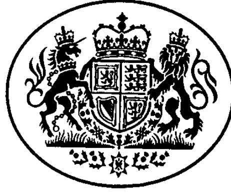

EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4106954/2019

Held in Glasgow on 5 September 2019

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Employment Judge A Kemp

15 **Ms A Donaldson** **Claimant**

The Geo Group UK Limited **Respondent**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that there were material differences other than sex for the difference in pay between the claimant and her comparators for the purposes of section 69 of the Equality Act 2010, and the Claim is dismissed.

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REASONS

1. This Claim is one for equal pay for like work under the Equality Act 2010. The Tribunal had ordered that there be a Preliminary Hearing to address the
35 material difference defence that the respondent had pled in its Response Form by Notice of 25 July 2019.

2. The claimant was represented by Mr Heggie, who confirmed that he would not be leading evidence. The respondent was represented by Mr Singh who confirmed that he would lead evidence from Ms Joanna Evans of the respondent. I am grateful to both of them for the clear and helpful way in which the hearing was conducted.

The evidence

3. A bundle of documents was provided. Evidence was given by Ms Evans.

The facts

4. I found the following facts to have been established:

5. The claimant is Ms Alison Donaldson.

6. The respondent is The Geo Group UK Limited.

7. The respondent provides justice and custodial services to government departments, being the Home Office (HO) and Ministry of Justice (MoJ) and by way of sub-contract to providers of such services to those departments.

8. The contracts with the HO held by the respondent were in respect of Immigration Removal Centres (IRCs). One such contract was for the IRC at Dungavel, near Glasgow. The IRCs housed those whose right to remain in the UK had been held to have expired, or not to have existed, and they were detained pending deportation from the UK.

9. The contracts held with the MoJ were in relation to prisons, and particularly in relation to those convicted of criminal offences who had been given sentences of imprisonment.

10. The claimant was employed as a Detainee Custody Officer (DCO) under a contract at the IRC at Dungavel. She had a contract of employment with the respondent so stating. She also had a Job Description setting out her duties.

11. The respondent also operated an IRC at Harmondsworth, near Heathrow Airport, London. They had other IRCs in the south of England, including Campsfield House in Oxford. Those working at IRCs as DCO in the south of England were paid a higher salary than the DCOs working at Dungavel as a result of market conditions operating in the south of England. Those working at Harmondsworth as DCO for example were paid a weighting to reflect that. The terms and conditions for staff at Dungavel IRC were the same whether the employee was male or female. The terms and conditions for staff at Harmondsworth IRC were the same whether the employee was male or female. The difference in terms and conditions arose from the geographical location of the IRC.

12. In order to operate as a DCO, the individual required to be accredited to do so. That included being assessed on a three yearly basis for control and restraint techniques. A refresher course was undertaken to maintain that assessment in force. The duties of DCO, which were the same whether at Dungavel or another IRC, included escorting the detainee outside the IRC but within the general area of it such as for medical or dental appointments.

13. The respondent operated a separate role of Detainee Escort Officer (DEO) under the HO contracts. The escort duties included taking detainees out of the IRC, such as to medical or dental appointments, but also to places further afield throughout the UK, and could include travel overseas in order to return the detainee to his or her country of origin. In order to be able to do so, the individual required to be accredited for such escort duties. That included an assessment on first aid issues, on a three yearly basis, with a refresher course undertaken to maintain that in force. In light of the additional duties, and requirements for training, a DEO was paid a higher salary than a DCO. A DEO could undertake the duties of a DCO, but a DCO could not undertake

the duties of a DEO. The terms and conditions for a DEO were the same whether the employee was a male or female.

14. Under contracts held with the HO, or by sub-contract from a provider to the HO, the respondent also operated a role of Prisoner Escort Officer (PEO). The role involved escorting prisoners who had been convicted and sentenced to a term of imprisonment to and from prisons, hospitals, courts and other premises. In order to be able to operate aa a PEO an assessment was undertaken and accreditation given. The training required for it included one to two weeks of escort training. Where that accreditation was in relation to a sub-contract, it was maintained by the principal contractor, not the respondent. A PEO was paid a higher salary than a DCO or DEO in light of the additional responsibilities and training required. The terms and conditions for a PEO were the same whether the employee was male or female.

15. The respondent operated initially a sub-contract from Serco, a major contractor to the government, with Serco holding a contract from the MoJ. The respondent employed PEOs under that sub-contract. Those employed as PEOs were paid higher salary than for DEOs and were paid a weighting when working in the south east of England.

16. Each of the accreditations for DCO, DEO and PCO were described by the respondent as “badges”, such that an employee who was accredited as all three was described as “triple-badged”, and an employee who was accredited as DCO and DEO was “double-badged”. The claimant was single badged, in respect of DCO alone.

17. The respondent’s contract with Serco for provision of PEOs terminated in January 2016 when the HO decided that its providers were not entitled to sub-contract for such a role. The respondent was however hopeful that the HO would reverse that decision, or that other opportunities for PEOs would arise at some point. In order to be able to respond to such opportunities they wished to retain staff who were badged as PEOs. There were about ten such PEOs who were at that stage working in the south of England.

18. The claimant's continuous employment dated from 4 March 2003, she having transferred to the respondent under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006. Her employment continued until its termination on 6 December 2018.

19. The claimant was paid at the top of the scale for a DCO at Dungavel IRC.

20. The claimant was paid less than the salary of her comparators, who are referred to below.

21. In February 2016 four employees of the respondent, namely Richard Wells, Stephen Moran, Chris Walker and Majid Nazir were all employed as PEOs or DEOs. They were all triple badged. They had worked under the Serco sub-contract, or in the case of Mr Moran at the Campsfield IRC which had closed. At that stage, and earlier, the respondent was hopeful that it may be able to obtain new contracts from the HO, MoJ or as sub-contractor. It wished to retain qualified and experienced staff particularly those who were PEOs in order to work on such contracts if awarded them, and to have the resources to make a realistic tender for them. There had been about 12 IRCs in the UK, but latterly the number was reduced to 8. All of those employees were offered to work at Dungavel IRC on a temporary basis, carrying out the role of DCO, in the hope that if work was won in the south of England they would be transferred to work there and resume working as a PEO or DEO. In the meantime they remained living in the south of England, but travelled to Dungavel and lived in a shared house near the IRC when working, before returning to their homes. They were maintained on the terms that they had received as PEOs, in order to retain them in employment, and were paid an allowance and travel expenses.

22. In March 2017 Mr Wells was approached to undertake a different role by a competitor of the respondent, and he resigned from them.

23. In 2017 a tender opportunity arose which the respondent wished to engage with. It was a tender to the HO for services at two IRCs in Gatwick, known as the Gatwick Estate. After initial work on the tender it was submitted in summer 2017. In the event that their tender was successful, as they were hopeful, they required staff to mobilise on that contract. To do so they required DEOs amongst others.

24. Mr John Coleman was employed by the respondent for a period of five years initially, working at the Harmondsworth IRC. When the respondent lost the tender for services at that IRC he transferred under the 2006 Regulations to the successful tenderer, Mitie. When working with the respondent and with Mitie, Mr Coleman was employed as a DEO. He was double badged. He was paid a higher salary than that of the claimant working as a DCO. He was also working in the south of England and paid a weighting allowance.

25. In November 2017 Mr Coleman approached the respondent and offered his services to work for them. He was still employed by Mitie when he did so. The respondent wished to employ him. Mr Coleman lived approximately 40 miles from Gatwick, and would be able to work on that contract if the tender by the respondent succeeded. The respondent decided to offer him a contract as DCO working temporarily at Dungavel IRC, but with a view to his transfer to Gatwick to work as a DEO there if their tender succeeded. They maintained his then salary, such that he was paid at the DEO rate for the south east of England, although working at Dungavel. He was also paid an allowance and travel expenses, and lived in a shared house with Mr Walker, Mr Moran and Mr Nazir.

26. In about January 2018 the respondent was informed that the tender process for Gatwick Estates would not be progressing, such that no award was to be made under it and that the then incumbent provider would be awarded an extension. They were thus aware that the Gatwick tender would not succeed.

27. In the period January to April 2018 the respondent considered how to react to the lack of success with the Gatwick tender, and the lack of any other new

business opportunities having arisen, or being likely to arise in the immediately foreseeable future. They commenced informal consultations with the four members of staff who had been retained, working as DCOs but paid at their former terms and conditions, about becoming a permanent DCO on the terms and conditions for that applicable in Dungavel. Of them, only one, Mr Coleman, was prepared to accept the offer of a permanent position at Dungavel IRC on the terms and conditions applicable to such a role there. He did so after his wife was also employed at that IRC, and in April 2018 he transferred to permanent Dungavel terms and conditions, such that he had a reduction in salary and was paid less than the claimant.

28. Mr Coleman transferred to Dungavel, together with his wife. He relocated to Hamilton in order to do so.

29. The remaining three employees, Mr Nazir, Mr Walker and Mr Moran intimated that they did not wish to work at Dungavel on reduced terms. The first respondent considered how to respond to them.

30. On 25 June 2018 the respondent received instructions from its US parent to formalise discussions with those staff with a view either to such a permanent transfer or redundancy. Consultations formally commenced with those three members of staff, and all three employees chose redundancy. Their employment with the respondents terminated on 31 August 2019 by reason of redundancy following that consultation. Up to that point they had been maintained on their then existing terms and conditions, by which they were paid higher salary than the claimant, although working as DCOs in fact at Dungavel IRC.

Respondent's submission

31. Mr Singh provided a written submission, and the following is a basic summary. He argued that there were factors other than sex that led to the differences in salary. He referred to the hiring of employees in the south east of England, the loss of the contract there, the desire to retain the skills, experience and badging of the comparators, both for the Gatwick tender, and more generally should other opportunities arise. Their workplace changed temporarily to Dungavel to maintain their employment, but with a view to their returning to the south east should the opportunity to do so arise. They were all triple badged, with the experience of working as escort officers, which the claimant did not. Mr Coleman had been previously an employee, and was recruited again with a view to working on the Gatwick tender if it succeeded, and temporarily working at Dungavel as DCO where there were vacancies. He too had been an escort officer, as DEO not PEO, which the claimant had not been. The initial higher rates for all had been compelled by market forces. In 2018 there were discussions after the Gatwick tender was not successful, and Mr Coleman accepted the offer of DCO terms at Dungavel, but the others had not. Mr Wells had earlier resigned. These factors were material. He referred to ***Rainey, Bowling** a*nd ***Hamilton*** (referred to further below).

Claimant's submission

32. The following is a basic summary of the submission made. Mr Heggie noted the terms of the Response Form, and argued that that is what the respondent had given notice of. That was that there had been a necessity to pay staff to recruit and retain for the Gatwick contract. There had been no argument as to short staffing in Dungavel unril this hearing. He argued that the respondent had not proven its case. He referred to paragraph 18 of ***Marshall*** (referred to further below). Although the respondent had made much of the triple badged status, that was not required for the Gatwick contract. No vouching had been provided. There was no evidence that the badging had been kept up to date. By reference to ***Shaikh*** he argued that the evidence did not support the assertions made by the respondent. If that were not accepted, he argued that in any event the reason given could only apply up to January 2018 when the Gatwick tender had been known to have been unsuccessful. After that there

was no proper justification in pleading or evidence for the fact that the comparators remained on a higher salary. He referred to ***Beneviste*** and the quotation at page 627 letter G in support of that argument.

5 **The law**

33. Section 69 of the Equality Act 2010 provides:

“69 Defence of material factor

10 (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
15 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
20 a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

(3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.

25 (4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex.

(5) “Relevant matter” has the meaning given in section 67.

30 (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.”

34. In commenting on the predecessor provision, section 1(3) in the Equal Pay Act 1970, guidance was given in ***Rainey v Greater Glasgow Health Board***

[1987] ICR 129 that the word “material” meant “significant and relevant”. That was concerned with the recruitment of a male employee who would not move from his then employer for less than the current salary, which was higher than that paid for the existing female employee. Those circumstances were held to have fallen within the terms of section 1(3) in the House of Lords.

35. In the case of ***Glasgow City Council v Marshall [2000] IRLR 272,*** also heard in the House of Lords, Lord Nicholls said the following at paragraph 18:

> “[A] rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be the difference of sex.”

36. The burden then passes to the respondent to establish its defence under section 1(3), now section 69 of the 2010 Act, and gives rise to a three stage process, which was explained as follows by Lord Nicholls:

> “The burden passes to the employer to show that the explanation for the variation is not tainted with sex. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine, and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a ‘material factor’, that is, a significant and relevant factor. Third, that the reason is not ‘the difference of sex’. This phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, the factor relied upon is […] a ‘material difference’, that is, a significant and relevant difference between the woman's case and the man's case.”

37. The then Mr Justice Underhill summarised the developed law as it was under section 1(3) of the Equal Pay Act 1970 in ***Newcastle Upon Tyne NHS Hospitals Trust v Armstrong & Ors [2010] ICR 674,*** at paragraph 19:

> "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."

38. He also summarised the law further in ***Bury Metropolitan Borough Council v Hamilton [2011] IRLR 358*** at paragraph 14 (which was upheld by the Court of Appeal in ***Council of the City of Sunderland v Brennan [2012] IRLR 507***).

39. In ***Benveniste v University of Southampton [1989] IRLR 122,*** heard at the Court of Appeal, because of financial problems affecting her employer, Dr Benveniste was appointed as a lecturer at a point on the lecturers' salary scale which was lower than would have been normal, given her age and qualifications. Her claim for equal pay, based on 'like work' was upheld by the Court of Appeal. It was held that the fact that the University had discretion as to where on the salary scale a lecturer ought to be appointed did not invalidate her claim. She was paid less simply because the University had insufficient money to pay her as she merited. When that temporary state of affairs had come to an end, the justification for paying the woman less than a man doing work of equal value also ended.

40. When the original explanation has a continuing effect the analysis may be different. ***In Secretary of State for Justice v Bowling [2012] IRLR 382,*** the EAT said this:

> "Ms Bowling and her comparator started in the same job at about the same time, but her comparator was placed two points above her on the applicable incremental scale because of his substantially greater skill and experience. By the time of the next pay review C had matched the performance of her comparator. The tribunal found that the original reasons for the differential ceased to be a material factor (and thus the basis for a s 1(3) defence) after the claimant had been in her job for about a year. The EAT (Underhill P) disagreed. The explanation for the differential had a continuing effect in the context of an incremental pay scale. 'The explanation was not time-limited; on the contrary, the initial decision to place [the comparator] two points up the scale had consequences for the following years.' (per Underhill P at paragraph 8) Thus the employer had satisfied the burden of showing an explanation that was not 'tainted by sex', and did not have to show justification. The fact that the Secretary of State might, in theory, have acted to remove the pay differential was nothing to the point—what was important was the explanation for the continuing differential, and that had nothing to do with gender."

Discussion

41. Ms Evans gave what I considered to be credible and reliable evidence. Whilst the claimant is correct that more in the way of supporting written evidence might have been provided, and I was surprised that there was no written evidence of issues such as the consultation with the three members of staff, the agreement with Mr Coleman, the departure of Mr Wells, the tender for Gatwick (where it was only said that the submission was summer 2017), and the discussions over business strategy after January 2018. I was however, despite those matters, prepared to accept that data had been lost from a virus, and that some documents were retained by the principal contractor Serco. More importantly I consider that Ms Evans gave candid evidence, had the knowledge of matters from her role as HR director, and I accepted what she said.

42. In my judgment the background to matters is relevant. The respondent recruited the comparators initially for work in the south of England. There was a weighting, to take account of different market conditions there. That weighting for that reason was unexceptional. It had the result that those recruited to work in that area of the UK were paid more than those recruited to work in Dungavel IRC, such as the claimant, including those who performed the same role as she did, being as DCO.

43. The comparators however did not work only as DCO, but as DEO and/or PEO. Those roles were different, involved additional training and responsibility, and were paid at a higher rate. I was satisfied that there were genuine reasons for those differences that were not tainted by sex. A male was paid the same as a female for each role in each location where they performed the same job and were in the same circumstances. Longer service might give a greater actual salary, but the ranges were the same.

44. Thereafter the contracts on which the comparators had worked were lost. One was because of an MoJ instruction not to sub-contract, the other because a tender was lost to a competitor, Mitie. The decision was taken to retain some staff, including the comparators (the position of Mr Coleman is somewhat different, as explained below). The reason given for doing so, which I accept, is that at that stage there was both a tender ongoing for work at Gatwick Estates, which the respondent was hopeful of success on, and generally a hope of other work from other opportunities that may come up, including if the MoJ reversed its decision that its contractors could not sub-contract for the PEO role.

45. Those were, I consider, genuine reasons, and were not a sham. They were separately I consider ones that were reasonable, although that is not the test.

46. The second issue is whether the explanation given is one that may itself involve sex discrimination.

47. With hindsight it is clear that the hoped for opportunities did not arise, but that does not mean that there was not at the time a genuine hope for them. As such, retaining those staff who had triple or in one case double badging, and experience, was understandable commercially. It both provided a resource to refer to in a competitive tender, should that happen, and the ability to mobilise quickly and effectively if the opportunity arose. There was a temporary employment of staff in Dungavel but with the hope that that would lead to new roles again in the south of England at the DEO or PEO level. The pay rates for PEO, DEO and DCO were different on account of the different levels of responsibility, duties and training. Differences between salary scales in the south of England on the one hand and Dungavel on the other were due to differing market forces. Males and females in each location and each role were paid at the same salary scales. I consider that there was no sex discrimination.

48. The third issue is whether or not the basis of the defence changed, in January 2018, when the decision on the Gatwick tender became known. Whilst the respondent might have responded to that with greater alacrity, I see nothing unusual in the timing of what did occur. There was clearly a need to consider matters in light of that new situation and the developing situation in other respects, or perhaps more accurately the lack of anything developing in other respects such that there were in fact at that stage no new business opportunities. In April 2018 discussions were started to try and persuade the staff onto standard Dungavel contracts, involving for them a pay reduction. That, again unsurprisingly, did not succeed. After instruction from the parent company, the consultation process became formal. One person, Mr Coleman, accepted. He moved to the standard terms at Dungavel, such that he was paid less than the claimant. Three others did not, and left on redundancy terms. Had they not done so, but followed Mr Coleman, they too would have been on terms no more favourable than the claimant. One person, Mr Wells, had left earlier to take up a different opportunity. The fact that the three employees did decide on redundancy, rather than accept reduced terms, is consistent with their stating in April 2018 that they would not agree to lesser terms, and is I consider further support for the conclusion that the explanation

is not one that is tainted by sex discrimination, but a product of the background circumstances.

49. I conclude that the respondent has proved that there were material differences between the claimant and her comparator that arose other than for reasons of sex. Those reasons are firstly the additional badges that the comparators had, secondly their level of experience in the roles of DEO or PEO or both, and thirdly the fact that they had been initially recruited for work in the south of England with a higher salary offered on account of market conditions there. For Mr Coleman, he was recruited from the south east, on what had been hoped would be a temporary role as DCO in Dungavel before becoming DEO in Gatwick. When that did not happen, after discussion, he agreed to the transfer and lower salary set out above.

50. The factors are material. They are not related to the sex of the claimant, as explained in ***Armstrong.*** The same situation would have pertained were the comparators female. They happened to be male. What mattered was not their sex, but the background circumstances of their recruitment in the south of England and carrying out duties at a higher level, if I may describe it as that, and retention in the hope of being redeployed, with work at Dungavel IRC as DCO carried out in the hope that it would be temporary and lead to a new role as DEO or PEO. When that did not take place, albeit after not a small period of time, the basis of the employment either changed (in the case of Mr Coleman) or terminated (for the other three, Mr Wells having earlier resigned).

51. I consider that the circumstances are materially different to, and distinguishable from, those in ***Beneviste***. There, the pay of the employee had been artificially restricted because of financial considerations. Those considerations having later terminated, the basis for the material factor defence evaporated in respect of her comparator. Here, the pay of the employee was at the top of the relevant scale for Dungavel, but her comparators working there were paid effectively on a historic scale given the geographic and working circumstances that applied to them originally. The

reason for that pay being maintained was to retain them as employees, and in the case of Mr Coleman to re-employ him, with the circumstance being the hope of additional work from the Gatwick tender, and any other opportunities, as has been referred to above. There was a need to address not the pay of the employee, as in ***Beneviste,*** but that of the other employees, the comparators, given the circumstances that the hoped for work did not materialise. That is a material distinction, and I note that ***Bowling*** also considered and distinguished ***Beneviste***.

Conclusion

52. The respondent has I consider proved its defence under section 69(1) of the Act, and no issue under section 69(2) arises.

53. In light of that, the claimant's claim for like work cannot succeed, and it is dismissed.

A Kemp
Employment Judge

12 September 2019
Date of Judgment

Date sent to parties **18 September 2019**