Sheriff.
49. From 2013 until March 2017 MHTS had approximately 105 legal members, 100 medical members and 119 general members. Approximately four part-time Sheriffs who were not Tribunal members also sat.
50. Between 1 April 2017 and 31 March 2018, the MHTS had 115 legal members, 125 medical members, and 128 general members in addition to nine part-time Sheriffs who were not Tribunal members.
51. The largest part of the work of the MHTS involves dealing with compulsory treatment orders (CTOs). While the CORO cases are approximately eight percent of the caseload. Dr Morrow convenes more CORO cases than the sherial convenor and deals with the lengthier and more difficult cases.

The Claimant's Grievance

52. Around October 2016 the claimant wrote to the respondents seeking a review of her current daily fee. In November 2016 the respondents advised that they did not consider that there had been a substantive change in the claimant's role since 2012 to warrant an increase in her daily fee. It was noted that her jurisdiction and workload would change once responsibility transfers for the private rented sector and letting agent cases. The respondents were committed to carrying out a full judicial role evaluation across the Chamber structure. The respondents said that the Ministry of Justice had asked that the Senior Salaries Review Body (SSRB) include the devolved jurisdictions in the remit of their next review which reports in June 2018 by which time all the Chamber Presidents would be in post and would dovetail with assumption of the claimant's responsibilities the private rented sector and letting agent cases.
53. The claimant raised a grievance with the respondents in December 2017 that she performs like work or work of equal value to that of Dr Morrow and despite this her remuneration package is significantly lower than his.
54. The respondents were content that there were no equal pay issues and any difference in remuneration between Tribunals are objectively justified. They considered that it was inappropriate to consider daily fee rates while the SSRB process was ongoing.

The Senior Salaries Review Body (SSRB)

55. The SSRB was invited to make recommendations on the appropriate pay levels required to recruit, retain and motivate high calibre judicial office holders at all levels. It was also asked to look at whether the current salary structure could be simplified and how best to reward judicial leadership.
56. As part of the review process SSRB officials visited Scotland for two days in November 2017 to meet the Scottish judiciary. The claimant and Dr Morrow were nominated by the Lord President to meet with the SSRB officials. The claimant met with them on 2 November 2017 along with other Chamber

Presidents. Dr Morrow was unable to attend. He prepared a note for the SSRB.

57. The key principles adopted by the SSRB included judges at the same level generally being paid at the same rate, regardless of the area of law in which they operated to facilitate collegiality and flexibility; a judge is expected to be able to hear cases in different jurisdictions, as necessary.
58. The SSRB recommended that current salary groups 5 and 6.1 should be combined into a new salary group V. The change was to be accompanied by introducing new four levels of leadership supplement plus a base rate, making five spot-rate pay points. The SSRB recommended that the post of Chamber President of HPC move to salary group V. The post of President of the MHTS is also in salary group V.

Comparison of the claimant's work and that of Dr Morrow

59. The claimant and Dr Morrow are Presidents of their respective Tribunals. Their appointments are subject to renewal every five years.
60. They are responsible for ensuring the efficient day to day running of their respective Tribunals. They develop policies and procedures for case management and issue practice directions. They allocate legal and professional non-legal members to hear cases for whom they also provide training, guidance and pastoral support. The claimant and Dr Morrow deal with capability issues of their members. They prepare annual reports. They convene Tribunals and determine cases as judges. They have the legal knowledge of the Tribunal judiciary working within complex and subject specific areas of statute law.
61. Since 2016 the HPC is a First-tier Tribunals for Scotland. The Lord President exercises functions under the TSA which are delegated to the President of the Scottish Tribunals and then to the specialised Chamber Presidents. While it was proposed that MHTS would transfer to the Mental Health Chamber on 1 December 2018 the transfer has been postponed.

62. The recruitment of members into the First-tier Tribunals for Scotland is undertaken by the JABS which makes recommendations to the Lord President for appointment. The Lord President consults the Chamber Presidents. The respondents recruit new members to the MHTS although Dr
5 Morrow is heavily involved in the process. He has interviewed everyone in office and chaired all the legal panels.
63. The HPC and the MHTS deal with different subject matters which are important to those involved. Parties have the option to raise proceedings before the HPC whereas patients before the MHTS do not have a choice. The
10 HPC generally adopts an adversarial procedure of determining the rights and obligations of entities exercising private law rights whereas the MHTS exercises jurisdiction over patients in need of compulsory measures in a generally non-adversarial context safeguarding the welfare of individuals suffering mental illness while balancing their own private interests against the
15 public interest.
64. Until January 2018 the MHTS considered more applications than the HPC. Dr Morrow presides over a larger Tribunal than the claimant in terms of the number of members and number of staff. The MHTS requires a large number of Tribunal members because it provides a Scotland wide facility at local
20 hospital and community level.
65. Every case before the MHTS involves some kind of compulsory measures of such as detention, directions as to where to reside and authorisation of medical treatment. Some but by no means all the cases before the HPC have a wider public interest.
- 25 66. Dr Morrow spends a significant amount of his time on restricted patient cases. He does all the interlocutory work for restricted patient cases and sits on more complex and longer hearings than the sheriff members convening CORO hearings. The claimant who is a legal member of the MHTS can not sit on these cases. There are no cases falling in the jurisdictions PRHP and HOHP
30 and now HPC that she requires to hear because of her appointment as previously as President and now as Chamber President.

67. The current day rates in England and Wales recognise the position of the Judge (Restricted Patents' Panel) as compared with other members of the Health, Education and Social Care Chamber and the Property Chamber as attracting a higher rate of pay.

5 *Observations on the Witnesses and Evidence*

68. In considering the evidence led at the preliminary hearing the Tribunal assessed the written and oral evidence from the claimant and Dr Morrow and the many documents produced. The Tribunal's assessment follows.

69. The claimant's witness statement and an addendum relating to additional documents that were produced were taken as read. Mr Fairley then asked her supplementary questions primarily related to the additional information of the differences of practical importance that the respondents say exist between the work of the claimant and that of Dr Morrow. The claimant was then cross examined and re-examined in the usual way.

70. The claimant came across to the Tribunal as genuinely believing that the jurisdiction of the HPC is comparable to the jurisdiction of the MHTS. In cross-examination she made few concessions and showed that she was familiar with her case and the documents produced in the joint set of productions.

71. The Tribunal considered that the claimant was consistent with her evidence before the Tribunal and it had no reason to question her evidence in relation to her job. The Tribunal was satisfied that she was giving a fair reflection of her job and duties. The Tribunal felt that the claimant's evidence focussed on the HPC and gave the impression that little had changed in the work done by her before January 2018. The claimant is a legal member of the MHTS and to that extent the Tribunal considered that her evidence about Dr Morrow's job and duties was reasonable. That said she acknowledged that she had no experience of CORO cases which she was not qualified to hear. Overall the Tribunal found her to be a credible and reliable witness.

72. Dr Morrow's witness statement and note of response to the respondents' additional information were taken as read. Mr Fairley also asked

supplementary questions. Dr Morrow was cross-examined and re-examined in the usual way. The Tribunal had no reason to doubt his evidence in relation to his job and duties. As a legal member of the MHTS the claimant was known to Dr Morrow. He was supportive of her claim. However, the Tribunal considered that Dr Morrow's comments about the similarities between his role as President of MHTS and the claimant's role as President of PRHP and HOHP then Chamber President of HPC were impressionistic rather than direct evidence about the work done by the claimant.

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73. The respondents suggested in the claimant's cross examination that the President of the Scottish Tribunals had oversight of the claimant as a Chamber President of a Scottish Tribunal. The claimant and Dr Morrow in his written response said that "oversight" was an inappropriate word. The respondents accepted this during submissions and said that it would be better expressed as "leadership". Until the claimant transferred to the First-tier Tribunals the Tribunal understood that the claimant and Dr Morrow were in the same hierarchical structure. After the transfer various responsibilities were delegated from the Lord President to the President of the Scottish Tribunals and then to the Chamber Presidents. The President of the Scottish Tribunals gives leadership to the Chamber Presidents in respect of their leadership functions in their respective Chambers. At this point the MHTS has not transferred to the Mental Health Chamber and is not a Chamber President.

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74. The respondents also suggested that the claimant contributed to the annual report prepared by the President of the Scottish Tribunal whereas Dr Morrow produces an annual report which is laid before Parliament. This was not disputed by the claimant. Dr Morrow said that this was a matter of convenience and was set up by the TSA and before then the claimant prepared the annual report the Tribunals of which she was President. The Tribunal noted that annual reports prepared by the claimant as President of PRHP and HOHP were produced.

75. The Tribunal was referred to the SSRB Report. The claimant gave evidence about providing job summaries. She had been asked to be involved in the

5 judgment panel exercise to discuss the job summaries but had declined because of a potential conflict with these proceedings. Dr Morrow replaced the claimant in that exercise. The claimant attended a meeting in November 2017 with the SSRB officials along with two other Chamber Presidents which lasted about an hour during which they talked about the types of cases their Chambers heard and the nature of the decision making. Dr Morrow did not attend but the claimant handed the SSRB officials a note that he had pre-prepared. The claimant accepted in cross examination that the SSRB Report concerned the entire UK judiciary. It had its eye to the future and wanted to
10 simplify the pay structure. The claimant also accepted that not every judicial post holder in salary grade V was to be paid the same as there were five pay points.

76. When considering the SSRB Report the Tribunal was mindful that it was asked to make recommendations on the appropriate pay levels to recruit,
15 retain, and motivate high calibre judicial office holders at all levels in the UK judiciary. In addition, the SSRB was to consider whether the salary structure could be simplified and how best to reward judicial leadership. The issue before the SSRB was not whether the work of the claimant and Dr Morrow was the same or broadly similar nor even if it was of equal value. The
20 recommendations in the last major review in 2011 were not implemented. The Tribunal did not know to what if any extent the respondents would implement the SSRB's recommendation in respect of the devolved Tribunals.

Submissions for the Claimant

77. The issue for determination is whether the claimant and Dr Morrow perform
25 and have performed "like work" in terms of section 65 of the EqA.

78. The Tribunal was referred to section 65(2) and reminded that the test of whether work is 'like work' is a two stage one. The stages must be considered separately: *Waddington* (above).

79. At the first stage, the question which must be considered is: "is the work
30 carried out by the claimant and the comparator of the same or broadly similar nature?"

80. The Tribunal was referred to Harvey, at Division K, para [208]: “Things can be of the same nature even when they are different (e.g. cheese and yoghurt) and that allows for some initial flexibility in the definition. Further flexibility is provided by the possibility that like work will be satisfied where the work is of a ‘similar’ nature, and yet more by the acceptance that such similarity need only be broad.” The Tribunal was also referred to *Capper Pass* (above).
81. At this first stage, the consideration should be of the work in general terms looking at the type or work involved, and the types of skill and knowledge required to do it. The search at this stage is for the wood not the trees (see *Dance* (above)).
82. The Tribunal should look at the work actually done under the contract, rather than what work might theoretically be done or what might theoretically happen under the contract. It is possible for a woman who does more work (or more responsible work) than her comparator to compare herself to that comparator on the basis of “like work”. On a purposive construction of the EqA, and applying the principle of equality outlined in Article 119 of the Treaty of Rome, the fact that a woman undertakes more duties (or more responsible duties) than her male comparator cannot result in a conclusion that the two are not undertaking like work: see *Sita* (above).
83. If this first stage question is answered in the affirmative for the claimant, a practical and evidential burden of showing differences passes to the respondents (see *Morgan* (above)).
84. In relation to stage 2 the Tribunal was referred to section 65(3) EqA which provides that, in comparing 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. Accordingly the amount of time spent by a comparator on different tasks alleged to be of practical importance may be significant (see IDS Handbook – *Equal Pay* – November 2017 edition at page 147, paragraph 5.12; the case of *Crook v Dexter Paints Limited* COET 2089/166; *Redland Roof Tiles* (above); *Dance* (above); *Morgan* (above);

Capper Pass (above) “it is vitally important to reiterate...that it is no part of a tribunal’s duty to get involved in fiddling detail or pernicky examination of differences which, set against the broader picture, fade into insignificance...If ever there is a realm of law in which practical common sense ought to apply it is in this field.”

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85. As at stage 1, the Tribunal should look at the work actually done under the contract, rather than what work might theoretically be done (see *Shields* (above)). A further important question is whether the comparison is with what is actually done by the comparator, or with what is required by the terms and conditions under which the comparator is employed. Support for the application of the contract test at stage 2 is to be found in the words of Lord Denning MR in *Shields* (above) at page 1169.

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86. Finally, an employer who seeks to found upon alleged differences must show not only that differences exist, but *also* that any such differences are of practical importance in relation to the terms of their work. This means that the employer must satisfy the Tribunal that any such differences are likely to be the actual explanation for the actual differential in terms and conditions, and not simply that those differences might hypothetically justify some notional differential (see Harvey Division K, para [224] and *Sita* (above) at para. [12]).

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87. The Tribunal was referred to unreported cases (both described in para 5.20 of the 2017 IDS Equal Pay Handbook). The sort of factors which may be relevant to comparison of judicial positions include:

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- a. The nature and scope of contractual duties actually performed.
- b. Responsibility.
- c. Seniority.
- d. Jurisdiction.
- e. Complexity and diversity of cases.
- f. Impact and sensitivity of decisions.

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- g. Court craft, including case management and communication skills.
- h. Leadership and management experience and skill.

5 88. In addressing this second stage issue, a practical guide is frequently for the Tribunal to ask itself whether or not any differences are such that they would result in the claimant and the comparator being put in a different category following a formal job evaluation exercise (see *British Leyland (UK) Limited*; and *Eaton* (above)).

10 89. Applying the principles in this case at stage 1 the claimant and her comparator are (and have at all times to which this claim relates been) Presidents of their respective statutory tribunal jurisdictions of the HPC and the MHTS. They perform a judicial role (the task of judging) as well as performing administrative, managerial, pastoral and organisational function.

- 15 90. In particular they were (and are) responsible under their contracts for:
- a. Ensuring the efficient running of their respective tribunals.
 - b. Allocation of legal and non-legal members to hear cases.
 - c. Developing efficient procedures for case management.
 - d. Identification and implementation of tribunal policy and procedure.
 - e. Providing guidance and pastoral support to their tribunal members.
 - f. Analysing training requirements and delivering training
 - 20 g. Dealing with capability issues of members.
 - h. Issuing directions as to practice and procedure
 - i. Preparing annual reports.
 - j. Judicial recruitment.
 - k. Chairing and determining cases as judges.

91. The skills and experience required to carry out that work are the same or broadly similar. They require to possess the judicial and case management skills expected of members of the tribunal judiciary working within complex and subject specific areas of statute law. They require to exercise leadership, management and ambassadorial roles within their respective jurisdictions.
92. The Tribunal was invited to attach significant weight to the SSRB Report. Two key conclusions which emerged from the SSRB Report were (i) that the salary structure should place court and tribunal judiciary within groups of broad comparability; and (ii) that judges at the same level of work should be paid at the same rate, regardless of the particular area of law in which they operate.
93. The job placement research exercise carried out by the SSRB involved comparing actual job descriptions to inform judgement about job placement. The criteria considered were: jurisdiction, complexity and diversity, impact and sensitivity of decisions, court craft and leadership and management.
94. Having carried out that exercise, the work undertaken by the claimant – that of Chamber President of the HPC – was allocated to salary group V. The work undertaken by her comparator, Dr Morrow – that of President of the MHTS – was similarly allocated to salary group V.
95. That is a particularly powerful and decisive adminicle of evidence that the work carried out by the claimant and that of her comparator respectively is the same or broadly similar work. If the evidence of the claimant and Dr Morrow is that has been the case since at least 2012.
96. Turning to stage 2, the Tribunal was again referred to the SSRB Report. It is not necessary to speculate as to whether differences between the claimant's work and Dr Morrow would put them in a different grade for job evaluation purposes (*British Leyland*), because that exercise has already been done, and the conclusion of the SSRB was that they should both be put at salary group V.
97. In spite of that determination (which was the output of a process initiated by and fully participated in by the respondents), the respondents now seek to

rely upon 15 separate factors of alleged distinction between the two positions. In so doing, however, it adopts precisely the pedantic and artificial analysis which the authorities have repeatedly warned against and which erroneous approach the SSRB was clearly at pains not to take.

5 98. The claimant's response to the respondents' 15 alleged differences using the lettering in paragraph 2 above is as follows:

10 a. This is not an aspect of "work" being done at all. In any event, Dr Morrow was (and is) subject to a level of control by the respondents and the statutory disciplinary committee in terms of Schedule 2 para. 5 of the MHA. The use of the word "oversight" is misleading. The President of the Scottish Tribunals does not exercise "oversight" of the claimant's judicial or management roles on a day to day, week to week or even month to month basis. Any differences between the roles of the claimant and her comparator are negligible in practice. This distinction is entirely hypothetical. It is not a difference of any practical importance to terms.

15 b. The question of "oversight" of the training function is hypothetical, as training functions are delegated to the Chamber Presidents and Dr Morrow respectively. A training responsibility is implicit as an aspect of the claimant's contractual duties per the job description. How that training responsibility is effected in practice is an issue of form rather than substance. Both the claimant and Dr Morrow have training responsibilities and exercise training functions in relation to the members of their respective Tribunals. Both the claimant and Dr Morrow are involved in judicial training through the Judicial Training Group and the Judicial Institute. Such differences (if any) as to how training is provided are not differences of any practical importance to terms.

20 c. This is entirely hypothetical. By statute, both positions are for 5-year fixed terms. The President of the Scottish Tribunals has never made a

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negative recommendation about the claimant's re-appointment. This is not a difference of any practical importance to terms.

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- d. The SSRB was aware of this and still graded both positions at V. The relevant issue is not "difference" but "difference of practical importance to terms".
- e. The SSRB well aware of this and still graded both positions at V. The issue is not "difference" but "difference of practical importance to terms".
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- f. The respondents have the responsibility for appointing and do in fact appoint to both bodies. Recruitment is, in any event, an issue which arises only infrequently. When required to do so, the claimant assists with recruitment to her Tribunal, as does Dr Morrow to his. It is misleading to say that Dr Morrow is "required" to oversee the appointment process to the MHTS (as a surrogate for JABS) when he has no contractual responsibility to do so. This is not a difference of practical importance to terms.
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- g. The SSRB was aware of this and graded both positions at V. The issue is not "difference" but "difference of practical importance to terms". The HPC also has professional members and hears evidence of a skilled nature.
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- h. The SSRB was aware of this and graded both positions at V. The issue is not "difference" but "difference of practical importance to terms". The HPC is under a legal duty to make adjustments for all participants in the judicial process (members or litigants) and – in common with the MHTS – does so when required on a regular basis.
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- i. It is misleading to use the word "supervisory". The claimant and Dr Morrow have very similar pastoral, development and guidance roles in relation to the Sheriffs who are legal members of their respective Tribunals. In that respect, the claimant's role and that of Dr Morrow's are the same. This is accordingly a "pernickety examination of [a]
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difference.. which, set against the broader picture, fade[s] into insignificance”. The SSRB was aware of this position in both Tribunals and graded both at V. It is not a difference of practical importance to terms.

5 j. The SSRB was aware of this and graded both at V. The issue is not “difference” but “difference of practical importance to terms”. The HPC also deals with cases of public interest and matters of huge personal importance to the parties (such as their ability to remain in their home or carry on certain businesses). The HPC regularly imposes title conditions which significantly affect the use of the property concerned. 10 The HPC also has jurisdiction to impose interdicts which would operate as a restriction on the conduct of the party so interdicted.

k. The SSRB was aware of this and graded both at V. The issue is not “difference” but “difference of practical importance to terms”. The 15 respondents do not “oversee” CORO cases. Rather, they are a party to the proceedings. Oversight is provided by the MHTS, thereby preserving judicial independence. The respondents can also bring proceedings to the HPC and be a party to those proceedings.

l. The SSRB was aware of this and graded both at V. The HPC also 20 regularly deals with vulnerable parties. The issue is not “difference” but “difference of practical importance to terms”.

m. The SSRB was aware of this and graded both at V. The issue is not “difference” but “difference of practical importance to terms”. The 25 caseload and workload of the HPC and the MHTS are comparable. Application volumes to MHTS have historically been higher than those to HPC and its predecessors, but the cases before the MHTS also tend to be resolved with a single hearing. By contrast, cases in the HPC tend to involve several stages from sift through written representations, to case management hearings to determinations and compliance 30 checks.

- 5 n. This is “pernickety examination of [a] difference.. which set against the broader picture, fade[s] into insignificance”. It is also technically incorrect to say that Dr Morrow lays an annual report before Parliament. Dr Morrow is currently under a duty to present his report to the respondents and not directly to the Parliament. Prior to 2016 when the transfer to the HPC took effect, the claimant submitted annual Reports on behalf of the HOHP and PRHP to the respondents. The claimant is now required to (and does in fact) present her annual report to The President of the Scottish Tribunals who then reports to the Lord President. There is no practical distinction between the two situations which is of any practical importance to terms.
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- o. This is not an aspect of “work” at all. In any event, it has never arisen in practice at any time to which this claim relates and is therefore entirely hypothetical. It is not a difference of practical importance to terms.
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99. In short, the respondents have failed to identify any difference of substance between the respective positions of the claimant and her comparator which is of any practical importance in relation to the terms of their work.
100. For all of these reasons, the Tribunal was invited to find that, in terms of section 65 of the EqA the claimant and Dr Morrow currently perform like work and have performed such like work since 2012.
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Submissions for the Respondent

101. The Tribunal was invited to find that the claimant’s work is not like her comparator’s work for the purposes section 65(2) of the EqA.
- 25 102. What is drawn from the authorities for the claimant are broadly accepted. It is accepted that regard should be had primarily to what the woman and the man do, and not to what the contract of employment requires them to do, except to the extent that it is done in practice (see *Waddington* (above)).
103. In *Capper Pass* (above at p857): part 1 of the test can be answered by a general consideration of the type of work involved, and of the skill and
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knowledge required to do it. For the second part, it is necessary go into the detail and to inquire whether the differences between the work being compared are “of practical importance in relation to terms and conditions of employment.” But again, trivial differences or differences not likely in the real world to be reflected in the terms and conditions of employment, ought to be disregarded. Differences should be “plainly of a kind which the industrial tribunal in its experience would expect to find reflected in the terms and conditions of employment.”

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104. In *Eaton* (above at p554) the Tribunal said: The test by which this suggested difference in degree of responsibility is established is by gravity of the consequences in the event of an error and we unanimously reject that as being the proper test for responsibility. The proper test is whether or not the same function is done with the same degree of competence; if it is, then the responsibility is the same. This approach was rejected by the EAT: In our judgment, the industrial tribunal came to a wrong conclusion on this point. Several decisions of the appeal tribunal have said that in applying section 1(4) of the [1970] Act the most important point to consider is what the woman does and what the man does, but we do not think it is right to disregard the circumstances in which they do it, any more than it would be when applying section 1(5); and the circumstances in which a job is carried out would commonly be taken into account in an evaluation study ... distinctions between two employees are often easy to spot in practice but difficult to distinguish only in terms of what each of them does. Thus, the level of responsibility attached to a job can be important, even though the actual acts done may seem similar from the outside.

105. The claimant encourages the Tribunal to look from the outside and see two Tribunal Presidents performing a leadership function, but that fails to distinguish the functions of the tribunals and thus the responsibilities and jobs of the claimant and her comparator.

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106. The respondent’s primary submission was that when looked at critically, the work of the claimant and her comparator can be seen not to be the same or broadly similar. Both are Presidents, but the jurisdictions of their respective

Tribunals and the respective functions that they exercise are so fundamentally different, their work is not broadly similar.

- 5 107. Looking at what the Presidents and their Tribunals do, the MHTS exercises a therapeutic role in a generally non-adversarial context safeguarding the welfare of individuals suffering mental illness while balancing their own private interests against the public interest. The HPC deals in a generally adversarial procedure (such inquisitorial element as there is appeared from the evidence to be peripheral) of determining the rights and obligations of private entities (or public bodies exercising private law rights) *inter se*.
- 10 108. This is not a pernicky or pedantic approach. It does not rely on fiddling detail which fades into insignificance. It is a real, fundamental difference in functions which impact on the day to day activities of the respective workers in question.
- 15 109. An important distinction is that in every case the MHTS exercises jurisdiction over patients in need of compulsory measures. It practises “therapeutic jurisprudence”. Every case before the MHTS involves compulsory measures of one sort or another. Even in “civil cases”, which is every patient not subject to a CORO, compulsory measures may include detention, directions as to where to reside and authorisation of medical treatment (including invasion of the person).
- 20 110. In CORO cases, the criminal court has imposed a compulsion order and a restriction order over potentially dangerous and seriously ill patients. The respondents have a duty [section 188] to monitor these patients and have the right to make representations in the management of the patient. Index offences may be of the utmost gravity including murder and violent sex offences. Decisions depend on a fine assessment of factual and expert evidence from psychiatrists, psychologists, social workers and others. The whole focus is on the treatment of an individual and, if necessary, balancing his or her interests against the public interest.
- 25 111. The claimant accepts, as she has to, that she does not have the qualifications to decide on such cases. Even as a member of the MHTS, these cases are
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out of bounds for her. On the *Capper Pass* test (above), she does not possess the skill and knowledge to perform the work that Dr Morrow does.

112. Dr Morrow spends a significant amount of his time on restricted patient cases. It is wrong to apply the eight percent of the MHTS cases figure to his workload. He does all the interlocutory work for restricted patient cases and more than an equal share than the members of the shrieval panel of convening tribunal hearings. He selects the more complex and longer hearings to chair. There are around 350-370 CORO hearings in a year in total. He also manages the tribunal dealing with civil cases but rarely convenes civil cases.
113. No one before the MHTS chooses to be there. Every patient is there compulsorily for a therapeutic reason. Whereas an individual with an issue with their housing or property that comes within the jurisdiction of the HPC has the option whether to take it to the HPC or adopt whatever other options might be available to them, for the patient in the MHTS, they have no option.
114. As much as the claimant genuinely believes, and there is no doubt that she does, that the jurisdiction of the HPC is comparable to the jurisdiction of the MHTS, the respondents invite the Tribunal to find that, objectively seen, it is not.
115. No doubt cases are important to those involved, and in exceptional cases there may be a wider public interest in some cases that come before the HPC (there was no attempt to quantify those cases) and the claimant rightly regards these as important and takes them seriously, but they do not compare in significance to the autonomy of the individual, the personal integrity of the individual, compulsory detention and compulsory invasive treatment with drugs. Nor does it compare with the wider risk of serious harm to individuals – patients and public – associated with all cases especially, but not restricted to, restricted patients.
116. The evidence before the Tribunal contained in the various judgments of the PRHP, the HOHP and the HPC relate mainly to rented accommodation failing to meet the repairing standard and ordering landlords to make repairs to

windows, boilers and such like. No attempt was made to demonstrate the amount of the claimant's work that involved vulnerable people. 100 percent of cases before the MHTS not only have the involvement of vulnerable people but have at their very core their treatment and wellbeing.

5 117. That responsibility runs all the way through the other duties of MHTS President. From recruitment, training, ambassadorship, working with stakeholders, support of members and the shrieval panel. The different contexts in which all these things happen, in the HPC on the one hand and the MHTS on the other, is important to bear in mind when considering
10 whether these individuals are really doing work that is the same or broadly similar, and indeed whether there are differences of practical importance.

118. In answer to the Tribunal's question, it would be simplistic to think that the duties of the President of the MHTS in judicial leadership, support of members and such like in the case of a Tribunal dealing with the kinds of
15 cases the MHTS deals with which have such potential outcomes should be regarded as just the same as those roles when applied to judicial leadership in the HPC. At the very least, even if the work of the claimant and her comparator are properly to be regarded as the same or broadly similar, the differences as demonstrated in evidence and summarised above are such
20 that part 2 of the test is not met. The differences that there are of practical importance in relation to the terms of their work.

119. The respondents did not need to lead evidence of a causal connection between the difference in work and the difference in terms. The Tribunal should follow *Capper Pass* (above) and apply its own judgment to whether
25 the differences are of a kind which it would expect to find reflected in the terms of work.

120. The following points are made in respect of the SSRB Report and its recommendations:

a. The question for it was not whether work was the same or broadly
30 similar – nor even of equal value.

- b. It was a huge exercise examining the entire UK judiciary so necessarily not most in-depth e.g. they spent two days in Scotland.
 - c. They were recommending “appropriate pay levels required to recruit, retain and motivate high-calibre judicial office-holders”.
 - 5 d. They took into account expected future developments.
 - e. They wanted to simplify the grading structure – the simpler it is the broader the pay categories must be
 - f. Even though it put HPC and MHTS in same broad band of V, they recommended five spot pay points. Base rate or one of four leadership
10 supplement points. The claimant maintained that “leadership” responsibility is the same regardless of the size of the tribunal or the number of people one is acting in a leadership role to. That cannot be the SSRB’s approach or there would only be one leadership supplement whereas there are four representing a range of leadership
15 responsibilities.
 - g. If SSRB felt all Chamber Presidents should be paid the same they could have said so – instead they intend to leave it to the judicial leaderships across the UK to agree and finalise transparent criteria and to take decisions about which posts should attract which
20 supplements.
 - h. Current day rates in E&W recognise the position of the Judge (Restricted Patents’ Panel) as compared with other members of the Health, Education and Social Care Chamber and the Property Chamber as attracting a higher rate of pay.
- 25 121. The respondents’ secondary position is that if the claimant’s and the comparator’s work are like work now, there is no proper basis for finding that it has been since 2013.
122. Impressionistic evidence was given that things were largely the same for both Tribunals throughout the period to which the claim relates. That looks to be

borne out by the objective evidence for the MHTS. The same cannot be said for the HPC (and its predecessors) whose jurisdiction underwent a significant increase with the creation of the HOHP in 2012 (for which the claimant received a pay rise) and then a very significant increase in 2017/2018. Only in cross did it emerge that prior to 1 December 2017 there was no eviction jurisdiction.

123. Such significant expansions in the jurisdiction of the HPC cannot be said to be insignificant and there is no basis for a finding of like work prior to, say December 2017. This is, of course, very much a secondary submission.

124. It is accepted in light of the evidence that items (n) and (o) in the respondents' further and better particulars do not represent differences of practical importance. Also, the use of "oversight" in items (a), (b) and (c) and "supervisory" in item (i) are not intended as conveying any interference in judicial independence and would be better expressed as "leadership". The use of "oversight" in item (k) is intended as a reference to the monitoring role of the respondents under section 188 of the 2003 Act and is not intended to convey any control by the respondent's over decisions of the MHTS.

Deliberations

125. The question of like work needs to be broken down into two distinct sub-questions: (1) is the work of the claimant and Dr Morrow of the same or broadly similar nature, and (2) are the differences between the things she and Dr Morrow do of practical importance in relation to the terms and conditions of employment. For the claimant to succeed on the like work question, the Tribunal appreciated that she must satisfy the Tribunal that the answer to both of these questions is in the affirmative.

126. At stage 1 the Tribunal considered the work in general terms; what was involved; the type of skill and knowledge required to so it. The Tribunal noted that the search at this stage is for the wood not the trees.

127. The Tribunal turned to its findings. During the period of the claim the claimant and Dr Morrow had been recruited, appointed and reappointed Presidents of

their respective statutory tribunal jurisdictions of the HPC (and its predecessors) and the MHTS.

128. Their Tribunals deal with different subject matters and types of cases which are important to the parties who are involved. The claimant and Dr Morrow have the skill and legal knowledge to chair and determine cases within their respective jurisdictions. There is no requirement for the claimant in her position as Chamber President to case manage and hear particular cases in her Tribunal's jurisdiction.
129. The claimant and Dr Morrow perform administrative, managerial, pastoral and organisational functions to ensure the smooth running of their Tribunals. They train and manage members who are professionals in their fields of expertise. Dr Morrow has a leadership role over Sheriffs who are sitting in a sherrival capacity in CORO cases.
130. The claimant and Dr Morrow are involved in judicial recruitment and preparing or contributing to annual reports.
131. Having carefully considered the evidence available the Tribunal was satisfied that in general terms the work of the claimant and Dr Morrow is and has been broadly similar.
132. The Tribunal then moved on to consider the details of the work of the claimant and Dr Morrow and to enquire if the differences between them are of practical importance. The Tribunal noted that in so doing it should consider the frequency or otherwise with which such differences arise in practice and the nature and extent of the differences. The emphasis at this stage was not so much the nature of the jobs done by the claimant and Dr Morrow but the differences in the tasks and duties that they respectively perform.
133. The Tribunal did not consider that the SSRB Report answered the question. As explained above the SSRB did not undertake a job evaluation study. The SSRB Report made recommendations about the appropriate pay levels required to recruit, retain and motivate high-calibre judicial office-holders taking account future developments. It proposed to simplify the pay structure.

It did not recommend that all Chamber Presidents be paid the same pay. It put the claimant and Dr Morrow in the same pay grade which had a five pay spots. The SSRB did not make any recommendations on which spot the claimant and Dr Morrow should be placed.

5 134. The Tribunal concentrated mainly on the work actually undertaken by the claimant and Dr Morrow and the amount of time actually spent by Dr Morrow on different tasks alleged to be of practical importance.

135. The Tribunal considered the autonomy of the claimant and Dr Morrow in leading their Tribunals. As the MHTS had not yet transferred to the Mental Health Chamber the Tribunals of which the claimant and Dr Morrow are President sit under different hierarchical structures. The President of the Scottish Tribunals delegates several functions to Chamber Presidents including training and is not involved in the claimant's day to day running of the HPC and judicial role. The Tribunal did not consider that any of these differences were of any practical importance to terms.

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136. The Tribunal then turned to mechanism for appointment and reappointment. The claimant and Dr Morrow are appointed on five years cycles. Their appointments have been renewed. The President of the Scottish Tribunals makes recommendations to the respondents about the claimant's reappointment. No such recommendation is required in respect of Dr Morrow's re-appointment. There was no evidence that the President of the Scottish Tribunals made a negative recommendation to the respondents about the claimant's re-appointment. The requirement of a recommendation from the President of the Scottish Tribunal was not in the Tribunal's view a difference of any practical importance to terms.

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137. When recruiting members, the Tribunal found that the claimant is consulted by the Lord President about recommendations by the JABS to appoint members to the HPC. Dr Morrow is involved in the process for recruitment of members to the MHTS. Although there appeared to be a recruitment exercise around 2017/2018 when jurisdictions from the Sheriff Court were transferred to the HPC the Tribunal's impression from the evidence was that recruitment

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occurred occasionally. The Tribunal did not consider that this was a difference of practical importance as to terms.

138. The issue which featured large in the respondents' resistance to the claim is that there were different subject matters dealt by of the HPC (and its predecessors) and the MHTS and responsibilities at play between what was involved in the claimant's work, and what was involved in the work Dr Morrow and that that was a difference of practical importance between their work.
139. The HPC and the MHTS deal with different subject matters. The Tribunal acknowledged that both involved complex areas of law and were important to the parties involved in the proceedings. Unlike applicants in cases before HPC (and its predecessors) the patients before the MHTS do not have a choice in being involved in the proceedings and cases before the MHTS involve some kind of compulsory measures balancing private and public interests. Some but not all cases before HPC have wider public interest and HPC has only had jurisdiction in eviction cases since December 2017.
140. The volume of cases in the HPC has increased since January 2018 as has the number of members for whom the claimant has duties and responsibilities. However, the number of members for whom Dr Morrow has duties and responsibilities remains higher. He also has responsibility for in houses convenors.
141. The Tribunal appreciated that some parties appearing before the HPC will be vulnerable individuals and reasonable adjustments will need to be put in place. However, the Tribunal could not assess on the evidence the amount of the claimant's work or that of the HPC involving vulnerable people. All cases before the MHTS involve and relate to vulnerable people.
142. The Tribunal's view on the evidence before it was that before December 2017 the degree of responsibility that Dr Morrow had in performing administrative, managerial, pastoral and organisational function as President of the MHTS was greater than that of the claimant because of the volume and of potential outcomes of the cases of the respective Tribunals.

143. Further and in the Tribunal's view more importantly throughout the period of the claim the Tribunal considered, having regard to the frequency of the difference in responsibility, that while restricted patient cases accounted for eight percent of the MHTS annual workload Dr Morrow spent a significant amount of his time on restricted patient cases. He dealt with all the interlocutory work for restricted patient cases and sits on more complex and longer hearings than the sherial members (acting in that capacity rather than as legal members of the MHTS) convening CORO hearings for whom Dr Morrow also provides leadership.
144. The Tribunal accepted that the claimant sifts applications to the HPC and sits on cases in the HPC. On the evidence before it the Tribunal's view was that the claimant did not consider it necessary for her as Chamber President to hear complex and lengthy cases in the jurisdiction of the HPC and its predecessors nor did she as a matter of course. There were certainly no cases falling in the jurisdictions the HPC or its predecessors that the claimant requires or required to hear because of her appointment as Chamber President or previously as President and which cannot be heard by panel convened by a legal member of the HPC Chamber. The Tribunal considered that this was a difference of practical importance such as to preclude the claimant and Dr Morrow who do broadly similar work from being regarded as employed on like work.
145. Accordingly, the Tribunal concluded that the claimant is not undertaking and has not undertaken like work as Dr Morrow in terms of Section 65(1)(a) of the Equality Act 2010.

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Employment Judge: S MacLean
Date of Judgment: 21 August 2019
Date sent to parties: 28 August 2019