`

EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mr M J Parr	**AND**	The Home Secretary

Heard at: London Central by CVP

On: 25 January to 1 February 2021 and in Chambers on 2 and 23 February 2021

Before: Employment Judge Nicolle
Members: Ms C James
Ms H Craik

Representation:

For the Claimant: S Robertson, of Counsel
For the Respondent: Mr B Collins QC, of Counsel

JUDGMENT

The claims for equal pay, direct race and direct sex discrimination fail and are dismissed.

REASONS

The Hearing

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

2. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. Members of the public attended the hearing accordingly.

3. The parties and members of the public were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal.

4. A request was made by a journalist to inspect the witness statements which was accommodated.

5. The participants were told that it is an offence to record the proceedings.

6. The Tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

7. From a technical perspective, there were no major difficulties. Whilst the Tribunal encountered some difficulties with background noise during the hearing these matters were regarded as an irritant rather than an obstacle to the conduct of the proceedings but necessitated several interruptions

8. After addressing preliminary issues, the Tribunal spent the entirety of the first day reading the witness statements and extensive documents within the bundle as highlighted by Counsel. We also read the respective opening submissions of Counsel.

9. The hearing was adjourned after lunch on Thursday 28 January because of Ms Robertson becoming ill and she was not able to continue until Monday 1 February.

10. There was an agreed bundle comprising approximately 1000 pages. This was either viewed in physical or electronic format, but all participants had access to all the documents.

11. The Claimant together with Sir Thomas Winsor, Chief Her Majesty Inspector of Constabulary (HMIC) (Sir Thomas) gave evidence. Dr Miv Elimelech, Police Integrity and Powers Unit (PIPU), Crime and Policing Group (Dr Elimelech), Zoe Wilkinson, Head of HO Sponsorship Unit (Ms Wilkinson) and David Lamberti, Director, Crime and Policing Group, July 2014-2019 (Mr Lamberti) gave evidence on the Respondent's behalf.

12. The Tribunal was provided with detailed written closing submissions by Counsel for both the Claimant and the Respondent which were spoken to during oral submissions. The Tribunal considered the written submissions after the oral submissions.

Agreed List of Issues

Equal pay

13. Was the Claimant engaged on like work within s.65(2) of the Equality Act 2010 (the EQA) with that of Her Majesty Inspector of Constabulary (HMI) Zoe Billingham (Ms. Billingham), HMI Drusilla Sharping (Ms. Sharping) and HMI Wendy

Williams (Ms. Williams) between 1 August 2016 and today? The Claimant was also an HMI. The Respondent does not dispute that the Claimant was engaged in like work with these comparators and that he was, and continues to be, paid less than them.

14. Has the Respondent shown that the difference between the Claimant's terms and that of his comparators was because of a material factor, reliance on which does not involve treating the Claimant less favourably because of his sex than the comparators (s.69 EQA) The Respondent relies on the material factors set out below:

(a) the adoption and application of new salary scales;

(b) the need for public sector pay restraint;

(c) market forces;

(d) pay protection arrangements; and

(e) the need to maintain a flexible remuneration system which operates within public sector pay policy and spending constraints, while also respecting the existing entitlements of HMIs.

15. If the Respondent's material factor defence is accepted, does it account for the whole of the difference between the Claimant and his comparators?

Sex/ Race Discrimination

16. Have the Claimant's complaints of sex and race discrimination been brought in time?

17. If not, is it just and equitable to extend time?

18. Was the Claimant treated less favourably than the Respondent treats or would treat others because of his race/ sex? The allegation of less favourable treatment is the Claimant being paid according to the new salary scales (the Claimant says that although the Respondent applied these new salary scales to him, they were not applied to other HMIs even after 2016). The Claimant does not accept that the salary scales were new.

Findings of Fact

Background Matters

The Claimant

19. Prior to being appointed as an HMI by the Respondent on 1 August 2016 on a salary of £133,983 the Claimant had been a public servant for more than 35 years and most recently had been a Rear-Admiral in the Royal Navy. He basic salary in the Royal Navy had been £120,000 together with various benefits and at the time he applied for a position as an HMI he had retired from the Royal Navy.

The Role of HMIs

20. HMIs are appointed by the Queen on the advice of the Home Secretary and the Prime Minister, in accordance with s.54 of the Police Act 1996. As independent holders of Public Office under the Crown appointed under Royal Warrant, they are neither Civil Servants nor Police Officers. The Home Secretary is ultimately responsible for appointing such number of HMI as he/she, with the consent of Her Majesty's Treasury (HMT), determines. The Home Secretary sets the terms of their appointments, save that s.54(5) of the Police Act 1996 requires HMT's consent to the remuneration packages of HMIs.

21. The process of appointment of HMIs follows a standard procedure for public appointments operated by the Home Office. An advertisement is published, a long list of candidates is sifted, and a short list is produced of candidates suitable for interview.

Individual HMIs in the relevant period

Roger Baker-retired in 2014
Ms Billingham 2009 – present
Ms Sharpling – 2009 until September 2020 (seconded to IICSA 2015 – 2020)
Stephen Potter – 2012 – 2016
Michael Cunningham – 2015 – 2017
Ms Williams – 2015 – present
The Claimant – 2016 – present
Phil Gormley – 2018 – July 2020

Relevant Policy Documents

Review body on senior salaries March 2012

22. This includes at s1.9:

> "Existing very senior managers "VSM" will remain on the old pay system. This will inevitably mean that some VSMs working alongside each other in similarly weighted jobs are paid very differently depending simply on when

they were appointed. This is very poor employment practice and may well lead to equal pay claims if men and women are paid differently for work of equal value".

The Civil Service Code as updated 16 March 2015

This provides for Civil Service values to include integrity, honesty, objectivity and impartiality. Under the heading integrity reference is made to keeping accurate official records.

Governance Code on Public Appointments December 2016

23. At s.2 this sets out that the principles of public appointments as comprising Ministerial responsibility, selflessness, integrity, merit, openness, diversity, assurance and fairness.

The existing HMIs

24. Ms Billingham was first appointed on 29 September 2009 and her remuneration during the material time was £185,791. Ms Sharping was also appointed on 29 September 2009 and her remuneration was £190,529. Ms Billingham and Ms Sharping are both white. The reason why Ms Sharping's remuneration is higher than Ms Billingham's is because Ms Billingham forfeiting a salary increase at a time of austerity.

25. Michael Cunningham (Mr Cunningham) was appointed on 1 September 2014. His remuneration is £185,791, and he is also white.

26. Sir Thomas was appointed as HMIC on 1 October 2012 and his remuneration is £199,995. He is white.

Downward pressure on HMI pay

27. Dr Elimelech said that there had been downward pressure on HMI salaries from 2009. She said that Ms. Billingham and HMI Roger Baker (Mr Baker) who retired in 2014 did not take an uplift to which they were entitled, and their salaries remained at £185,791. The other two HMIs did, however, accept the pay rise. Otherwise, all would have been paid the same.

28. She said that there had been a practice of HMI pay being referenced against Chief Constable pay. This was because prior to the appointment of Ms. Sharping and Ms. Billingham all HMIs had been former Chief Constables. She was strongly of the view that the roles of HMIs were not comparable at a day-to-day level and in terms of personal responsibilities with those of Chief Constables who she considered had greater responsibilities.

29. Ms. Wilkinson referred to intense pressure from Sir Thomas to pay new HMIs at the top of the salary scale.

30. She said that the pressure to drive down HMI salaries had been constant and consistent and was increasing. She said that HMI salary anomalies would even out over time.

31. Mr. Lamberti was aware of downward pressure on HMI pay from 2009.

32. He denied that there was a direct correlation with Chief Constables' pay. However, he accepted that Chief Constable pay did influence HMI pay. He said it was not necessary to obtain Treasury approval providing an HMI appointment was within the permitted range.

The appointment of Mr Cunningham

33. In around March 2014 it was confirmed that Mr. Baker intended to retire following expiration of his Royal Warrant in September 2014.

34. A letter dated 27 March 2014 from the Rt Hon Theresa May, the Home Secretary May 2010-July 2016 (Mrs May) to the Rt Hon Danny Alexander, Chief Secretary to the Treasury (CST) 2010-May 2015 (Mr Alexander) included:

> "I am seeking your agreement to appoint a new HMI at the rate that the current post holder, Mr Baker is paid. His current salary is £185,971 and I believe his replacement should be paid an equal amount. While we recognise the need to bear down on senior salaries, this salary is comparable to that received by the Chief Constables of West Midlands and Greater Manchester, Assistant Commissioners of the Metropolitan Police and the Deputy Director General of the National Crime Agency which are posts of equal importance".

She went on to say:

> "Since 2010 HMIC have taken important steps to cut staffing and organisational costs".

Emails of 19 May 2014

35. Stephen Polly, Private Secretary (Mr Polly) sent an email at 9:17 AM to Mary Calam, DG, Crime and Policing Group, 2013-2015 (Ms Calam) and Dr Elimelech and copied to others. He stated:

> "We should distinguish between the new appointment and the re-appointments. Pay freeze since 2009, x% additional workload, impact on the programme if they go".

36. In an email later that day from Ms. Calam to Dr Elimelech and Mr. Polly she stated:

> "CST is routinely demanding the reduction of public appointment salaries at recruitment of new appointees.

> But I don't think there will be any budging the Chief Secretary to the Treasury (CST) from a desire for at least some reduction for the new appointment".

37. A submission document was produced by Mark Lomas, PIPU, Crime and Policing Group (CPG) (Mr Lomas) dated 19 May 2014. This included:

> The CST has rejected our proposal to maintain the current salary level for the new HMI appointment. The CST is keen to apply downward pressure to HMI salaries.

38. He set out a recommendation for the new appointment which was to propose a salary scale of £165,000-£185,000 but to push to reappoint Ms Sharping and Ms Billingham on their existing salaries but agree to apply downward pressure when these post holders leave office.

39. The submission was cleared by Ms Calam and then forwarded to Mrs. May.

40. In a memorandum dated 21 May 2014 sent by Ms. Calam to Sue Gray, Senior Civil Servant, Cabinet Office (Ms Gray) the following was stated:

> "We have made a revised proposal to the Home Secretary of a salary of £165,000-£180,000, with an accompanying clear expectation that the appointment should be at the lower end of that scale (but allowing for some negotiation with the successful candidate if needed)".

41. In an email from Dr Elimelech to Ms Calam and others dated 23 May 2014 she stated that it was likely that the 2009 salary would apply for the new HMI appointment.

42. Dr Elimelech said that it was for the Home Secretary and CST to determine HMI pay. This was not a matter to be determined by Sir Thomas.

43. It transpired that Mr. Cunningham; the successful candidate was appointed at the preexisting salary for HMIs with effect from 1 September 2014.

44. Dr Elimelech said that it had been quite a relief that CST had accepted the salary proposed for Mr. Cunningham but that there was on going downward pressure on pay from CST.

<u>Appointment of Ms. Williams</u>

45. In a letter from Ms Calam to Sir Thomas dated 16 October 2014 she referred to the impending appointment of Ms. Sharping to become a panel member for the non-statutory inquiry, which preceded the Independent Inquiry on Child Sexual Abuse and the need for a further HMI appointment. She stated:

> "The appointment would be on the same standard terms and conditions as the existing HMIs and we would seek the same level of remuneration as HMIs currently receive".

46. In a submission prepared by Lindsey Marks, HR, Team Leader, Senior Civil Service (SCS) Recruitment and Public Appointments (Mr. Marks) dated 31 October 2014 he set out considerations for the proposed new HMI appointment. At paragraph 6 of his submission, he stated:

> "Any difference in the rates of pay of the various HMIs would need to be reasonable and (assuming it would result in HMIs of different genders receiving different rates for effectively the same work) it would need to be objectively justified to avoid breaching equal pay legislation".

47. A recommendation was made that the new HMI role should be remunerated at £185,791 as per the appointment of Mr Cunningham.

48. In a further submission from Mr Lomas dated 10 December 2014 he included the following recommendation/summary:

> "That you note HMTs position and agree to recruit for the replacement HMI using a salary scale of £170,000-£185,791".

49. In the section entitled Consideration the following comments were included:

- The Treasury have indicated to officials that they are keen to see some downward pressure applied to HMI salaries and that this appointment is an ideal opportunity to start to do so.

- For example, if the preferred candidate is currently paid significantly below £170,000, we would look to appoint at the lower end of the scale.

50. Sir Thomas raised the issue of HMIs being paid varying amounts. He said that it would need to be objectively justified to avoid breaching equal pay legislation.

51. In an email from Mr. Marks to Dr Elimelech, Mr Lomas and Jason Marday of 24 February 2015 he stated:

> "Would consider £165,000-£185,791 as this was more likely to get CST agreement".

52. In an email from Alastair Whitehead to Mr. Marks of 10 March 2015 he advised that the Home Secretary had decided to appoint Ms. Williams. Ms. Williams is black.

53. Sir Thomas says that on 11 March 2015 he telephoned Ms Calam to tell her that it was unjustifiable to pay Ms Williams less than the other HMIs, particularly Mr. Cunningham. He says that he told her it was unfair and unsustainable to pay a black woman less than a white man for a job of exactly equal weight.

54. On 19 March 2015 Mr. Lomas sent an email to Mr. Lamberti which included:

> "Ms Williams is currently paid around £107,000. Our view therefore would be to appoint at the bottom end of the scale, particularly given the need to be seen to be applying downward pressure to these roles".
>
> "There are two possible issues however with appointing Ms Williams at the bottom end of the scale. The first is the risk of legal challenge from Ms Williams regarding equal pay".

55. Later that day Dr Elimelech sent an email to Mr Lamberti and Mr Lomas stating:

> "Sir Thomas wants Ms. Williams to be appointed on Ms Sharping's salary (£185,000) – for a host of reasons. It is not his decision".

56. In an email from Mr. Lomas to Mr. Lamberti and Dr Elimelech of 23 March 2015 he stated:

> "Sir Thomas may potentially view any decision to appoint Ms. Williams at the bottom end of the scale as the Home Office reneging on the terms of the agreement for the release of Ms. Sharping. Will want to point to the fact that CST's approval (and future approvals) was subject to downward pressure being applied to these roles where it is appropriate".

57. In an email from Mr. Lomas to Ms Calam and Rickesh Nagar of 24 March 2015 he stated:

> "Any decision to appoint Ms Williams at the lower end of the salary scale will require handling with Sir Thomas".

He went on to state in relation to the appointment of Ms Williams "they are likely to be more than content to be paid £165,000".

58. Ms. Calam replied later that day stating:

> "I am very happy with this position if we are confident on the legal risk. I have already had one go on this topic with Sir Thomas, so very happy for Mr Lamberti to speak to him in the first instance".

59. In a letter from Mr. Marks dated 25 March 2015, Ms Williams was advised of her appointment as an HMI on a three-year term from 18 May 2015 at a salary of £165,000.

60. In an email from Dr Elimelech to Mr Lamberti of 8:10pm on 25 March 2015 she stated:

> "HR have spoken to Ms Williams and offered her a salary of £165,000. She was not pleased. Her concerns are twofold":

- Parity and equality – she pointed out that other HMIs earn £185,000-£190,000, so questioned why she was being offered less; and

- Fairness and credibility – HMI salaries are in the public domain and at £20,000 less, the perception formed will be that she is "junior".

61. Dr Elimelech went on to state:

> "Paying Ms Williams less has nothing to do with the fact that she is a black woman. The CST was clear at the start of this campaign that we had to move to a scale and appoint towards the lower end. Implying that this has anything to do with Ms. Williams' protected characteristics is a cheap trick and should be closed off immediately".

62. A note of a telephone conversation between Mr. Lamberti and Sir Thomas on 26 March 2015 records Sir Thomas saying that the right salary was the same salary as Mr. Cunningham as the jobs were of equal weight.

63. In an email from Mr. Marks to Dr Elimelech and Mr Lomas of 11:33 on 27 March 2015 he referred to having spoken with Ms Williams that morning and that she had signed the offer letter and definitely wants to accept the role. However, she would like to continue negotiations in relation to her salary.

64. In an email from Mr. Lamberti to Jane Cosgrove, HR Director, Home Office July 2013 - August 2015 (Ms. Cosgrove) and Ms Calam of 11:51 on 27 March 2015 he said:

> "Appoint Ms Williams at £180,000-£185,000. Benchmark professionally the next three appointments and use that opportunity to reset the salary for these roles for the future. In effect, Ms Williams' appointment would be the last of a series".

65. In a reply email of 12:51 that day Ms Cosgrove stated:

> "I do not, subject to legal advice, see the merits in going for the higher rate. The economic climate has changed, it is usual for a candidate to be offered the bottom of the pay scale and in this instance, she is receiving a 58% increase. We would not have offered any different to a man in the role".

66. In an email from Mr. Lamberti to Ms Calam, Mr Lindsey and Ms Cosgrove of 13:28 on 27 March 2015 he stated:

> "The Government has recently appointed and reappointed others to similar roles on a (higher) salary. Wouldn't the right approach be to benchmark and reset for a number of these roles?"

67. In an email from Mr. Lamberti to Ms. Cosgrove, Mr. Marks, Ms. Calam, Mr. Lomas, Dr Elimelech and Ian Shepherd of 14:52 on 27 March 2015 he said:

> "Appoint Ms Williams on the same salary as the lower paid HMIs. All future appointments to HMI posts will be based on the results of benchmarking".

68. In a letter from Mr. Marks dated 27 March 2015 Ms. Williams was advised that her remuneration had been increased to £185,791.

Dr Elimelech's evidence

69. Dr Elimelech said that in the process leading to the appointment of Ms. Williams that Sir Thomas had been very involved but that the line in the Department was to stand firm given that Sir Thomas was advocating for a salary at the existing level.

70. Dr Elimelech said that the salary originally offered to Ms. Williams of £165,000 was fair for the job. She referred to a policy from 2014 onwards of there being a range of pay for HMIs rather than a set rate. She also said that the Home Office would not appoint at a salary much higher than the applicant's existing salary. She also referred to there being a feeling from the Treasury that HMIs' pay was too high and could not be justified.

71. She said that there was pressure to conclude Ms. Williams' appointment so that Ms. Sharping could be released to the Child Sex Abuse Enquiry.

72. A further reason for time pressure regarding Ms. Williams' appointment was that Parliament was about to prorogued.

73. She referred to the benchmarking exercise and her view was that the final appointee prior to its terms coming into effect, in this case Ms. Williams, would "luck out".

Sir Thomas's notes and evidence

74. Sir Thomas says that on every occasion of an HMI appointment, there had been difficulties with the Home Office regarding pay. He says that it was during the appointment of Mr. Cunningham in 2014 that the idea of a pay banding to previous salary had been mentioned for the first time.

75. The bundle at pages 221-222 contained Sir Thomas's handwritten notes regarding the appointment of Ms Williams. At page 222 reference is made to the proposed salary range of between £165,000-£185,000 and that this was much more than her last pay at the CPS. Sir Thomas recorded that as she was a full HMI, she should be paid the same as the other HMIs.

76. On page 221 Sir Thomas in a speech bubble at the bottom of the page refers to a call with Ms Calam on 11 March 2015 referencing "race and sex". However, it was put to Sir Thomas that his handwritten notes were not contemporaneous but may have been recorded subsequently. He accepted that they were not specifically referable to one day alone and whilst he maintains they were accurate may have been produced after 27 March 2015.

77. He says that he believes he told Ms. Williams that she was being paid less than the other HMIs. However, it is, in any event a matter of public record.

78. He is unequivocal that the reason for Ms. Williams' increase in pay was attributable to her sex and/or race. He says that whilst Civil Servants will sometimes forebear from writing matters down out of caution this was in his view the only explanation for the volte face.

79. He wholly rejects any notion, which he says was subsequently raised by the Respondent, that her pay was raised due to official agreement with him that the new HMI would receive the same pay as the existing HMIs.

80. We find that Sir Thomas's approach had been consistent in advocating HMI pay at the top of the prevailing scales. Whist he rejected the suggestion that he had been "lobbying" the Home Office for higher HMI remuneration we accept the evidence of Dr Elimelech that this was the case. This is based on both the evidence given by the Respondent's witnesses but also our review of the contemporaneous correspondence. Further, we find that whilst Sir Thomas was in part motivated by concerns regarding possible issues regarding equal pay and discrimination in the appointments of Ms. Williams and the Claimant, that his primary motivation was to maintain existing HMI pay levels.

The evidence of Mr. Lamberti

81. He says that race and sex are always part of the context in any appointment.

82. Mr. Lamberti did not consider deferring the finalisation of Ms. Williams' pay pending the benchmarking exercise.

83. He said that the benchmarking exercise was because of a need to be able to provide a rational evidence basis for HMI remuneration. There was a question as to what the right salary for an HMI was. This needed to be objectively reviewed and determined. He was of the view that HMI salaries should be benchmarked before they were lowered.

84. He acknowledged that he had discussed with Ms. Calam potential press attention regarding Ms. Williams being a black woman and paid lower than the incumbent white HMIs. He said that the concern would have been the same had it been a white male.

Benchmarking exercise

85. In a submission prepared by Mr. Lomas dated 13 May 2015 reference was made to the benchmarking of salaries for HMIs. At paragraph 2 of the section headed "Consideration" included the following:

> "It was considered that to pay Ms Williams less than the other HMIs presented the Department with a risk of legal challenge in regard to both equal pay and discrimination (given Ms Williams' protected characteristics)".

86. The Respondent's witnesses, and particularly Mr Lamberti, contended that this was a reference to a general risk, rather than specific to Ms Williams, and that the requirement for a benchmarking exercise was to have a "scientific basis" for the setting of HMI salaries. We, however, find that it reflected a concern at the time of Ms Williams' appointment, and that the primary motivation for the subsequent increase in her remuneration was because of a perceived risk specific to her and her protected characteristics. We further find that the motivation for the benchmarking exercise was at least in part attributable to the Respondent's decision that Ms. Williams should be the "last in a line" of HMI appointments and thereby avoid the immediate perceived concern that she as a black woman would be the first to receive a reduced salary below that of the incumbent HMIs.

87. A further submission was produced by Heather Kinzett and Lyle Wilton from the Historic Police Misconduct and Investigation Unit Policing Directorate dated 28 October 2015. Again, in the section entitled "Consideration" reference was made to the appointment of Ms Williams and the decision to appoint her at the top of the salary scale being on the grounds of:

(a) equal pay; and
(b) discrimination: regarding protected characteristics under the EQA.

88. The submission proposed a salary range for HMI appointments between £133,983 (the lower salary of a Chief Constable in England and Wales) and £150,457 (the average salary of a Chief Constable).

89. The submission recommended that any reappointment of the existing HMIs should be on the revised salary scales.

90. Reference was made to Stephen Otter, HMI having recently resigned and leaving his post in May 2016.

91. At paragraph 18 concern was expressed that Sir Thomas was likely to oppose downward pressure on HMI remuneration to include seeking his own legal advice and rejecting the benchmarking exercise.

92. Annexes to the submission included detailed figures regarding Chief Constable remuneration together with what were regarded as comparable public sector positions.

93. A further submission was prepared by Ms Kinzett and Mr Wilton dated 14 January 2016. This did not materially change the position as set out in the submission dated 28 October 2015 and therefore it is unnecessary to highlight any points from this document.

94. An updated submission was prepared by Ms. Kinzett and Mr. Wilton dated 20 January 2016. This stated that a comprehensive benchmarking exercise had been completed and the following options had been identified. In summary these were:

> **Option 1** – retain current salary levels for HMIs with future appointments being made at the same level, i.e., £185,791 - £190,529.
>
> **Option 2. (i)** – retain the current salary scale for new HMI appointments of £165,000 - £190-529 but introduce an explicit presumption that new appointments are made at the bottom of the scale.
>
> **Option 2. (ii)** – lower the bottom of the current salary scale to new appointees to £133,983 with appointees to be paid at the bottom of the scale or their current basic salary, whichever is higher.
>
> **Option 3** – introduce new salary scales for HMIs of £133,983 - £150,457 based on the benchmarking exercise.

95. The recommendation was for option 3 but with the caveat that the recipients of the submission (the Home Secretary, the Permanent Secretary and the Minister of State Policing, Fire Crime and Criminal Justice and Victims) may decide that option 2 (ii) is preferable in implementation terms.

96. In an email of 20 January 2016 Stephen Knight advised Mr Wilton and the Home Secretary that he would recommend option 2(ii) and stated:

> "We should defend robustly and challenge on equality grounds: it is common practice to introduce revised T&Cs for new employees".

97. We were referred to an updated version of 20 January 2016 submission which included an Annex D entitled "Sir Thomas's concerns over salary benchmarking". This records that he argued that the benchmarking methodology was wholly inaccurate as it failed to carry out a job evaluation.

98. In an email of 9:46 on 28 January 2016 Mr Whitehead advised the Home Secretary and others that it had been agreed that option 2 (ii) was the best option.

99. The above decision was then recorded in a letter from Mrs. May to Sir Thomas dated 28 January 2016 in which she recorded that a new HMI salary scale of £133,983-£190,529 had been adopted with an explicit presumption that any increase beyond the bottom of the scale has a considered justification. This letter did not make any reference to the relevance of an applicant's previous salary.

100. In a letter from Mark Sedwill, Permanent Secretary at the Home Office February 2013 - April 2017, (Mr. Sedwill) to Sir Nick Macpherson, Permanent Secretary at the Treasury (Sir Nick) dated 8 February 2016 he recorded:

> "The successful candidate Ms Williams was appointed at the top of this scale. The Home Office was concerned that to pay her less than her fellow HMIs presented the Government with a risk of legal challenge on the grounds of discrimination".

He went on to say that it was now intended to revise the salary scale to £133,983 - £190,529.

101. It was not until 29 March 2016 that Sir Nick replied to Mr Sedwill's letter of 8 February 2016. He said that the intention to revise down the lower end of the HMI pay scale by almost £30,000 was appreciated and agreed. He requested that all necessary steps were taken to secure a remuneration package at the lower end of the pay range as opposed to the higher end as had been the case in recent appointments. He said that the Chief Secretary was not likely to approve individual salaries at the top of the scale in future without very strong evidence for why this is necessary.

102. Mr. Sedwill communicated the revised salary position for HMIs to Sir Thomas in a letter dated 29 March 2016.

The Claimant's appointment and subsequent reaction

103. In an email from Mr. Lamberti to Neil Round, Deputy Principal Private Secretary at the Home Office, (Mr. Round) and Ms. Calam of 19 April 2016 reference was made to the Claimant's specific circumstances and his having retired from the Navy. Mr Lamberti asked what a basic of £133,983 plus enough for a flat would be and what the precedents were on what is effectively a relocation package.

104. Ms. Wilkinson said that the Claimant was regarded as having a zero-income given that he had retired.

105. Mr. Lamberti said that there had been no consideration to the possibility of lowering the pay of any of the existing HMIs.

106. He said that if the Claimant had been appointed at the same time as Ms. Williams his salary would have been £165,000.

107. In a letter dated 7 June 2016 Mr Marday advised the Claimant that he had been appointed for a five-year term on a salary of £133,983.

Draft letter from Sir Thomas to Mr. Sedwill of 8 June 2016

108. We were referred extensively to this letter which Sir Thomas confirmed remained a draft. The Claimant said that he did not see this letter until February 2018. Sir Thomas said that the draft was prepared by a specialist employment barrister at Blackstone Chambers who had been instructed at his instigation. At paragraph 13 Sir Thomas referred to the appointment of Ms Williams and his having successfully argued for her to be paid the same as the other HMIs to include on the basis that it was impermissible to pay a black woman less than a white male for a job of equal weight. He said that this point was both critical and decisive and the increase was in his view an attempt by the Home Office to avoid risks of equal pay and/or race discrimination claims by Ms Williams.

109. At paragraph 34 Sir Thomas stated that there was a serious risk of a successful equal pay claim by the Claimant if he were to decide to make one. He also stated in paragraph 39 that equivalence was required by considerations of fairness and equality. He argued that differentials in salaries were damaging to collegiality and would be divisive, unfair and irrational.

Claimant's letter dated 8 June 2016

110. In a letter of 8 June 2016 to Mr. Marday, and copied to Sir Thomas, the Claimant expressed concern that the salary offered to him was substantially below that of his predecessor Mr Otter and that the other HMIs were paid between £185,000-£194,999.

111. The Claimant said that whilst he had discussed the above letter with Sir Thomas this had not included a discussion of equal pay and discrimination under the EQA.

112. In a submission from Jo Dawes, Head of HMIC Policy, Crime and Policing Group, 2016-18 (Ms. Dawes) and Mr. Wilton to the Home Secretary and Permanent Secretary dated 15 June 2016 it was recommended that there should be an increase in the Claimant's salary from £133,983 to £141,887 to reflect the average rental cost for the South East and travel costs in London.

113. At paragraph 12 of the submission, it was advised that CST would need to be informed of the appointment and agreed salary but would need to approve any salary above that of the Prime Minister's then salary of £142,500.

114. In an email from Nikki Burgess to Mr Wilton of 20 June 2016 she recorded that the Home Secretary had agreed to the recommended increase in the Claimant's salary from £133,983 to £141,887.

115. Mr. Lamberti advised the Claimant of this increase in his salary in a letter dated 21 June 2016. This letter included reference to the benchmarking exercise and the agreed new pay arrangement including a salary scale of £133,983-£185,791 and a presumption that all new appointments would be made at the bottom of the scale or the candidate's current base salary; whichever was higher.

116. We find that the basis for the increase to the Claimant's salary represented an artificial contrivance to provide some salary increase but without departing from the presumption that salary should be at the bottom of the new salary band and that the methodology for the calculation of the enhancement was designed to maximise the increase without exceeding the threshold of the Prime Minister's then salary which would necessitate Treasury approval.

117. In a letter dated 23 June 2016 the Claimant advised Mr Lamberti of his acceptance of the offer. He, nevertheless, recorded reservations about his pay compared to that of other HMIs.

118. Mr. Marday replied to the Claimant's letter of acceptance dated 23 June 2016 on 7 July 2016. He confirmed a start date of 1 August 2016 and that it was

not considered appropriate to engage in further discussion regarding his remuneration.

119. In a note of agreement dated 20 December 2016, prepared by the Permanent Secretary at the Home Office, reference was made to current HMI pay being unaltered if appointed also as HMIs for Fire and Rescue even though these would be separate annual appointments. The Note stated that the Claimant's pay remains anomalous and that there may need to be further discussions between him and the Home Office.

120. A submission was prepared by Mr Wilton dated 2 February 2017 in connection with the proposed reappointments with the addition of responsibility for Fire and Rescue Services. The submission primarily comprised an historical review of HMI pay and at paragraph 15 it is recorded that "HMIC this and HMI remuneration conditions are already uniquely generous in the public sector and further uplift lacks justification".

121. It was clear from the submission that there had been discussion with Sir Thomas and that he had advocated strongly for HMI pay to reflect the additional responsibilities for fire service inspection, but his view was strongly opposed.

122. A further submission was prepared by Mr Polly dated 9 March 2017. This included a reference to the Claimant's most recent request for a pay increase as a condition of him taking on the new function in respect of the Fire Service. At paragraph 9 Mr. Polly referred to Sir Thomas and the Claimant having on several occasions raised concerns about the differential in his salary and the possibility of making an equal pay claim.

123. The Claimant says that he had discussed a possible equal pay claim during a meeting on 27 February 2017 with Paul Lincoln, DG Crime Policing and Fire Group, 2015-2017 (Mr Lincoln) and Mr. Lamberti. He says that he asked if Ms. Williams' pay had anything to do with considerations of race and/or sex and that this was strenuously denied by Mr Lamberti. Mr. Lamberti says that he has little recollection of the meeting and he is surprised at the prominence that it now has in the Claimant's case.

124. The Claimant and the other HMIs were reappointed on their current salaries with simultaneous appointment as Fire Inspectors on 17 July 2017.

<u>Relevant events in 2018</u>

125. The Claimant sent a five-page letter to Sir Thomas dated 11 January 2018 in which he sought his advice about how he should pursue a complaint about his pay. He explained the timing of his complaint as relating to the addition of Fire and Rescue Services to his portfolio and his hope that that would prompt a reconsideration of the pay policy for HMIs and what he described as the promise that there would be an independent review of the pay structure following this appointment process.

126. In his letter the Claimant made specific reference to the pay of Ms Williams and the principle of equal pay for equal work and it being illegal not to pay equally on the grounds of protected characteristics.

127. At paragraph 11 of his letter the Claimant said that he had recently become aware of the details of the recruitment of Ms Williams. He sought clarification as to the basis upon which Ms. Williams' pay had been increased and referred to the potential for unlawful discrimination.

128. The Claimant had been provided with access to Sir Thomas's file on HMI appointments in early 2018 and we consider it likely that this was, at least in part, the prompt for him writing this letter. The Claimant says that he was aware from the outset that Ms Williams had complained about her initially proposed salary and that whilst he had a suspicion that her protected characteristics may have been the motivation for the increase that this had always been denied by the Home Office.

129. Michael Gilligan, HO Sponsorship Unit 2017- present (Mr. Gilligan) prepared a submission to the Permanent Secretary at the Home Office dated 26 January 2018. He said at paragraph 5 that there was no obvious case for discrimination because of the Claimant's protected characteristics. He said that the difference in salary was a result of departmental efforts to restrain senior salaries in line with Government policy.

130. In an undated document entitled HMICFRS - HMI Remuneration (pages 622 to 624 in the bundle the following was included at paragraph 7:

131. "Sir Thomas has repeatedly suggested that the Claimant may have an equal pay legal claim. The Claimant is currently the only white male HMI, however at the time he was appointed there were male and female HMIs and both white and BAME. Mr. Cunningham was in post at that time and is also a white male. As such there is no obvious case for a claim of discrimination" [the rest of the paragraph is redacted].

132. In a letter from Sir Phillip Rutnam, Permanent Secretary at the Home Office, April 2017-February 2020 (Sir Phillip) to Sir Thomas dated 26 January 2018 he explained that the Claimant as a public appointee may request an internal review of his terms of appointment, including remuneration, at any time by contacting HOSU directly. He concluded by saying that it was hoped that an HMI would engage with the department in this manner before submitting a formal complaint.

133. In an email of 22 February 2018 to Ms. Wilkinson the Claimant recorded:

> "We agreed that we should exhaust all possible alternatives before he issues employment tribunal proceedings".

134. Ms Wilkinson denies that any pressure was applied on the Claimant not to pursue a tribunal claim.

135. In a 14-page letter to Ms. Wilkinson dated 12 March 2018 the Claimant requested a formal review of his pay. Given that the letter included detailed references to applicable legislation and case law we infer that the Claimant would have had sight of the draft letter dated 8 June 2016 prepared for Sir Thomas by Counsel.

136. In his letter the Claimant referred specifically to the circumstances of the increase in Ms. Williams' pay. At paragaraph 55 he rejected the contention that a new policy on HMI pay had been established in March 2016 following the benchmarking review.

137. It is not necessary for us to refer to the various Home Office documents and notes regarding the process for responding to the Claimant's complaint regarding his salary.

138. A draft submission was prepared by Mr Gilligan for the Home Secretary in May 2018. This referred specifically to the appointment of Ms Williams at paragaraph 53-55 (cross referring to the Claimant's letter of complaint). The response to the Claimant's concerns regarding the basis for the increase in Ms. Williams' pay referred to this being because of an agreement with Sir Thomas that the HMI taking Ms Sharping's role would receive the same remuneration as the existing HMIs. Further, reference was made to her appointment being prior to the implementation of the new HMI remuneration policy and that both Ms. Williams' and the Claimant's appointments were in accordance with the HMI remuneration policy in force at the applicable times. Whilst we find that the Claimant's appointment was in accordance with the post benchmarking exercise remuneration policy for HMIs, we find that Ms. Williams was initially appointed on a salary of £165,000 in accordance with the then prevailing policy, but this was subsequently increased on 27 March 2015 contrary to the stated policy.

139. Lawrence Carter, Senior Civil Servant Home Office HR, Ms. Wilkinson and David Stuart, HR Director – Work Force, Resourcing and HR Delivery prepared a submission for the Home Secretary dated 5 July 2018 regarding the Claimant's remuneration review. Paragraph 9 (a) referred to the increase in Ms Williams' salary as having been due to an official-level agreement with Sir Thomas that the new HMI would receive the same pay as the existing HMIs.

140. At paragraph 9 (f) it was stated that the comparison between Ms. Williams and the Claimant was not legitimate as she was appointed prior to the benchmarking exercise and the introduction of the new pay policy.

141. In a letter dated 18 July 2018 the Rt Hon Sajid Javid, Home Secretary April 2018-July 2019 (Mr. Javid) advised the Claimant that following the review undertaken it had been decided not to increase his remuneration. He referred to the benchmarking review and said that the comparison with Ms. Williams was not legitimate.

142. In an email from Ms. Wilkinson to the Claimant of 22 August 2018 he was advised that David Lebrecht (Mr. Lebrecht) had been appointed to lead a review of HMI remuneration.

143. The undated document entitled HMI pay review terms of reference specifically stated that the pay of individuals in roles held prior to becoming HMIs should not be used as a determinate of pay.

144. The Claimant says that he had no detailed discussion with Sir Thomas regarding potential legal options. He says he did not know about employment tribunal time limits and in any event wanted to avoid going down the legal route. Further, he was "pretty confident" that matters would be resolved by the Home Office. He also says that he had a huge workload which at times was almost unmanageable. He says that it was not until March 2018 that he had more than suspicion that Ms. Williams' sex and race may have been the material factors in her pay increase. He says that Mr. Javid's letter dated 18 July 2018 was the "final straw".

145. On 8 October 2018, the Claimant commenced employment tribunal proceedings. This was shortly before the deadline for commencing a claim. The Claimant explained the delay because of time spent looking after his terminally ill father after Mr. Javid's letter dated 18 July 2018.

146. Mr. Lebrecht's Report on the pay of HMIs was finalised in December 2018 (the Report). He recorded that the pay range that exists at present had been created by circumstance and is clearly not considered fit for purpose by either those responsible or those in receipt. Otherwise, the detailed findings of the report are outside the scope of this judgment.

147. In a letter dated 5 November 2019 the Rt. Hon Priti Patel, Home Secretary July 2019 - present advised the Claimant that following the Report his remuneration would be increased from £133,983 to £175,000 backdated to 20 December 2018 and that he would no longer receive his current London allowance of £7,904 per annum.

The Law

Equal Pay

148. S.66 EQA 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…*

149. S.69 EQA provides:

> *(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.*

150. S.64(1)(a) provides that the above sections apply where,

> *a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does.*

151. S.65(1) provides that, "A's work is equal to that of B if it is… like B's work".

152. The approach is summarised in a well-known passage of the decision of the House of Lords in Glasgow City Council v Marshall [2000] ICR 196 (per Lord Nicholls at 202F-203A):

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

> *Fourth, that the factor relied upon is… a "material" difference, that is, a significant and relevant difference, between the woman's case and the man's case."*

153. In Marshall the House of Lords held that where the employer established that a disparity in pay was due not to the difference of sex but some of other factor material in the causative sense, he was not obliged to establish that there was a good reason for the disparity; and that, since it was not contended that the disparity in pay between the teachers and the instructors was tainted with sex discrimination, the employers had established the defense under s.1(3) of the Equal Pay Act 1970.

154. To relate that passage to the present case: Because the Claimant is paid less than female HMIs undertaking like work, the burden of explaining the difference in pay passes to the Respondent, which must show that the explanation for the variation is not tainted with the difference between the Claimant and his named comparator's gender.

155. If the reason for the disparity is not tainted by sex, it makes no difference whether it is a good or bad reason. The Respondent is not required to justify its treatment of the Claimant, only to show that it did not treat him differently on grounds of his sex. As Lord Nicholls put it in Marshall:

> *"it is apparent that an employer who satisfies the third of these requirements is under no obligation to prove a "good" reason for the pay disparity. In order to fulfil the third requirement, he must prove the absence of sex discrimination, direct or indirect. If there is any evidence of sex discrimination, such as evidence that the difference in pay has a disparately adverse impact on women, the employer will be called upon to satisfy the tribunal that the difference in pay is objectively justifiable. But if the employer proves the absence of sex discrimination, he is not obliged to justify the pay disparity."*

156. Put even more shortly:

> *"if a difference in pay is explained by genuine factors not tainted by discrimination, that is sufficient to raise a valid defence… in such a case there is no further burden* on the employer to "*justify" anything" (Strathclyde Regional Council v Wallace* [1998] ICR 205, per Lord Browne- Wilkinson at 214D).

157. For a more recent authority, see Secretary of State for Justice v Bowling [2012] IRLR 382 (EAT, Underhill P) at para 4:

> *"the mere fact of a man and a woman doing the same job but on different pay places a burden on the employer to prove*

> *an explanation for the difference. If he does not do so, discrimination is presumed. But in the usual case the employer will prove an explanation, and the real question will be whether the explanation is 'tainted by sex'. If it is not tainted by sex it does not have to be 'justified'.*

158. A desire to save cost against the background of financial constraints may operate as a genuine material factor - see Bonnevie v University of Southampton [1989] ICR 617 per Neill LJ at 627H-628A, although in that case the employer's defence failed because the need to save cost was no longer an applicable and causative factor at the time in question.

159. Given s.65 and s.66 EQA, there is here a prima facie presumption that the difference in the remuneration between Ms Williams and the Claimant is due to sex discrimination. The Claimant is entitled to the benefit of s.66 if the Respondent fails to prove that the difference between the Claimant's terms and Ms. Williams' terms does not involve treating him less favourably because of his sex, than the Respondent treated Ms. Williams. See CalMac Ferries Ltd v Wallace [2014] ICR 453 at [3] to [7].

160. "Treats" does not denote a hypothetical – it requires considering why each was paid as they were; see CalMac at 460 16 C to D.

161. At CalMac [8] Langstaff J drew attention to the Attorney General's warning in Enderby not to adopt a 'formalistic approach' nor allow a conceptual scheme defining discrimination to 'operate as a straitjacket'.

162. In Fearnon v Smurfit Corrugated Corrugated Cases Lurgan (Limited) [2008] NICA 45 at [12] to [16]. At [17], the NICA rejected the tribunal's view that the red circling gave open-ended protection. Instead, it must be considered afresh. Fearnon also evaluates Snoxell v Vauxhall Motors Ltd [1977] ICR 700 and Phillips J's qualification in Outlook Supplies Ltd v Parry [1978] IRLR 12 of his obiter comments in Snoxell.

163. In Snoxell the EAT held that an employer's plea that the variation between a man's and a woman's contract was genuinely due to a material difference other than sex had to be genuine, clear and convincing.

164. Fearnon v Smurfit at [15]:

> "It was therefore incumbent on the tribunal to examine not only the motive for the introduction of red-circling, but also the reasons that it has been continued. It is wrong to assume that because it was right to institute the system, that it will remain right to maintain it indefinitely."

165. In Enderby v Frenchay Health Authority and Secretary of State for Health [1993] IRLR 59 the ECJ held that it was for the national court to determine precisely what proportion of any increase in pay was attributable to market forces

and it must necessarily accept that the pay differential is objectively justified to the extent of that proportion. If that is not the case it is for the national court to assess whether the role of market forces in determining the rate of pay was sufficiently significant to provide objective justification for part or all the difference. Therefore, it must determine, if necessary, by applying the principle of proportionality, whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between the jobs in question.

Direct discrimination

166. Section 13 EQA provides that:

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

167. Under s13(1) of the EQA direct discrimination takes place where, because of sex, a person treats the claimant less favourably than that person treats or would treat others.

168. To show that there has been unlawful direct discrimination for which a respondent is liable a tribunal must be satisfied that there has been:

(a) less favourable treatment (than an actual or hypothetical comparator); and
(b) such treatment was on the grounds of the claimant's protected characteristic.

169. S 23(1) EQA provides there must be 'no material difference between the circumstances relating to each case'. The comparator must not share the claimant's protected characteristic. Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285 is authority that the circumstances of the comparators must not be materially different.

The burden of proof

170. Under s13(1) of the EQA read with s.9, direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

171. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the ‘reason why’ the Claimant was treated as he was.

172. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

173. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.) The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g., race) and a difference in treatment. LJ Mummery stated at paragraph 56:

> "Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the Respondent had committed an unlawful act of discrimination."

174. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR870.

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Time limits

175. It is relevant to under S.123 (1) (a) and (b) and (3) (a) of the EQA provide for a time limit of three months starting with the date of the act which the complaint relates to or under s.123 (1) (b) such other period as the tribunal thinks just and equitable. S.123 (3) (a) provides that conduct extending over a period is to be as done at the end of that period.

176. For acts extending over a period, it is relevant to consider whether a discriminatory regime, rule, practice or principle, which had a clear and adverse effect on a complainant, existed. There is a distinction between a continuing state of affairs and a one-off act with ongoing consequences.

177. The respondent argues that the claimant's ongoing rate of pay is a consequence of the decision of June 2016 – see Sougrin v Haringey Health Authority [1992] ICR 650.

178. The tribunal needs to consider whether the decision of 18 July 2018, not to increase the Claimant's remuneration, should be taken together with the 2016

decision and treated as a continuing act (Metropolitan Police Commissioner v Hendricks [2003] ICR 530) so as to bring the claim within time.

179. The claimant argues that his grievance/complaint dated 11 January 2018 triggered a review resulting in a fresh decision on 18 July 2018 and that his claim is therefore in time in accordance with Rovenska v General Medical Council [1997] IRLR 36 and Sougrin.

Extension of time for the discrimination claim on the basis that it would be just and equitable

180. The Tribunal had regard to the "checklist" of factors in s.33 of the Limitation Act 1980 in accordance with British Coal Corporation v Keble [1997] IRLR 336, bearing in mind that a decision to extend time is the exception rather than the rule Robertson v Bexley Community Centre [2003] IRLR 434.

181. The checklist of factors in s.33 is a useful guide of factors likely to be relevant, but a tribunal will not make an error of law by failing to consider the matters listed in s.33 provided that no materially relevant consideration is left out of account: Neary v Governing Body of St Albans Girls' School [2010] ICR 473. S.33 requires the tribunal to take into account all the circumstances of the case, and in particular the factors set out at s.33(3). Those factors which are relevant to the claim are:

(a) the length of, and reasons for, the delay by the claimant;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action; and
(d) the steps taken by the Claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

182. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, while the checklist in S.33 provides a useful guide for tribunals, it need not be adhered to slavishly.

183. On the just and equitable extension, the claimant relies on Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 – primarily to displace any submission on the exceptionality of the 'just and equitable' extension based on Robertson v Bexley. Moreover, since the House of Lords decided in Horton v Sadler [2007] 1 AC 307 in the context of s.33, their Lordships general point is key for what is just & equitable.

184. The fundamental question is whether it is fair and just in all the circumstances of the particular case to expect the defendant to meet the claim on the merits, notwithstanding the delay in commencing the proceedings. The discretion whether to grant permission is wide and "In resolving an application under section 33 the court must make a decision of which the inevitable effect is either to deprive the defendant of an accrued statute-bar defence or to stifle the claimant's action against the tortfeasor who caused his personal injuries. In

choosing between these outcomes the court must be guided by what appears to it to be equitable, which we take to mean no more (but also no less) than fair, and it must have regard to all the circumstances of the case and in particular the six matters listed in S.33 these are, as Lord Diplock observed in Thompson [1981] 1 WLR 744,751, 'a curious hotchpotch'…" per Lord Bingham in Horton at 323-4.

Statutory provisions pertaining to HMI appointments

185. The appointment of HMIs is governed by s.54 of the Police Act 1996, which provides for the Queen to appoint such number of Inspectors as the Secretary of State may with the consent of the Treasury determine. By s.54(5), HMIs are paid such salary and allowances as the Home Secretary may with consent of the Treasury determine.

186. An HMI is a "Public Office" for the purposes of s.50(2)(b) of the EQA. Under s50(6) of the EQA:

> "A person who is a relevant person in relation to that office must not discriminate against a person appointed to that office as to the terms of his or her appointment on any protected grounds such as sex or race. The relevant person in this case is the Home Secretary".

Submissions

187. We set out briefly the principal arguments advanced by both parties:

Claimant

188. If a pleaded material factor is accepted, it does not account for the whole of the difference between the Claimant's salary and that of Ms Williams as per Enderby (24) to (29).

189. The reference to the "new" pay scales as providing a bright line between Ms Williams and the Claimant does not reflect the reality.

190. That the new salary scales after the benchmarking exercise were not "new" but rather a revision of the current pay scale.

191. That nothing material changed in the Respondent's pay policy for HMIs between Ms. Williams' appointment and that of the Claimant.

192. That the benchmarking exercise undertaken in early 2016 emerged from an email from Mr Lamberti dated 27 March 2015 relating to the pay of Ms Williams and therefore it is attributable to and tarnished by the same considerations of sex as applied to the increasing of Ms. Williams' pay as it is part of the same decision.

193. That the Tribunal must be satisfied that the difference in treatment between Ms Williams and the Claimant is not in any way related to the difference of sex as per Lord Nicholls in Glasgow v Marshall.

194. Under the principles emanating from the case of Carltona v Commissioner of Works [1943] 2 All ER 560 and subsequently known as the Carltona doctrine or principle that a Minister is responsible for the decisions of their Department's Civil Servants.

195. In accordance with the principle enunciated in Enderby the Tribunal should not adopt a formalistic approach and should avoid a straitjacket.

196. That the salary differential between the Claimant and Ms Williams was "staggering".

197. That by making a reference to the pay protection cases there had been no attempt by the Respondent to attempt to equalise pay and therefore ignoring concepts of fairness. Ms. Robertson did, however, acknowledge that this was not a standard pay protection case.

198. She argues that the Lebrecht review undermines the Respondent's material factors and demonstrates how poor the 2016 benchmarking exercise was.

199. In relation to the Tribunal's jurisdiction to consider the sex and race claims she says that in accordance with Hendricks there was a continuing state of affairs. In any event she says that the claim was in time given Mr Javid's letter in respect of the Claimant's complaints not being sent until 18 July 2018. Further, she argues that it would be just and equitable for the Tribunal to extend time.

The Respondent

200. That there had been a change of policy regarding HMI pay and that this was hugely transparent from the documentation.

201. The explanation is not sex tainted. That the question of the overall fairness of the policy was not part of the test. Cost considerations can be a relevant factor.

202. Under s.23(1) of EQA, on a comparison of cases for the purposes of s.13, there must be no material difference between the circumstances of each individual's case.

203. In relation to jurisdiction that there was no continuing course of conduct but rather that the Claimant's rate of pay was a consequence of the decision of June 2016.

204. That the Tribunal should concentrate on the contemporaneous documentation regarding the increase in Ms. Williams' pay rather than subsequent documents to include Mr Sedwill's letter of 8 February 2016. The contemporaneous documents were likely to be more reliable.

205. In relation to jurisdiction that there had been a long period of delay. He rejects the contention that the Claimant was in anyway pressurised not to initiate employment tribunal proceedings.

206. The Respondent accepts that the Claimant was engaged on like work within s.55(2) of the EQA with Ms Billingham, Ms Sharping and Ms. Williams from 1 August 2016 onwards.

Conclusions

Equal Pay

The Material Factor Defence

207. Given that the Respondent has conceded that the Claimant's work was "like work" to that of his comparators, and that he was paid less than them, the presumption is that the difference in pay is due to the difference in gender. The burden then passes to the Respondent to prove that the difference in pay was caused by some other factor than the difference in sex.

208. To discharge the burden, the Respondent needs to adduce evidence about what factors were relied upon to determine the rates of pay offered to the Claimant and his comparators (primarily on the Claimant's case that of Ms. Williams). It cannot rely simply on assertions that it made in its pleadings. If the Respondent failed to discharge that burden (i.e., it cannot prove that any of the factors that it has set out in its defence were in fact the cause of the difference in pay), the Claimant succeeds. He does not have to prove that the difference in pay was due to the difference in gender. Equally, it is not for the Tribunal to speculate on whether some factor, other than the ones put forward by the Respondent, might have been the cause of the disparity in pay.

209. If the reason for the disparity is not tainted by sex, it makes no difference whether it is a good or bad reason. The Respondent is not required to justify its treatment of the Claimant, only to show that it did not treat him differently on grounds of his sex.

210. To satisfy the burden of proof the Respondent must satisfy the Tribunal on the following matters:

- that the explanation is genuine;
- that the factor caused the difference in treatment;
- that the reason is not "the difference of sex"; and
- that the factor is significant and relevant.

211. The concept of equal pay under s.66 EQA only provides protection in circumstances where there is a disparity in pay between a claimant and a

comparator of the opposite sex performing like work where that disparity cannot be explained by a material factor under s.69 EQA.

212. The question we need to address is whether the material factors relied on by the Respondent at paragraphs 26-27 of its Grounds of Resistance in fact amounted to relevant causative factors in this case.

213. We find that what the Respondent refers to as new salary scales arising from the benchmarking exercise were attributable, to satisfy the burden of proof, the material factors it relies on namely public sector pay restraint, market forces and the need to maintain a flexible remuneration system which operates within public sector pay policy and spending constraints. We do not, however, consider that the material factor relied on of "pay protection arrangements" had any bearing or relevance to the new pay scales. Whilst not conceded as a material factor it is apparent to us that the Respondent has sought to place little, if any, reliance on pay protection arrangements.

214. It is possible for a desire to save cost against a background of financial constraints to operate as a material factor.

215. We consider that cost considerations were a significant factor to the Respondent in assessing and setting the new salary scales. The evidence points to significant pressure from the Treasury to reduce HMI pay because of austerity but also a perception that their pay was "excessive" compared to other comparable public sector positions. The existence of this downward pressure on HMI pay was acknowledged by all witnesses including Sir Thomas.

216. Had option 3 been chosen in the benchmarking exercise we consider that it would unequivocally have constituted a new salary scale. Whilst we consider the position in relation to option 2 (ii) more debatable we nevertheless find that it did constitute a new pay scale and therefore a material factor. We find that it included elements of public sector pay restraint (the need to reduce the pay of HMIs which was seen as excessive), market forces (that salaries offered to potential HMIs should not exceed their existing salaries and what level of pay was therefore required to attract the preferred candidate) and the need to maintain a flexible remuneration system (an element of flexibility built in by having pay bands, rather than spot rates, largely referrable to different rates of Chief Constable pay). We find that pay protection arrangements did not have any bearing on the new pay scales following the benchmarking exercise.

217. We reach this finding for the following reasons:

(a) The pre-existing salary range for HMIs had a lower threshold of £165,000 and this was now reduced to £133,983. Whilst the Claimant argued that it was the pre-existing pay policy with a different lower band, we conclude that this did represent a material change to the existing policy and therefore a material factor distinguishing the Claimant's position from that of Ms Williams.

(b) Whilst there had been pre-existing pressure to reduce HMI pay this had been subject to the existing salary bands. Whilst we accept that at the time of Ms Williams' appointment there was pressure to offer the appointee no more than was required, to include consideration of existing remuneration, that would not have enabled a salary below £165,000 to be offered. We therefore find that the benchmarking exercise gave rise to a new policy which was to pay at the bottom of the new band from £133,983 to £185,791 unless exceptional circumstances applied. Given that the Claimant had retired from his position in the Royal Navy and that his previous base salary was £120,000 there were no such exceptional circumstances.

218. We therefore find that the Respondent has succeeded in establishing a material factor which justifies a distinction between the Claimant's remuneration and that of Ms. Williams.

Was the increase in Ms. Williams's salary influenced by her sex?

219. Whilst we have found that the Respondent has established the existence of a material factor, we nevertheless need to consider whether that factor fully explains the differential between the Claimant's salary and that of Ms. Williams and whether that material factor was tainted by the difference in gender between them.

220. We considered whether the additional differential between £165,000 and £185,791, the increase in Ms. Williams' salary made on 27 March 2015, was due to the difference in sex between her and the Claimant.

221. We find that the fact of Ms. Williams being a black woman, and the Respondent's perception of the litigation and reputational risk she therefore potentially posed, to be the reason for this sudden and significant increase. We reach this finding for the following reasons:

(a) The unequivocal evidence of Sir Thomas was that there was no realistic explanation for the decision to increase Ms. Williams' pay other than the Home Office's concerns regarding potential reputational risk because of her being a black woman.

(b) That had the Respondent's now stated position, that there was an agreement that Ms. Williams should be paid the same salary as Ms. Sharping, been the case it would have been expected that the salary initially offered to her would have been no less than £185,791 and not the £165,000, she accepted.

(c) There are numerous references in the Respondent's paper trail both at the time of the decision in March 2015, and thereafter, to concerns regarding equal pay and discrimination claims being a factor in the decision to increase her pay.

(d) There was clear and acknowledged pressure from at least 2014, and possibly as early as 2009, from the Treasury to reduce HMI pay and this

pressure was reflected in the initial decision to offer Ms. Williams a salary at the bottom of the then scale i.e., £165,000. Had it been the intention that there needed to be a benchmarking exercise and review of HMI pay, to include considerations of comparability with Chief Constable and other equivalent roles, there would have been no need to offer her the initially lower salary and then subsequently revert to the existing HMI remuneration level.

(e) That the initial salary offered to Ms. Williams was in accordance with the then applicable salary scales and guidelines for HMI appointments but was increased outside the scope of these guidelines, and without any rational business reason necessitating such an increase, given that she had accepted the offer and her previous salary was £107,000.

(f) That there were no genuine grounds to support any suggestion that Ms. Williams may renege on her acceptance of the offer at £165,000. As such considerations regarding a need to resolve matters to facilitate Ms. Sharping's appointment to the Public Enquiry, and the imminent proroguing of Parliament, do not provide an explanation for the abrupt volte face.

(g) That given the extremely protracted processes for the appointment of HMIs the decision made between 25-27 March 2015 to revert Ms. Williams' originally offered and accepted salary to that previously applicable would be more consistent with a concern regarding her protected characteristics rather than a decision that any disparity in HMI pay should be deferred pending a benchmarking process.

222. Whilst we accept that considerations of equity, otherwise than pertaining to protected characteristics, may well have been a factor in the decision to retain parity of pay for HMIs on the appointment of Ms. Williams we nevertheless reject the Respondent's evidence that protected characteristics played no part.

223. We do not consider it possible to apportion the extent to which the increase in Ms. Williams's pay was attributable to concerns regarding her sex or race as distinct protected characteristics but rather that her being a black woman gave her a negotiating leverage to increase her pay and as a result she benefited from because what arguably constituted positive discrimination in her favour.

224. We find that the Respondent viewed the Claimant as a white male to pose little legal and reputational risk should he seek to challenge his remuneration on equality/discrimination grounds.

225. We therefore find that the increase in Ms. Williams' salary from £165,000 to £185,791 was influenced by the Respondent's concern that the initially proposed differential between her pay and that of the white incumbents could give rise to legal and reputational risks to the Home Office. The differential was not due to the difference of sex but rather due to the positive discrimination from which Ms. Williams benefitted.

226. In any event we find it to be significant that when the Claimant challenged his pay this was not ignored by the Respondent, but rather it went to considerable lengths to find a somewhat artificial mechanism, based on a notional London weighting and travel allowance, to increase his pay to £141,887, just short of the maximum permitted level without requiring approval from the Treasury as result of his salary exceeding that of the then Prime Minister (£142,500). In other words, both the Claimant and Ms. Williams had their initially offered and accepted salaries increased in circumstances where the Respondent's then prevailing policy for HMI pay did not necessitate, or indeed justify, such an increase given their previous salary levels. Whilst the actual and percentage amount of Ms. Williams' increase was greater than that of the Claimant, we consider that this was attributable to the new pay scales following the benchmarking exercise and in the Claimant's case a requirement that any salary above £142,500 would have required consent from the Treasury, which given his previous salary and retired status, would almost certainly not have been forthcoming had it been requested. In contrast the salary initially offered to Ms. Williams (£165,000) was already significantly more than the threshold requiring Treasury consent and therefore the Claimant's position was different from hers.

227. We find that the difference between the Claimant's and Ms. Williams' gender was not the reason for the that element of the pay differential between her pay and that of the Claimant because of the increase in her pay from £165,000-£185,791. We consider that a situation where there was arguable positive discrimination in favour of a previous appointee as a black woman does not have the effect that this element of the pay differential between Ms. Williams' salary and that of the Claimant was "tainted by sex" in circumstances where we find that Claimant at the time of his appointment was treated in the same way as an equivalent woman would have been, to include the same current career status i.e. retired and previous salary i.e. £120,000.

228. We therefore find that Respondent has established a material factor which explains the difference in pay between the Claimant and his comparators and therefore the equal pay claim fails and is dismissed. Whilst the case argued by the Claimant focused virtually exclusively on a comparison with Ms. Williams for completeness, we also find that the material factor explains the difference between the Claimant's pay and that of Ms. Billingham and Ms. Sharping. Given that they were both appointed in 2009, 7 years prior to the benchmarking exercise and revised pay scales for HMIs, we find that their circumstances were very different and as above the material factor defence succeeds.

Complaints of sex and race discrimination

Time issues and jurisdiction

229. We consider that the same principles apply to the Claimant's claims for direct race and sex discrimination. We find that the Tribunal does have jurisdiction to consider these complaints on the basis that there was a continuing course of conduct rather than an act with continuing consequences. We reach this finding for the following reasons:

230. Whilst the Claimant had suspicions regarding the circumstances surrounding the increase in Ms. Williams' pay it was not until his inspection of Sir Thomas' file on HMI pay in early 2018 that these concerns were confirmed. We find that prior to this time the Claimant had raised concerns regarding his pay but had understandably decided to focus on his new role and what we consider to be a reasonable expectation that the Respondent would address the anomaly in his pay as part of the 2017 review and reappointment process. Therefore, whilst there was undoubtedly a substantial delay, we find that it was only on being provided with full transparency regarding the process resulting in Ms. Williams' pay being increased that the Claimant was able to fully assess his position.

231. We then find that he moved quickly to ascertain the process for raising a complaint and submitting a detailed letter of complaint on 12 March 2018. We then find it was reasonable for him to await the outcome of the internal review which was not confirmed to him until Mr Javid's letter dated 18 July 2018.

232. Had we needed to do we would also have found it would have been appropriate for us to exercise our discretion on the grounds that it would be just and equitable to extend time. This would in part have been for the reasons set out above but also because of the following factors:

(a) That the position had only become fully apparent to the Claimant in early 2018 and he moved with reasonable promptness thereafter; and

(b) That given that the Respondent was undertaking ongoing reviews of HMI salaries through extensive processes of submissions and reviews up to and including the Lebrecht Report there is limited validity in an argument that the cogency of the evidence would have been significantly compromised. In effect the same issues continued to be discussed and form part of the framework for HMI salary reviews.

Direct sex discrimination

233. Given our findings on the equal pay claim we find that the claim for direct sex discrimination must fail because the Tribunal does not have jurisdiction, this claim being properly brought under Part 5 Chapter 3 of the EQA.

Direct race discrimination

234. We find that the Claimant was not treated less favourably than Ms. Williams on account of race for the reasons set out below.

225. The decision to increase Ms. Williams's pay may have constituted positive discrimination in her favour, at least in part is attributable to the Respondent's perception that she as a black woman posed a greater litigation and reputational risk than the Claimant did at the time of his appointment, it did not automatically constitute less favourable treatment of the Claimant on account of his race.

226. At the time of his appointment, we find that an equivalent black man would have been offered, and paid, the same remuneration as the Claimant. Given that

the benchmarking exercise had been undertaken, and the new salary scales set, after Ms. Williams' appointment the Respondent had reason to pay a different salary to the Claimant. Ms. Williams is not therefore a correct comparator for the purpose of s.23 of the EQA.

227. We therefore reject the claims for direct race discrimination in respect of the initial terms of the Claimant's appointment.

228. We do, however, need to consider whether the treatment of the Claimant's request for a review of his initial remuneration was less favourable than that of Ms Williams when she expressed concern regarding her remuneration and it being lower than the incumbent HMIs. We find that the Claimant was not treated less favourably than Ms Williams on account on his sex or race and we reach this finding for the reasons set out below.

229. Whilst Ms Williams' salary was increased to the maximum then applicable HMI pay level on her raising concerns we find that the Claimant's concerns expressed both prior to and post-appointment were addressed on a comparable basis given the new pay scales. This meant that his aggregate remuneration was increased from £133,983 to £141,887 once the London weighting and travel allowance are included. We find that this in effect represented the maximum discretion available to the Home Office given pressure from The Treasury and an informal policy pursuant to which Treasury approval would need to be obtained for any salary above that of the then existing salary of the Prime Minister at £142,500.

230. The claims for direct race and sex discrimination therefore fail. The claim for equal pay fails as set out above.

Employment Judge Nicolle

Dated: **4 March 2021**

Judgment and Reasons sent to the parties on:

04/03/2021.

For the Tribunal Office