



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107708/19

Held on 17, 18, 19, 20 & 21 June and 12 August 2021

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**Employment Judge J M Hendry
Members: J McCaig
E Coyle**

15

Ms E Borkowska

**Claimant
Represented by
Mr A Hardman,
Advocate**

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The University of Aberdeen

**Respondent
Represented by
Ms E Kinmond,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is as follows:

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**(One) that the Claimant is not engaged in like work with that of her
comparator and,**

**(Two) that in any event the Respondent has demonstrated to the Tribunal's
satisfaction that the disparity in pay between the Claimant and that of her
comparator is due to a material factor untainted by sex discrimination, and
accordingly holds that the claim is not well founded and is dismissed.**

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E.T. Z4 (WR)

REASONS

1. The Claimant in her ET1 contended that she had been discriminated against
5 by the Respondent on the grounds of her sex and that she was entitled to
equal pay with a named comparator, Dr. A. The Respondent opposed the
claim. Although they accepted that the Claimant was paid less than her
named comparator, their position was there were material factors untainted
by sex discrimination, that led to the disparity in pay.
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2. It was agreed that remedy would be decoupled from the hearing and dealt
with, if appropriate, at another hearing.

Issues

- 15 3. The Tribunal required to consider both the basis on which the Claimant and
her named comparator (Dr A) had been initially recruited and employed and
the subsequent history in order to determine whether or not they carried out
like work and if respondent's material factor defence was made out. The
Tribunal also had to consider carefully the burden of proof as it applied to it's
20 those facts.

Evidence

4. The Tribunal was greatly assisted by parties who provided the Tribunal with
a considerable quantity of background information. Witness statements were
25 provided from the claimant and from Mrs Fiona Smith and Mr Tracy White
for the respondent. The witnesses also gave oral evidence to the Tribunal.
The Tribunal had regard to the agreed chronology and also to the Joint
Statement of Agreed Facts.

Agreed chronology

Date	Page	Narrative
July 2017	212	Reward Strategy Working Group (“RSWG”) Terms of Reference
01 August 2017	99	University of Aberdeen approved hourly rates
02 Nov 2017	222	RSWG meeting
Nov 2017	144	HR Partner (Reward & Policy) job description and person specification
07 Nov 2017	151	Application from Claimant
04 Dec 2017	165-179	Interview of Claimant
05 Dec 2107	182	Statement of written particulars of terms and conditions of employment
08 Jan 2018		Commencement of employment
11 Jan 2018	260	Induction
06 Feb 2018	276	HR Specialist Services Team meeting
09 Feb 2018	193	Probationary Monitoring one-month assessment meeting
13 Feb 2018	281	Industrial Action Working Group meeting
27 Feb 2018	286	HR Professional Team meeting
28 Feb 2018	289	Industrial Action Working Group action points
26 March 2018	304/5	RSWG meeting
28 March 2018	311	HR Specialist Services Team meeting
17 April 2018	338	RSWG Career Pathways & Progression within and between grades subgroup meeting
18 April 2018	340	RSWG Framework Agreement & Pay structures subgroup meeting
19 April 2018	193	Probationary Monitoring three-months assessment meeting
23 April 2018	345	RSWG Financial and non-financial benefits & Total reward subgroup meeting

25 April 2018	346	RSWG Promotions, Contributions & Recognition arrangements subgroup meeting
01 May 2018		Meeting with Tusker sales representatives
22 May 2018	367	RSWG meeting
23 May 2018	368	HR Specialist Services Team meeting
05 June 2018	374	HR Professionals Team meeting
06 June 2018	377/8	RSWG meeting
June 2018	389	Senior Management Team ("SMT") meeting
28 June 2018	399	RSWG Promotions, Contributions & Recognition arrangements subgroup meeting
19 July 2018	437/8	RSWG Financial and non-financial benefits & Total reward subgroup meeting
20 July 2018	439/41	RSWG Framework Agreement & Pay structures subgroup meeting
06 Aug 2018	456/7	RSWG Career Pathways & Progression within and between grades subgroup meeting
16 Aug 2018	193	Probationary Monitoring six-months assessment meeting
17 Sept 2018	502	HR Specialist Services Team meeting
20 Sept 2018	507	HR Professional Team meeting
27 Sept 2018	511	RSWG Framework Agreement & Pay structures subgroup meeting
20 Nov 2018	581	HR Professional Team meeting
15 Oct 2018	193	Probationary Monitoring nine-months assessment meeting
Dec 2018	591	Invitation to Tender for provision of Employee Benefits Platform and Employee Assistance Programme
01 Dec 2018	102	University of Aberdeen approved hourly rates
12 Dec 2018	644	RSWG Framework Agreement & Pay structures subgroup meeting
09 Jan 2019	707	RSWG Framework Agreement & Pay structures subgroup meeting
31 Jan 2019	193	Probationary Monitoring eleven-months assessment meeting
Feb 2019	722	Contract for the purchase and supply of childcare Voucher scheme between Respondent and Edenred (UK Group) Ltd

20 Feb 2019	769	Grievance
20 Feb 2019	780	HR Professional Team meeting
04 March 2019	829	Grievance Hearing
07 March 2019	829	Witness meeting with Fiona Smith
14 March 2019	829	Grievance Investigation Report and outcome
25 March 2019	801	Application for a Contribution Pay Award
27 March 2019	880	Outcome of Application for a Contribution Pay Award
15 April 2019	900	Legitimate Interests Assessment
24 April 2019	909	RSWG Framework Agreement & Pay structures subgroup meeting
25 Sept 2019	925	Grievance Appeal Hearing
11 Oct 2019	935	Grievance Appeal written representations
30 Oct 2019	946	Grievance Appeal Meeting with Tracey White
04 Nov 2019	950	Grievance Appeal Meeting with Kenny Bruce
18 Nov 2018	952	Outcome of Grievance Appeal (Stage One)

Joint Statement of Agreed Facts

- 1 The Respondent employs more than 3,500 staff.
- 5
- 2 The Respondent's Department of Human Resources provides services supporting managers and staff of the Respondent. The work of the department is carried out by teams or sections. The teams and sections are structured to align with the Respondent's management and governance structure. The structure of teams and sections within the Department of Human Resources is subject to intermittent modification corresponding with
- 10
- any changes made to the Respondent's management structure.

3 Each of the teams and sections housed within the Department of Human
Resources comprises staff appointed as HR Partners, HR Advisers, HR
Assistants, and graduate trainees. Staff employed with the Department are
referred to collectively as “Professional Services” (posts graded 5+) or
5 “Support Staff” (posts graded 1-4).

4 The Respondent uses a Grade Structure which applies to its Professional
Services and Support Staff. The structure provides 9 Grades of employment.
The structure allocates against each Grade specified National Spinal Points.
10 There are two categories of points. These are “Normal Grade Points” and
“Contribution Points.” Normal Grade Points are allocated according to an
employee’s length of service after appointment to a Grade.

5 On appointment, staff normally commence on the first Normal Grade Point of
15 the Grade. Appointments can be made on a higher spinal point on a case by
case basis. For each year of employment, the employee is allocated an
additional point until they achieve the Normal Grade Point maximum for their
Grade.

20 6 Contribution Points are allocated in accordance with the Respondent’s
Contribution Reward Policy and Procedure (page 60). That policy provides
for accelerated increments of points. Incremental advancement is limited to
the maximum contribution point in any grade. Where an employee has
already achieved the maximum contribution point on a grade, they may be
25 considered for a Non-Consolidated payment normally restricted to 3% of
basic salary.

7 Progressing to a higher grade within the Grade Structure is dependent on the
employee being promoted (now regraded).

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8 In 2017 within its Department of Human Resources the Respondent
employed graduate trainees at Grade 4 of the Grade Structure. Grade 4
included Normal Grade Points 17 to 22 and Contribution Points 23 to 25. HR

Advisers were employed at Grades 4 and 5. Grade 5 included Normal Grade Points 24 to 28 and Contribution Points 29 to 31. HR Partners were employed at Grades 6 and 7. Grade 6 included Normal Grade Points 30 to 36 and Contribution Points 37 to 39. Grade 7 included Normal Grade Points 37 to 43 and Contribution Points 44 to 46.

9. The Respondent's Grade Structure with salary values for each National Spinal Point and full-time salary values from 01 August 2017 and 1st December 2017 appears at page 100.

Higher Education Role Analysis or "HERA"

10. The Respondent uses the HERA tool to ensure that individuals are receiving equal pay for equal value. It is a widely recognised system. In addition there is a common grading used across most of the Higher Education sector.
11. The system was developed over 14 Universities. Sample employees from all staff were interviewed and the information about the work they carried out was analysed and evaluated. The system allows distinctions between role elements which can be carried out by employees with less developed abilities based on experience or qualifications. Elements involving less responsibility attract lower scores.
12. The HERA system was used at the University in 2005 and by 2006 incorporated all roles. This then generated generic HERA job descriptions which allowed a role score to be calculated. This then identified the grade in the grading structure. Before any recruitment such as that of the Claimant and Dr A the line manager would check that the HERA job description still applied to the post and generate a score to decide the grade. The job description for the post is different and includes all possible key responsibilities that might be allowed in due course.

13. In some cases the key responsibilities in the job description straddle two HERA job descriptions such as HR Partner. Appointment can be made at either the lower (6) or higher grade (7). The respondent does not carry out a specific HERA evaluation where job elements have already been evaluated when the way in which elements of a post change.
14. The recruitment is carried out with the recruitment Job Description as part of Further particulars and the Person Specification. Successful candidates are given work based on experience and qualifications which if they are new to the Education Sector tend to be routine and of low risk .
15. Successful candidate complete a probation period of 12 months which can be reduced or extended as appropriate.

15 **Pay**

16. The Grade Structure determines salary. Against each grade there are a range of points from the National Spine. Points are allocated to employees namely “normal grade points” and “contribution” points each year. The contribution points are awarded (for working at an extremely high standard) in accordance with the Respondent’s Contribution Reward Policy (JBp60).

Promotion

17. Until 2021 when it was replaced staff such as the Claimant after 12 months service could apply for promotion.

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Recruitment

18. In or about June 2014 the University advertised the post of Human Resources Adviser. The post was allocated reference number HRS021A. Those interested in applying for that post were provided with information provided in Further Particulars for Applicants (page 105).

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19. The Essential Knowledge & Skills for appointment was
- a degree or equivalent professional experience
 - CIPD membership.
 - 5 • Relevant experience within a generalist HR role
 - Demonstrable understanding of current employment legislation and best practice guidelines on relation to staffing matters.
 - Demonstrable interest in and understanding of the HR issues affecting public sector organisations, particularly higher education.
 - 10 • Excellent oral and written communication skills
 - Sound knowledge of current employment law and good practice
 - Ability to work as part of a team and on own initiative
 - Proven track record of accepting personal responsibility in ensuring that both the individual and team objectives are successfully achieved
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20. The terms of employment stated that *“Salary will be at the appropriate point on the Grade7 salary scale (£37,756 - £45,053 per annum) with placement according to qualifications and experience.*
- 20 *Consideration will be given to making an appointment at grade 6 level £30,728 -£36,661 for a candidate who meets the educational criteria and demonstrates the potential to develop into undertaking the full role”.*
21. Dr A (“the comparator”) applied for the post and following interview on 29
25 September 2014 was offered appointment as HR Specialist Services Partner (page 114).
22. At the time of his appointment the comparator held the degrees of Ph.D. Human Resource Management/organisational behaviour (2011) and M.Sc. Human Resource Management (2002-2004) and held Chartered
30 Membership of the CIPD.

23. Between September 2008 and his appointment by the Respondent he had been employed as HR Business Partner/Recruiter and Senior Researcher at the Office for National Statistics. Prior to that he had had 4 years' experience as Human Resource Officer (Learning and Development) with Shell Petroleum Development Company and 3 years' experience as a Post Graduate Course Tutor (Organisational Development) with a focus on managing change.
24. In or about October 2017 the University advertised the post of HR Partner (Reward & Policy) Human Resources (page 150). The post was allocated reference number HRS051A.
25. Those interested in the post were able to access job information comprising an introduction, job description, candidate background, terms of appointment and a person specification. (page 144).
26. The Essential Knowledge & Skills criteria for appointment was a degree or equivalent professional experience and CIPD membership without specified level. The desirable criteria sought a higher degree.
27. The person specification identified essential and desirable specifications against the criteria of "Education/qualifications"; "Work and other relevant experience (including training)"; and "Personal qualities and abilities.". These included.
- Experience in reward, benefits and pensions.
 - Practical experience in a large multi-union environment.
 - Track record of delivering reward strategies in a complex environment, incorporating a broad range of reward issues.
 - Detailed up to date knowledge of remuneration and benefits including pensions, salary sacrifice, senior pay and flexible benefits.
 - Up to date knowledge of pay legislation such as Equality Act, National Minimum Wage, Living Wage, tax thresholds and auto enrolment.

- Experience of effectively and creatively communicating changes to employees.
- Generalist HR experience, especially review/development and implementation of HR policies and procedures, conduct/capability, consultation, redundancy and restructuring.
- Experience of performance related pay systems.
- Experience of job evaluation.
- Demonstrable negotiation and influencing skills.
- High degree of analytical skills.
- Excellent verbal and written communication skills with the ability to communicate effectively to diverse audiences, including strong presentation skills and the ability to produce clear and concise written material.
- Ability to write exceptional quality briefing papers and policy documents.
- Ability to develop and maintain key internal and external relationships.

28. The terms of appointment within the job advert stated that *“Salary will be at the appropriate point on the Grade6/7 salary scale (£32,548 - £39,992 and negotiable with placement according to qualifications and experience.”* The salary level £32,548 was spinal point 30 of the Grade Structure and £39,992 spinal point 37. Spinal point 30 is the first Normal Grade Point for Grade 6. Spinal point 37 is the first Normal Grade Point for Grade 7.

29. Applicants for the post were invited to apply online. The closing date for receipt of applications was 13 November 2017.

30. The Claimant submitted her application form (page 151) on 07 November 2017.

31. The Claimant's application form included the following information

31.1 From September 2013 she had been employed by Aberdeenshire Council as a HR Adviser (Pay & Reward).

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31.2 Between June and September 2013 she had been employed by Aberdeenshire Council as a HR Analyst

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31.3 Between April 2009 and June 2013 she had been employed by Police Scotland initially as a Clerical Office, then Admin Assistant and latterly as a Criminal Intelligence Researcher.

31.4 She held a Diploma in Human Resources Practice awarded by Aberdeen College in 2014

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31.5 She qualified as an Associate member of CIPD on March 2014

32. The Claimant was one of three applicants short listed for interview. The Claimant was interviewed by a selection committee on 04 December 2017.

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The members of the selection committee were Professor Margaret Ross, Peter Fantom and Fiona Smith. The decision of the committee, as recorded on a selection committee form (page 179) was that the best candidate was the Claimant and that she should be offered appointment with a starting date of 08 January 2018, at Grade 6 and with a salary of £32,548 being National Spinal Point 30 on the Grade Structure.

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33. On 5 December 2017 the Respondent made an offer of employment to the Claimant. The Claimant was sent a Statement of Written Particulars of Terms and Conditions of employment (page 182) That Statement included the following provisions

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“Your basic salary will be paid at the first spinal point (spinal point 30) on Grade 6 of the University of Aberdeen Staff Grading Structure which is currently £32,548 per annum.

5 *Your basic salary will be increased annually from 1 August 2018 to the next spinal point for your Grade on the University’s normal (non-contributory) grade point scale until the maximum is reached for your Grade on that scale.”*

10 34. In terms of her appointment the Claimant was required to undergo a 12-month period of probation. During the period of probation, the Respondent undertook a monitoring process under which the Claimant’s performance of duties was reviewed at five meetings. These meetings took place on 9 February, 20 April, 16 August, and 16 October 2018 and on 31 January 2019. The first four review meetings were conducted by the Head of HR, Mrs Tracey
15 White and the final meeting by HR Manager (Systems & Reward) Mr Kenny Bruce who had assumed responsibility as the Claimant’s line manager in November 2018. Notes of each review were recorded cumulatively on a Probationary Monitoring Form (page 193).

20 35. On 1 August 2018, the Claimant moved to spinal point 31 (salary was increased to £34,188) as part of the incremental pay progression policy that applies to all University staff on 01 August each year.

25 36. On 20 February 2019 the Claimant lodged a grievance regarding her grading and salary (page 769).

37. The Claimant’s grievance was considered by the Respondent in accordance with its Grievance Policy (page 42).

30 38. On 25 March 2019 Kenny Bruce the Claimant’s line manager submitted on behalf of the Claimant an Application for a Contribution Pay Award (page 801). The application was for a contribution award of 2 spinal points. The

application was supported by the Claimant's Line Manager and the Director of People.

- 5 39. On 14 March the Respondent's HR Manager (Tracey White) wrote to the Claimant advising that following her investigation, the Claimant's grievance was not upheld. (page 829). The Claimant was provided with the Grievance Investigation Report (page 829).
- 10 40. On 25 March 2019 the Claimant submitted notification of her intention to appeal against the grievance outcome (page 867).
- 15 41. On 27 March 2019 the Respondent notified the Claimant of the outcome of the application for a contribution award (page 880). That outcome was that with effect from 1 April 2019 the Claimant's salary was increased by one additional increment to £35,210 per annum being the third point (spinal point 32) on Grade 6 of the Respondent's Staff Grading Structure.
- 20 42. On 25 September 2019 the respondent (Hulda Sveinsdottir) met with the claimant to hear her appeal (page 925).
- 25 43. On 18 November 2019 the Respondent (Hulda Sveinsdottir) wrote to the Claimant advising her that her grievance appeal was not upheld (page 952). The Claimant was also advised of a recommendation that she be considered for promotion under the normal procedure to Grade 7 of the Respondent's Staff Grading Structure on the basis of an expansion of the Claimant's role and growing responsibilities as well as demonstrated competency. The Claimant was also advised of a further right of appeal available to her under the Grievance Procedure. The Claimant did not exercise her right of further appeal.

Additional Findings in Fact

44. The terms and conditions of employment and remuneration in the Respondent's HR Department relate to and are determined by the level of work for which the employee is responsible. Graduate trainees are employed on grade 4 salaries. HR advisors are employed in grade 4 and 5 salaries. HR partners are employed on grade 6 or 7 salaries.
45. In the HR Department grade 7 is the highest non-managerial grade. The work performed by grade 7 post holders involves greater autonomous responsibility than the work expected of grade 6 post holders. The elements applicable to the grade are set out at JB 83-91. These include planning, delegation and managerial responsibilities.
46. Progress to grade 7 is achieved by a grade 6 post holder being promoted. Promotion occurs on the post holder's acceptance being able to work under less supervision, with greater autonomy, and on work that is more complex which carries greater responsibility.
47. The role of HR partner (grades 6 and 7) was originally created in 2014. The posts of HR partner (internationalisation), HR partner (reward and policy) and HR partner (specialist services) were expected to be held by grade 6 and 7. Someone appointed at grade 6 would be gaining experience and demonstrating aptitude would be entitled to be appointed to grade 7.
48. The Higher Education Role Analysis (HERA) job evaluation scheme consists of 14 elements of factors considered in prospective jobs namely:
- Communication;
 - Teamworking;
 - Liaison and networking;
 - Service delivery;
 - Decision making, process and outcomes;

- Planning and organising resource;
- Initiative and problem solving;
- Analysis and research;
- Sensory and physical demands;
- 5 • Work environment;
- Pastoral care and welfare;
- Team development;
- Teaching and learning support;
- Knowledge and experience.

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Comparator's Appointment

49. The comparator (Dr. A) was appointed to the role of HR Partner (Specialist services in September 2014 (JBp114/115). At that point he had considerably more experience and was better qualified than the claimant when she came to be employed. His Personal Profile detailed his extensive work experience (JBp112/113) He was a Chartered (full) member of the CIPD. He had undertaken management responsibilities (JB p111).

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50. The respondent's expectation was that Dr. A would be employed on a wider range of activities, with more autonomy and responsibility than those that would be carried out by a grade 6 postholder. He was expected to and became the lead in various activities as follows:

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Employee Engagement

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- He was HR lead in respect of the University's Staff Survey responsible for its design, creation, implementation, communication, and analysis of results. He was the subsequent lead in coordinating and directly assisting in staff presentations and focus groups to discuss results. This included working with the campus trades unions and Stress Working Group to agree survey questions including a separate HSE Survey.

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- He was HR lead in assisting the Vice Principal People to take forward the Employee Engagement Group and development of the Employee Engagement Strategy and Action Plan. He was the architect in terms of creating and implementing the Strategy and Action Plan.

Health and Wellbeing

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- He was the Key HR representative, assisting the Director of Health, Safety & Wellbeing responsible for organising and delivery of staff wellbeing events at the University arranged to try and improve awareness of mental health issues and the support available for staff and students.
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- He collaborated with experts within and outwith the University to improve effective monitoring of Mental Health and wellbeing activities and targets.
 - He represented the institution at regional events e.g. Scottish Wellbeing Forum.
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- He delivered training on mental health first aid (over 180 staff and students trained) and training sessions for Mental Health coordinators and Champions.
 - Dr A was the HR lead in coordinating the University's submission to Health Working Lives to maintain Silver accreditation.
- 25
- Dr A was the HR lead in consulting with stakeholders to review and update the staff survey in respect of health and wellbeing including introducing the HSE Stress Survey as part of this.

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Equality and Diversity

- He was involved in supporting HR and other University colleagues with Athena Swan applications through provision of staff data and HESA benchmarks, data training sessions and quality assurance of reports.
- 5 • Responsible for reviewing how E&D data is processed and feeds into the KPIs for Schools and colleges.
- Responsible for completing and publishing the Gender Pay Gap report 2018.

10 **Data Analytics and Benchmarking**

- He completed sector level benchmarking surveys e.g. the HR Performance Indicators Survey 2017.
- He improved data collection and analysis to support strategic, operational and ad hoc reviews e.g. REMCOM, Gender pay gap scenario modelling for professional services and to support recruitment decisions
- 15 • He prepared REMCOM papers for the Director of HR 2015, 2016, 2017, 2018 which is responsibility that has now transferred to the HR Manager (Systems and Reward) to whom Eva reports. These reports inform decisions taken by the Remuneration Committee with regards senior salary uplifts including the Senior Management Team.
- 20 • He developed and improved data analytics and reporting e.g. identified incorrect reporting of staff turnover on management reports and rectified this, identified difficulties in benchmarking sickness absence at the university and invested significant time in providing a workaround. Delivered papers to the Respondent's Management Group and the court detailing these changes.
- 25 • He completed analysis on HESA and Respondent data and delivered papers to UMG/SMT which provided some context and identified issues with the Times Higher gender pay ranking.
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- He completed analysis and developed a report for the Wesley group (group including other universities that the University is a member of) on race equality and providing recommendations.
- Regular responsibility for preparing papers for the Director of Human Resources for SMT, Operating Board and Court with limited input from others.

Other

- Dr A developed a 9-day fortnight scheme suitable for the University and started a 3-month pilot before further roll out. Developed a toolkit to support implementation and managed the integration of feedback into the guidance notes. Undertook subsequent review of the scheme.
- He was the HR representative on a variety of internal committees and working group-Health and Safety, Stress Working Group, Business Continuity, Information Security, Employee Engagement.
- He was involved in other duties commensurate with the grade of the post for such as supporting internal HR disciplinary casework (as investigating officer) and was the HR clerk to appeal hearings.

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51. The comparator's work included greater independence/responsibility /autonomy in decision making than that of the Claimant for example in employee engagement, staff survey, stress working group and subsequently greater impact of decision making by him independently. The comparator's work involved broader involvement and leadership in University working groups as well as engagement with external groups. He was responsible for projects that had long term strategic importance.

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52. The Claimant's post was a new one created in June 2016 out of a need to have a clearer focus on reward matters than had happened in the past. The work of the RSWG had not progressed as quickly as hoped. The post was occupied by Nicola Hendry who was able to carry out extensive preparatory

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work culminating in the Terms of Reference being adopted. She had been asked to assist the School of Education and was unable to start all the objectives of the Reference because of this commitment.

5 53. Although the reward and policy post that the claimant obtained had not itself
been assessed through “HERA” the various elements making up the post had
previously been assessed in 2006 at grade 6. Mrs White undertook a review
and concluded that the role elements would remain the same but that there
would be flexibility to allow the postholder to become involved in non reward
10 related projects in the future. It was envisaged that the elements of the role
would be re-assessed when promotions took place. A successful candidate
with the minimum qualifications and experience was expected to ‘grow’ into
the post and have both additional duties and an increased level of
responsibility as they did.

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54. The Respondent had a policy for managing promotion (JBp.64-71). It provides the following:

“2.3 Criteria for promotion

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This procedure deals specifically with promotion. The types of role changes and evidence required are:

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- *Increases in responsibility and/or complexity in the duties undertaken;*
- *Significant changes to job duties that affect the level of responsibility attached to the role;*
- *Evidence presented in the application indicating that the level at which duties are being undertaken in relation to the relevant HERA elements has changed;*
- *Measures of external and internal (academic) standing and esteem*

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An individual’s ability to work overseas is not in itself, a factor that will influence whether an application for promotion is successful. Rather, the factors outlined above will be used to determine this.

Notwithstanding, working overseas may in turn lead to evidence of these factors being met. Similarly, the role of an individual who is not able to work overseas and remaining in the UK may also develop in such a way that these factors are met.

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It is recognised that a number of individuals within the University undertake the following additional duties as part of their role which can be taken into account in making an application for promotion. It should be noted that undertaking the duties associated with these roles is deemed to be part of an individual's overall duties and will not warrant promotion in isolation:

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- *Radiation Protection Supervisors;*
- *Laser Protection Supervisors;*
- *General Safety Advisors;*
- *Role Analysts*

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Decisions on promotion will be based on changes in levels of responsibility; an individual's demonstrated contribution within their present role and their personal achievements. These will be evidenced by supporting information and be subject to verification by the appropriate Head of Schools/Section/line manager.

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2.4 Staff Promotion Committee

The Staff Promotion Committee has delegated authority from the University Court to consider recommendations on promotion from all Promotion Sub-Committees and to approve recommendations on behalf of the Court. The Staff Promotion Committee will delegate responsibility for the initial assessment of candidates to the relevant Promotion Sub-Committees and will receive recommendations from these Sub-Committees for consideration and approval. The formal composition and remit of the Committee is:

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Composition – Principal (Convener)

Senior Vice Principal

*University Secretary
Vice Principals
2 Role Analysts*

5 ***The Convener will ensure an appropriate gender balance in the composition of the Sub-Committee***

10 ***Remit – To consider recommendations received from the Promotion Sub-Committees and to agree and approve the outcomes of the Promotion Exercise***

15 *The Arts and Sciences Promotion Sub-Committees and the University Professional Services Promotion Sub-Committee will consider all applications received for promotion to Grades 7-9 in their area of responsibility.*

2.4.1 Arts Promotion Sub-Committee

20 ***Composition - Vice Principal (Convener)***
Heads of School
1 Dean of Teaching and Learning
1 Dean of Research
1 further Vice Principal
At least 2 Role Analysts
25 *Human Resources Partner (Clerk)*

The Convener will ensure an appropriate gender balance in the composition of the Sub-Committee.

30 **2.4.2 Sciences Promotion Sub-Committee**

Composition - Vice Principal (Convener)
Heads of School

1 Dean of Teaching and Learning

1 Dean of Research

1 further Vice Principal

At least 4 Role Analysts

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Human Resources Partner (Clerk)

The Convener will ensure an appropriate gender balance in the composition of the Sub-Committee.

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If additional information is required in respect of any applications for promotion, it is expected that the Arts and Sciences Sub-Committees will co-opt appropriate individual(s) as advisory members. The advisory members will normally be individuals with recognised experience in the discipline or subject area and/or the immediate line manager of the applicant.

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Their role will be to assist the Sub-Committee members in ensuring that they are in possession of the full information required to make an informed decision on the application for promotion under consideration.”

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55. The Respondent has a policy relating to recruitment/selection of staff. It provides the following:

5.2 Job Evaluation

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Job evaluation is the process of measuring different elements of a role in order to grade it in a fair and consistent manner. The University has adopted a job evaluation tool called Higher Education Role Analysis (HERA) to undertake this process for Support Staff and Administrative roles. Academic and Research roles will be evaluated by matching the job descriptions to nationally agreed role profiles.

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5.3 Prior to advertisement, a HERA job description form, outlining the duties and responsibilities attached to new posts (or posts which have been restructured since the date of the last evaluation), will be completed by the immediate line manager to enable a full evaluation process to be undertaken.

56. The HERA elements for grade 6 are mostly duplicated in the grade 7 elements (JB79-83). Grade 7 elements also include:

- 5 • *In conjunction with Senior HR Manager provide feedback on a regular basis to HR team and effectively manage issues of underperformance.*
- *Attends committees and other forums as HR representative as appropriate eg. Independent Fellows group, College Council, Senior Secretaries group.*
- 10 • *Advise HR and other University staff on immigration issues regularly explaining complex regulations and processes to individuals with limited knowledge of the new procedures.*
- *Reviews written work of HR Co-ordinators members, providing quality check.*
- *Lead School of Medicine and Dentistry HR Team providing support.*
- 15 • *Liaises with external organisations to implement and facilitate joint working e.g. McGrigors, NHS Grampian, NES.*
- *Liaises with Trade Union colleagues to ensure good working relations are maintained.*
- *Ensures HR team delivering service to School at a high standard, providing quality check for HR Co-ordinators and amending practices as appropriate where any difficulties are be highlighted.*
- 20 • *Ensures team provides a visible on-site HR presence to the College to promote the work of HR. This has been key in developing strong relationships with the School I support.*
- 25 • *In terms of Immigration Issues, on a daily basis I make decisions or make recommendations to colleagues on which visas to apply for.*
- *A wrong decision in this regard can have serious implications in terms of our licence to issue Certificates of Sponsorship but also in terms of HR's reputation.*
- 30 • *Co ordinates the annual Promotions/Regrading and Discretionary Award Exercises for area of responsibility, this is massive exercise each year due to the number of applications received. Last year we introduced Sharepoint to the CLSM committee which made the*

committee and sharing of applications much slicker and saved huge resource.

- *Assist Senior HR Manager in dealing with staffing matters within the CLSM HR team. Including issues of underperformance or conflict.*
- 5 • *Monitor and inform the management of performance issues of HR Coordinators within In School of Medicine and Dentistry team.*
- *Provides informal mentoring support to HR Advisors.*
- *Deliver HR elements of the College Induction as well as meeting all new staff on a one-to-one basis to advise them on our role and answer any questions.*
- 10 • *Demonstrate knowledge of employment law.*
- *Proactively seeks advice from colleagues who have been involved in similar situations and other colleagues would turn to me as for similar advice.*
- 15 • *Viewed as resident expert on immigration issues and as such a large proportion of my time is spent advising colleagues on such aspects.*

57. In December 2019 a grade 6 employee could be appointed on a range of salaries from £33,797 to £40,323. A grade 7 could be appointed on a salary range of between £41,526 to £49,522.

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Claimant's predecessor

58. The Claimant's immediate predecessor Nicola Hendry was initially appointed at Grade 5. She was a highly qualified and experienced HR practitioner. Her CV was produced (JBp134-136). She had a Honours degree in Arts (business studies) followed by a MSc in Human Resource Management. She was appointed in 2016 to the post now occupied by the Claimant at a starting salary of grade 7, spinal point 38.

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59. The HR partner (reward and policy) job description person specification is set out the expectations for the post (JB144-149). The advertisement stated that the successful applicant should have the following:

5 “CIPD qualified, you will have an up-to-date expert knowledge of remuneration, benefits and rewards practices. You will have a proven track record in developing, implementing and communicating reward policies and procedures. Ideally you will have had experience of playing a pivotal role in a large scale change exercise involving reward.”

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Claimant's Application

60. When the Claimant applied for the post she produced a CV setting out her experience and qualifications (JB152-157). The Claimant's most relevant experience was with Aberdeenshire Council with whom she worked for approximately four years. Her duties had been:

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- *Analyse data and produce regular and ad-hoc reports to HR operational teams, services and management.*
- *Monitor data for accuracy, undertake maintenance of information in a range of databases.*
- *Provide analytical, research and statistical support to HR teams.*
- *Produce and distribute monthly management reports.*
- *Liaise with managers to ensure successful implementation of changes following service reviews.”*

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61. The Claimant was an associate member of the CIPD. The Claimant was interviewed and appointed in January 2018 at Grade 6 on a salary of £32,548 spinal point 30. Mrs White was involved in the claimant's recruitment. Mrs White approved the Job Description and the Person Specification. She was confident that the role elements were appropriately graded. The appointment could have been made at a higher grade if a candidate had the appropriate qualifications and experience but the Respondents were prepared

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to appoint a less well qualified and experienced candidate and with support and supervision allow them to develop into the role. It was on this latter basis that the claimant was recommended for appointment by the recruitment panel. Her qualifications were basic and she had limited experience.

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62. Mrs White was not on the recruitment panel. No notes from the appointing panel exist.

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63. Once appointed the claimant reported to Mrs White who carefully considered the work that she was then asked to undertake. The work tended to be work that had been carried out in the past, that did not call for any particular expertise or creative drafting of documents and was of a recurring nature. Her work was closely supervised. She was not asked to author original communications.

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64. There were a tasks that although fell within the Claimant's role she was not asked to carry out due to her inexperience. Mrs White took it upon herself to update the Operating Board (Policy and Resources Committee) which involved responding to committee members. The comparator did deliver a presentation to the committee. The claimant was not asked to be involved in the USS Pension scheme given its complexity and was not asked to support committees dealing with this work. She was not involved in negotiations with the Trade Unions nor involved in what the Respondents would regard as important strategic matters. She had no managerial responsibility.

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65. Preparing reports and analysing data for the Senior Staff Pay Policy was within the claimant's potential remit but was left for her comparator given it's complexity.

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66. In her probation period the Claimant was asked to carry out general clerking and administrative work for committees. She was not expected to be the 'lead' on projects other than on her day to day activities within her responsibilities. This did not include any managerial responsibility. The Claimant was the clerical or administrative 'lead' assisting the Vice Principal with the work of the

RSWG but her role was providing coordination and facilitation rather than decision making.

5 67. The Claimant works within defined parameters and does not design projects or have decision making responsibility.

Witnesses

10 68. The Tribunal found the Respondent's witnesses both credible and reliable. They gave their evidence in a clear professional manner. These were issues and areas of work in which they were both highly experienced. We could detect no animosity towards the Claimant who they regarded as a hardworking and able colleague but one with whom they had a genuine disagreement over her position in these proceedings. Mrs Smith gave her evidence in a straightforward and professional manner. We found that her evidence was particularly helpful as she had worked her way through the Respondent's ranks and had a detailed knowledge both of the system in place and its history.

15 69. Mrs White, in particular, was a clear and straightforward witness who exhibited considerable professionalism and had a very full knowledge of the recruitment processes, a good overview of the system operated by the University and the position of the Claimant and Dr A in that system. She was adamant that the Claimant was, at appointment, and remained, relatively inexperienced but was being supported to move up through the grades as her experience deepened.

20 70. We found the Claimant to be confident, able and articulate. As a historian she was a reliable witness although some hyperbole crept into her evidence. She had a high opinion of her talents and some basis for that belief. On some matters we did not find her evidence at points particularly convincing principally that she was actually carrying out work at the same level of responsibility and expertise as her comparator, Dr A, whose work she tended to disparage. This may have been her honest perception but she did not have the overview of her colleague's work the other witnesses had nor did it accord with the evidence of the those witnesses particularly Mrs White's evidence.

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Submissions

Claimant's Position

71. The Claimant's position in Mr Hardman's submission was that she was doing
5 like work with that of the comparator and that her job was similar in nature and
any differences were of no practical importance. The period over which the
Claimant seeks redress is from the 18 January 2018 to the present. The
University contended that these jobs were not identical or of a similar nature
and in the alternative that the difference between Ms Borkowska's pay and
10 Dr A was because of a material factor.

72. In this case, Mr Hardman stressed that the switching burden of proof between
the parties was of substantial significance. Because of the sex equality clause
as described in s.66(2) of the Act, Ms Borkowska has a *prima facie* right to
15 equal pay to that of her comparator for like work. If Ms Borkowska can prove
that she and Dr A were employed in work that is of a broadly similar nature,
then the entire burden of proof in all remaining issues shifts to the University.
The burden of proof is, of course "on the balance of probabilities". This was
described by Denning LJ in **Miller v Minister of Pensions** 1947 2 All ER 372
20 in these terms:

25 "The degree of cogency] is well settled. It must carry a reasonable degree
of probability, but not so high as is required in a criminal case. If the evidence
is such that the tribunal can say "we think it more probable than not", the
burden is discharged, but if the probabilities are equal, it is not.
(Counsel's emphasis)

73. In broad terms Mr Hardman's position was that Ms Borkowska meets that
standard of proof, as she requires to do in the first part of this case, but
30 thereafter the Respondent requires to do so, and does not.

74. The principle was he continued clearly explained by Mr Justice Langstaff (as
he then was) when President of the Employment Appeal Tribunal in the
introduction to his judgment in **Calmac Ferries Ltd v Wallace and another**

[2014] ICR 453 at paras 2 – 7. In this case, Ms Borkowska does not rely upon the terms of s.69(2) which might be colloquially referred to as the ‘indirect discrimination’ argument, and so the issue of justification for any indirect discrimination does not arise. What she does say, in short, is that she did like work to that of Dr A. The Respondent have not proved to the necessary standard why there was a difference between the amounts of their pay, far less that it was not because of her sex.

75. The meaning of “like work” is explained at paras 37 to 39 of the Equal Pay Statutory Code of Practice. There are two questions of fact for the Tribunal to resolve firstly were they employed in work of a broadly similar nature. The Claimant has led evidence that:

- Both jobs were as “HR Partner”;
- Both jobs were in “Specialist Services”
- Neither had any line management responsibilities as part of their role.
- Both were line-managed by the same level of manager (Grade 8)
- The Claimant has provided detailed evidence of what her role actually involved.

She compares that to what is said to have been her comparator’s role at paras 32 – 112 of her witness statement. She makes the assertions, backed by evidence of her job activities – that her role and that of her comparator were broadly similar (WS p.14, para 28). There was little challenge to her explanation of her duties. The challenge which was made focused on the importance of her role compared to the importance asserted as applying to that of her comparator. Mr Hardman invited the Tribunal to accept the Claimant’s evidence on this issue, and find that her role was little different to that of her comparator.

76. This position was he suggested effectively confirmed by the comments of Ms Sveinsdottir, who heard the Claimant’s Stage One Appeal against the outcome of her Grievance. (Vol.3, p.952 last para). Ms Sveinsdottir comments, “*Whilst I understand that you are the sole HR Partner specialising in Reward,*

I also understand that the HR Partner duties are equivalent despite the individual specialisms within the section.....” Leaving aside for the moment the ‘material factor’ defence, the Claimant’s position was that Ms Sveinsdottir considers the Claimant did like work with her comparator.

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77. The Respondent’s witnesses also agreed that the roles were broadly similar and both agreed in cross examination that they took no issue with Ms Sveinsdottir’s assessment of the Grievance. There was very little evidence of the work carried out by the comparator at all and secondly, even were it to be considered accurate, how much “broader” was the comparator’s role and what does “broader” mean?

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78. Counsel submitted that while there may in theory be a reason for distinguishing between two roles it is not demonstrated as fact here. The example provided in the case **Samira Ahmed v BBC** 2206858/2018 (in particular, paras 147 – 153) supported this contention: Where the Claimant and the Comparator are carrying out broadly similar work, differences in the breadth of the subject matter (or “audience”) are insufficient to prevent the work being considered ‘like work’ for the purposes of s.65(2)(a) EqA.

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79. The second question he suggested was whether any differences between the Claimant’s work and that done by her comparator were of practical importance having regard to the frequency with which any differences occurred in practice, and the nature and extent of those differences. This question is for the University to prove on the same balance of probabilities. They have failed to do so. Counsel’s position was that the Respondent, in part by insufficient evidence available to support the point (which is for the Respondent to prove), has not demonstrated that such differences as there are between their work are not of practical importance in relation to the terms of their work for the purposes of s.65(2)(b) EqA.

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80. Counsel then turned to consider the material factor defence. If the Claimant was found to have been doing like work, then the second issue was whether the pay difference between Ms Borkowska and Mr A occurred as a result of a material factor which is not related to sex? The burden of proof on this issue falls on the Respondent. They must produce the necessary exculpatory evidence about its pay system and its application in the case of the Claimant and of her comparator (Ms Borkowska and Mr A) to demonstrate the difference in pay was the result of a material factor not related to sex. The principle is that the difference in pay between the employees is, of itself, evidence that this has been, however inadvertently, because of the difference of sex. That was the *prima facie* position. If the Respondent employer is not able to prove objectively (rather than simply assert) why the difference in pay exists, then the material factor defence must fail, and the Claimant must succeed in her claim. Mr Hardman referred to the House of Lords decision in **Glasgow City Council v Marshall** [2000] ICR 196 (pages 202-203).

81. The importance of proof by the employer was, he observed, further explained in **Calmac Ferries Ltd v Wallace and another**. More starkly the issue was stressed by the Court of Appeal in **BMC Software Ltd v Shaikh** 2019 ICR 1050, in particular at para 19. Where (now Lord Justice) Underhill states, "*If an employer is going to seek to justify a pay disparity based on a factor such as the comparator's promotion or superior "merit" or "market forces" it needs to be able to explain with particularity what those factors mean and how they were assessed and how they apply in the circumstances of the case.*"

82. The Respondents have not, however, he contended produced any cogent and particularised evidence to explain how the grade and rate of pay applicable to the Claimant's comparator, Dr A is justified because of greater responsibility consequent upon better qualifications and prior experience, as they contend. In the words of counsel for the Claimant in **BMC Software v Shaikh**, (para 16) they "*had not produced the necessary exculpatory evidence about its pay rise system and its application in the case of the respondent and the comparator(s)*". As required by Underhill LJ in that case (see para 14 above)

they have not explained “*with particularity what those factors mean and [in particular] how they were assessed and how they apply in the circumstances of the case.*”

- 5 83. In the circumstances of this case, the material factor defence, to be made out, must be supported by careful detailed evidence. It is not possible to challenge in forensic detail, or indeed take any particular issue with, assertions which are not supported by particularised evidence. The Respondent has not overcome that presumption, on the balance of probabilities. It has not made out a material
- 10 factor defence to the standard required, and so must fail. While it is not directly relevant to the issues of evidence in this case, reference is made to the ***Equal Pay Statutory Code of Practice, paras 25 - 39, 77 – 84, 130, and 132***, as those sections of the Code which may assist in explanation of the general law in this case. Reference is also made to sections ***160 – 167***, in particular at
- 15 section ***166*** as highlighting the best practice in respect of the issues which have arisen in this case.

Respondent’s Submissions

- 20 84. Mrs Kinmond outlined the history and context of the matter. The Claimant’s complaint originated as a “fair pay” grievance against her female predecessor. The complaint before the Tribunal is that the Claimant’s work as HR Partner (Reward & Policy) was the same or broadly similar to her chosen comparator, Dr A. 2. Dr A, HR Partner (Specialist Services) The differences outlined
- 25 between their work showed real practical differences which frequently occurred in practice. The Respondent also submitted, even were the Claimant to succeed in her claim that her work was equal to Dr A’s, any difference in pay is fully explained by the higher qualifications and experience, responsibility, demands and degree of independent decision making, held by and expected of Dr A when compared with the Claimant. The Claimant had the most basic
- 30 qualifications on her appointment to the University, with no degree, a CIPD diploma and associate membership to the CIPD (automatic on receipt of her diploma), and less than half the amount of relevant experience that Dr A had on his recruitment.

85. By way of contrast, on his appointment to the University over 3 years' earlier, Dr A had a PHD in Human Resources Management/Organizational behaviour, an MSC in Human Resources Management, a BSC in Microbiology and was a Chartered member of the CIPD, with previous supervisory/line management experience and recognised expertise in data analysis.
86. The Respondent's position was that the work of the Claimant was not equal to that of her comparator. In addition the Respondent contended that the difference in pay between the Claimant and her comparator was because of one or more material factors reliance on which does not involve treating the Claimant less favourably because of her sex.
87. The factors relied upon by the respondent were: a. The relative qualifications and experience of the Claimant and Dr A; b. The greater level of responsibility allocated to and higher demands placed on him and the degree of independent decision expected of Dr A.
88. The relevant law she submitted was contained in Section 65 of the Equality Act 2010 ("EA 2010") provides, (1) A's work is equal to that of B if it is— (a) like B's work, (b) rated as equivalent to B's work, or (c) of equal value to B's work. (2) A's work is like B's work if— (a) A's work and B's work are the same or broadly similar, and (b) such differences as there are between their work are not of practical importance in relation to the terms of their work. (3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to— (a) the frequency with which differences between their work occur in practice, and (b) the nature and extent of the difference. The Equality Act 2010 Code of Practice on Equal Pay (the "EA 2010 Code") provides that determining "whether the woman and her male comparator are employed in work that is the same or of a broadly similar nature....involves a general consideration of the work and the knowledge and skills needed to do it." [paragraph 37] and that "Differences such as additional duties, level of responsibility, skills, the time at which work is done,

qualifications, training and physical effort could be of practical importance.”
(paragraph 38).

- 5 89. The Respondent’s position was that it is the tasks and duties actually done, the
work actually undertaken that should be the focus rather, than how a job
description or contract of employment describes the job and the duties entailed
in it. (**Shields v E Coomes (Holdings) Ltd** [1978] IRLR 263 (CA)). In
Waddington v Leicester Council for Voluntary Service, [1977] 1 W.L.R 544
10 (1976) it held that in considering whether a woman’s work is like a man’s work
the focus should be on what each of them does and also the circumstances in
which they do it. Responsibility “is a job aspect highly regarded by all groups
of employers and employees alike, and we would think it not only
unacceptable, but also wrong, to ignore it as a factor properly to be taken into
account.” The Judge then gave examples where this might be seen in practice.
15 Distinctions between two employees are often easy to spot in practice but
difficult to distinguish in the terms of what each of them does.
90. It should be recalled, Mrs. Kinmond, continued that the purpose of the
legislation is to eliminate sex discrimination not provide fair pay. (per Simler J
20 in **McNeil v Revenue and Customs Commissioners** [2018] ICR 1529).
91. It was not disputed that the Respondent applied the Higher Education Role
Analysis (“HERA”) to all roles and had created a portfolio of evaluated generic
HERA job descriptions by 2006. The HERA job descriptions provided a
25 summary of the main responsibilities of role elements of the job and the
Respondent’s witnesses (Tracey White, HR Manager and Fiona Smith, Head
of HR Partners) both confirmed that these have been referred to in recruitment
processes and regularly tested through promotion processes since their
introduction with several promotions of HR Partners from Grade 6 to Grade 7
30 in recent years. The role of HR Advisor was evaluated through the HERA
process as capable of appointment at both Grade 6 (JBp79) and Grade 7
(JBp83) with separate HERA job descriptions produced for each grade. The
role elements for Grade 7 included an emphasis on line

management/supervisory responsibility, expert level knowledge, responsibility for being the “Lead” on projects or representing the University, attending senior meetings on strategic issues, and direct engagement with senior managers. The job titles of the Grade 6/7 HR Advisers in the team were changed to HR Partner in 2014 (JB p 27 Witness Bundle paragraph 10). The Respondent has procedures for managing applications for promotion for Academic, Academic Related and Technical Staff to Grades 7 – 9 (JBp64). The process involves completion of an application form that requests evidence/information under each specific element of the HERA JES. Applications are then considered by a promotion sub-Committee. The Respondent has promoted people to Grade 7 through this method. The promotion policy sets down criteria which candidates will be required to meet for promotion.

92. It was important Mrs Kinmond suggested to note that Mrs White drafted the job description for the role, the role elements for which had previously been undertaken mainly by HR Partners but also by more junior HR Advisers. Mrs White therefore concluded that appointment at HR Partner on the same terms was appropriate: grade 6/7 salary scale and negotiable with placement according to qualifications and experience. Mrs White undertook a short review of the role after the Claimant’s predecessor departed and altered the job title to HR Partner (Reward & Policy), not changing the role elements, but allowing for greater flexibility to allow the post holder to also be engaged in non-reward policy related projects.

93. The selection committee decided the Claimant should be offered appointment, at the lowest spinal point of Grade 6 (in line with the Respondent’s acknowledged policy) and this clearly reflected her relative lack of experience and qualifications and also reflected that her role could be carried out on a more junior level.

Discussion and Decision

94. The statutory provisions with which we are concerned are as follows:

65 Equal work

5 (1) *For the purposes of this Chapter, A's work is equal to that of B if it is—*

- (a) like B's work,*
- (b) rated as equivalent to B's work, or*
- (c) of equal value to B's work.*

(2) *A's work is like B's work if—*

- 10 (a) *A's work and B's work are the same or broadly similar, and*
(b) such differences as there are between their work are not of practical
importance in relation to the terms of their work.

(3) *So on a comparison of one person's work with another's for the purposes*
of subsection (2), it is necessary to have regard to—

- 15 (a) *the frequency with which differences between their work occur in*
practice, and
(b) the nature and extent of the differences.

(4) *A's work is rated as equivalent to B's work if a job evaluation study—*

- 20 (a) *gives an equal value to A's job and B's job in terms of the demands made*
on a worker, or
(b) would give an equal value to A's job and B's job in those terms were the
evaluation not made on a sex-specific system.

(5) *A system is sex-specific if, for the purposes of one or more of the demands*
made on a worker, it sets values for men different from those it sets for women.

25 (6) *A's work is of equal value to B's work if it is—*

- (a) neither like B's work nor rated as equivalent to B's work, but*
- (b) nevertheless equal to B's work in terms of the demands made on A by*
reference to factors such as effort, skill and decision-making.

30 And:

66 Sex equality clause

(1) *If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.*

5 (2) *A sex equality clause is a provision that has the following effect—*

(a) *if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;*

(b) *if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.*

10

And:

69 Defence of material factor

15 (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*

20 (b) *if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.*

(2) *A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.*

25 (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.*

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

(5) *"Relevant matter" has the meaning given in section 67.*

(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.

5 95. We considered the application of Section 136 of the Equality Act which sets out the burden of proof. There was no dispute as to how the shifting burden would apply in this case. The Tribunal also had regard to the Equal Pay Statutory Code of Practice and to the helpful injunction at paragraph 37 that “A detailed examination of the nature and extent of the differences and how often they arise in practice is required.”

10

General Background

Higher Education Role Analysis or “HERA”

15 96. The University uses a tool known as HERA (Higher Education Consortium) to assist ensure that people were getting paid equal pay for equal value. In addition there is a common grading system. The system is widely used. As Mrs. Smith explained to us it allows distinctions to be made between role elements that can be carried out at a more basic and at higher levels. It appears

20 a robust system. However, the entire HERA process is not carried out every time someone is employed and that formed part of the Claimant’s criticism of the Respondent. We understand that to do so would be time consuming and burdensome. Before any recruitment a Job Description is prepared by the line manager of the post and compared against the HERA job descriptions.

25 Sometimes the post will straddle two HERA job descriptions as here and the interview panel have the choice of placing the successful candidate in as here grade 6 or 7 depending on ability. It is unfortunate that more detailed notes do not seem to be available about the recruitment process but it is readily inferred from the circumstances and the advice that would be given by the HR

30 representative advising the panel why the comparator was appointed to the higher grade given his qualifications and experience. Mrs Smith advised us that where role elements have been ‘HERA’ assessed it is relatively easy to

then identify the correct grade amongst posts that are already evaluated. This was the process adopted in the case of the Claimant.

- 5 97. The factual background is that the Respondent recruited the Claimant as an HR Partner on grade 6 and the comparator Dr A as a Specialist Services Partner on grade 7. It was apparent that the Claimant was considerably less qualified and experienced than her comparator. We need not spend too much time narrating the differences which were substantial and apparent in the Tribunal's view. The comparator had both superior appropriate academic qualifications namely a Ph.D. Human Resource Management/organisational behaviour (2011) and an M.Sc. Human Resource Management (2002-2004) He also had gained Chartered Membership of the CIPD as opposed to the claimant's more junior membership. He had what could be described as an impressive track record as opposed to the claimant's more limited experience in a junior technical role with Aberdeenshire Council.
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- 15
98. The comparator was expected to work at a higher level than the Claimant, in a different specialism in which he had previous experience, with broader responsibilities to the Claimant and with greater autonomy and management responsibilities.
- 20
99. On the other hand the Claimant at grade 6 was in a post (formerly held by a grade 7) in which she would have to develop from what could be described as being a relatively unknown quantity into someone capable of carrying out the full range of work in policy and reward up to the level of a grade 7 like her predecessor. The confidence the Respondent placed in her appeared to be later fully justified as she developed in the role. We accepted the evidence of Mrs White, a person with extensive experience, that the post had been created to help move towards performance related pay because existing members of the HR team, although qualified and experienced, did not have the capacity to undertake the role. Mrs White drafted the job description. Some of the work would be relatively routine or mechanical but would include some more difficult elements. It was envisaged that the candidate would grow in to the role and
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- 30

less support would be needed as time went on. She was appointed at the lowest spinal point reflecting her qualifications and experience.

100. The Claimant's predecessor Nicola Hendry was appointed at grade 7. It was
5 because of this higher grading that the Claimant raised a grievance. We found
it useful to consider her experience and qualifications (JBp130-133) which we
found were considerably greater than those of the Claimant having gained a
BA in business, a MSC in Human Resource Management, Associate level
CIPD and four or five years relevant experience in 'reward' in the private sector.
10 It was a practice of the Respondent to appoint at grade 6 in the expectation
that with support the candidate would move in due course to the higher grade.
Where that relevant experience of a specialist area did not exist then the
appointment would have to be at a higher level to bring in that experience to
the HR team. We were given the example of a Grade 7 recruited for the post
15 HR Partner (Internationalisation) where the HR team did not already possess
significant experience in immigration and overseas project work.

101. Looking at these various matters in the round and considering the probationary
element in the Claimant's appointment we had no qualms that the initial
20 appointment at grade 6 was wholly appropriate.

Claimant's Progress

102. Following the Claimant's appointment Mrs White selected the work that could
25 be allocated to her considering her basic qualifications and experience. More
difficult work was not given to her although she would have a supporting role
such as with the changes to the Pension scheme where she was given
responsibility for preparing documents and supporting the Communications
Team using previous documents to assist her. She was not asked to author
30 documents and her revisions were checked. She was closely supervised.
Because she had no experience of the Pension scheme in operation or been
involved in Industrial action she was not made responsible for this area of work.

103. The core work the Claimant was involved in was progressing the pay review to implement changes towards performance related pay although mostly in relation to the less contentious aspects such as providing clerking and clerical support to the committees. During this period there was no significant strategic proposals considered which would have involved direct negotiation with the trade unions and which the claimant would have observed but not conducted. She acquitted herself well and was found to be hardworking and conscientious during her probationary period.

Dr A's Progress

104. The Claimant's comparator Dr A in the same period was responsible for Equal Pay matters in the University. This was a high profile role involving him with the higher levels of management and with the staff and Trade Unions. He had responsibility for the Gender Pay Gap report and devising the format used by the Claimant in later years. Her work activities on the other hand were restricted because of her relative lack of experience. An example of this was she was asked to help Mrs White regarding pension consultations but did not take over responsibility for the matter nor was she appointed lead HR to assist the Finance Director on this topic. She probably would have been if she had greater qualifications and experience been given this responsibility.

105. Counsel for the Claimant criticised the failure as he saw it of the Respondent giving more detailed evidence and supporting documentation evidencing that day to day work. We do not regard this criticism as being ultimately well founded. While in many cases that might be essential we were not convinced that this is such a case. There was no challenge to the fact that Dr A had these many duties and responsibilities. It was open to us to accept that evidence as persuasive in the particular circumstances here.

106. Reference was made to the **Samira Ahmed** case. In that case the employers, the BBC, had a number of evidential difficulties which we will not comment upon but one of the essential problems they had was that they failed to show any greater skill was required to present one popular (scripted) programme as

opposed to another (scripted) programme nor just whether one of the presenters had a greater public profile to another. The situation here is in no way comparable. To argue that any two broadcasters must be doing like work would, at the most extreme level, be to equate someone reading out football scores with the skill, knowledge and preparation required to conduct say the Nixon/Frost interviews.

107. The Claimant's Counsel is correct that the day to day work was not analysed in a granular sense and there were some generalisations made about the comparator's work. That was a risk the presentation of the Respondent's case ran. In this case there, it was the clear gulf between the level of work being carried out by the Claimant and her comparator and the level of attendant responsibility that impressed the Tribunal. We did not regard this as a "narrow" case where some additional responsibility or duty was being artificially magnified to justify a disparity. There was a volume of evidence given by Mrs White in particular who oversaw the HR function. She was in a position to assess the work being carried by both the Claimant and Dr A knowing as she did the various tasks and projects in which he was the 'Lead' and which carried considerable responsibility over and above those carried out by the Claimant. The Claimant was not in a position to meaningfully challenge this evidence. If there was little expertise or skill or responsibility in carrying out for example the University's Gender Pay Gap Reporting then we were left unconvinced by the her evidence to that effect.

108. On the one hand it was apparent to us that Dr A came to the post highly qualified and experienced and on the other the work he was employed to carry out was more taxing and wide ranging. This was not just an assertion. The requirements of the grade he accepted matched the sort of projects and responsibilities we accept he had. For example he not only came with line management experience this was one of the responsibilities that a grade 7 had which lower grades did not and a responsibility exercised by him in post. For example he had acted up in a management role for a period as a grade 8. He was not only responsible for delivery of the Gender Pay Gap report but for

creating it's format along with other concurrent projects in which he was the lead. His role was much more autonomous than the Claimant's. He often worked directly for the Principal.

5 109. We also heard evidence that he had particular expertise in data analysis and
in recognition of this prepared reports for the Principal who at that point was
Sir Ian Diamond. He was also called on to deliver training on data analysis. In
the round we heard sufficient evidence of the type of work Dr A had carried
out in the past, was expected to do because of his grade 7 role and did in fact
10 carry out to convince us that he fully performed at the top of the grade 7 level.

110. We do not intend to minimise the Claimant's considerable efforts. She started
from a relatively low base of experience and qualifications having worked in a
relatively junior role with Aberdeenshire Council for just over 4 years and in
15 that period she was not exclusively employed in Pay and Reward work. We
accepted that her role with the Respondent was an established and relatively
narrow one in a team of experienced people who could and did provide her
with support.

111. Once in post the Claimant gained experience in Pay and Reward. It was
20 apparent that she did not work as independently as her comparator. In her
evidence she told us that she prepared reports for presentation to the
Respondent's Senior Management Team and others. This was a grade 6
responsibility and she did not work independently as her work was subject to
review. That seems to have become relatively 'light touch' on a day to day
25 basis as she manifested her competence. A distinction was properly drawn
between the comparator's work where he was responsible (lead) for the Staff
Survey and the Claimant's more modest (in terms of responsibility and
difficulty) presentations to the RSWG groups. We agree with Mrs Kinmond's
submission that that these were not really comparable in terms of scale or
30 responsibility and that the Claimant had a more administrative or clerking role
vis-a-vis the RSWG and more generally her work was more routine and
supported.

112. The Claimant gave examples of her work for example significantly improving participation in the BUPA scheme and introducing a benefits voucher. These are not novel or challenging tasks and struck the Tribunal as quite mundane. For example the voucher scheme she introduced might have to be 'tweaked' for the University staff but it appears to have been an 'off the shelf' scheme with no great requirement for any particular skill or expertise to introduce.

113. We considered the grievance and the outcome of that grievance to which we had been referred by Mr. Hardman. The grievance must be seen in context which was that it dealt with four principal although interconnected matters. The Claimant was unhappy at her initial salary and her grade. She raised whether her job description was consistent with her duties. That aspect was not upheld the decision maker commenting that the job description did not articulate key tasks but that it stated "the level of responsibility an individual would be expected to be working at.." (JBp952). In relation to the issue of spanning two grades Ms Sveinsdottir also raised the issue that although duties might be similar as between HR Partners the level of responsibility was not. She recorded that the Claimant's responsibilities had grown "incrementally". We were not in any way surprised by this finding as that was what was initially envisaged when she was employed and in keeping with the evidence we heard. The Claimant was in fact invited to apply for promotion to grade 7 by Ms Sveinsdottir. But it is going too far, we suggest, to say that this was an unequivocal recognition of like work.

Material Factor Defence

114. We considered that even if we were wrong to conclude that the differences in responsibility were insufficient to justify our view that this is not a case where like work is made out we went on to consider that material factor defence. We accepted that the burden of proof would fall on the Respondent. The Claimant's position was that the Respondent had not met that burden. They had not produced the necessary exculpatory evidence and as prima facie there was a disparity then the claim must succeed. We were referred to the case of **Glasgow City Council v Marshall (2001) ICR 196** and the discussion of the burden of proof contained there. As previously stated we accepted the

evidence of the Respondent's witnesses. They are careful professional people giving evidence within their area of expertise and about a recruitment grading system that has been set up carefully using the HERA tool. The Claimant was unable to undermine the application of that system. Even if we are in error in our rejection of the Claimant's contention that she was carrying out like work we agree that if we had reached that conclusion the onus would have been on the Respondent's to demonstrate that the disparity was tainted by sex discrimination. In our view they have done so.

115. We agree that the matter of the starting salaries was left to the interviewing panel but this must be seen in the context of the whole recruitment process on the one hand the candidates experience and responsibility on the other. We have already noted that the panel was an experienced one. Mrs Smith was part of the panel and a highly experienced HR professional. She was well acquainted with the HERA process and grading. Mrs White had also assessed the posts.

116. In short we found it very difficult to understand how the panel could have done anything other than what they did do faced with the two candidates they had. If the disparity in experience and qualifications between the Claimant and her comparator had been less marked the various criticisms made by the Claimant's Counsel might have been more difficult for the Respondent to meet possibly leading us to a different conclusion but that is not the situation here.

117. We had to decide if the disparity in pay was due to a factor that is not related to sex. It is apparent that the Respondent takes it's responsibility to maintain a fair and non-discriminatory recruitment process very seriously. Considerable time and effort had been put into the system both historically and in the current recruitment at issue. It could not be argued that the process is not genuine in some way or a sham. There was an established process for looking at the correct evaluated HERA job descriptions and where a new post would sit against grading or gradings. There was nothing to suggest that the grading of the various elements by the HERA system had become inadequate in some

way and the elements to be used in any new job description were considered at that point and also evaluated when promotions were made from grade 6 to 7.

- 5 118. In the round we were confident that the Claimant's sex discrimination played no part in the Claimant's initial grading and that even if the Claimant had demonstrated she was carrying out like work her claim must be fail.

	Employment Judge	J Hendry
10	Member	J McCaig
	Member	E Coyle

	Date of Judgement	17 September 2021
	Date sent to parties	17 September 2021

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