



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Ms R Burke**

**v**

**TalkTalk Group Ltd**

**Heard at:** London Central

**On:** 27 January – 7 February 2020

**Before:** Employment Judge Hodgson  
Dr V Weerasinghe  
Mr P Secher

**Representation**

**For the claimant:** Ms S Aly, counsel

**For the respondent:** Ms McCann, counsel

## JUDGMENT

1. For the purposes of section 65 Equality Act 2010, the claimant's work was not like work with any comparator.
2. For the purposes of section 64 Equality Act 2010, the claimant's work was not equal to the work of any comparator, to the extent it relies on an allegation of it being like work.
3. For the purposes of section 66 Equality Act 2010, the claimant's terms of work do not include a sex equality clause that her contract, in terms of pay, should be equal to any comparator, to the extent that it relies on an allegation of like work.
4. The claim that her work was of equal value to that of her comparators remains to be determined by this tribunal.
5. The claim of unfair dismissal fails and is dismissed.

# REASONS

## Introduction

- 1.1 By a claim form dated 14 December 2017 the claimant alleged unfair dismissal and a breach of the equality clause because she was not paid the same as her comparators.

## The Issues

- 2.1 The issues as given to the parties are set out below.

### Unfair dismissal - redundancy

- 2.2 Has the respondent shown a potentially fair reason for dismissal being redundancy? In the alternative, did the circumstances amount to a substantial reason. The claimant's particulars of unfairness<sup>1</sup> allege there was no genuine redundancy situation and in the alternative that if there was a reduction in the respondent's need for employees to carry out work of a particular kind, it was not the reason for the claimant's dismissal. No positive reason is advanced.
- 2.3 Did the respondent act fairly in treating that reason as a sufficient reason to dismiss the claimant?
- 2.4 Was the dismissal otherwise procedurally unfair? If so, has the respondent shown that it would have dismissed in any event, had it followed a fair procedure? If so, by when?
- 2.5 The claimant alleges specific allegations of unfairness as follows:
- 2.6 Failing to identify a selection pool containing all relevant roles. The particulars of unfairness state the pool should have been the programme directors comprising the claimant, and the three equal pay comparators.
- 2.7 The particulars of unfairness state "the outcome of the redundancy process was predetermined."
- 2.8 The particulars of unfairness state "there was no genuinely independent appeal, and its outcome was predetermined."
- 2.9 The particulars of unfairness state "Derek Cheng allowed himself to be influenced in the redundancy appeal by evidence collected after the appeal hearing in which the claimant was given no opportunity to

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<sup>1</sup> All references to particulars of unfairness are references to the document produced by Ms Cunningham on 6 December 2018.

comment before he made his decision." The evidence envisaged is not specified.<sup>2</sup>

- 2.10 The particulars of unfairness state the claimant was given inadequate notice that her job was at risk.
- 2.11 The particulars of unfairness state "the claimant was not given the opportunity to apply for the role in the restructure of Tom Webber's team that was completed shortly before she was told that she was at risk of redundancy. (The reorganisation is the one referred to in the claimant's email of 20 May 2017 [223]; the respondent says it cannot find the announcement which the claimant refers.)"
- 2.12 The particulars of unfairness state "there was no genuine or adequate efforts to find the claimant alternative work during the redundancy consultation period."
- 2.13 The particulars of unfairness state "consultation was a purely formal exercise not generally directed to seeking alternative to dismissal or mitigating the effect of dismissal on the claimant."
- 2.14 On day three we agreed that the tribunal did not need to consider allegations of unfairness not raised by the claimant.

#### The equal pay claim

- 2.15 Should the claimant's contract be treated as including an equality clause in relation to pay corresponding to the terms in the contracts of three comparators:
- 2.16 The comparators, and their material roles relied on are as follows:
  - 2.16.1 Mr Daniel Rynehart – The claimant alleges that Mr Rynehart did the same programme director role as her for the period 1 September 2015 to 31 July 2017. The respondent alleges that he was a programme director for technology, band B role.
  - 2.16.2 Mr Jonathan Ellison – The claimant alleges that Mr Ellison did the same programme director role as her for the period 1 September 2015 to 31 July 2017. The respondent alleges that he was programme director for consumer, a band B role.
  - 2.16.3 Mr Daniel Richardson – The claimant alleges that Mr Richardson did the same programme director role as her for the period 1 February 2017 to 5 June 2017. The respondent alleges that he was mobile operations director, a band B role.
- 2.17 Was the claimant's work equal to that of any comparator in that it was either:
  - 2.17.1 like work; or

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<sup>2</sup> Further allegations were filed on day 2 in a document headed "particulars of matters that the claimant would have raised prior to the appeal outcome."

2.17.2 work of equal value.

- 2.18 In relation to like work it is the claimant's case that her work was the same or broadly similar to the comparators and such differences as there were between their work were of no practical importance in relation to the terms of their work.
- 2.19 The claimant alternative position is that the work is of equal value because it is neither like the comparator's work nor rated as equivalent but the work in terms of the demands made on the claimant by factors such as reference to effort, skill, and decision-making make it equal.<sup>3</sup>
- 2.20 It is common ground that this tribunal is not considering the equal value claim at this stage. Nevertheless, both versions of the agreed issues provided by the parties referred to the equal value claim and state: "Is the job banding process used by the respondent based on Willis Towers Watson global grading system a job evaluation study within the meaning of section 80(5) of the Equality Act 2010." It was agreed that this issue will not be considered at this hearing.
- 2.21 If the claimant was engaged in like work or work of equal value to any of the comparators, has the respondent shown that the difference between the terms was because of the material factor and it did not involve treating the claimant less favourably than comparators because of her sex? It is common ground that the material factor defence relied on is advanced in the same manner, and having regard to the same facts, whether the claim is put as one of like work or one of equal value. The claimant does accept that if there is a material factor defence to the like work claim it would be equally applicable to the equal value claim.
- 2.22 The issues as agreed between the parties state: "Is the difference in pay between the Claimant and her comparators justified by the matters pleaded by the Respondent in paragraph 3 of the Respondent's Further and Better Particulars as material factors pursuant to section 69 of the Equality Act 2010?"
- 2.23 There is reference to paragraph 3 of the respondent's further and better particulars which provide:

**Dan Rynehart:**

**The Respondent will contend that the difference in pay between the Claimant and Mr Rynehart was justified by:**

- the Claimant's salary in previous roles prior to her employment with the Respondent;
- the comparative experience, skill and capability of the Claimant and Mr Rynehart in their roles between September 2015 and July 2017;

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<sup>3</sup> The claimant has not clarified this claim further since the recusal application in the first hearing. It was agreed that the tribunal would not consider the equal value claim at this hearing. However, there is no specific order concerning the future conduct of the equal value claim and it remains before this tribunal. until further order. The respondent indicated that if it defends the like work claim, it may seek to strike out the equal value claim.

- the independent job banding process operated by the Respondent which takes into account the different responsibilities of the Claimant and Mr Rynehart and Willis Towers Watson compensation data;
- Mr Rynehart's salaries in previous roles with the Respondent as Transformation Director for Consumer and Customer Transformation Director in the Respondent's Business to Business function;
- Mr Rynehart's previous experience in roles with large operational/line roles with sizeable accountabilities.

**Jonathan Ellison:**

The Respondent will contend that the difference in pay between the Claimant and Mr Ellison was justified by:

- the Claimant's salary in previous roles prior to her employment with the Respondent;
- the comparative experience, skill and capability of the Claimant and Mr Ellison in their roles between September 2015 and July 2017;
- Mr Ellison's salary prior to his employment with the Respondent;
- the independent job banding process operated by the Respondent which takes into account the different responsibilities of the Claimant and Mr Ellison and Willis Towers Watson compensation data;
- Mr Ellison's previous experience in roles with large operational/line roles with sizeable accountabilities.

**Dan Richardson:**

The Respondent will contend that the difference in pay between the Claimant and Mr Richardson was justified by:

- the Claimant's salary in previous roles prior to her employment with the Respondent;
- the comparative experience, skill and capability of the Claimant and Mr Richardson in their roles between February and July 2017;
- Mr Richardson's roles between February and July 2017 requiring a fundamentally different experience, skillset and capability to the Claimant's;
- the independent job banding process operated by the Respondent which take into account the different responsibilities of the Claimant and Mr Richardson roles and Willis Towers Watson compensation data.

## **Evidence**

- 3.1 We heard from the claimant. She relied on two witnesses: Ms Charlotte Challis; and Ms Sarah Schutte.
- 3.2 For the respondent the following gave evidence: Mr Charles Bligh; Mr Thomas Hoosen-Webber; Mr Daniel Rynehart; Mr Derek Cheng; Mr Jonathan Ellison; Mr Daniel Richardson; Mr Neil Farquharson; Ms Samantha Kirk; and Mr Mark Dickenson.
- 3.3 We received a bundle of documents R1.
- 3.4 Both parties gave written submissions.
- 3.5 We received various other documents and we will refer to them as necessary below.

**The hearing**

- 4.1 On day one, we identified that the parties had served issues in compliance with the orders of 13 December 2018. However, the claimant failed to comply with order 2.11. The Scott schedule we had referred to during the first hearing had been completed but had not been supplied. There were some additions to the bundle, which were not objected to. The respondent agreed to provide electronic versions of the statements and the bundle.
- 4.2 On day 2, we reviewed the issues and agreed them. The tribunal confirmed it would endeavour to provide the parties with a written list of issues, so the parties could check they had been recorded correctly.
- 4.3 The claimant confirmed that she did not pursue her application of 10 January 2020 for disclosure.
- 4.4 The claimant filed a document purporting to comply with order 2.11 of 13 December 2018.
- 4.5 Ms McCann referred to a document prepared by the respondent which was said to respond to paragraph 98 of the claimant's statement. It was said that it referred to matters which were not in the respondent's evidence. The status and purpose of the document was uncertain. The tribunal indicated that it would be appropriate for the respondent to serve additional witness statements and seek an order to rely on additional evidence.
- 4.6 We agreed the timetable. All examination of the claimant's witnesses would be concluded within 2 days. All examination of the respondent's witnesses would be completed in 3 days. There would be half a day for submissions. There would be 3 full clear days for the tribunal's consideration. We confirmed that, if necessary, we would exercise our powers to limit the cross-examination of any specific witness in order to maintain that timetable. We confirmed that unless there were exceptional circumstances the timetable would not be extended. The parties agreed to proceed on that basis.
- 4.7 On day 4 of the hearing, we gave to the parties our list of issues and invited them to confirm whether there were any inaccuracies.
- 4.8 On day 5 of the hearing, the respondent sought to introduce a chain of emails from 2015 concerning the claimant's knowledge of salary bands. It had been the claimant's evidence that she did not learn of them until the grievance appeal meeting in 2017. The document had been produced because an individual had attended the hearing the day before and listened to the claimant's evidence; she considered her evidence was contradicted by the email chain. The claimant objected to the emails being included. We admitted it and gave oral reasons on the day. In

summary, it would not have been clear when disclosure was first undertaken that the document was relevant. It became relevant following the claimant's assertion of her lack of knowledge and was disclosed at the appropriate time. In any event, as it was relevant, it could be dealt with. Ms Ali applied to recall the claimant and that application was granted.

### **The Facts**

- 5.1 The respondent is a well-known company providing telecommunications services to both private individuals and businesses.
- 5.2 In 2014, the respondent entered into a joint venture company, Bolt Pro Tem Ltd, which comprised TalkTalk, Sky, and City Fibre. Each company owned a 33% stake. The aim was to trial investment in fibre broadband. The purpose was to run a trial with roughly £10 million investment between the three companies. The trial was to take place in York and involved 14,000 homes. Of those 14,000 homes, there were to be two tranches, which have been referred to as T1 and T2.
- 5.3 Underpinning the trial was the application of fibre technology. In essence, instead of hiring the use of pre-existing copper wire technology, the aim was to introduce into cities a new network of fibre cabling. This involved installing the fibre infrastructure by either putting the fibres in the ground or using existing poles. The customers would then attach to the new infrastructure, which in itself would be served by a physical exchange that connected to the Internet. This project was known as Project Lightning. The product was known generally as Ultrafast. The object of the research was to assess feasibility and consider whether the network could be built to a particular budget, which we understand was, initially, £500 per customer.
- 5.4 On 8 April 2015 the claimant commenced employment with the respondent; her job title was programme director, lightning. She was interviewed for the position. We do not have any original job advert.
- 5.5 The respondent company has pay bands. We are concerned with bands A- E (A being the highest) the claimant was in band C and was paid £110K per annum. Within the bands are grades, albeit those grades are not specifically published. She was at the highest grade for her band (grade 16). Her appointment was confirmed by letter of 26 February 2015. This contained the terms of her employment. It records her job title as programme director, her job band as C, and her manager's job title as general manager (R1/82).<sup>4</sup>
- 5.6 We were referred to one document which the parties have referred to as the job description (R1/98). This confirmed that she reported to the

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<sup>4</sup> The page numbers are references to the source documents in the bundle. The content of any document referred to has been described sufficiently within these reasons. It is not intended that such documents be incorporated.

general manager of Ultrafast and her job was band C. It describes the role in the following terms:

**Innovation and delivery of Ultrafast is at the heart of our business. The Program Delivery Director will play a pivotal role in turning our exciting vision, in rolling out Ultrafast Broadband, into reality. The service delivered will delight our customers, make them better off and enable Britain to become better connected.**

- 5.7 There is a section headed "how will I add value in this role?" which the parties have referred to, generally, as the job description which states as follows:

**Leading and delivering the Lightning Programme delivery function by:**

- **Playing a key role in shaping TalkTalk's Ultrafast product – a strategic business initiative**
- **Ensuring that enabling work streams are delivered within committed scope, time and budget, using robust and consistent project management tools**
- **Taking responsibility for the readiness status of the programme**
- **Updating senior leaders across the business on all aspects of delivery**
- **Representing the programme at TalkTalk group change planning and governance forums**

**You will continue to programme manage the ongoing successful trial in York and lead the national roll-out.**

**There are over 40 FTE's contributing to the Programme across 6 key work streams – you will be responsible for ensuring this is an effective team and managing our joint-venture partners' contribution. You will provide strong programme leadership, coach on project management, employee effective risk management tools, as well as supporting individual professional development. You will be comfortable with innovation and emerging technology.**

**Success will require nurturing and enabling projects and people; developing relationships and influencing multiple stakeholders is an essential skill. You will bridge between organising the programme today and integration of Ultrafast into BAU; ensuring we have the correct capability deliver now whilst growing to enable roll-out at scale.**

- 5.8 The general manager was Richard Sinclair. The exact relationship, in terms of seniority, between the claimant and Richard Sinclair was disputed. Ultimately, the claimant accepted in evidence that Mr Sinclair was senior. We find that he had overall responsibility for the Ultrafast provision and was senior to the claimant. It was Mr Sinclair with whom she discussed and agreed objectives.
- 5.9 Project Lightning was limited to York. However, the purpose of the project was to provide information which may underpin a national rollout. The respondent's evidence was that the potential costs of installing infrastructure for a national rollout would have been in the region of £1.2 billion.
- 5.10 For there to be a national rollout, it would have been necessary to have authorisation, an appropriate corporate structure, and funding. We accept



the respondent's evidence that funding such a programme was beyond the capacity of the balance sheet of TalkTalk. It would have needed significant investment. Inevitably, that would mean setting up an appropriate corporate structure and securing the necessary funding. Potentially, it would have been a joint venture, albeit none of the parties involved in Bolt Pro Tem Ltd had any commitment, or obligation, to take the matter forward as a joint venture. Put simply, the possibility of future rollout was no more than an aspiration; any implementation would have required a specific corporate structure, funding, and detailed planning for resourcing. Rollout would inevitably have involved consideration of staffing, to include the generation of all positions from the most senior at band A and all relevant roles throughout the bands. It would have been necessary to have representation at the most senior level of the respondent. The nature of the work would move beyond the limitations of a specific pilot project and would generate significant demands operationally.

- 5.11 To the extent that we have evidence of the claimant's detailed role, we will come to that when we consider the equal pay claim. The relevant facts can be conveniently considered when we consider the claimant's role compared to those of her comparators. At this stage, it is enough to observe that having regard to the totality of our deliberations, we have accepted that the claimant's responsibility concerned the delivery of the Lightning programme. However, before considering the events which led to her dismissal, it is necessary to give some detail of the work she undertook concerning any potential expansion.
- 5.12 At no stage during the claimant's employment did the respondent resolve to, or envisage, rolling out Ultrafast, countrywide. The initial focus was on T1 and T2 which concerned the northern part of York. After February 2017, the joint venture company came to an end and the respondent made the decision to proceed, on its own, to include 40,000 homes in the southern part of York. We understand the final total in T1 and T2, ultimately, was up to 20,000 homes and in addition, there would be an extra 40,000 in York as part of T3.
- 5.13 The Lightning programme existed to provide information concerning feasibility. The claimant was involved in analysing the information generated and providing data. She was involved in identifying other potential cities and this was known generally as future cities. However, at the time the claimant was involved, the ambition remained limited; there were three further cities identified involving approximately 40,000 further houses.
- 5.14 Some work was undertaken in relation to the possibility of a more general rollout and the way it could be both structured and funded. This was dealt with by a group of people who were collectively referred to as Greenzone. The claimant was not part of this strategy group. She provided data for it, but otherwise was not involved. Greenzone was a team which considered strategy at a high level. It considered the correct corporate vehicle and

the potential for finance. It was largely concerned with the possible approach to financing. It was recognised that the balance sheet of TalkTalk would not in itself support the venture. Mr Bligh confirmed that providing fibre infrastructure for the country would represent an investment of at least £1.2 billion. The potential Greenzone strategy involved liaising with venture capital companies and merchant banks.

- 5.15 The claimant has sought to suggest that she was involved in Greenzone's work. She was not. Greenzone used data generated by Project Lightning. Generation of such data was an integral function of Project Lightning. In addition, within the Lightning programme, some work was undertaken on identifying future cities. This information was used by Greenzone, but it was the high-level financing which was its concern. Greenzone had a limited budget and only £50,000 was authorised for consultancy fees.
- 5.16 In her appeal against the outcome of the grievance, the claimant describes her job role and pay (R1/550). She states that she developed a strategic business case and development model to deliver the next phase of the programme across five additional regions with a costing of £250 million. The respondent accepts that she may have had some input into a business case, but it was Mr Richard Sinclair who was the executive responsible for pulling the business case together. It was Greenzone that was concerned with the corporate vehicle and the potential funding. The claimant's role was limited; she accepted in evidence that this involved the input of relevant data, as was consistent with her role within the Lightning programme.
- 5.17 In late October 2015, TalkTalk suffered a cyber-attack. This created a crisis which had to be managed immediately. The claimant was not at that stage involved in the cyber-attack response. The respondent needed to deal with the immediate aftermath, to secure all the IT infrastructure, and to implement strategies to limit the commercial damage. The claimant was involved in none of that early reaction. One of her comparators, Mr Daniel Rynehart was involved, and during the relevant period reported, at least initially, directly to the CEO, daily. Other senior managers were also diverted from their general functions to deal with the aftermath and consider security measures and restoration. By January 2016, the initial aftermath of the cyber-attack had been dealt with. Mr Rynehart was able to return to his original function concerning technology transformation and he relinquished his security functions. It was at that point the claimant became involved. At paragraph 31 of her statement she says the following:

**31. In December 2015 I was called into a meeting with Tom Webber to discuss how I could support the Cyber Security Programme. This was considered the highest priority programme in the business at the time (for obvious reasons) and required a Programme Director to take on the responsibilities as outlined above. I was given the role of the Programme Director for the Cyber Security Programme which I carried out alongside my existing role of Programme Director for Lightning. I agreed to do this**

as the Cyber Security Programme was a priority programme but was going to be relatively short term which I could plan around the longer term Lightning programme.

5.18 The demands of the Lightning programme had reduced at that time and it was envisaged that the claimant would maintain oversight of that ongoing project, but would have sufficient time to be involved in the security project going forward.

5.19 In her statement, she describes the parameters of the security role as follows:

**34. My accountabilities for delivering the Cyber Security programme were:**

**a. Manage the governance – develop all board packs, progress reports and attend and minute the monthly security committee meetings (attended by Dido Harding and James Powell).**

**b. All planning, resourcing and delivery activities for the successful delivery TalkTalk's security programme, designed to improve TalkTalk's security capabilities as demonstrated across a maturity matrix.**

**c. The day-to-day management of security, project and technical delivery teams across 6 workstreams:**

**i. Secure the Systems – implementation of the strategic technical change projects through the change function (e.g. WAF and Firewalls)**

**ii. Secure by Design – creating high security 'zones' using separation and segmentation techniques across TalkTalk's network.**

**iii. Risk Management – to develop a suite of Security Policies and a Risk Management framework for the business**

**iv. Secure Culture – work closely with the internal comms teams to deliver a 'gold' communication and training plan into the business.**

**v. Security operations – Development of a Security Operations Centre ('SOC'), to monitor security and respond to incidents and threats to the network.**

**vi. Third Party Security – review all contractual relationships and security access rights granted to over 200 third party suppliers.**

**d. Management of the capex (capital expenditure) and opex (operational expenditure) budgets associated with the security programme.**

**35. I was accountable for the successful delivery of the 6 workstreams on the security programme, with the outcomes of the programme post cyber-attack featured in the Chief Executive Officer's review in the TalkTalk Telecom Group Annual Report 2016 [page 805] I was responsible for the "detailed review of our systems and processes following the cyber attack" mentioned there.**

5.20 This evidence is misleading. First, the claimant was not involved in the initial management of security after the cyber-attack. Second, while she identifies at (c) (i) - (vi) the relevant functions, the claimant accepted in cross-examination that it was not her responsibility to secure the systems, albeit she had some limited input, and it follows paragraph 35 of her statement is misleading.

- 5.21 Mr Rynehart had been responsible for all six parts. The claimant was only responsible for items (ii) - (vi). Her role was significantly smaller than Mr Rynehart's had been. She did not take over his full responsibility.
- 5.22 It was always envisioned the claimant would provide assistance whilst any demands of her role on the Lightning programme permitted. The claimant received, a one-off bonus of £5,000 in recognition of her efforts, as confirmed on 24 November 2016.
- 5.23 On 16 January 2017, by email (R1/181), Mr Webber addressed the claimant's role going forward. Mr Scott Traynor took over responsibility for running the security portfolio. He would work with Mr Derek Cheng and the security team. It was envisaged then that Lightning was growing in ambition and the claimant would then continue in her Lightning programme role. At around that time the claimant's involvement in security ended.
- 5.24 On 21/22 February 2017, the Lightning plc committee met. The claimant was not part of this committee. Lightning was represented by the general manager Mr Sinclair. This committee resolved to scale down Project Lightning. The key decision was recorded as follows:

**Key decisions**

- **No more work to be completed on future cities – next 9 months to be entirely focussed on completing York**
  - **Definition of success over the next 9 months**
    - **Trajectory of penetration in current footprint is towards 45% (between TT and Sky)**
    - **To have a detailed plan of how we would achieve a build in T3 of 100% Micro-trenching@ <450 per home passed (for 40K homes this would cost £18m)**
    - **To have clear visibility of how we would achieve a build cost per home under £400**
    - **To have clear visibility of how we would achieve a marketing cost per add of under £[50]**
- 5.25 In order to complete T3, it was envisaged there would be capital expenditure of a maximum of £20 million over two years. Of that budget, £18 million was for the build and would, essentially, fund a third-party company. The remaining £2 million would be the budget for the remaining management of the scheme. No decisions were made by the Lightning plc committee meeting as to the implications for the structure of the Lightning programme, or any role within it. It follows, no decision was made to make the claimant's position redundant at that time.
- 5.26 Implementation of that strategy fell, primarily, to Mr Webber; he was not at the meeting. Mr Webber was unclear as to when the decision was communicated to him. He believes it would have been shortly after the decision was made. At that time, he was a group change director (band A). At the time the respondent was considering its budgets. It was a time of financial constraint. Contractors were being discontinued; other

headcount and structures were being considered, in order to make savings.

- 5.27 Prior to the committee's decision, the claimant had been asking for more resource, and in particular requested a programme manager who would sit directly beneath her. Mr Webber believed there was, what he describes as "a disconnect between the claimant's thinking and the business's." He formed the view, having regard to the reduction in the scale of the Lightning programme, that it was not necessary to have the programme led at director level and delivery of the objectives could be supervised by a cheaper programme manager. He did anticipate that the claimant would have difficulty accepting his rationale.
- 5.28 It is not clear exactly when he formed the view that it would be unnecessary to continue with a programme director. Mr Webber's oral evidence would suggest that there was an ongoing process of discussion, but around mid-March, his thoughts were clarifying. He accepts that he had a number of conversations with Mr Sinclair and HR. The totality of those conversations is not detailed.
- 5.29 We should note that the parties have referred to difficulties in the relationship between the claimant and Mr John Rees, head of network architecture, the Lightning programme. The claimant has not advanced any positive case as to the reason for her dismissal. It has been neither party's case that the interaction between the claimant and Mr Rees had any material influence on any decision, and their relationship has not been raised in cross-examination. It is clear from the documentation that there were difficulties around the middle of March 2017.
- 5.30 By 3 May 2017, the respondent had taken a decision, provisionally, to make the claimant's post redundant. On 3 May 2017, Mr Webber wrote to HR setting out the rationale for the decision as follows:
- **We have reviewed the structure of Change Programmes/Portfolios across the group and agreed them at Exco**
  - **We are all aligned that the scale of Lightning is as a programme (not portfolio) and we have been reviewing the scale of senior change resource required to deliver the programme this year – particularly in the context of challenging budget**
  - **There are 4 main chunks of activity to lightning – the dig/build, the IT development, trials, establishing operating processes/capabilities**
  - **The biggest chunk is being delivered by a third party and doesn't require programme management but strong contract management – which is not a change activity, If I look at the remaining activities, they don't justify a resource at her level and as of such, I intend to remove the role from the structure and it will be managed by a more junior Programme Manager going forward.**
- 5.31 There is further correspondence within HR which refers specifically to the issues with John Rees and includes a comment from Ms Angie Wiseman that "it's all getting a bit out of hand." However, there is no evidence that Mr Webber was involved in this, and ultimately, he made the decision to proceed with the redundancy. The claimant has not pursued her cross-

examination on the basis that Mr Webber had any ulterior motive. There were difficulties which involved the claimant; however, there is no basis on which we could find, as a primary fact, that any such difficulties materially influenced Mr Webber's decisions.

- 5.32 On 11 May 2017, Ms Gemma Davies sent an email (R1/208) which referred to the rationale and specifically contained the following:

**We believe that the seniority of the person is not needed here, if you remove the 'dig' costs you're left with a £2m project. The importance is in a person who can collaborate, get things done at TalkTalk and understand tech. A good comparison is Scott Traynor and his work on security. The key risk in all of this is the RFP which is currently in progress.**

- 5.33 On 16 May 2017 Mr Webber met with the claimant. He described it as an informal meeting where he wanted to give the claimant a "heads up" before starting the formal HR process. During that meeting he told her that her post had provisionally been selected for redundancy. He followed that up with a hand-delivered letter which set out the rationale and gave details about ongoing consultation. The letter referred to sources of support and assistance and highlights the careers site for vacancies.

- 5.34 It is the claimant's case that she was instructed her position was being made redundant. That is inconsistent with the letter of 16 May 2017 and on the balance of probability we prefer the respondent's evidence. In her statement at paragraph 58 she says the following

**58. On 16<sup>th</sup> May 2017 I was called into a meeting with Tom Webber where he instructed me that my position was being made redundant. The reasons given were the same as the reason set out in the letter at page 210 of the bundle. I was told that the scope of the Lightning programme had been reduced, and a Programme Director was no longer necessary to run this programme. This was simply not true. A Programme Director is / was still required to complete the trial phases within York, engage and onboard a new set of Network Planning and Construction partners, and then go on to lead the deployment of TalkTalks full fibre network across 5 more regions in the UK.**

- 5.35 It is apparent that the claimant did not accept at the time, and has not accepted since, that there was any scaling back of the Lightning programme. She disagrees with the respondent's decision on resourcing and it is apparent from that paragraph in her evidence that she disputes the appropriateness and rationality of the underlying business decision.
- 5.36 On 16 May 2017, the claimant reacted negatively. She stormed out of the meeting, slammed the door, and then told colleagues she had just been fired. Thereafter, her relationships with her colleagues became strained. Mr Webber's unchallenged evidence is that it was difficult to get any engagement with her after the initial conversation, and that she disengaged from the stakeholders and requested garden leave.

- 5.37 On 17 May, Mr Webber confirm by email (R1/214) that the consultation would be for at least 30 days, that her role would exist until 31 July, and that he would meet with her formally at least twice.
- 5.38 On 21 May 2017, the claimant sent a request for clarification. This document had a number of themes. She alleged she was in a shared pool of resources being five programme directors: Ms Lynne Steele, Mr Jonathan Ellison, Mr Dan Rynehart, Mr Neil Carey and herself. She referred to Mr Scott Traynor as a further programme director on temporary promotion. She alleged that there was a policy of first in first out and asked why it had not been applied. She questioned why she had not been warned earlier. She questioned why other programme directors had not been put at risk. She asked why she had not been put on garden leave. She referred to Mr Richard Sinclair as the Lightning programme sponsor and questioned how his expectations would be met in the process. She set out her substantive loss calculation which included the "executive incentive scheme – £223,757." She referred to her total claim pursued as £289,654.74.
- 5.39 It is apparent that her contentions were discussed with Mr Sinclair; he did not support her perception.
- 5.40 The claimant has referred to several emails which we will need to consider. There are emails on 6 June 2017 (R1/231). In one email, Ms Sam Kirk, reward director, questioned whether the claimant was leaving by mutual consent and whether it was performance related. There is an email from Mr Webber of 22 May (R1/222). This refers to Mr Traynor and states she does not have the director title. It does state, "the reality is that the security team will unlikely have her back." However, it does say that as far as he is concerned, he is happy to consider her in the context of a security role.
- 5.41 On 6 June 2017, Ms Joanne Farnhill did question whether the claimant would be treated as a bad leaver. We accept Ms Kirk's unchallenged evidence that a bad leaver has a specific meaning for share options. There was indication at that time the claimant may choose to leave, and that would not be a redundancy. Voluntary resignation, or voluntary acceptance of a settlement, would constitute being a bad leaver for the purposes of share options.
- 5.42 The first formal consultation occurred on 5 June 2017 (R1/240). The redundancy rationale was explained. The claimant stated she wanted garden leave, as her preference. She understood she had the option to continue working. The points raised prior to the meeting were discussed. In particular, the claimant believed other programme directors should be put at risk. Mr Webber considered each of the roles she identified and explained why he believed she was not suitable. He specifically identified the other programme directors who were more senior and accountable for running larger and more complex portfolios.

- 5.43 The respondent provided a written summary of responses to issues raised (R1/254); this gave detailed answers to a number of questions, including the alleged first in first out policy, the nature of the shared pool, and queries in relation to six potential roles - including programme director security programme, and director in another area. It is not clear when this specific document was given to the claimant, but all the relevant matters were discussed with her.
- 5.44 During the first consultation meeting, the claimant stated on two occasions that she required a settlement agreement. Mr Webber raised with the claimant the possibility of applying for other roles, but he believed the claimant was not interested. We accept his evidence that the claimant did not at any time say that she wished to be considered for, or would be prepared to accept, junior positions.
- 5.45 On 9 June 2017, Mr Mark Dickinson, the chief people officer, sent the claimant a letter confirming she was now on paid leave.
- 5.46 The second consultation meeting was scheduled for and took place on 21 June 2017 (R1/270). Prior to that, on 14 June 2017, the claimant submitted an appeal letter. It is the respondent's practice that an appeal against proposed redundancy is allowed prior to any final decision to dismiss. The rationale behind this is that it gives an individual employee a real possibility of disputing the rationale for the decision and securing a change in policy before the redundancy takes effect.
- 5.47 The appeal letter was lengthy and set out comments about the Lightning programme and its various components. It is difficult to discern the rationale for the appeal. Assertions were made in relation to the scope of funding and it is clear the claimant refers to the "future city strategy" which was said to be looking for 250 million over a five-year period. No such budget had been agreed; it is unclear why this is referred to. Several other budgetary figures are quoted, but it is unclear where they come from. The substantial part of the appeal appears to be her assertion that the Lightning programme is "one of the largest (in terms of change), complex, innovative and strategic projects that TalkTalk will undertake this year. For this reason I can't quite understand how the group change director would not want director level representation at all change shared service forums..." The second element is an assertion that she is part of a shared service pool of resources and she should be repositioned into another change leadership role given her twenty years of experience. Her third assertion is that, as she had not been included in any discussion, she had not had an opportunity to apply for other relevant roles, albeit no specific role is identified. The appeal annexed further information. The first part appears to be an outline of relevant events, her experience and performance, and various questions which she said had not received satisfactory answers. The second part was her CV.
- 5.48 Mr Derek Cheng, TalkTalk's chief security officer, was appointed to hear the appeal.



- 5.49 The second consultation took place on 21 June 2017 (R1/270). At the second meeting Mr Webber confirmed that further consideration had been given to the pool, but that her suggested pool was not the right approach, as the other people in the proposed pool were not in comparable roles. The status of the future cities project was confirmed. It had been de-scoped by the plc board in February 2017. There was some high-level project work in Greenzone. Mr Webber did not accept that the Greenzone work was part of the claimant's role, as it was a corporate and finance question. The claimant confirmed that she had been checking the internal site, Workday, but had found no suitable vacancy. At no time did she say that she wished to be considered for any junior positions. The claimant did not explicitly request bumping of colleagues she considered more junior or suggest it as a possibility. She did suggest that she would be more suitable than other incumbents to undertake the other programme director roles within the pool that she thought ought to be applied.
- 5.50 There were further redundancies within the business. On 28 June 2017 TalkTalk announced a collective redundancy consultation which was associated with the withdrawal of mobile services. This required a collective consultation process, but it is common ground that it was of no significance to the claimant's case and we need consider it no further.
- 5.51 On 8 August 2017, the claimant submitted a subject access request; on the same day she submitted a grievance about equal pay and sex discrimination (R1/498). That grievance was heard by Mr Gary Steen, chief technical officer and Ms Angie Purcell, people director. There were no more consultation meetings.
- 5.52 Mr Cheng dealt with the appeal against redundancy. Mr Cheng joined TalkTalk in July 2016 as chief security officer. He had worked with the claimant when she was supporting the security programme, prior to the appointment of Mr Scott Traynor. Mr Traynor was junior to the claimant. Mr Cheng believed Mr Traynor had been more successful in the programme, possibly because of his light approach, and possibly because he was 100% focused. Mr Cheng had only general awareness of the Lightning trial. He considered the claimant's documentation and he summarised the three main points of appeal as follows: first, the programme going forward required director level management; second, the claimant should be considered for other roles; and third, all the programme director should have been put in a pool.
- 5.53 Following the meeting with the claimant, he followed the matter up and had a number of discussions. Not all of those discussions were minuted. He had a brief discussion with Mr Sinclair. He completed his outcome and sent a decision on 21 July 2018 (R1/491); he concluded that the other programme directors referred to were band B directors with "very large and complex programmes to manage." In comparison he found the claimant's programme was "smaller and less complex." He considered a band C role was proportionate to the complexity. He did not consider it

unusual for individuals of similar titles to have different job bands. By the time he was considering the appeal, Mr Webber was recruiting for the programme manager level and Mr Alex Cain had picked up the ongoing Lightning programme duties. We should note that the role was advertised on Workday and so should have come to the claimant's attention. She was not specifically provided with the job description; she never requested one. He noted the remaining Lightning work was being done at a more junior level, without difficulty.

- 5.54 He reviewed the ongoing treatment of future cities and acquainted himself with the Greenzone initiative and its limitations. He accepted Greenzone was concerned with funding and business strategy and was not part of the claimant's role. He considered the specific roles the claimant identified. He deals with these at paragraph 21 of his statement as follows

**21. In my appeal outcome, I also dealt with the other roles that Rebecca said she should have been considered for. Some of the roles she described did not exist, others were more junior and there were other roles which were fundamentally different to Rebecca's role and did not match her skill set and experience, but did match the skill set and experience of the person appointed.**

- a. Rebecca referred to a security programme director. As this was my area, I knew first hand that this was not a director level role. Scott Traynor had been promoted to Head of Change Delivery for security reporting into Lynne Steele. This was more junior than Rebecca's role.
- b. Rebecca had asked about other programme director roles in the business. I confirmed that we did not have any current vacancies but that if one opened up then Rebecca would be able to apply.
- c. We did not require a programme director role for the Rest of York. It was the reduction in that requirement which had led to Rebecca's role being at risk.
- d. Julian Walton's new role on Lightning was a significantly more junior role and focussed on operational delivery rather than programme work.
- e. I explained that the role of Future Cities programme director did not exist. Phil Eayres was temporarily assigned to Greenzone at ExCo level to work on the business strategy and Nick Dale was supporting from a finance perspective. Neither were doing programme roles.
- f. Dan Richardson (TTB – Transformation Director) had been at risk at the same time as Rebecca and had been mapped into this role as his skill set and experience perfectly matched the requirements.
- g. Lynne Steele had returned to her substantive Change Delivery Director role.

**h. Jemma Withers had been appointed to a TDLC programme delivery role which was of a different nature, which Rebecca's skill set and experience did not match.**

**i. Similarly, Neil Carey had been appointed to a mobile strategy role which was of a different nature that Recca's skill set and experience did not match.**

- 5.55 We accept his evidence. There was no specific challenge to any of this evidence.
- 5.56 We should observe that much of the evidence presented to us is not directly relevant to the matters we have to decide. There have been a number of areas of dispute. We do not propose to resolve all disputes. We will only consider the disputed evidence to the extent it is necessary to determine the issues in this case.
- 5.57 During the evidence the claimant repeatedly referred to various organisational charts which recorded her position in the structure. Her job title is not in issue. It is clear that programme directors could be either band C or band B. They indicate, at best, reporting lines. The organisation charts are not in our view helpful in resolving the issues, as job titles are not determinative; they tell us nothing of the differences between the roles and whether those differences are of significance in the tasks performed. We have not found it necessary to make further findings about the organisational charts.
- 5.58 We have heard considerable evidence about the claimant's experience. She has indicated that she is more experienced than her comparators. Her assertion is based on the most limited evidence and it is clear that, when she made her assertion, she was not fully apprised of the experience of her comparators. There is no doubt that the claimant has considerable experience in her field. However, she has very limited experience of operational matters when compared with the comparators she relies on for equal pay. We do not need to consider her experience further.
- 5.59 As to the detail of each of the roles, it will be convenient to set out any specific relevant findings of fact when we consider our conclusions.
- 5.60 The respondent alleges that the claimant's evidence lacks credibility. The claimant alleges that the evidence of the respondent's witnesses lacks credibility. This is not a case which turns on questions of credibility. We have been able to reach our conclusions on the balance of probability. Nevertheless, as both parties have raised credibility, even though it is not in our view directly relevant, we will consider the important submissions.
- 5.61 We have considered the representations made by the claimant in submissions about the credibility of the respondent's witnesses. There is a specific challenge to Mr Cheng's evidence on the basis he failed to keep documentation. There is no requirement to keep detailed notes of every

conversation in an appeal process. He identified the appeal points carefully. The appeal meeting was adequate. He carefully investigated matters arising and spoke to relevant employees. His decision was comprehensive, detailed, and well supported. A failure to detail every conversation neither undermines the reasonableness of his investigation nor reflects on his credibility.

5.62 There is challenge to Miss Kirk's evidence based on the respondent's failure to keep details of the grading of the claimant's position prior to employment. Ms Kirk was not involved in any the original grading and her credibility is not undermined.

5.63 Mr Dickinson was concerned with reviewing the grading of the claimant's post. We accept his evidence that in accessing the system and undertaking the grading process again he did not realise that the original information would not be saved. We do not accept that his credibility is undermined.

5.64 There are challenges to the claimant's credibility. Some of those challenges concern her approach to evidence which is relevant in this case. The claimant has given inconsistent evidence about facts which are fundamentally relevant to our decision, and we should consider those discrepancies.

5.65 At paragraph 77 of her statement she says:

**...At this meeting I was advised by Tom Webber that I was not pooled with the other programme directors as they were in a higher banding than me and had larger portfolios than me.**

5.66 At paragraph 78 she says the following:

**78. Tom's comments came as a complete shock to me. I addressed this in my redundancy appeal and my email of 30 June 2017 to Francesco Fabbroni commenting on the minutes of the redundancy appeal meeting [page 351- 353b]. I had understood that all the programme directors were on the same banding level. I asked that this was investigated further particularly as the other programme directors were all male. *This was the first time I became aware that I may be being treated differently in terms of my pay, benefits and grading as my male peers.*<sup>5</sup> I was also provided with the scripted response in respect of Lightning. I was told that Project Greenzone was being led by Phil Eayres, who was being assisted by Nick Dale and Julian Walton, and that project Greenzone was not the Future Cities element of the Lightning programme [page 272].**

5.67 This contains a categorical assertion that she had not previously been aware that her male peers were on a different band. The claimant's email from 23 October 2015 (admitted on day 5) refers to the concept of bands. It refers to programme directors at B grade and senior change managers at C grade. The claimant knew that she was at C "grade." She specifically stated in her email, "This appears to come about as a result of

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<sup>5</sup> Our emphasis.

Lightning having a GM, at B grade which has then artificially downgraded the rest of the team I suspect." Her email specifically requested that her and Alex's grades be reviewed. She referred to a sense of equity. The claimant accepts that this email is entirely inconsistent with her written evidence: she knew the bands existed in 2015; she knew that some of her comparators were at different bands in 2015. The explanation given for the incorrect evidence in her witness statement was that she had forgotten her email of 23 October 2015.

- 5.68 We should also note that her statement at paragraph 78 is inconsistent with the evidence she gives at paragraph 103 which is as follows:

**103. In a Change Leadership Team meeting in December 2016, Dan Richardson was introduced as the "Programme Director equivalent" for TalkTalk's mobile business unit and would henceforth be reporting into Tom Webber with the same responsibilities as the other Programme Directors. During this announcement, Dan Richardson did a "fist punch" in the air and indicated that he had been promoted and received a pay rise upon his move to Change. In an informal conversation at a later point, I asked Tom Webber about a grade uplift myself, but he stated that I was 'not affected'.**

- 5.69 In her oral evidence, the claimant accepted that she requested an increase in her grade in 2016. She accepted that if at the time she believed she and any comparator were on the same band, her request for an uplift would have put on her on a higher band than her comparators. It is difficult to reconcile the claimant's concerns, as expressed in December 2016, with her assertion that she did not know of the discrepancies until the second consultation meeting in June 2017. There are a number of possible explanations. Part of the explanation could be that she had forgotten her email in 2015. It is more difficult to explain why she alleges she did not understand bands in 2016, when she was asking for a grade uplift and no adequate explanation has been given in relation to that. It is possible there was some confusion. It is also possible that the claimant has deliberately misled the tribunal. We do not have to decide which is the more probable explanation, as nothing turns on it. We do observe that whether there is any attempt to deliberately mislead or not, there may be doubt as to the overall accuracy of the claimant's evidence, given the reliability of her memory on key relevant evidence.
- 5.70 The respondent has also alleged that the claimant has sought to exaggerate. Two key matters are relied on. The first is a minor point. During her grievance on 24 August 2017 she represented her daily rate with Rank group at £750. It was, in fact, £550 plus VAT. It is possible that her answer was recorded incorrectly, but she did not change it when she had an opportunity to do so. It is possible that this was a legitimate error and was not an exaggeration.
- 5.71 The second point is more serious and concerns the representations she made at various times as to the level of budget funding the Lightning programme.

- 5.72 At paragraph 98 of her statement she refers to a capital cost of £30 million and other capital expenditure to of £40 million. In addition, she refers to the budget for future cities initially at £250 million and then inserts a figure of £1.5 billion in relation to work stream of 5 regions. The claimant has not been able to justify any of these figures. We will look at the true capital expenditure in due course. It is also apparent during the redundancy process, and the various grievances and appeals generated, she exaggerated the budgets associated with Lightning.
- 5.73 Mr Bligh's unchallenged evidence is that the lightning team was given £10 million to spend over two to three years to run a trial in York. He notes that her redundancy appeal letter referred, inaccurately, to £250 million funding for a five-year period. In her grievance meeting she referred to the fibre network to York as having a £50 million capital expenditure investment programme (R1/512); that was not true. There was never approval for a £50 million spending in York. In the appeal grounds she stated she delivered a technical change programme to the value of £11 million in addition to construction programme of £45 million. Neither was true. In the grievance appeal meeting (R1/561) she refers to the joint investment in Lightning as being £75 million. That was not true. Mr Bligh's evidence on this point is not challenged. The claimant has given no adequate explanation as to why her statements of the relevant capital expenditure were inaccurate, or why her estimates increased during the redundancy process.

## **The law**

### **Unfair dismissal**

- 6.1 Section 98 Employment Rights Act 1996 provides, in so far as it is applicable:

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
  - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it—
- ...
  - (c) is that the employee was redundant, or
  - ...
- (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.**

- 6.2 In **Safeway Stores Plc v Burrell [1997] ICR 523** the EAT set out a simple three stage test when considering redundancy: (1) was the employee dismissed (2) if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished or were they expected to cease or diminish (3) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?
- 6.3 There were no grounds for importing into the statutory wording a requirement that there must be a diminishing need for employees to do the kind of work for which the claimant was employed. The only question to be asked when determining stage 2 is whether there was diminution in the employer's requirements for employees (rather than the individual claimant) to carry out work of a particular kind. It is irrelevant at this stage to consider the terms of the claimant's contract. The terms of the contract are only relevant at stage three when determining, as a matter of causation, whether the redundancy situation was the operative reason for the employee's dismissal. The test set out in **Burrell** was subsequently endorsed by the House of Lords in **Murray & Another v Foyle Meats Ltd [1999] ICR 827**.

**Lord Irvine LC (with whom Lords Jauncey, Slynn and Hoffmann agreed) said this:**

**"My Lords, the language of paragraph (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter."**

- 6.4 In considering the fairness of the dismissal the tribunal must apply section 98(4) Employment Rights Act 1996, applying that section we must consider the reasonableness of the employer's conduct not whether the tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. There may be, although not in all cases, a band of reasonable responses where one employer might reasonably take one view, and another quite reasonably take another view. The function of the Tribunal as an industrial jury is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might adopt.

Equal pay

6.5 Section 64 of the Equality Act 2010 provides:

- (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;
  - ...
- (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.

6.6 Section 65 of the Equality Act 2010 provides:

- (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.

6.7 Section 66 of the Equality Act 2010 provides:

- (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) ...

6.8 Section 69 of the Equality Act 2010 provides for a 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.

...

(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.

- 6.9 When like work, is established, an equality clause will operate unless the employer can demonstrate that the variation in contract terms is due to a material factor other than sex. **Underhill P** summarised the developed law as it was under s 1(3) of the EPA 1970 at para 19 in **Newcastle Upon Tyne NHS Hospitals Trust v Armstrong & Ors** UKEAT/0069/09:

...it is necessary for a tribunal first to identify the employer's "explanation" for the differential complained of (a preferable phrase to the conventional but clumsy terminology of a "material factor" to which the differential is "due") and then to consider whether that explanation involves sex discrimination, applying the well-known principles which underlie both the relevant UK legislation and the jurisprudence of the European Court of Justice.

- 6.10 For the reasons we will deal with in our conclusions, we do not need to consider in detail the law as it now stands concerning the material factor defence.
- 6.11 Under section 65 Equality Act 2010 two people are doing like work if first, they do work of the same or a broadly similar nature, and second, if such differences as there are between their work are not of practical importance in relation to the terms of their work. The two elements of that definition must be considered separately.
- 6.12 It is also be possible for a woman who is doing more onerous or demanding work than a comparator who enjoys more favourable terms to bring a complaint.
- 6.13 Whether work is of broadly similar nature is a question of fact for the tribunal. Like work will be satisfied where the work is of a similar nature, such similarity need only be broad. The tribunal should not take too pedantic an approach or undertake too minute an examination. It should consider the matter in broad, general terms (see e.g., **Dorothy Perkins Ltd v Dance** [1977] IRLR 226, EAT).
- 6.14 It is the nature of the work done which is in issue. The tribunal should look to the work done as opposed to the work that might be done under the contractual terms of employment. The fact that an individual chooses to do more than the job requires should not make any difference when it comes to assessing what his work is.<sup>6</sup> It is the work on which a person is

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<sup>6</sup> Albeit, not a point relevant to or argued in Ms Burke's claim.

employed that is relevant (see **Redland Roof Tiles Ltd v Harper** [1977] ICR 349, EAT).

- 6.15 At the first stage, it is necessary to assess the similarity of the nature of the work, as opposed to the similarity of the tasks performed.
- 6.16 If the work is broadly similar, it is necessary to consider if there are differences between their work, and if so, are they of practical importance in relation to the terms of their work. It is necessary to consider the totality of what a person does.
- 6.17 If a respondent is asserting a difference in responsibility, it is important to consider if the comparator does, in fact, exercise a greater degree of responsibility than the claimant.
- 6.18 Not only is there a question of whether the comparator does in fact do something significantly different from the claimant, there is also a question of how often he does it. The Equality Act 2010 section 65(3) specifically states that in assessing whether the differences between what he does and what she does are of any practical importance, the tribunal must have regard to the frequency with which the differences occur, as well as the nature and extent of the differences.
- 6.19 Both parties made submissions on the relevant law.

#### The claimant's submissions

- 6.20 In so far as they are relevant to the case law on like work the claimant's submissions say:

**21. The Tribunal has to determine as a question of fact whether the Claimant did "like work" to her Comparators. The focus is on what the Claimant and her Comparators actually did, rather than what they might in theory be required to do under the contract of employment: see Capper Pass Ltd v Allan per Slynn J**

#### The respondent's submissions

- 6.21 In so far as they are relevant to the case law on like work the respondent's submissions say:

**31. For work properly to be considered to be "like work", the Tribunal must conclude that:**

**31.1. The roles are the same or broadly similar; and**

**31.2. Any differences between C's work and that of her comparator are not of practical importance, necessitating consideration of the frequency with which difference occur in practice and the nature and extent of the differences. ...**

**32. In Brunnhofer v Bank Der Osterreichischen Postsparkasse [2001] IRLR 571, the CJEU held that, in order to determine whether employees**

perform equal work, it is necessary to ascertain whether, when a number of factors are taken into account, such as the nature of the activities actually entrusted to each of the employees, they are, in fact, performing equal work.

*What is actually required in the roles:*

33. In the case of *Capper Pass Ltd v Allan* [1980] ICR 194 (per Slynn J at 196F-G), it was emphasised that the focus is on what C and her comparators actually did, rather than what they theoretically might be required to do, for example under their contracts of employment. The Job Description, if any, and the contract of employment may not reflect accurately the work that was done: see *Waddington v Leicester Council for Voluntary Service* [1977] ICR 266; and *Dorothy Perkins Ltd v Dance* [1977] IRLR 266.

*Responsibility/scope:*

34. Exercise of responsibility may well be a factor in determining whether work is “like work” (or, indeed, work of equal value): see *Capper Pass and Waddington* (above) as well as *Eaton Ltd v Nuttall* [1977] ICR 272.

35. In *Capper Pass*, the EAT ruled that if there are differences between jobs that justify differences in grading, those differences will prevent the two jobs from being regarded as ‘like work’. In that case, the EAT held that, having found that the differential between a female canteen assistant graded 1 and a male canteen assistant graded 3 was justified because the man handled larger sums of money and accordingly had more responsibility, the tribunal was wrong to hold that they were employed on ‘like work’. The EAT concluded that such a finding constituted a difference of practical importance between their work, which was accordingly not ‘like work’.

36. In *Eaton v Nuttall*, the claimant had responsibility for order stock worth up to £2.50 per item (£15 in today’s money). By contrast, her comparator had responsibility for ordering stock worth up to £10 (i.e. four times as much). The EAT upheld the employer’s appeal, Phillips J acknowledging that it was necessary to look at difference in practice and that employers and employees considered responsibility to be an important feature of a job and it had to be fully taken into account when examining comparative work. Similarly, in *Morgan v Middlesbrough Borough Council* [2005] EWCA Civ 1432, the claimant worked as a Grade 7 school administrator in a primary school; whilst her comparator, who was Grade 5, occupied the same role but in a larger secondary school and earned more than she did. The tribunal found that although they both had the same job title, his duties were more managerial and strategic than hers, including some financial responsibility. The CA agreed. See also *Peskett v Robinsons* [1976] IRLR 134.

## **Conclusions**

### **Equal pay**

- 7.1 The claimant compares herself to three others. For the purposes of like work, it is necessary to consider two questions. First, do the comparators do work of the same or a broadly similar nature to the work of the claimant. Second, are there differences, and if so, are the differences of

practical importance in the terms of the work. The two elements are separate. Neither party has sought to separate the two questions in the submissions. It is necessary for us to analyse the relevant detail of each of the four roles in order to ask both relevant questions.

- 7.2 It is part of the respondent's case that it operates a global grading system for all jobs. This is based on a methodology developed by Willis Towers Watson (WTW). The methodology directs that the organisation is first calibrated for factors such as complexity and global revenue. In the respondent's case this led to 21 grades with the CEO at the highest point. The methodology, dictated by WTW, is then applied using a series of questions which has been referred to as a decision tree. The series of 'yes' and 'no' answers generates further questions which eventually lead to a breakdown and a job grade. The respondent has overlaid the 21 grades with 5 bands (A - E). Each band has several grades. The highest grade in band C is 16. The lowest grade in band B is 17.
- 7.3 It is the respondent's contention that the claimant's role, project director, was analysed using the global grading system prior to her joining and was fixed as band C, grade 16. There is no contemporaneous evidence directly proving the evaluation. However, there is indirect evidence. The job description at page 98 directly refers to band C. There is evidence from Ms Kirk that it would have been done, albeit she was on maternity leave at the time. To the extent she asserts direct knowledge, that would appear to be hearsay.<sup>7</sup>
- 7.4 The job profile for the claimant's role clearly showed it had been banded at Band C (R1/98).
- 7.5 At each of the annual pay benchmarking reviews (in July), the claimant's job code referred to the grade for the role (i.e. 16) (R1/628 – 630).
- 7.6 The claimant's own contemporaneous evidence from 2015 supports her understanding that the role was band C and below that of her comparators.
- 7.7 When the banding is done, the computer system generates a profile which remains on the system. The claimant's grievance was rejected, and this led to an appeal. During that process, Mr Dickinson reviewed the grading of the claimant's role and the two comparators she relied on at the time, Mr Daniel Rynehart and Mr Ellison. The system already had a profile which demonstrated to him that the grading had been done. Using his own knowledge of the roles, he then went through and undertook the grading again. He made some minor amendments (none of which have been challenged) but reached the same grading decisions. Unfortunately, he did not know that the process overwrote the original analysis. The

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<sup>7</sup> In his grievance interviews, Richard Sinclair made it clear that Jane Garnsey (in Reward) had evaluated and benchmarked the role prior to C's recruitment) (R1/ 535 and 579).

original data could have been preserved by taking screenshots, but he failed to do this.

- 7.8 We have accepted the evidence of Mr Dickinson and Ms Kirk that the profile had already been done leading to the claimant's role being band C. We find on the balance of probability, that the exercise had been undertaken at the relevant time, i.e., prior to the claimant's recruitment and appointment.
- 7.9 There is one question on the decision tree which determined the difference between the claimant's role and the two comparators relied on at that stage; the question is: does the role "set/significantly influence organisational functional strategy?" For the programme director, Lightning, the answer was "no" and this dictated band C. For the roles of Mr Rynehart, and Mr Ellison, the answer was "yes" and this dictated band B. The claimant conceded in cross-examination that that question was answered correctly in relation to the three roles.
- 7.10 It is necessary for us to consider, a little further, what is meant by significantly influencing organisational functional strategy.
- 7.11 The WTW system assists with evaluating whether a role sets or significantly influences functional strategy (section 1.3) (R1/693). Jobs that determine or have a significant influence on "functional strategy" are those negotiating the functional goals with the organisation's CEO and the Board; "functional strategy" is not to be confused with responsibility for implementation or the management of the functional programmes; only roles that make or strongly influence decisions that affect the whole function should be considered to have an impact on the function's strategy.
- 7.12 "Function" and "Functional strategy" are defined (R1/767): Function is a subset of an organisation. Functions tends to be broad and encompass multiple different sub-functions, areas and teams. Finance would be considered a function; functional strategy is responsibility for planning and delivery of end results, finances/budget, setting departmental policies and contribution to corporate strategic decisions.
- 7.13 Each of the bands is subdivided into grades. The specific grade depends on further factors, but we do not need to consider those.
- 7.14 It follows on the respondent's case, in relation to the two comparators, relied on during the grievance process, that they influenced functional strategy, whereas the claimant's role did not. The difference can be stated simply. It is the respondent's contention that the claimant's role concerned the management of a limited project, which was designed to explore the viability of providing Ultrafast broadband to business and domestic customers. This was, essentially, a pilot which was being used as a viability study, and as part of a joint venture. At that time, whilst it was hoped that the product could be developed commercially and provide

significant income, there was no commitment to do so. If the project were successful, it would be necessary to consider the appropriate corporate structure, the method of financing, and the implications in terms of staffing. It follows that had there been a rollout, that would have been significant for functional strategy.

- 7.15 On the other hand, it is the respondent's case that the two comparators were already responsible for areas that directly influenced functional strategy. In the case of Mr Ellison, he was programme director for consumer. The role was fundamental to the respondent's strategy for transforming the customer experience for over 3 million customers. In the case of Mr Rynehart, he was programme director for technology. Technology was the largest single expense, and as the main product sold by the company was technology, without technology the fundamental function of the company would be undermined.
- 7.16 Mr Richardson's role was mobile operations director. It was essentially an operational role. He led the operations of the mobile function after the departure of the executive committee's managing director for mobile (Mr Jeff Dodds).
- 7.17 It has been an integral part of the claimant's case that her responsibility for Project Lightning should not be taken in isolation. It is her case that she should be considered to have responsibility for functional strategy when the role is looked at as a whole, and that the whole should be deemed to incorporate full responsibility for the national rollout of Ultrafast broadband to customers.
- 7.18 In her claim form, the claimant states, "As programme director, the claimant was also accountable for the design, development and delivery of a deployment plan and new business model that would enable a UK wide fibre network to be built simultaneously across 5 regions, within a 5 year period, to a total investment of about £2 billion. The expectation was that she would deliver the network through a series of phases in line with the respondent's capital spending power." The claimant fails to set out in her evidence, in any meaningful way, the basis for this alleged understanding. The height of her evidence is she points to a job description at paragraph 98 and to the words "you will lead the national rollout."
- 7.19 At no time did the respondent commit to a national rollout. At no time was a budget of £2 billion agreed. At no time was a timeframe of 5 years agreed. There may have been desires and aspirations, but there was no agreement. There was no corporate structure. There was no funding. There was no overall management structure. Undoubtedly, if the project had been successful and TalkTalk had sought to start a national rollout, the management of that rollout would have been considered. It would not necessarily have remained within the corporate structure of TalkTalk. The evidence we have is Talk Talk's balance sheet would not support it. Whatever the organisational structure used, it would have become a key functional strategy, as the evidence we received was the infrastructure

build cost was over £1 billion. This would require board representation, management at all levels, and across all grades. Within that context, it is difficult to understand what would be envisaged by "lead a national rollout." Viewed one way, the most senior board member could be said to be the lead. Responsibilities would, no doubt, be delegated to individuals below at all relevant grades. It is not suggested by the claimant that she would become a band A lead. Instead she suggests that her role would be the equivalent of her band B comparators, but this interpretation is, in our view, entirely speculative.

- 7.20 There is a difference, in our view, between the concept of leading and the concept of responsibility. Leadership can occur at all levels, but it does not necessarily equate with overall responsibility. Completing a project could be said to be leading a deployment. It does not necessarily mean that the person who completes the project would acquire overall responsibility to lead a new product which had become functionally important for an organisation.
- 7.21 We have heard significant evidence on the relative experience of the claimant and her comparators. We do not need to analyse that in detail. We are concerned with the specific roles and the actual work undertaken in them, rather than the possibility of future work, which itself is contingent on future developments. There is, however, one key difference in the experience of the claimant and the experience of the comparators which we should highlight. The claimant's experience is largely on projects and change management. She had little or no experience in large-scale operational management. All of the comparators did have experience in large-scale operational management. Experience in operational management would have been key in any rollout and the claimant did not have that experience. Whilst it is possible that she could have been employed in a band B role, it is far from certain. The corporate vehicle did not exist. The funding did not exist. The relevant roles had not been considered or defined. It would have been possible for the claimant to apply for any position that was created, but her suggestion that in some manner her job would simply become one of key operational significance, or that was the intention, is entirely speculative and in our view illogical and unsustainable.
- 7.22 Before going on to consider each of the relevant roles in detail, we should consider the importance of the claimant's role in security. In submissions, it was conceded that the security role is not relied on for the purpose of comparing the work undertaken by the claimant and that undertaken by her comparators. During the course of cross-examination, it appeared that the claimant was advancing, at one stage, the argument that security determined functional strategy, whereas her contractual role did not. The claimant's counsel, Ms Aly, clarified that was not the claimant's case. In submissions she accepted the work undertaken in the security role was not part of any comparison relied on.

- 7.23 For the sake of completeness, we should say a little more about the security role. Having regard to the totality of the claimant's case, she appears to assert that she was responsible for the security response after the cyber-attack and second that she took over the role from Mr Dan Rynehart. Neither of those contentions are sustainable. It is clear from our findings that she was not involved in the initial crisis management following the cyber-attack. Mr Rynehart was involved in dealing with the initial impact and he did have responsibility which was significantly greater than any the claimant had at any time. It is also wrong to say that she replaced Mr Rynehart. She took responsibility for the continuing implementation of some of the areas for which he had had responsibility. There was a key important difference: she had extremely limited responsibility for securing the systems. It follows her role was much more limited and, in our view, not comparable. As the security role is not relied on by the claimant, we need to give no further detail of this, and we have simply identified the key differences. It would follow that there were significant differences between the claimant's function in security and that of Mr Rynehart, and the differences were of practical importance in terms of their work. This would inevitably lead to the conclusion that she was not undertaking like work with Mr Rynehart in the security function.
- 7.24 We should now consider the detail of the claimant's role in Project Lightning and the roles of the comparators.
- 7.25 It is common ground that the each of the managers were senior. There was a degree of similarity in the work. Each had responsibility for a particular area. In relation to their respective areas of responsibility, they each undertook management at a high level. That involved, to some degree, delivering results in relation to objectives. It was necessary to implement, define, and suggest strategies. There was a degree of influence on, or control over, budgets. There was liaison with third parties. There was general management. There was a degree of reporting and accountability.
- 7.26 Neither party has sought to identify the broad areas of similarity. We remind ourselves that when considering the first relevant question for like work we are asking whether the work is of a broadly similar nature. It is a question of fact for the tribunal. It is clear that we must look at the work actually done as opposed to the work that might be done under the contractual terms. We are concerned with the similarity of the nature of the work. This is a case where the key difference is said to relate to functional strategy. There is no suggestion that the fundamental nature of the work undertaken is different. Instead the respondent relies on factors such as organisational significance, scale, and responsibility. We observe that there is no meaningful argument advanced by either side to suggest that the work was not broadly similar. Taking all of this into account, we are able to answer the first question in the affirmative, for at least the claimant and the two comparators Mr Rynehart and Mr Ellison. It is less clear whether the work of Mr Richardson, which was perhaps more operational, is broadly similar, but nothing turns on this and for the



purposes of this analysis, we accept that all the roles were broadly similar work.

- 7.27 We now come to the differences and it is necessary to look in more detail at each of the roles.

The claimant's role (programme director for Lightning)

- 7.28 The role did not significantly influence functional strategy. If Lightning failed, the project would fail, and it would not undermine any of TalkTalk's functions.
- 7.29 To the extent it was strategically important, it was not the claimant's responsibility for setting the relevant strategy. That responsibility was Mr Sinclair's. Whilst the claimant had an input, it was Mr Sinclair who had responsibility for reporting to senior management.
- 7.30 There were 15 to 40 projects over the three-year period. The budget was £12 million over three years to 2018. The exact level of the budget has been subject of debate. We note that there was a £20 million budget fixed in February 2017 to complete T3. However, £18 million of that budget was to fund a third-party contractor. The exact figures are not, in our view, crucial. What is clear is that budget was limited. The claimant has referred to having a £250 million budget for expenditure over five years on future cities. No such budget was ever agreed. The most that was spent on future cities was £50,000 by Green zone on consultancy fees, and the claimant was not involved in this.
- 7.31 The claimant had limited control over the budget. Mr Sinclair had overall responsibility.
- 7.32 The claimant had limited responsibility and scope for moving resources. It is clear that she could make suggestions, but she did not have delegated authority.
- 7.33 It is accepted that the claimant's role did not, at the time she performed it, significantly influence organisational or functional strategy. The claimant has not sought to argue that the grading was incorrect in this respect.
- 7.34 The job profile was assessed as grade C.

Mr Ellison's role (programme director for consumer)

- 7.35 This role is fundamental to TalkTalk's strategy for transforming the customer experience for over three million customers. Consumer is one of TalkTalk's largest and most important functions. It has a revenue of approximately £1.2 billion.

- 7.36 The role is accountable for devising and delivering consumer programmes with annual capital expenditure of over £30 million with 79 projects annually.
- 7.37 Failure of the consumer portfolio would undermine one of TalkTalk's key functions.
- 7.38 The role reported directly to a member of the executive committee.
- 7.39 The role owned the consumer budget on behalf the chief operating officer. Mr Ellison sat on the capital expenditure committee.

Mr Rynehart's role (programme director for technology)

- 7.40 This role had responsibility for monitoring and driving the capital expenditure for TalkTalk's largest single expense (the technology network of the whole company). The role was responsible for devising and running programs for technology across the whole business with an annual capital expenditure of £60 million on a hundred projects, with associated resources. Failure of the technology programme would fundamentally undermine one of TalkTalk's key functions. The role reported into a member of the executive committee.
- 7.41 The role involved managing a budget of more than £30 million per annum with another £30 million annually in relation to network spend. The role had responsibility for planning, prioritising, and managing the overall technology investment budget for projects.
- 7.42 Mr Rynehart sat on the capital expenditure committee (which the claimant did not) and was the technology lead on the committee reporting to band A executive committee members. The role was significant strategically in influencing future capabilities and the need for technology. It clearly influenced functional strategy.

Mr Richardson's role (mobile operations director)

- 7.43 This role historically reported to Mr Jeff Dodds (managing director for mobile who was a board member of the executive committee) the role was essentially operational and ran the mobile function, after the departure of Mr Dodds. The role was responsible for devising and then operating TalkTalk's new billing and customer support systems. There was accountability for leading and delivering key change programmes within the mobile business which included two major programmes Tornado and Thunder with an annual capital expenditure of £60 million. The mobile function at that time delivered £45-£50 million revenue per annum. The customer base involved 750,000. There was a team of approximately 120 people. Mr Richardson was a member of the mobile leadership team. It was both a senior operational and change management role.

Comparison

- 7.44 When the roles are compared side-by-side a number of key factors emerge.
- 7.45 The claimant's role was concerned with the delivery of a limited project which at the time did not contribute to functional strategy. The three comparators' roles were already deeply embedded in the respondent's structure and were key to functional strategy.
- 7.46 The relevant budgets were significantly different. The Lightning project concerned an envisaged £12 million expenditure over three years. The initial Lightning project was embedded in a joint venture for which there was additional, but limited, capital commitment. A future rollout was aspirational and there was no budget and no corporate vehicle.
- 7.47 In contrast the technology role envisaged £230 million expenditure over three years (as set out in the respondent's job comparison table which was not disputed). The consumer role involved expenditure of £150 million over the same three-year period. Mobile operations involved expenditure of £27 million over two years.
- 7.48 The number of projects involved were limited for the Lightning project and were greater for both technology and consumer.
- 7.49 The nature of reporting differed. The claimant functionally reported to Mr Sinclair for the purposes of Lightning and to Mr Cheng for the purposes of security, both of whom were band B. The comparators all reported directly to band A employees.
- 7.50 This is not a case which turns on any burden of proof. The respondent has provided clear evidence of difference in the tasks performed by the claimant and her comparators.
- 7.51 When considering the things done by an employee, the definition is wide enough to include the exercise of responsibility. Responsibility can be illustrated by reference to any relevant factor. Budgets, strategic significance, responsibility for operational matters, and accountability may all be important. There are clear differences in relation to all of these areas.
- 7.52 The most important and significant difference is the one which determined grading. Project Lightning was a limited project which at that time did not have any influence on functional strategy. The fact that it may have led to a consumer programme which would have had an influence on functional strategy is irrelevant. It is necessary to consider the tasks as they were undertaken at the time. Moreover, any future involvement the claimant may have had in any operational rollout was entirely speculative and uncertain. It may have been that she would have been involved, but the nature of, and level of, that involvement cannot be assumed.

- 7.53 The other three comparators were each involved in areas which had immediate and important functional significance. They were all responsible for key areas of the business. Failure in any area could have fundamentally undermined the business. That was not the case for the claimant's project.
- 7.54 The budgets involved were significantly different. Even within the budgets, each of the comparators had greater flexibility, delegated authority, and responsibility.
- 7.55 The claimant's responsibility for operational matters was significantly less than any of the other comparators. Further, the type of management undertaken by each did have differences. The claimant was more involved in direct line management than the others.
- 7.56 The overall accountability also differed. Each of the three comparators had greater direct accountability to the board. Whilst the claimant clearly had some accountability, the main accountability for the project rested not with her, but with Mr Sinclair.
- 7.57 When we stand back and consider all of these factors, we are satisfied that there is clear water between the claimant's role and the roles of her comparators. There are key differences in terms of the overall budget, accountability, and importance to the business. It cannot in our view be argued that those differences are anything other than of practical importance in relation to the terms and conditions of employment. The key difference, which revolves around the importance of the areas of responsibility to the business, is fundamental.
- 7.58 We have considered both the frequency with which the differences occurred in practice, and the nature and extent of the differences. As to frequency, the differences were constant. The nature is fundamental. The extent is significant.
- 7.59 It follows that the claimant was not employed on like work.
- 7.60 We have considered whether it is appropriate for us to go on to consider the material factor defence.
- 7.61 Under section 64 Equality Act 2010, if a person (A) is employed on work which is equal to comparator (B) then the provisions of section 66 – 70 apply.
- 7.62 Section 65 provides for when work will be treated as equal. One situation is when there is like work, which is what is under consideration here. We have found that the claimant was not engaged on like work with her comparators. It follows that pursuant to section 64, sections 66 – 70 do not apply. The material factor defence is found at section 69, and it follows it does not apply.

- 7.63 The material factor defence applies where the sex equality clause is engaged because the claimant is found to be undertaking equal work to a comparator. It does not apply in this case. The material factor defence only engages if equal work is established, and is considered in the context of that finding.
- 7.64 If equal work is established, there is a rebuttable presumption of sex discrimination. The burden passes to the respondent to establish its defence. The respondent must establish several points. First, the explanation must be identified. It must be genuine, and it must explain the difference. In that sense it must be material. It is then necessary to consider whether the explanation involves sex discrimination. As the burden has already passed to the respondent, it would be for the respondent to provide its explanation.
- 7.65 During submissions, the claimant confirmed that she alleged there was direct discrimination. The claimant does not allege any form of indirect discrimination. She does not rely on section 69(2). She does not allege that she was placed at a particular disadvantage when compared with persons of the opposite sex. It follows that the question of justification does not arise. The respondent has not been called upon to justify anything as a proportionate means of achieving a legitimate aim.
- 7.66 The nature of the material factor defence has been subject to refinement and clarification. We have received a schedule of material factors relied on by the respondent which contains detailed replies to the claimant. The type of factors identified include the background, qualifications, the experience and vocational training of the comparators and the claimant. Detailed evidence is given in relation to each. There is also reference to salary and salary progression. There is reference to benchmarking of the various roles, which is a comparison as to the perceived level of the role and its perceived comparison in relation to competitors. There is reference to the job banding. There is reference to skill/capability and track record. The schedule is unhelpful and does not in our view state accurately the respondent's true case on the material factor.
- 7.67 Having considered carefully the submissions of both parties, it is clear to us that there is a significant overlap between the matters advanced as the material factor defence and those matters relevant to the consideration of like work, and in particular, the differences between the roles. If the differences in roles were rejected for the purpose of like work, there is a real possibility that they could not form a relevant explanation which in no sense whatsoever has tainted by sex. However, the differences have not been rejected.
- 7.68 It is the respondent's evidence that the roles were fundamentally different in terms of the functional strategic importance. That single question determined whether they were placed in band C or band B and in turn that reflected a key and important difference in the roles, as regards their importance and function within the business. The claimant's role was then

paid in accordance with the appropriate rate for a band C grade 16 and the comparators were paid appropriate rate in accordance with band B grade 17. Moreover, it is said the claimant's position was placed in a band and grade prior to her employment. It follows that the material factor was the operation of WTW grading system, as employed by the respondent, which led to the position being graded before the claimant was employed. We have found, as a fact that the position was graded before being offered to the claimant. There is no evidence to suggest the grading was influenced because it was, in some manner anticipated that the person who would be appointed would be a woman. The key question that led to the band selection was, it is conceded, answered correctly. In those circumstances, it is difficult to see how any argument of direct discrimination would be formulated, as whoever was appointed to the role would have been subject to the same banding and grade.

- 7.69 There is greater difficulty going on to consider the question of direct discrimination. When a factor is material in the sense that it is genuine and it explains the difference, it may not matter whether it is in some general sense justifiable. It simply must be free of the taint of discrimination.
- 7.70 We are conscious that the claim is still pursued as an equal value claim. The claimant must now decide if that claim is to be pursued. It has been common ground that the material factor defence is put in the same way for the like work and equal value claim. This may lead to conceptual difficulties as the basis for an equal value claim, and the extent to which the factual basis relied on is different to the claim for like work, if any, is unclear. We have previously considered the nature of the equal value claim, and no doubt the claimant will wish to review her position in the light of this judgment. It may be that the approach to the equal value claim may yet have some influence on the nature of the material factor defence. Both parties have indicated that the material factor defence is the same whether we consider the claim as one of like work or as one of equal value. That may or may not be right, but it cannot be assumed, in the absence of the claimant making the basis for the equal value claim clear. It follows we cannot, in some general sense, decide the material factor defence.
- 7.71 We have noted that the material factor defence cannot be determined at present, as it does not engage given that like work is not established. Nevertheless, it has been argued before us, and we have identified some of the key principles and findings of fact arising from the claim, as it has been put at present; we can come to no final decisions as the equal value claim has not been argued before us, and it is unclear how it is advanced, if at all. If it is to be pursued, and if a new factual basis is relied on, the claim may require amendment. The claimant will need to consider her position. There are clear difficulties which must be addressed, if an equal value claim is to be pursued. We hope this is of assistance to the parties, but we stress we have come to no final decision on a material factor

defence, as it is not relevant to the like work claim and the equal value claim remains unclear.

- 7.72 We should note that there are a number of points raised in the respondent's submissions which do not appear to be relevant to any material factor defence. There is reference to benchmarking. However, benchmarking occurred after the grading was put in place, and does not explain the original grading; it appears to be irrelevant. There is reference to the experience of the individuals. Experience may explain why each of them secured their roles. However, it is the roles which were graded, and the individuals' experience was ultimately irrelevant. Their experience may explain why they were given the jobs, it tells us nothing about the grading of the jobs, or the tasks involved. There is reference to starting salaries. The influence of this is less clear. We received limited evidence. It is possible that there was a range of salaries even within a particular band and a particular grade. Perhaps the starting pay of each individual was influenced by their salaries prior to joint TalkTalk. Such negotiations are not unusual. We simply do not know. However, the fundamental difference is explained by the initial banding. There is reference to the requirements of the roles and their strategic importance. However, this is simply a restatement of the matters which are relevant to the question of like work and reflects the matters considered in the WTW process. Factors such as strategic importance feed into the original job evaluation, but it is that initial evaluation leading to grading which is important.
- 7.73 We observe it would potentially be possible for a company to make a mistake when deciding the original banding without it necessarily undermining a material factor defence, but in this claim it has not been argued that there was any mistake.
- 7.74 We observe that if we were wrong in our finding that the claimant was not engaged on like work, the factual basis on which those conclusions have been reached would be undermined and, equally, the factual basis for analysing any the material factor defence would be undermined.

#### Unfair dismissal

- 7.75 Has the respondent shown a potentially fair reason for dismissal? The respondent's primary case is that the reason for dismissal was redundancy. The claimant advances no positive alternative reason.
- 7.76 Paragraph 15 of the claimant's submissions alleges the respondent has failed to demonstrate its reason. Further points are relied on by the claimant. It is alleged the HR Department were confused as to the reason because they refer to the claimant as a bad leaver. It is alleged the respondent did not consider the claimant's full role within the business. It is said that part of her responsibility was stripped away in relation to security and given to Mr Traynor and that her remaining responsibilities were given to Mr Cain. There is reference to page 206 of the bundle and Gemma Davis's email concerning the high risk to announce the

redundancy given the RFP (request for procurement), but the relevance of this is not stated. It is alleged from the email exchange at 207 and 223 that various employees are being coached. It is said there is no documentary rationale, other than the committee reference notes, as to why her role does not exist anymore. The claimant makes no submissions on the law.

7.77 We have regard to **Murray & Another v Foyle Meats Ltd** [1999] ICR 827.

7.78 Lord Irvine LC (with whom Lords Jauncey, Slynn and Hoffmann agreed) said this:

**My Lords, the language of paragraph (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs.**

7.79 The first question is whether there is an economic state of affairs in existence. Here the relevant question is whether the requirements of the business for employees to carry out work of a particular kind have diminished. In this case there is clear evidence that the scope of the Lightning programme had materially changed. The joint venture was over. The relevant committee in February 2017 took the decision to scale down the operation and to focus on completing the building of the infrastructure in the southern part of York. This was known as T3. The funds to be allocated were limited. £18 million was allocated to the build, which was largely to fund the third-party contract. The balance of the budget, £2 million, represented the scale of the continuing project.

7.80 There is clear evidence of a business decision. The respondent was entitled to make that business decision. The claimant may have disagreed with it, but that is not relevant.

7.81 There was not at that stage a continuing future cities programme. To the extent the claimant had been involved in that, she was concerned with a desktop analysis based on the data obtained from the Lightning pilot. Any consideration of the potential rollout was at a high level and concerned the corporate structure and the financing by merchant banks or investors. The claimant was not involved in that process known as Greenzone and it was never envisaged she would be. It is clear that the scope of the pilot at that stage had materially shrunk and the need for a high-level director had diminished. A second business decision was taken by Mr Webber which involved consideration of the managerial resource necessary for the remainder of the Lightning programme. He was entitled to come to the view that it was no longer necessary to have a director of the claimant's experience and the remaining programme could be managed by a programme manager at a lower grade within band C. This led to saving expense which was important to the respondent at the time. The project has not needed management a higher level since.



- 7.82 The fact that there was a continuing need for security is not relevant, as a diminished need for employees of a particular kind came about because of the changes in the Lightning programme. We have no doubt that there was a diminished need for employees of a particular kind. The relevant kind of employee was high-level management of the Lightning programme.
- 7.83 The second question is whether the dismissal was attributable wholly or mainly to that state of affairs. We have considered the various challenges. We do not accept that the claimant's responsibilities for security were stripped away. She had returned from a secondment to her normal post by the time redundancy was being considered. The fact that it was necessary to continue some management at a lower level does not mean that the claimant's redundancy was not attributable to the state of affairs. It would have been possible for her to take the lower position, but she expressed no interest in it, and did not apply for it when advertised. We have considered the various emails and we have been referred particularly to the email from Ms Wiseman at page 206. Nothing in this email undermines the rationale adopted by Mr Webber or indicates any ulterior motive. Announcement of redundancies can be sensitive. We do not accept that there is any attempt to coach individuals as to the true reason. We find that Mr Webber anticipated the claimant would view the prospect of redundancy negatively. He anticipated she would react negatively, and it is clear from the subsequent events that his fear was well-founded. This does not undermine the fact of the business decisions, or the relevance of the rationale. It is wrong in our view to say there is no documentary evidence explaining the rationale for the decision. The rationale is set out clearly in the consultation letters and the supporting emails. The rationale is fully supported by the overarching business decision by which the Lightning programme was scaled down.
- 7.84 We find that there was a true redundancy situation and that the claimant's dismissal was wholly or mainly attributable to it. The reason, being redundancy, is made out. There is no need for us to consider in the alternative whether it would also be a substantial reason.
- 7.85 We next consider the allegation of unfairness raised. It is first alleged there was a failure to identify the appropriate selection pool. It is the claimant's case that she should have been put in a pool with the three individuals identified as comparators for the purposes of equal pay. This assertion is underpinned by a number of assumptions as follows: the claimant had greater experience; the jobs were at the same level; and the jobs were interchangeable, as demonstrated by her assertion that they constituted like work. We will deal with each of those points.
- 7.86 First, the jobs are not interchangeable. It was never envisaged that they would be. Whilst the respondent had restructured itself in such a way that a number of jobs at various levels could be more easily interchanged, there was never any absolute rule and there is no evidence of

interchangeability at the level of her comparators' roles. We accept that there was some evidence of secondment following the cyber-attack in 2015. Mr Daniel Rynehart was taken from his normal role and he led the frontline response. The claimant then took over part of his role for a period of January 2016. This coincided with the scaling down of Lightning at that stage. However, all this falls short of showing interchangeability in the pool as defined by the claimant. The reality is, as we have already explored, each of the other roles had significantly greater responsibility, and required operational experience. It may be that the claimant was more experienced in change management. However, her experience in no sense whatsoever made her suitable for high-level operational roles and she was significantly less qualified than comparators in that respect. The reality is the claimant did not have greater relevant experience. It also follows that the jobs were not interchangeable. For the reasons we have already explored, it is apparent that there were both operational requirements and specific sector knowledge requirements which would make interchange extremely difficult.

- 7.87 Second, as to the assertion that the jobs were at the same level, that cannot survive our finding on equal pay. There is a clear difference between the roles. The claimant's role involved a limited budget and was concerned with executing a specific pilot project. As part of that, she was required to draw conclusions and give proposals which may be used more widely. It was never envisaged that she would lead any general nationwide rollout, as what that would involve could not have been defined. The comparators, on the other hand, exercised control or influence over much larger budgets and each were dealing with matters which were fundamental to the business at the time. It is possible that had the Lightning programme project been successful and had it led to a large rollout, that it would have become a significant contributor to the business; it was not a significant contributor at the time.
- 7.88 Third, her assertion the jobs were interchangeable is unsustainable. They were different for the reasons explored. The claimant did not have the relevant technical knowledge or operational experience to deal with the other roles.
- 7.89 These matters were considered by the respondent at the time. It is for the respondent to select the appropriate pool. It is necessary for the respondent managers to address their minds to the problem and to act rationally. The claimant was able to make representations. Her representations were fully considered. The decision that the pool should not be widened is one which was open to a reasonable employer and it demonstrates no unfairness. It follows the claimant was, essentially, in a pool of one. She did not suggest, at any time that she should be compared to other employees on a lower grade.
- 7.90 It is said that the outcome was predetermined. This assertion has a number of strands which appear to be the following: she should have been warned earlier; there was no proper consultation; there was a failure to

offer her suitable alternative employment; and she was deprived of the opportunity of applying for other roles.

- 7.91 In considering this, we have regard to the obligation to undertake individual consultation. The purpose of consultation is to allow consideration of alternative employment and to see whether there are ways that redundancies can be avoided. It does not necessarily follow that the claimant should be consulted as to the business decision. It is important that an employee is given sufficient information on which to challenge the selection for redundancy. In order for there to be fair consultation, it is generally accepted the employee must know the following: an indication (i.e. a warning) of provisional selection for redundancy; confirmation of the basis for selection; an opportunity to comment on his or her selection assessment; consideration of alternative positions; and the opportunity to address any other points the employee wishes to raise.
- 7.92 We do not accept the claimant's contention that for there to be a fair warning the claimant must be told of a business decision at the first possible moment. In this case, the original decision to reduce the scope of the Lightning programme occurred in February 2017. However, that in itself did not mean the claimant was at risk of redundancy. Mr Webber considered the various options. It is not inappropriate for the respondent to reflect on the position, and to consider the implications, both with the relevant managers and HR. It is not inappropriate for the respondent to consider the potential fallout when starting a redundancy process. There may be sensitivities when senior employees are involved. In this case it was reasonable for the respondent to take some time to consider its position and whilst it is possible that the claimant could have been told earlier, we do not view any delay in this case as constituting any unfairness. The approach was one open to a reasonable employer, and it is not for us to substitute our view. The claimant was told at an appropriate time, and as told in enough time to allow for a meaningful consultation.
- 7.93 To the extent the claimant suggests she should have been told earlier so that she could argue or dispute the business decision, that is not a matter relevant to consultation, and does not lead to unfairness.
- 7.94 We accept that there were other redundancy programmes at the time. Had those specific redundancy programme concerned the claimant's work, and had she not been warned earlier, that could have created a difficulty. However, the other potential redundancies were entirely independent and irrelevant. To the extent the claimant now asserts that she could have applied for other roles, we find no evidence in support of that. All the roles were subordinate. The fact that the claimant showed no interest, at all, in applying for the programme manager's role for Lightning in our view demonstrates that any suggestion she may now have that she would have applied for other junior roles is disingenuous.

- 7.95 The claimant was told of the reason for her selection. She was informed of the scaling down of Lightning and the limited future scope. She was informed of the rationale concerning the level of management for the ongoing project.
- 7.96 The claimant had ample opportunity to comment on the selection process and assessment. There was an informal meeting. There were two consultation meetings. She put in written submissions. There was an appeal process concerning the redundancy itself. She had ample opportunity to make representations. She made detailed representations concerning all relevant matters. She challenged the pool. The prospect of other employment was raised. Her complaints were responded to in writing and the appeal points were fully investigated and rejected for rational reasons. The outcome was, no doubt, disappointing. However, the respondent is not obliged to accept the claimant's arguments. It is obliged to consider them with an open mind, and the overwhelming evidence is that it did.
- 7.97 As regards alternative positions the claimant identified, they were considered specifically on appeal. We should consider those briefly now.
- 7.98 It is clear that the most appropriate suitable alternative role was the programme manager for Lightning. This was advertised. The claimant could have applied for it. At no time did she indicate any interest in the role. The height of her submission is that the failure to send her the job description, in some manner, prevented her from applying. That argument is unsustainable. She knew the job existed. It was advertised. She could have applied. She did not apply because she chose not to.
- 7.99 We accept that the respondent does have a duty to behave in a proactive manner when it comes to alternative employment. However, the claimant made it plain at an early stage that she was not interested in redeployment. Mr Webber brought the possibility of redeployment to her attention and formed the view, on rational grounds, that the claimant had no interest. The claimant now presents her case on the basis that, in some manner, she should have been offered a variety of jobs at a lower level, despite her total lack of engagement in the process of potential redeployment. If an employee makes it plain to an employer that he or she is willing to accept any type of suitable employment, anywhere in the organisation, at any level, it may be possible to criticise the employer for not identifying every possibility. However, where an employee shows general hostility, and no interest in the process of redeployment at all, it is difficult to criticise the employer for simply ensuring that the claimant could be aware of any vacancies.
- 7.100 Finally, this is a situation where the claimant had an opportunity to raise all the matters that she wished to raise. She had that opportunity at the two consultation meetings and at the appeal. Thereafter she raised a grievance, which was not directly relevant to the redundancy, nevertheless it allowed her to make further representations. In the circumstances, we

are satisfied that the consultation in this case was appropriate and one open to a reasonable employer.

- 7.101 There is criticism of Mr Cheng's appeal. We have already considered this in our finding of fact. Mr Cheng reviewed the claimant's appeal carefully. The claimant was given an opportunity to develop her arguments at the hearing. Mr Cheng carefully researched the relevant points arising. He gave a detailed and rational decision. It appears to us that this was a particularly careful, thorough, and competent investigation. Underpinning the claimant's appeal is her assertion that the Lightning project was ongoing at a high level. It was not, and Mr Cheng was entitled to come to that decision.
- 7.102 There is a general assertion that the claimant should have been allowed to comment on the evidence obtained by Mr Cheng during the redundancy appeal. That would be a very unusual position for an employer to adopt. There are many occasions when there are meetings in the context of redundancy or disciplinary matters when matters are identified where it may be appropriate for the decision maker to seek further information. There is no general rule that the employer should be allowed to comment on the information obtained as a result of the necessary investigation. There is no unfairness in the procedure adopted by Mr Cheng.
- 7.103 We reject any assertion that the appeal was predetermined. There is no credible evidence for this.
- 7.104 We do accept that there are many occasions when a business takes a decision at a high level leading to a particular function being seriously affected. If that function is scaled back it may be that any senior manager responsible will no longer be required. In many cases, it will be inevitable that there will be redundancies. However, a situation which is likely to lead to an inevitable outcome is not the same as a situation which is predetermined. It appears that the claimant hints at there being an ulterior motive, but her case has not been pursued on that basis and there is no evidence on which we could find it.
- 7.105 It was agreed at the hearing that we would not consider any Polkey related issues.
- 7.106 We have found there was a redundancy situation and that redundancy was the sole or principal reason for the claimant's dismissal. As regards the fairness of the procedure adopted, to include the consultation, we find that the procedure adopted by the respondent was one which was open to a reasonable employer. Dismissal was within the band of reasonable responses open to a reasonable employer. It follows that we reject the allegation that the dismissal was unfair.

**Future conduct**

7.107 The parties should now consider the equal value claim and should let the tribunal have their proposals.

Employment Judge Hodgson

Dated: 8 April 2020

Sent to the parties on:

08/04/2020

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For the Tribunal Office