



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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**Judgment of the Employment Tribunal in Case No: 4107832/2020 Heard at
Edinburgh on the Cloud Based Video Platform, on 15th and 16th June 2021**

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**Employment Judge J G d’Inverno
Tribunal Member Ms Mary Watt
Tribunal Member Ms J Copeland**

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Miss J Dowling

**Claimant
Represented by:
Ms Nicole Dowling
(Friend)**

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KPMG UK Limited

**Respondent
Represented by:
Mr A Sendall of Counsel
Instructed by Mr Mark
McCanney – Solicitor**

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JUDGMENT OF THE TRIBUNAL

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The unanimous Judgment of the Tribunal is that the claimant’s claim for equal pay pursuant to sections 64-71, of the Equality Act 2010, is dismissed.

REASONS

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1. This case, in which the claimant gives notice of a claim for equal pay pursuant to sections 64-71, Part 5 Chapter 3 of the Equality Act 2010 (“EqA”), called for Final Hearing on the Cloud Based Video Platform, before a full Tribunal at Edinburgh, on 15th and 16th June 2021. The claimant, Miss Jennifer Dowling, was ably represented by Ms Nicole Dowling. The

Respondent Company KMPG UK Limited was represented by Mr A Sendall, of Counsel, instructed by Mr McCanney, Solicitor.

2. The Tribunal, at the outset records its appreciation of the assistance afforded it by the balanced and measured eliciting of evidence from witnesses, and submissions made, by both parties' representatives.

The Claim

3. The claimant had confirmed, in the course of Closed Preliminary Hearing which proceeded before Judge Macleod on the 12th of April 2021, and as is recorded in the Note of Output issued by Judge Macleod following that Hearing and she reaffirmed in the course of Case Management Discussion conducted at the outset of the Final Hearing, that the claim of which she gave notice and which she sought to have determined by the Tribunal was an equal pay claim which was accurately described in its constituent parts in the paper apart to Response Form ET3 at paragraph 4 thereof and, in the following terms:-

"On the Respondent's reading, the Claimant's claim is for Equal Pay brought under s.64-s.71 of the Equality Act 2010 ("EqA"). In particular, the Respondent understands the Claimant's case to be that:

a. A male colleague, Mr. Michael Leonard ("Mr Leonard") does the same role as the Claimant, amounting to Equal Work within the meaning of s.65 of the EqA.

b. Mr. Leonard is paid significantly more than the Claimant.

c. Consequently, the term of the Claimant's contract of employment relating to pay is less favourable, within the meaning of s.66 EqA, than the corresponding term in Mr. Leonard's contract.

d. Therefore, by virtue of s.66(2)(a) EqA (the 'Sex Equality Clause') that term in the Claimant's contract must be modified such that it is not less favourable than the corresponding term in Mr. Leonard's contract.

5 e. In not having done so, the Respondent is in breach of its obligations under the EqA."

4. The Respondent Company, which has entered appearance resisting the claim, denies that it is in breach of the terms of the Equality Act and denies
10 that it has discriminated against the claimant on the basis of her sex or at all. In particular the respondent gives notice of relying upon the statutory Material Factor Defence provided for in terms of section 69 of the EqA 2010.

15 Issues

5. The Issues, requiring investigation and determination by the Tribunal at Final Hearing and agreed by parties pursuant to Employment Judge Macleod's Direction of 12th April 2021 were:-

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Claim

25 1. **(First)** C's claim is for equal pay pursuant to ss. 64-71, Equality Act 2010 ("**EqA 2010**").

Issues

30 2. **(Second)** C's male comparator is Michael Leonard ("**Mr Leonard**").

3. **(Third)** R admits that C and Mr Leonard do equal work for the purposes of s. 65(1), EqA 2010.

5 4. **(Fourth)** R admits that a term of C's (her pay terms) is less favourable to her than a term of Mr Leonard's (his pay terms) is to him (thus engaging the sex equality clause C's terms are treated as including pursuant to s. 66(1) EqA).

10 5. **(Fifth)** Does the sex equality clause in C's terms have effect in relation to the difference between C's and Mr Leonard's terms?
Specially:

15 5.1 Can R show that the difference is because of a material factor?

• C contends that the material factor must exist "today".

• R relies on;

20 (i) at the point the difference in terms arose, Mr Leonard was an external hire (paragraph 36(a) and 38-39 of the Grounds of Resistance); and,

25 (ii) Mr Leonard's greater (than C's) relevant commercial experience and level of qualification (paragraphs 36(b) and 40(a)-(b));

5.2 If so:

30 5.2.1 Does reliance on or on either of those material factors involve treating C less favourably than Mr Leonard, because she is a woman?

5.2.2 Can C show that reliance on or on either of those material factors puts her and other women doing equal work to her at a particular disadvantage when

5 compared to men doing equal work to her? If so, is
reliance on or on either of those material factors a
proportionate means of achieving a legitimate aim?
R relying upon the legitimate aim of being able to
externally recruit competent, experienced and
professional staff.

10 6. **(Sixth)** C says that the following are additional issues; R says, to
the extent relevant at all, that they are matters for evidence:

15 6.1 Has the Respondent admitted on several occasions (and in
writing) that there is “no reason” why the Claimant’s pay
should be at least as high as the mid-point of the D grade
(and hence Mr Leonard’s pay)? [C to please specify all of
the “several occasions” she relies on]

6.2 If so:

20 6.2.1 Has the Respondent had multiple opportunities to
apply for additional funding to resolve the
acknowledged pay disparity over the last 2 years?

25 7. **(Seventh)** Has there been a material factor or valid reason for
choosing not to apply for “hot spot” funding to address this
admitted pay disparity between a male and female colleague?

Sources of Oral and Documentary Evidence

30 6. The Tribunal heard evidence on affirmation:-

- From the claimant Miss Jennifer Dowling, and
- Ms Lauren Clinton, a colleague and fellow employee; and

(b) for the respondent from:-

- Mr James Healy, a Director of the respondent; and
- Ms Lucy Hughes, an HR Business Partner within the respondent's organisation.

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All witnesses gave evidence on affirmation, answered questions in cross examination and in re-examination and questions from the Tribunal, as required.

10 Documents

7. Parties lodged a Joint Bundle of Documents extending to some 218 pages to some of which reference was made in the course of evidence and submission.

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Statutory Provisions and Case Authorities

8. In the course of submission, the Tribunal was referred by parties variously to the following statutory provisions and case authorities which were respectively relied upon by them and all of which the Tribunal considered to be relevant and applicable to the circumstances of the case:-

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The Equality Act 2010 sections 64 to 71 including, in particular; section 65(1), section 66(1), section 66(2), section 67, section 69(1), section 69(2). Those provisions are readily accessible on the internet, and are here referred to for their terms and held incorporated for reasons of brevity.

Case Authorities

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- (1) **Secretary of State for Justice (Appellant) v Bowling**
[2012] IRLR 382 (EAT per Underhill P as he then was)

(2) **Walker (Appellant) v Cooperative Group Limited and another** (Respondents) [2020] EWCA Civ 1075 per Bean LJ

5 (3) **Benveniste v University of Southampton** 1988 [“of Appeal] 617

(4) **Glasgow City Council and others (Respondents) v Marshall and others** (Applicants/Appellants) [2000] IRLR 272, HL, Lord Nicholls

10 Findings in Fact

9. The Tribunal records the following agreed facts, confirmed by parties to be binding upon the Tribunal for the purposes of the Hearing and, on the oral and documentary evidence presented makes the following essential Findings in Fact, restricted to those relevant and necessary to the determination of the Issues:

10. the Respondent Company is the employing entity of KPMG LLP. It is an accountancy and professional services firm with offices throughout the world. Its services include the provision of tax compliance advice to individual private clients and to corporate clients. Private individual client tax compliance is the “business line” in which both the claimant and her identified male comparator, Mr Leonard, work.

11. Both the claimant and Mr Leonard are respected, experienced and capable professional employees of the respondent. Both are employed in the respondent’s private client Managed Services Team (“MST”) and are located in the respondent’s Glasgow office.

12. The respondent maintains a grading system which it applies to its employees. Both the claimant and Mr Leonard are ‘D Grade’ sometimes referred to as an ‘Assistant Manager’.

13. Within different Grades there are steps corresponding to sub-divisions of the Grade. Persons at Grade D are designated D1 (lowest level), D2 (mid-level) and D3 (highest level). Both the claimant and Mr Leonard, as at the year end final review point on 1st October 2020, were D3. As at the date of the Hearing, in terms of the 2020/2021 mid year interim review, the claimant has regressed to D2 and Mr Leonard remains at D3.
14. The respondent also grades employees by performance, allocating them to 'Performance Zones' ('PZ') ranging from PZ1 (the highest) to PZ5 (the lowest). 45-60% of employees are expected to fall within the PZ3 zone, with 20-40% above and 5-15% below. This performance grading is an annual process and is typically one of the factors taken into account when assessing pay increases (referred to within the respondent's organisation as 'Merit Awards').
15. D Grade persons in MST are responsible for reviewing UK tax returns from a broad range of high-net-worth individuals including Company Directors, Partners in commercial partnerships, entrepreneurs and non-UK domiciled persons, they also oversee more junior (E Grade) staff who prepare tax returns.
16. The MST is divided into teams, which broadly correspond to the tax returns which that team deals with. Mr Leonard is currently a member of the Partnership Team which largely deals with tax returns for Partners in commercial business partnerships. The claimant is a member of one of the general individual teams called Team A, which does not do partner returns but does a wide range of returns for other individuals.
17. Both the claimant and Mr Leonard are sufficiently experienced to deal with returns of all levels of complexity.
18. Some employees in the MST, such as the claimant, work throughout the year, while others work only in the period from June to February which is the

respondent's busiest time for tax compliance. These latter employees are called 'Annualised'.

5 (a) Mr Leonard is an Annualised employee and has been since he joined the respondent in 2017.

(b) Mr Leonard works a full year's worth of contracted hours but works them compressed generally into the months of June to February in each year and generally does not work in the months February/March to May.

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19. Where Mr Leonard's pay is referred to in this Note of Reasons his annual equivalent pay is shown (i.e. the pay he would receive for a full year if he worked a full year's hours evenly distributed across a full year). This allows for comparison between the claimant's pay and his to be made on a consistent basis.

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20. Whilst there are, some differences in the work done by each of them, the respondent accepts, and the Tribunal finds in fact, that the claimant and Mr Leonard do equal work within the meaning of section 65 of the EqA.

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The Pay Range for D Grade Employees

21. Employees are paid within a salary range for their Grade and role. The salary ranges used by the respondent's private client Managed Services Team (MST) apply across the respondent's tax business and are split by Grade. They are not split by step Grade.

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22. The salary ranges also have regional bands to take into account varying salary points across the UK. Within each range a 'Mid-Point' is identified, which is an external benchmark; it is not an internal average.

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23. The Mid-Point of the regional Grade D salary applicable to Glasgow is £36,000.

24. Newly promoted employees are typically placed towards the bottom of the Grade salary range. In years 2017, 2018, 2019 and 2020, were placed at the bottom of the Grade salary range into which they were placed, and as they progress, all other things being equal, will reasonably expect to receive pay rises to bring them up to the Mid-Point.
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25. Through its salary review process the respondent seeks to bring employees' salaries, which are below it, up to the Mid-Point but it can take several reviews for this to be achieved. A central factor in this process is affordability to the business at any particular point in time.
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The Development of the Claimant's Pay

26. The claimant joined the respondents in 2010, however, given the nature of the claimant's claim the claimant's pay falls to be considered only over the period from October 2017, which was when the identified male comparator, Mr Leonard, was externally recruited to the respondent's business.
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27. The claimant was promoted to D Grade (D1) in June of 2017 and was placed at the bottom of the salary range, in accordance with the respondent's applicable policy and practice, and which was, at that time, £31,000.
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28. Having been promoted in the second half of the salary review period October 17 to October 18, the claimant was not eligible for a salary review until 1st October 2018.
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29. Subsequent to 2017, the claimant's management recognised the objective of progressing her salary towards and up to the Mid-Point, particularly given her experience, and all other things being equal. However, the salary funding available in each of the subsequent years was very limited in the context of performance across the respondent's business being less in those years than in recent previous years.
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30. In 2018 the claimant was awarded a salary increase of £500 and progressed to D2 (transition from one sub-division to another within a Grade is regarded and described as “a progression” and a “progression point”. Transition between one Grade and another for example from Grade E to Grade D, is described and considered as a “promotion”).
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31. In part the reason for the claimant’s pay rise being of the level which it was in 2018, as because in that year she had been performance rated as PZ4 (which indicates a failure to meet some expectations).
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32. The average of pay increases received by those of her colleagues who were rated PZ3, during the same period, was £800.
33. In 2019 the claimant was awarded a salary increase of £1,000, and was also progressed from D2 to D3. That award reflected a sum of £370 over and above the funding of £630 which had been allocated to the claimant’s team for her pay rise in that period and had the effect of progressing the claimant’s salary towards the Mid-Point, albeit by a relatively modest amount standing the very limited salary funding available.
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34. Had there been more funding available to the claimant’s Managers in 2019, (which there was not), some of it would have been allocated to the claimant so that her progression towards the Mid-Point in that year would have been greater.
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35. In 2019 the claimant was performance rated at PZ3 and only those rated at PZ1 and PZ2 were allocated more significant amounts of increase.
36. In 2020 the claimant’s pay remained unchanged despite her being performance rated at PZ2 as at the October 2020 full year review point.
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37. The absence of a pay increase reflected the respondent’s then firm wide policy, in the context of the impact of the Covid pandemic upon their business’s performance and consequently upon the central factor of

affordability, that there would be no merit awards (routine/normal salary reviews and increases).

5 38. In fact, there were no pay rises awarded within the respondents in the 2019/2020 salary review except for those persons who were promoted on the 1st of October 2020 and those achieving step progressions in the respondent's graduate programmes (at E Grade only). Neither the claimant nor Mr Leonard fell within either category.

10 39. Neither the claimant nor Mr Leonard received a pay rise at the 1st October 2020 salary review point.

The Development of Mr Leonard's Pay

15 40. Mr Leonard joined the respondent in October 2017 as a D2 Grade with an Annualised salary of £36,000.

41. In 2018 Mr Leonard progressed to D3 and received a pay increase of £1,000.

20 42. In 2019 Mr Leonard received a pay increase of £740.

43. In 2020 Mr Leonard's pay remained unchanged.

25 44. Throughout his time with the respondent Mr Leonard has been performance rated at PZ3.

30 45. Mr Leonard is the only male D3 Grade employee in the respondent's MTS in Glasgow. He is not the highest paid person in that group. The highest paid person in that group is female.

Comparison of the Claimant's and Mr Leonard's Pay

46. The claimant's annual pay is £32,500. Mr Leonard's Annualised pay is £37,740.

47. The difference in pay between the claimant and Mr Leonard amounts to the claimant's pay being less favourable within the meaning of section 66 of the EqA.

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The Reasons for the difference in Pay

48. The difference in pay between the claimant and Mr Leonard arose at the point when Mr Leonard was recruited by the respondent in 2017 and has not, in any substantial amount arisen since then.

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49. In 2017 the claimant's pay was 86% of Mr Leonard's pay.

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50. As at the date of Hearing, the claimant's pay remains at 86% of Mr Leonard's pay.

51. That state of fact subsists notwithstanding:-

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(a) The claimant being performance rated at PZ4 in 2018, that is below Mr Leonard who was performance rated at PZ3; and,

(b) Mr Leonard having progressed to D3 in 2018 while the claimant achieved the same progression only one year later in 2019;

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(c) The claimant having been performance rated as PZ2 as at the 20-21 interim review period.

52. The reason that Mr Leonard was paid at a higher amount than the claimant's then salary upon joining the respondent was:-

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(a) He was an external hire, the market premium is typically payable to recruit someone from outside the business.

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- (b) He already had significant experience at Assistant Manager level (D Grade) and had broader experience than the claimant, that is to say in addition to private personal tax experience he had commercial and corporate tax experience which, although not directly relevant to the post into which he was being recruited was relevant to the respondent's wider tax practice bringing with it the potential, should the requirement for the same arise in the future, for more flexible deployment of technical resource.
- 10
- (c) He already had attained and held the Chartered Tax Advisor's qualification ("CTA") a qualification which he achieved in 2013.
- (d) The CTA is the highest level of tax qualification in the United Kingdom and is offered by the Chartered Institute of Taxation.
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- (e) It is a qualification valued by the respondents who support its internal acquisition by employees through meeting the cost of some of the outlays associated with obtaining the qualification and providing their employees, who are working towards its achievement, with substantial amounts of study leave.
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- (f) Pre-attainment of the CTA qualification prior to recruitment makes a candidate more marketable such that they can command a higher salary at the point of recruitment. It is also an indicator of the candidate's achievement of an ascertained level of technical expertise and knowledge which is likely to have a positive impact on a candidate's performance if recruited.
- 25
- (g) The claimant does not hold the CTA qualification.
- 30
- (h) New hires are paid within the relevant salary band that they join. In order to successfully recruit externally, the respondent

typically requires to pay a premium above the candidate's current salary or, at very least, to match that current salary and often, at a premium to the otherwise market rate.

5 53. Payment of a premium or matching is required:-

(a) In order to entice the candidate to move from their current job to work for the respondent and, having moved, to retain the candidate

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(b) To reflect the disruption of moving from an established employer to a new employer and the uncertainty associated with doing so, and,

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(c) To reflect the loss of some and the diminution of other, employment rights, associated with breaking continuity of employment with an established employer, and the requirement to begin to accumulate, of new and from a zero point, continuity of employment and build associated employment rights with a new employee.

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25 54. The above factors/reasons are all associated with and arise from the requirement to recruit, and the process of recruiting externally and the premium associated with doing what is required to attract and retain all of which, in the case of Mr Leonard, ultimately required the respondents to match his salary with his pre-existing employer.

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30 55. That matched salary, as it happened, equated to the Mid-Point in the salary scale paid by the respondents to D Grade employees, a Grade which Mr Leonard had already attained at the point of recruitment.

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56. In approaching his recruitment the respondent's initial intention and aspiration had been to recruit him at a salary £1,000 below the Mid-Point, that is

£35,000. Mr Leonard, for his part, sought a salary of £38,000, that is £2,000 above the Mid-Point.

57. In order to secure his acceptance of an offer of employment the respondents were required ultimately to match his pre-existing salary at £36,000 which equates to the Mid-Point for Grade D.
58. Had Mr Leonard been a female candidate for recruitment who, in all material and relevant respects, other than gender, presented for recruitment in the same way as Mr Leonard, the respondents would equally have matched her salary in order to entice and retain her. A pre-attained CTA qualification on her part, pre-existing experience at Assistant Manager (D Grade) and broad experience extending beyond that of private client individual tax would all have been valued equally by the respondent and would have commanded the payment of similar premium at the point of recruitment. That is to say a female candidate in those equivalent circumstances would equally have been recruited at a salary of £36,000 resulting in the same salary differential and between and less favourable pay of the claimant, within the meaning of section 66 of the EqA but such differential and less favourable pay would not have occurred because of and would have been wholly unrelated to the claimant's gender and the gender of the recruit, both being female.
59. The respondents recognise and value the CTA qualification, whether acquired by an employee prior to their joining the respondent's business or acquired internally by an employee while in the respondent's employment. They support employees working towards the attainment of the CTA qualification during their employment by the payment of some of the financial outlays associated with taking the examinations and by the provision of substantial periods of study leave to facilitate their preparation for what are universally recognised to be technically complex and difficult examinations.
60. Their policy which is applicable to all employees irrespective of their gender, is not to recognise internal attainment of the CTA qualification with a directly related salary increase. Rather, the attainment of the qualification positively

impacts upon performance grading and generally upon performance leading, in turn, to faster progression within a Grade and eligibility for promotion to Manager Grade and thus, in course, to increased financial reward and salary.

5 Internal Grievance

61. In June of 2020 the claimant raised an internal grievance complaining that the respondent was in breach of its obligations under the Equality Act in respect of her pay, in comparison with that of Mr Leonard.

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62. The Grievance Panel considered that the reasons for the difference in pay between that of the comparator Mr Leonard and the claimant were those associated with the requirement and decision to match Mr Leonard's then existing salary with his previous employer at the point of recruiting him to the respondent's employment.

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63. The Panel concluded that the reasons for the difference were wholly unrelated to the gender of either the claimant or of her identified comparator, Mr Leonard.

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64. In circumstances where concerns were raised about whether offering him less than his existing salary would be sufficient to recruit him, a decision was taken to match his salary.

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65. The salary which he was accordingly offered, of £36,000, placed him, as it happened, at the Mid-Point of the Grade D scale (£31,000 to £41,000).

66. The claimant appealed the grievance outcome. A Grievance Appeal Panel considered the appeal in October of 2020. The Appeal Panel upheld the original internal Grievance Panel's decision affirming its reasons.

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67. The respondent's witness, Mr Healy, accepted in evidence that had the respondent's financial performance been better in years 2018 and 2019 and, absent the impact of the Covid 19 pandemic, it was likely that the claimant's

salary would be higher than it currently was and probably at or much closer to the Mid-Point of the D Grade scale.

- 5 68. The size of the increases that the claimant had actually received had been linked, in part to her own performance ratings and in particular the fact that in 2018 she was only rated PZ4.
- 10 69. The comparator Mr Leonard, on the other hand, had been consistently rated at PZ3 and had progressed to D3 a year before the claimant and thus had a year's more service and experience in that Grade.
70. There are 11 female and 1 male employees at Grade D3 in the team of which the claimant is a member. (Page 171 of the Bundle).
- 15 71. The salaries for the 11 female members of staff at Grade 3 are all different from each other and range from £32,500 to £40,256.
72. The highest paid woman at D3 is paid more than Mr Leonard.
- 20 73. The reasons for the differences in pay as between the 11 female employees at Grade D3 do not relate to a difference in gender.
74. The third person listed in the table at page 171 of the Bundle has a salary which differs by only £57.50 from that of Mr Leonard.
- 25 75. That person, who is of the same gender as the claimant, was appointed as Grade D3 at the same time as the claimant in October of 2019.
- 30 76. The difference in her pay and that of the claimant is, on the balance of probabilities, attributable to the fact that she reached Grade D3 in 2014 and has had the benefit of incremental pay rises in salary review years 2014, 2015, 2016 and 2017 when the respondent's financial results were relatively better than they were in 2018, 2019 and 2020 and thus, the business could afford to provide employees with more generous pay rises.

77. The 2 employees immediately above the claimant on the list at page 171 were also progressed to D3 at the same time as the claimant and, while their salaries are greater than the claimant's by a relatively small margin, that difference, on the balance of probabilities is likely to be attributable to the claimant's receiving a PZ4 rating in 2018.
78. There are some substantial differences between salaries paid to the members of the claimant's team at D3. Only the comparator Mr Leonard is male. The differences between the salaries of the female staff are attributable to factors other than gender.
79. The progression in pay of the claimant on the one hand and of Mr Leonard on the other, is not tainted by discrimination and is unrelated to gender.
80. The original reasons for the difference in pay between the claimant and Mr Leonard reflect the fact that for the various reasons which the Tribunal has found in fact established, his existing salary with his previous employer was matched by the respondents at the point of recruitment in order to entice him into accepting the offer of employment.
81. He was thereafter progressed to D3 a year earlier than the claimant and in 2018 was assessed as PZ3 when the claimant was assessed as PZ4.
82. In 2019, the claimant's salary was increased more than Mr Leonard's. In 2019 the claimant was progressed to D3.
83. Since the claimant's progression to D3 there has only been one full year pay review point (October 2020). In that year the claimant was performance rated at PZ2 whereas Mr Leonard remained rated at PZ3. In 2020 however in consequence of the impact of the Covid 19 pandemic on the respondent's business, only those attaining promotion and those who progressed within the E Grade (the respondent's graduate scheme) were awarded pay rises in 2020.

84. The differences in pay between the claimant's pay and that of Mr Leonard the male comparator, is attributable to and explained by material factors which do not involve treating the claimant less favourably because of her sex. The reasons for the pay differential are wholly unrelated to the gender either of the claimant or of the comparator Mr Leonard.
85. Neither the claimant nor other female D3 employees doing work equal to the work done by the claimant and by Mr Leonard, are put at a particular disadvantage when compared with Mr Leonard.
86. Although the difference in pay between the claimant's and Mr Leonard's amounts to the claimant's pay being less favourable within the meaning of section 66 of the EqA, no 'sex equality clause', in terms of section 66, operates as between the claimant and Mr Leonard such as to vary the claimant's pay in the circumstances, because of the provisions of section 69 of the EqA 'defence of a material factor'.
87. Separately, the aim of employing and retaining competent, experienced and professional staff to service the requirements of the respondent's client base is a legitimate aim.
88. The respondent experiences challenges in developing and recruiting competent and experienced staff to undertake the roles undertaken by the claimant and Mr Leonard the male comparator seeking to recruit such staff from the external competitive job market and thereafter retain them, in addition to developing such expertise internally amongst their pre-existing staff is, and the causative material factors which the Tribunal has found established in fact, amount to a proportionate means of achieving a legitimate aim.
89. There exists within the respondent's business the concept of "hot spot funding".

90. Applications for hot spot funding are to be made exceptionally and, generally outwith the normal salary review cycle, for the purposes of attempting to retain a skilled employee who has communicated an intention to or there exists a likelihood that they may leave the respondent's employment to take up another job and whose departure, at the particular point in time, would have a major impact upon the respondent's business.
91. The point of such funding, if made available, would be, for example, to match or better a salary being offered by a recruiting competitor sufficient to retain the employee with the respondent.
92. In the respondent's employer scoring matrix, under which any candidate in respect of whom Managers wish to consider making an application for hot spot funding, a potential candidate must achieve a threshold score of 15.
93. The availability of hot spot funding in otherwise appropriate cases and the amount of any particular funding made available is also informed and ultimately governed by "affordability", at any particular point in time.
94. The Chair of the internal Appeal Panel, which affirmed the decision not to uphold the claimant's grievance, recommended that the claimant's Managers give consideration to making an application for hot spot funding as a possible means of addressing what they had recognised as the claimant's legitimate, albeit non-gender related, concerns about the progression of her salary towards the Mid-Point of the D Grade.
95. On the scoring matrix, the claimant had achieved a score of 6 against the threshold score of 15 required for application for hot spot funding.
96. On the balance of probabilities the Panel was aware of the claimant's low scoring at the time of making the recommendation.
97. At the year end review as at October 2020 the claimant was performance rated PZ2. Which represented an improvement from her 2019 performance

rating of PZ3. A rescoring of the matrix to reflect the claimant's October 2020 PZ2 performance rating would have resulted in an increase in the scoring matrix of 1 point that is to say the claimant would have scored 7 against the threshold requirement of 15.

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98. The claimant's Manager Mr Healy who would have been the person required to make an application for hot spot funding in respect of the claimant, gave consideration to the recommendation of the Appeal Panel. He concluded that there was no prospect of such an Application succeeding if made on the claimant's behalf, particularly in 2020 when a moratorium had been placed on all pay increases with the exception of those newly promoted and those progressing within band E, nor did he consider based upon the claimant's matrix scoring, that the stateable grounds upon which an Application could be made.

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99. Upon consideration he declined to make such an application and did not do so.

100. The respondent's HR Partner Ms Hughes agreed with and supported that assessment.

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101. Mr Healy's assessment and conclusion in that regard, and Ms Hughes's concurrence, would have been the same had the claimant been a male employee whose circumstances were in all other regards the same as the claimant's.

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102. Mr Healy's decision not to apply for hot spot funding was wholly unrelated to the claimant's gender.

30 **Finds in Fact and in Law**

103. The respondent has satisfied the burden of proof in relation to its pled material factor defence to the claimant's equal pay claim.

Submissions**Submission of the Claimant**

104. In recognition of the thoroughness with which the claimant's representative
5 Ms N Dowling prepared them, the submissions made on behalf of the
claimant are set out in full below as noted by the Judge:-

10 The claimant's representative asked the Tribunal to note that the
respondents and the claimant were in agreement in relation to a
number of material and relevant facts:-

(a) That the claimant ("C") and her relied upon male
comparator Mr Michael Leonard ("L") do "equal work"
for the purposes of section 65 of the Equality Act 2010
15 ("EqA") (Grounds of Resistance at page 38 of the Joint
Bundle)

(b) That both C and L were respected and experienced
members of the private client tax team both capable of
dealing with the most complex level of tax returns (page
20 37 of the Joint Bundle ("page 37"))

(c) That the difference in pay between C and L amounts to
C's pay being "less favourable" within the meaning of
25 section 66 of the EqA

The above was the case despite the fact that the evidence, in her
submission, went to show that C was outperforming L in October of
2020, at the last full review point, when C was graded at PZ2 for
30 performance and L was graded at PZ3.

105. The respondent's position, notwithstanding the above concessions, was that
it denied that a 'sex equality clause' (section 66 of the EqA) operates as
between the claimant and Mr L, to vary the claimant's pay because of the

provisions of section 69 of the Act, that is the respondent's pled defence of a material factor.

5 106. In so doing the respondents gave notice, in their Grounds of Resistance and in the witness statements of their witnesses, of three reasons upon which that defence was said to rest:-

10 (a) That at the point of recruitment Mr L had greater private client experience and broader experience (including experience of corporate tax matters) than the claimant, which although the respondents asserted was relevant to them in seeking to recruit him was not, in the claimant's representative's submissions directly relevant to the post to which he was being recruited;

15 (b) That Mr L had already achieved and held the CTA qualification at the point of recruitment which the respondents say was also a factor which resulted in him being recruited at an increased premium in terms of which the respondents offered to match his existing salary;

20 (c) The fact that Mr L was an external hire in October 2017 which typically commands a higher salary premium at the point of making an offer in order to entice an attractive candidate into accepting the offer.

25 107. Regarding the first reason given notice of that is to say greater experience, the claimant's representative submitted that that as an alleged state of fact had been refuted in the claimant's witness statements and had not been seriously contested in cross examination. In the cross examination of
30 Mr Healy and Ms Hughes neither was able to confirm that Mr L's corporate experience was directly relevant to the role to which he was recruited or whether it had in fact ever been utilised by the respondent, for example, by seconding him to the corporate tax team. Further, Mr Healy and Ms Hughes each confirmed that within the respondent's organisation, corporate tax work

capability sat within a different team and in terms of legislative provisions was governed by different tax rules.

5 108. Ms Hughes had agreed in cross examination with the claimant's representative's proposition that any secondment to the corporate tax team was likely to take place in the quiet period for private client tax, that is in the period immediately after the 31st January deadline for submitting of tax returns, through to in or about June of each year at which point information began to be submitted again in relation to private client tax returns.

10 Ms Hughes had also confirmed that Mr L worked his full time equivalent compressed hours generally only in the period between June and February each year. That appeared to mirror consistently what was the busy period for private client tax returns. Ms Hughes was not aware of whether Mr L had ever been seconded to corporate tax.

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109. Regarding the second cited reason, the CTA qualification;

The claimant's representative submitted that Ms Clinton, the claimant's witness, had confirmed that while she had achieved the CTA qualification internally with the respondents she had not received nor had she expected to receive a specific salary increase for achieving the qualification *per se*.

20 Mr Healy and Ms Hughes had each confirmed that that position was one which was aligned with the respondent's practice in relation to internally gained qualifications that is to say that the respondents valued the attainment of the qualification by funding certain of the outlays which required to be incurred by a candidate and by allowing many hours of study leave to employees in order to pursue the qualification whereas, both had confirmed, in the case of an external candidate who had already attained the CTA qualification presenting for recruitment the prior possession of the qualification would generally attract a premium in terms of salary offered, the

25 respondents for their part neither having to fund the attainment of the qualification either through the payment of outlays or allowance of study leave and the qualification itself being a marker of achievement of a level of

30 technical competence.

110. While Ms Hughes had confirmed in cross examination that an external female recruit would be equally likely to attract and receive a salary premium at the point of recruitment if they already had the CTA qualification, she was not able to cite any actual example of that having happened.

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111. In re-examination the converse point was brought out by the witnesses namely that internal employees who gained the CTA qualification who were male would also not be given a pay rise if obtaining the CTA qualification internally but as no evidence of that actually having happened within the claimant's team had been presented, all the other members of the team being female, the claimant's representative invited the Tribunal not to accept but rather to reject the evidence of both Mr Healy and Ms Hughes on that point.

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112. Under reference to the grievance outcome (at page 158 of the Bundle), the claimant's representative drew the Tribunal's attention to the fact that in the reasons cited in the outcome letter for the paid differential only the third of the pleaded reasons appeared to be founded upon as a material factor namely, the fact that Mr L was an external hire who thus attracted a premium at the point of recruitment. On the other hand both of the respondent's witnesses had confirmed all three of the factors pled would have had an impact on the pay differential. Given that the claimant has disputed all three and the grievance appeal outcome referred only to the external hire point that, submitted the claimant's representative, supported the claimant's expressed view and opinion that only the external recruitment point was really in play.

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113. Turning on the above basis to the external hire factor, the claimant's representative, under reference to page 41 paragraph 38 of the Grounds of Resistance, noted that the respondents unpacked that factor into three components:-

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(a) The need to entice an external recruit;

(b) To address the uncertainty of moving from an existing employer to a new employer; and

(c) To address the loss of employment loss/diminition of employment rights associated with breaking continuity of employment with an existing employer and starting afresh with a new employer.

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114. In the claimant's representative's submission, based on the evidence the first and second of these sub-elements should be viewed as having fallen away by October 2019 that is after two years by Mr L in his new employment, and she considered that the weight to be attached to the third should likewise be viewed at least as diminished at the two year point as Mr L would, at that point, again attain the right to complain of unfair dismissal and to receive a statutory redundancy payment (albeit the claimant's representative accepted that the remedies associated with the enforcement of those rights did vary proportionately with the number of years of new service accrued and that therefore there would be a continuing effect).

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115. While the respondent's witness Ms Hughes had indicated that it would not be reasonable to seek to reduce Mr L's salary after the two year point or to artificially restrict it, she had confirmed that the respondent's salary review policy (page 158) would permit, all other things being equal, the directing available salary resource more towards colleagues, such as the claimant who had some way to travel towards the Mid-Point of the Grade band in terms of salary and less towards those who were already at the Mid-Point or above it, with a view to facilitating equalisation over a period of time.

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116. Turning to the comparator the claimant's representative noted that Mr L had joined the respondents on the 1st of October 2017 with a salary which matched his existing salary with his previous employer which, as it happened, at £36,000, coincided with the Mid-Point and, upon that basis, the respondents, if wishing to be seen to act fairly and reasonably had opportunity to and should have begun to adjust his salary downwards in relative terms while increasing the claimant's.

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117. That course of action she said could have been justified on the basis that financial performance in 2018 and 2019 within the respondents, had been lower than in previous years and it would have been reasonable of the respondents to do so.

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118. Despite the above, the allocated funding for increase of Mr L's salary had not been deliberately reduced in 2018 and 19 relative to the claimant. In explaining that position the respondents placed reliance on the claimant's PZ4 rating, which, at 1st October 2018 was lower than Mr L's PZ3. The claimant had received a salary increase of £500 at that review point, but on the evidence of Ms Hughes, had she been a PZ3 she would have been likely to have received an additional £300, that being the average across the Grades assessed at PZ3 at that point.

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119. Mr Healy had confirmed that a contributing factor to the claimant's PZ4 grading was that she had not been accredited to sign off on simple tax returns without supervision, albeit that at the same time she was already dealing with super complex tax returns under supervision and reviews (page 131). The claimant's representative invited the Tribunal to hold that the claimant's non-accreditation, at 1st October 2018, was more to do with the attitude of the Manager who was charged with awarding that accreditation than the claimant's performance. In this regard she relied upon the evidence of Ms Clinton who said that the Manager responsible had not accredited any D Grade reviewers including the claimant and, that shortly after the process of accreditation was taken over by a more senior Manager, the claimant was quickly accredited albeit after the 1st October 2018 salary review point. The respondent had not chosen to cross on that point and therefore the claimant's representative invited the Tribunal to accept that evidence and to make that Finding in Fact. Turning to the question of grading distribution, Ms Hughes's evidence had been to the effect that the respondents, at the point of final annual review adhered to a forced distribution curve when assigning performance ratings which curve required some employees across the private client tax team be given a PZ4 rating, albeit that at the interim review grading point in any year no forcing of the distribution occurs and colleagues

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are graded purely on their actual performance against set standards and not adjusted in relation to each other.

120. The respondents also placed reliance on the fact that at the October 2019
5 review point the respondents had in fact increased the funding which had
otherwise been allocated to the claimant for salary increase of £600 by a
further £400 to £1,000 at the point when she progressed from D2 to D3. The
respondents maintained that that reflected an additional increase and a
10 desire to move the claimant closer to the mid point of the Grade. However on
the evidence of Mr Healy and Ms Hughes and in the respondent's
submission, Mr L had also received a salary increase of £1,000 when he
progressed from D2 to D3 in the previous year and thus it could be seen that
both the claimant and Mr L had received the same amount of salary increase
15 at the point when they each respectively progressed from D2 to D3 and yet
the claimant had only achieved that after intervention it is said by the
respondents, in order to move her towards the Mid-Point.

121. The claimant's representative drew the Tribunal's attention to the HR
comment contained in the offer approval and management form, at page 177
20 of the Bundle, in terms of which it was noted that in matching Mr L's existing
salary on recruitment it would create a salary differential between him and
certain other members of the team but that they (certain other members of
the team) may receive a salary review in October, impliedly October of the
same year 2017 so that some of the gap would be bridged. Also, the role to
25 which Mr L was being recruited was that of reviewer rather than preparer so
that in itself accounted for an element of a higher salary. The HR commenter
went on to state as both other peers were female this might result, in the
future, in the potential for the perception that the discrepancy was because of
gender difference.

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122. While Ms Hughes had confirmed in evidence that the respondents carried out
extensive annual gender based salary audits, those reviews were carried out
at Tax Department level which covered some 2,300 employees and such
reviews would not deliver sufficient granularity to pick up or reflect the

disparity in this particular case between the salary of the claimant on the one hand and that of Mr L on the other.

5 123. Whilst it was possible to understand why the claimant versus Mr L differential would have gone undetected in such an audit review, the specific issue had been focused in the internal grievance and thus, the respondents were fully aware of it.

10 124. A subsequent Appeal reached the conclusion that the main reason for the difference between the salaries was the external recruitment of Mr L and the premium paid in matching his salary at that point, whereas the pleaded case mentioned other matters.

15 125. The scoring matrix completed in respect of consideration of the recommendation that the respondents consider applying for “hot spot funding” to address the claimant’s complaint, had shown a score of 6 on the part of the claimant whereas the threshold for making such an application was 15, but that score had been impliedly available to the Appeal Panel when they made that recommendation and thus they made it notwithstanding the
20 fact that the score was substantially below the threshold. The opportunity to update the scoring matrix with the more accurate information that appears at page 171 was not taken, or to rescore on an assumption that the claimant ought not to have been graded as PZ4 but rather as PZ3, albeit that in the respondent’s contention, doing so would have made a difference to the score
25 of only 1 point that is to say the claimant would have scored 7 against the threshold score required of 15 as opposed to 6.

30 126. On Ms Hughes’s analysis of the documentary evidence put to her it appeared clear on the evidence that the Appeal Panel only had access to what was inaccurate salary information presented at page 170 of the Bundle and not the subsequently corrected information at page 171.

127. The recommendation to consider applying for “hot spot funding” had been shared by the Panel with Ms Hughes who in turn shared it with Mr Healy as directed.

5 128. Both Ms Hughes and Mr Healy confirmed that they were not aware of any
other instances in which a Chair of an Appeal Panel, who was also a Partner,
had recommended that they consider applying for hot spot funding. In the
claimant’s representative’s submission that recommendation was an
10 additional circumstance and should have been regarded by Mr Healy as
sufficient to override the fact that the claimant’s score even if adjusted was
less than half of the required threshold score and he should have made an
application, if behaving reasonably. The opportunity was not taken to update
the matrix with the result, in the claimant’s representative’s submission that
15 both Mr Healy and Ms Hughes considered that there would be in effect no
possibility of an application being positively considered if it were to be made
and thus it was not made. In her submission the application should have
been made by the respondents if they were acting reasonably and in it they
should have highlighted the extra circumstance of the fact that an internal
Grievance Appeal Panel, although already aware of the claimant’s low score,
20 had nevertheless recommended that such an application be made.

129. In summary, the claimant’s representative submitted that whereas the
respondents seek to rely before the Tribunal on three reasons amounting to a
material factor defence for the pay differential/premium of £5,000 paid at the
25 point of external recruitment of the comparator Mr L, the claimant had
disputed and evidenced that two of the three reasons did not exist or at least
their existence had not been sufficiently evidenced by the respondent on
whom the burden of proof sat. In support of that proposition she noted that
the internal Appeal Panel cited only one of the reasons namely that of internal
30 recruitment. In their letter of outcome she submitted separately that of the
three reasons cited at least the first two would have ceased to exist at the two
year period and the third would have been reduced in its impact at the two
year period that is, after Mr L had been recruited and as at 1st October 2019.
She invited the Tribunal to hold in a worst case scenario that any material

factor explaining the pay difference had ceased to exist as at 1st October 2019 and that the respondents, in accordance with that policy ought to have closed the pay gap between the claimant and a male comparator in the subsequent salary reviews.

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130. On the other hand the reality was that despite there being two salary reviews in October 2019 and October 20 and the specific recommendation from the Appeal Panel that the claimant's Managers consider applying for (additional) "hot spot funding", the pay discrepancy remained at £5,240 as at the date of the Hearing 16th June 2021. That was a case despite, as at October 2020 both the claimant and Mr L would have been considered, from the respondent's perspective, properly as peers in the D3 category all other things being equal for the first time, with the exception that the male comparator at that point would have had one year's more experience in the Grade than the claimant.

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131. If one removed from the equation the detrimental effect on the claimant's salary associated with what she considered to be a wrong grading of them at PZ4, that would suggest that the salary differential had only been closed by some £60 or so in the pay reviews since the male comparator's recruitment on the one hand and the claimant's progression to the D Grade from the E Grade both in 2017. The respondents ought to have been addressing the pay disparity between these two employees who carried out equal work to the same standard but, with one paid significantly below the Mid-Point and one paid above the Mid-Point, and she invited the Tribunal to find that the reason for the disparity was, as at the date of Hearing the difference in gender between the claimant and the male comparator and to decide the case on that basis.

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132. Following the delivery by the respondent's representative of his submission the claimant's representative exercised a limited right of response in respect of three matters:-

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5 (1) In relation to the respondent's representative's submission that the real material factor for the pay differential namely the premium paid to the male comparator at the point of recruitment remained the explanation for the differential, the claimant's representative submitted that that of itself did not explain why the comparator had been paid £1,740 by way of salary increase in the intervening 3½ years whereas the claimant had been paid only £1,500.

10 (2) That the comparison prayed in aid by the respondent's representative of the female members of the team and the male comparator was not valid because none of those individuals was directly comparable to the claimant (valid or relevant).

15 (3) That the respondent's explanation, set out at paragraphs 17 and 18, of the £1,000 salary increase paid to the male comparator on the one hand and of that paid to the claimant, on the other, is not the same and was inconsistent and that the respondent could not have it in effect" both ways".

20 **Submission for the Respondent**

133. The respondent's representative submitted as follows:-

The Claim

25 (1) The Claimant's claim is for equal pay pursuant to ss. 64-71, Equality Act 2010 ("EqA 2010"), Part 5 Chapter 3. It was not, for example, a complaint of unfair dismissal, constructive or otherwise the fairness of which might involve the assessment of the reasonableness of the respondent's conduct.

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The Issues

(2) The issues to be decided by the ET related predominantly to the material factor defence under s.69 EqA 2010 which is relied upon by the Respondent.

(3) The following matters are common ground between the Claimant and the Respondent:

5 (1) The Claimant's male comparator is Michael Leonard ("Mr Leonard").

(2) The Respondent admits that the Claimant and Mr. Leonard do equal work for the purposes of s. 65(1), EqA 2010.

10 (3) The Respondent admits that the Claimant's pay term is less favourable to her than Mr. Leonard's pay term and that the sex equality clause is engaged pursuant to s. 66(1) EqA).

(4) The issues to be decided are as follows:

15 (1) Does the sex equality clause in the Claimant's terms have effect in relation to the difference between the Claimants and Mr. Leonard's terms? Specifically:

(a) Can the Respondent show that the difference in pay is because of a material factor? In this regard:

(i) the Claimant contends that the material factor must exist "today";

20 (ii) The Respondent contends:

(A) at the point the difference in terms arose, Mr. Leonard was an external hire (paras 36(a) and 38-39 of the Grounds of Resistance [Bundle p41]); and

25 (B) Mr. Leonard's greater (than the Claimant) relevant commercial experience and level of qualification (paras 36(b) and 40(a)-(b) [Bundle pp41-42]);

5 (b) If so, does reliance on or on either of those material factors involve treating the Claimant less favourably than Mr. Leonard because she is a woman? (The respondent's position is that at the time of his recruitment the male comparator was not actually being compared with the claimant at all rather he was being assessed as a potential recruit.

10 (c) If the answer to (b) is in the affirmative, can the Claimant show that reliance on or on either of those material factors puts her and other women doing equal work to her at a particular disadvantage when compared to men doing equal work to her? (That is to say the burden shifts to the claimant)

15 (d) If the answer to (c) is also in the affirmative, can the Respondent show that reliance on or on either of those material factors is a proportionate means of achieving a legitimate aim? In that regard, the Respondent relies on the legitimate aim of being able to externally recruit competent, experienced and professional staff; (and in
20 respect of which the burdens which is back to the respondent).

25 (5) In addition to those issues, the Claimant also contends that the following matters are additional issues, whereas the Respondent contends that to the extent that these are relevant at all, that they are matters for evidence rather than issues to be decided:

30 (1) Has the Respondent admitted on several occasions (and in writing) that there is "no reason" why the Claimant's pay should be at least as high as the mid-point of the D grade (and hence Mr Leonard's pay)?

(2) If there is "no reason":

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- (a) Has the Respondent had multiple opportunities to apply for additional funding to resolve the acknowledged pay disparity over the last 2 years?
 - (b) Has there been a material factor or valid reason for choosing to not to apply for any of this funding to address this admitted pay disparity between a male and female colleague?

The Applicable Law

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- (6) The key provision of the EqA 2010 for the purposes of this hearing is s.69 EqA 2010 which provides (so far as relevant) as follows:

69 Defence of material factor

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- (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.
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- (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.
- (3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim...
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- (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.
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- (7) In **Glasgow City Council -v- Marshall** [2000] IRLR 272, HL, Lord Nicholls summarised the key features of the material factor defence as follows (at para 18):

5 *"[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."*

10 The burden then passes to the Respondent to establish its defence under s 69. The trigger for the employer having to prove its case under the 'material factor' defence is not disparate impact as between men and women, nor the identification of a 'provision, criterion or practice' that has such effect. All that is needed is proof of a difference in pay and the establishing of equal work between claimant and comparator. When the burden passes, it gives rise to a three stage process; again, per Lord
15 Nicholls:

20 *"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."*

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- (8) The Claimant also asserts in this case that the explanation for the difference in pay is time-limited. Where it is time-limited in a causative sense, then once the factor that explains the variation no longer operates the explanation (and the s 69 defence) falls away -

see **Benveniste -v- University of Southampton** [1989] ICR 617, where the appointment of a woman to a particular point on a pay scale was attributable to the financial difficulties which the employer was experiencing at the time. 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.

(9) However, the crucial point is that the material factor defence is to be analysed in a causative and not a justificatory sense. It is only at the point when the factor ceases to provide the explanation for the pay differential that the defence falls away – see the Court of Appeal decision in **Walker -v- Co-Operative Group Ltd** [2020] IRLR 896. In that case, Mrs Walker's equal pay claim was based on a comparison with the work done by two male comparators. The Co-Op relied upon 'material factors' which included the additional experience of the comparators and the operation of market forces. These were accepted as providing a defence at the time when the salaries of all were fixed, but a later Hay Job Evaluation Scheme scored the claimant's job higher than her comparators. The ET held that the material factor could not continue to operate as a defence, but the EAT and the CA held otherwise. As Bean LJ explained (at [42]): 'the critical question is whether all the material factors which, as the ET found, explained the pay differential between Mrs Walker and either Mr Asher or Mr Folland in February 2014 had ceased to operate as an explanation for the difference in February 2015.' This was not the case, and for that reason the equal pay claim failed. The CA held that the ET had made the mistake of asking whether at the crucial time the material factors had ceased to **justify** the differential, when it should have asked whether the material factors had ceased to **explain** it.'

(10) The decision in **Walker** confirms and applies the approach taken by Underhill P (as he then was) in the earlier decision in **Secretary of State for Justice v Bowling** [2012] IRLR 382, EAT. '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

5 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
10 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 para 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
15 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.'

(11) For the reasons set out below, it is submitted that the material factors
relied upon by the Respondent continue to explain the difference in
pay between the Claimant and Mr Leonard and that the Employment
20 Tribunal should apply the decisions in Walker and Bowling.

The Material Factors

(12) It is submitted that when considering the issues in this claim, it is
fundamentally important to remain focused upon the reasons for the
25 difference between the Claimant's pay and that of Mr Leonard. This is
an equal pay claim. It is not an exploration of how fair or unfair the
Respondent's salary structure is or whether it has been administered
well or badly. The Claimant, Ms Clinton and the Claimant's
representative have devoted considerable attention in their evidence
and presentation of the claim to whether the Respondent acted fairly in
30 the way in which it dealt with issues of pay and specifically its failure to
increase the Claimant's pay to at least the midpoint of the Grade D pay
scale. Indeed, the Claimant's underlying complaint appears to be less

that she is being paid less than a man for undertaking the same work and more that her level of pay does not reflect her skills and experience and that she feels underpaid when compared to all of her colleagues at the same grade, all of whom are women except for Mr Leonard.

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(13) The reasons why Mr Leonard is paid the salary of £37,740 seem to be largely uncontentious. He was recruited as a Grade D2 in 2017 at a salary of £36,000. At the time of his recruitment the Respondent understood that he was employed by Grant Thornton at a salary of £36,000 (p177). He was apparently hoping to achieve a salary of £38,000 (p177). The Respondent initially considered offering him a salary of only £35,000, but concern was raised about offering him less than his existing salary (see p178) and so a decision was taken to match his salary. The salary that he was offered, as it happened, placed him at the midpoint of the Grade D scale (£31,000 to £41,000).

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(14) The salary that was agreed for Mr Leonard reflected a number of factors:

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(1) His existing salary and the perceived importance of matching it in order to secure his recruitment;

(2) The fact that he already had significant experience at assistant manager level and had broad experience which made him an attractive candidate.

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(3) The fact that he was CTA qualified.

In reality sub-paragraphs (2) and (3) above were sub-factors of sub-paragraph (1) i.e. the need to match his salary in order to recruit him and entice him into accepting an offer of employment. Although the Claimant sought to play down the role that these factors should have played in the recruitment decision, she did acknowledge in cross-examination that all of those factors had a potential part to play when deciding what offer to make to Mr Leonard. Indeed, it is noteworthy that in paragraph 3 of Ms Clinton's witness statement and in cross-

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5 examination, she acknowledged that “Historically, our team have had difficulties recruiting individuals of the appropriate calibre.” It is an important part of the reason for the difference in pay that a recruitment premium is often necessary in order to recruit the right people, even if this results in them being paid more than some of the existing workforce and is a reason that applies equally to men and women that is to say had the male comparator been a female recruit in the same circumstances the respondents would have equally required to and would have matched that female potential employee’s salary in order to secure her recruitment.

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(15) The Claimant has focused on the direct relevance of Mr Leonard’s broader experience to the work that he was actually doing within the team. However, as was pointed out by Mr Healy and Ms Hughes in their evidence the broad range of experience makes him attractive as a recruit even if the experience might not be of direct and immediate relevance to the work he was initially recruited to undertake. As Ms Hughes pointed out, his broader skills could for instance be used to second him to another department during quiet periods. Thus, the reference, at page 41 to “relevant” means relevant to the respondent and their broader needs rather than relevant to the specific post to which Mr Leonard was being recruited.

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(16) The Claimant has also sought to challenge the CTA as a material factor on the basis that when an internal candidate obtains a CTA qualification they do not expect to receive an automatic pay rise. However, it is submitted that this is a flawed approach. The fact that an internal candidate may not receive a pay rise for obtaining the CTA does not mean that the qualification is not perceived as valuable by the Respondent. The Respondent pays for a proportion of the costs of obtaining the CTA qualification and gives employees study leave to support them in the process of acquiring the qualification. This strongly supports the view that it has a value to the Respondent. Moreover, as explained by Mr Healy in evidence, the fact that a candidate for

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employment by the Respondent has the CTA qualification can provide reassurance that they are a suitable for employment and makes them more attractive. Equally, as Mr Healy had also confirmed while not rewarded directly or immediately with a salary increase for attaining the qualification an internal candidate who does so accelerates their promotion eligibility and on promotion achieves increased financial award sooner than they might otherwise have done so. Thus, in the respondent's representative's submission the claimant's representative in seeking to compare the respondent's treatment of the CTA qualification in the hands of an male candidate who presents for recruitment already having attained it on the one hand, with their treatment of the qualification in the hands of an internal female employee who attains it while in their employment, the claimant's representative was not "comparing apples with apples" but rather was seeking to compare "apples with pears".

(17) Following his recruitment, Mr Leonard has always been rated as PZ3. In October 2018, he was moved up to Grade D3 (p171) and received a pay rise of £1,000. The difference in his pay rise and the Claimant's pay rise in that year is explained by his step up to D3 and by the difference in their performance grading as the Claimant was assessed as PZ4.

(18) In October 2019, Mr Leonard was rated as PZ3 again and received a pay rise of £740 (p169) compared to the £1,000 pay rise received by the Claimant. Neither Mr Leonard nor the Claimant received a pay rise in October 2020 - in common with most other staff.

(19) In order to consider the reasons for the difference in pay between the Claimant and Mr Leonard, it is also important to understand how the Claimant's salary of £32,500 has come about. It is submitted that the factual history as to how the Claimant's current level of pay has been arrived at is summarised succinctly in paragraph 3 of Mr Healy's

statement and is also not the subject of significant challenge by the Claimant.

5 (20) The Claimant was promoted to Grade D1 in July 2017. At that time her salary was increased to £31,000 which is the bottom end of the Grade D scale. It appears to be uncontentious that this was done in line with the Respondent's normal practice for anyone being appointed to a new grade. Having been promoted in July 2017, the Claimant was not eligible for a pay review in October 2017. Although the Claimant's representative made numerous references in her questioning of the Respondent's witnesses to there having been four pay reviews since the Claimant was appointed to Grade D, there have only been three: 10 October 2018, October 2019 and October 2020.

15 (21) In October 2018, the Claimant was rated as PZ4 which equates to not always meeting expectations and as a result, she received only a small pay rise of £500. As noted above, this contrasted with a pay rise of £1,000 for Mr Leonard who was rated PZ3 and was also progressed to Grade D3 at that time.

20 (22) In October 2019, the Claimant was progressed to D3 and was awarded a pay rise of £1,000 (which was in excess of the sum originally allocated of £630) whereas Mr Leonard was only awarded a pay rise of £740. The £630 originally allocated to the Claimant and the 25 £740 actually awarded to Mr Leonard reflect a 2% salary increase on their respective salaries.

(23) In October 2020, as noted above, the Claimant and Mr Leonard did not receive pay rises.

30 (24) It is accepted by the Respondent that had the Respondent's financial performance been better in the years 2018 and 2019 in particular, it is likely that the Claimant's salary would be higher and would be likely to have reached at least the midpoint of the D Grade scale. The reason

that it has not done so is entirely unconnected with the Claimant's sex. The size of the increases that she has actually received have also been linked to her own performance ratings and in particular, by the fact that in 2018 she was only rated at PZ4. Mr Leonard, on the other hand has been consistently rated at PZ3 and was progressed to D3 a year before the Claimant.

(25) It is also important to note what has happened to the salaries of the other Grade D3 staff:

(1) There are 11 women and 1 man at Grade D3 – see Bundle p171.

(2) The salaries for the 11 female members of staff at Grade D3 are all different from each other and range from £32,500 to £40,256.

(3) The highest paid woman at Grade D3 is paid more than Mr Leonard.

(4) The reasons for the differences in pay as between the 11 female employees at Grade D3 cannot relate to a difference in sex.

(5) The third person in the list on p171 is of significance in that there is only £57.50 difference between her annual salary and that of Mr Leonard. She was appointed as Grade D3 at the same time as the Claimant in October 2019. The significant difference in her pay and that of the Claimant seems to be attributable to the fact that she reached Grade D in 2014 and will have received pay rises in 2014, 2015, 2016 and 2017, that is across a 4 year period when the Respondent's financial results were not as poor as they were in 2018, 2019 and 2020.

(6) The two employees immediately above the Claimant on the list at p171 were also progressed to D3 at the same time as the Claimant and it is noteworthy that their salaries are only marginally more than the Claimant's that, which differential, on the balance of probabilities, can be seen to be explained by the claimant attaining a PZ4 performance rating in 2018 whereas the other two employees did not.

5 (26) When one considers the salaries of the 12 staff at D3, it is submitted that it is clear that there are some substantial differences between what the staff are paid. Only Mr Leonard is male. The differences between the salaries of the female staff are obviously attributable to factors other than sex. The history of the progression in pay for the Claimant and Mr Leonard is not tainted by discrimination and has nothing at all to do with sex. The original reasons for the difference in pay between the Claimant and Mr Leonard reflect the fact that his salary was matched when he was recruited, he had more experience than the Claimant, and he was CTA qualified at the time of his recruitment and had been so qualified for about 5 years, according to Mr Healy's evidence. He was then progressed to D3 a year earlier than the Claimant and in 2018 was assessed as PZ3 when she was assessed as PZ4. In 2019 the Claimant's salary was increased more than Mr Leonard's at the time that she also became D3. There has only been one pay review since they have both been at Grade D3 (October 2020) at which time there were no pay increases for sound business reasons connected with Covid and the performance of the business.

25 (27) It is submitted that the difference in pay between the Claimant's pay and that of Mr Leonard is attributable to material factors which do not involve treating the Claimant less favourably because of her sex. The reasons for the differences in pay have nothing at all to do with the sex of either the Claimant or Mr Leonard.

30 (28) It is also submitted that there no evidence has been adduced by the Claimant from which it could properly be concluded that as a result of the material factors, the Claimant and other female D3 employees doing work equal to the work done by the Claimant are put at a particular disadvantage when compared with Mr

Leonard. The Claimant bears the burden of proof of this matter under s.69(2) EqA 2010 and on the evidence presented has failed to discharge it and thus the claim falls to be dismissed without the need to consider the subsequent issue of justification.

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(29) Even if the Claimant was able to satisfy the Employment Tribunal of the matters required by s.69(2) EqA 2010, it is submitted that the Respondent can still satisfy the burden required by s.69(1)(b) that the material factors amount to a proportionate means of achieving a legitimate aim. In that regard, the Respondent relies on the legitimate aim of being able to recruit competent, experienced and professional staff externally. As noted above, the Claimant's own witness (Ms Clinton) accepted that there are particular challenges for the Respondent in recruiting competent and experienced staff to undertake these roles. In circumstances the respondents seeking to recruit such competent and experienced staff externally constituted a proportionate means of achieving that legitimate aim.

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(30) As for the additional matters relied upon by the Claimant as issues, the Claimant was asked at the beginning of the hearing to identify all of the "several occasions" upon which she relies in respect of her assertion that the Respondent admitted on several occasions (and in writing) that there is "no reason" why the Claimant's pay should be at least as high as the mid-point of the D grade (and hence Mr Leonard's pay). The Respondent does not accept that these are discrete issues which form part of the conclusions that the Employment Tribunal needs to reach in respect of the equal pay claim. Moreover, the two documents identified by the Claimant's representative, do not support the Claimant's assertions. Indeed, it is submitted that the documents, particularly when read with the other contemporaneous documents in the Bundle and with the witness statement identify numerous reasons (as set out above) why the Claimant's salary

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has not yet reached the grade midpoint and is still different from Mr Leonard's pay.

5 (31) The further additional matters raised by the Claimant in relation to
hotspot funding are also not central to the issues that fall to be
decided by the Employment Tribunal. The hotspot funding issue
has been cogently explained by the Respondent's witnesses. The
Claimant did not meet sufficient of the criteria in the matrix to
stand any prospect at all of being the recipient of such funding.
10 In any event, the issue that needs addressing in respect of the
Claimant's pay is not that it is less than Mr Leonard's pay, it is
that because of the pay restraint that has been in place for the
last few pay reviews the Claimant and some of her other
colleagues have not yet reached the midpoint of the pay scale
15 when her performance is such that she could have reasonably
expected to have reached that point by now, in normal
circumstances. The fact that she has not done so, has nothing to
do with her sex or Mr Leonard's sex and indeed has nothing to do
Mr Leonard at all.

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Conclusion

(32) For the reasons set out above, it is submitted that the
Respondent has satisfied the burden of proof in relation to its
material factor defences to the Claimant's equal pay claim.
25 Accordingly, the Claimant's claim should be dismissed.

134. Finally, that after his recruitment at the Mid-Point of the Grade band in 2017,
the male comparator as well as the claimant and other female members of
the team, also had a reasonable expectation, all other things being equal,
30 that he would receive salary increases in subsequent years, and that his
salary would not be artificially held back to allow that of other members of the
team, who had not been externally recruited to catch up with his. The
appropriate way to seek to reduce/eliminate any otherwise unmerited

differential was to increase the salaries of those who were below the Mid-Point incrementally towards the Mid-Point.

135. While that had been and remained the respondent's reasonable aspiration, it had not proved possible, in the course of pay reviews October 2018, October 2019 and October 20 to achieve that to the extent of eliminating the differential, due to external adverse circumstances including, the Covid crisis and a relatively poorer performance across the respondent's business in 2018 and 2019 (pre-Covid). Those reasons, while regrettable, were wholly unrelated to the sex of either the claimant or that of the male comparator Mr Leonard, or indeed to any other characteristic of the male comparator.

The Applicable Law

136. The Tribunal unanimously accepted as accurate the statement of the applicable law, set out by the respondent's representative and noted by the Tribunal at paragraphs 133(6) to (7) above, and adopts and incorporates the same by reference in the Note of Reasons for the purposes of brevity.

Discussion and Disposal

137. As noted above, the claimant's claim is one for equal pay pursuant to the terms of sections 64 to 71 of the EqA 2010, Part 5 Chapter 3.

138. It is admitted by the respondent that the claimant and the identified male comparator Mr Leonard do equal work within the meaning of section 65 of the EqA (paragraph 17 of the Grounds of Resistance).

139. It is further admitted that the term in the claimant's Employment Contract relating to pay is less favourable, within the meaning of section 66 of the EqA, than is the equivalent term in Mr Leonard's contract (paragraph 32 of the Grounds of Resistance). The effect of the same is to engage the "Sex Equality Clause" as set out in section 66 of the 2010 Act. The Sex Equality Clause, even where engaged however, will have no effect as between the

claimant and Mr Leonard if the provisions of section 69 of the EqA, being the “defence material factor” is established by the respondent, a matter in respect of which the burden of proof sits with the respondent.

5 140. In this case the respondent relies upon the section 69 EqA defence that is the
defence of material factor offering to prove, as pled, that the difference
between the claimant’s salary and that of the male comparator, whom it is
accepted do equal work, is explained by a material factor (factors) which are
wholly unrelated to the gender of either the claimant or of the male
10 comparator.

141. Thus, the Issues requiring investigation and determination by the Tribunal
were as follows:

15 (1) Did the Sex Equality Clause and the claimant’s terms have effect
in relation to the difference between the claimant’s and
Mr Leonard’s terms? That is to say in particular:-

20 (a) Could the respondent show, (the burden of proof sitting
with the respondent in terms of section 69(1) of the
Act), that the difference in pay is because of a material
factor reliance upon which:-

25 (a) does not involve treating the claimant less
favourably because of the claimant’s sex
than the respondent treats Mr Leonard,
and

30 (b) if the material factor is within sub-section
(2) of section 69, is it a proportionate
means of achieving a legitimate aim

142. Thus can the respondent show that the difference in pay is explained by a material factor/factors wholly unrelated to the gender of the claimant on the one hand and the male comparator on the other and if so,

5 (a) does reliance on, or on either or any of those factors, involve treating the claimant less favourably than Mr Leonard because she is a woman? And;

10 (b) if the answer to (a) above is in the affirmative, can the claimant, upon whom the burden of proof sits in terms of section 69(2) of the 2010 Act, show that reliance on any of those material factors puts her and other women doing equal work to her at a particular disadvantage when compared to men doing equal work to her? And

15 (c) if the claimant discharges her burden of proof establishing that the answer to (b) above is in the affirmative, can the respondent then show that reliance on or on any of those material factors is a proportionate means of achieving a legitimate aim.

20 143. While the respondent's contention was that it would establish on the evidence that the difference in pay between that of the claimant and that of Mr Leonard was attributable to and fell to be explained by material factors which did not involve treating the claimant less favourably because of her sex and thus reasons which have nothing at all do with the sex of either the claimant or
25 Mr Leonard, the respondent also contended, and in the alternative offered to prove, that the recruitment and retention of appropriate competently skilled and experienced staff was a legitimate aim and that the recruiting of those staff on the external and competitive job market, in addition to developing those skills and experience within individuals already in their employment,
30 was, in the circumstances, a proportionate means of achieving that legitimate aim.

144. Thus, although some of the evidence adduced by and on behalf of the claimant and some submissions made went to the issue of whether or not the

respondents had acted reasonably and or fairly, in the circumstances, in not proactively progressing the claimant from the entry level Grade D salary which she was awarded on her first progression to D3 in 2017 to the Mid-Point of that band, at a faster rate across the October 2018 and October 2019 salary reviews when opportunity to do so existed (and or by the October 2020 salary review point), or the date of the Hearing, the reasonableness or fairness of the respondent's actings in that regard is not the relevant test to be applied. Rather, as Underhill P (as he then was) made clear in **Secretary of State for Justice v Bowling** at paragraph 8, the question to be asked and answered was, and the instant case is, had the employer satisfied the burden of showing an explanation that was not 'tainted by sex' for the differential in pay between the claimant and Mr Leonard, and, the fact that the Secretary of State might, in the case of **Bowling** and the respondents might in the instant case, 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 whether that had nothing to do with gender.

145. The Tribunal found all of the witnesses who gave evidence before it to be both credible and, to the extent that their evidence went to matters of fact, reliable. In reality there was little or no difference between the evidence adduced by and on behalf of the claimant and that adduced on behalf of the respondent insofar as that evidence related to matters of fact. Rather, such differences as emerged fell within the areas of opinion and of speculation for which no factual basis was presented or established.

146. On the oral and documentary evidence presented the Tribunal unanimously held that the respondents had discharged their onus of proof under section 69(1) of the EqA 2010 and had shown, on the preponderance of the evidence and upon the balance of probabilities, that the pay differential had been established by the requirement and decision to match Mr Leonard's pre-existing salary at the point of recruiting him, in order to entice him into accepting an offer of employment and thereafter retaining him in that employment, all as the Tribunal has found in fact. That explanation for the difference had a continuing effect in the context of an incremental pay scale

that is to say, as in the case of **Bowling**, the explanation was not time limited. On the contrary, the initial decision to match the comparators pre-existing salary at the point of his being recruited already at Grade D2, which, as it happened had the effect of placing him at the Mid-Point of the respondent's D band in circumstances where the claimant on achieving promotion into the D band in the same year was placed in accordance with the respondent's then policy, at their lowest salary point in the band had an enduring effect. That explanation for the differential had a continuing effect in the context of an incremental pay scale and had consequences for the following years,

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147. The material factor (and sub-factors) which the respondents relied upon to explain the particular salary at which the comparator was recruited, were factors wholly unrelated to the sex of either the claimant or of the male comparator.

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148. On the other hand, the Tribunal unanimously considered that no evidence had been adduced, by or on behalf of the claimant, from which it could properly be concluded that as a result of the material factor/factors relied upon, the claimant and other female D3 employees doing work equal to the work done by the claimant were or are put at a particular disadvantage when compared with Mr Leonard. The Tribunal unanimously considered that the claimant had failed to discharge the burden of proof (which, in this regard sat with her) in terms of section 69(2) of the EqA 2010.

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149. Had the Tribunal considered that the claimant had discharged the burden of proof under section 69(2) of the 2010 Act, which it considered she had not, the Tribunal considered, on the evidence presented, that the respondent would, nevertheless have justified, in terms of section 69(1)(b) that its reliance upon the material factor amounted, in the circumstances that the respondent's aim of being able to recruit competent, experienced and professional staff to service the requirements of its client base was a legitimate aim and further, that seeking to do so, in part, through recruitment from the external competitive job market and the matching of a candidate's salary with a pre-existing employer and or the payment of a premium to an

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attractive candidate in order to entice the candidate into accepting a job offer and thereafter retaining him in that employment, amounted to a proportionate means of achieving that legitimate aim.

5 150. For the above reasons the Tribunal unanimously concludes that the claimant's claim for equal pay in terms of sections 64 to 71 of the Equality Act 2010 fails and falls to be dismissed.

10 Employment Judge: Joseph d'Inverno
Date of Judgment: 19 July 2021
Entered in register: 28 July 2021
and copied to parties

15 **I confirm that this is my Judgment in the case of Dowling v KPMG UK Limited and that I have signed the Judgment by electronic signature.**