EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Dr I Kaneva v **UK Research and Innovation**

Heard at: London Central (by video) **On**: 22 – 26 and 29 November 2021

Before: Employment Judge E Burns

Representation

For the Claimant: **Melanie Sharpe (Counsel)**
For the Respondent: **Saul Margo (Counsel)**

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

(1) The Claimant was engaged in "like work," within the meaning of section 65(1)(a) of Equality Act 2010, to Alex Montoya, but not Joao Mokochinski.

(2) However, the difference between the Claimant's pay and that of her comparators (Mr Montoya and Mr Mokochinski) was not because of the Claimant's sex. Her claims for equal pay based on like work and equal value therefore fail and are dismissed.

(3) The Claimant's claims that she was subjected to detriments on the ground that she made protected disclosures pursuant to section 47B of the Employment Rights Act 1996 fail, because she did not make any protected disclosures. The claims are therefore dismissed.

(4) The Claimant's claim under section 27 of the Equality Act 2010 also fails and is dismissed.

(5) There will not be a further hearing in the case.

REASONS

THE ISSUES

1. This is a claim arising from the Claimant's employment with the Respondent from 1 November 2018 to 11 September 2020.

2. The issues to be determined at this preliminary hearing were as follows:

Equal Pay

2.1 Was the Claimant engaged in work that was "like" the work carried out by her comparators within the meaning of section 65(1)(a) of Equality Act 2010?

(The comparators relied upon by the Claimant are Mr Alex Montoya and Dr Joao Mokochinski)

2.2 In particular, was the Claimant's work "broadly similar" to that of her comparators – section 65(2)(a)?

2.3 If so, were such differences as there were between the work of the Claimant and her comparators of no practical importance in relation to the terms of their work – section 65(2)(b)?

2.4 If so, was the difference between the Claimant's pay and that of her comparator(s) because of a material factor reliance on which:

a. does not involve treating the Claimant less favourably than her compactor(s) because of C's sex; and

b. if the factor is within section 69(2) of the Equality Act 2010, is a proportionate means of achieving a legitimate aim.

In respect of both comparators:

(i) the fact that they applied for and were placed in roles in different pay bands at the start of their employment; and

(ii) their skills and experience.

Additionally, in respect of Mr Montoya, his length of service.

Whistleblowing - Protected Disclosures

2.5 The Claimant relies on three qualifying protected disclosures:

a. 28 September 2020 – a verbal disclosure made to Becky Smith (Investigation Manager for the Claimant's second grievance) that the Claimant's job had incorrectly been advertised as a pay band

5 post and that other jobs may have faced similar issues within LMS;

b. 27 October 2020 – a verbal disclosure to Matthew Coles, Chair of the Claimant's second Grievance Hearing that new post holders would be exploited as a result of incorrect job evaluations and that this was a systemic issue within the MRC / LMS;

c. 25 November 2020 – a verbal disclosure to Paul Ellix (HR Business Partner) that "LMS systematically does not evaluate jobs and puts them in a lower pay band than they deserve for the financial benefit of the institute"

2.6 Do the events the Claimant relies on amount to qualifying protected disclosures pursuant to section 43B of the Employment Rights Act 1996?

a. Did the Claimant make a disclosure of information which tended to show that the health and safety of any individual has been, is being or is likely to be endangered (section 43B(1)(d) of the Employment Rights Act 1996)?

b. If so, did the Claimant make this disclosure reasonably believing it was in the public interest to do so?

c. If so, did the Claimant reasonably believe the disclosed information showed that the health and safety of any individual has been, is being or is likely to be endangered (section 43B(1)(d) of the Employment Rights Act 1996)?

Victimisation

2.7 Did the Claimant do a protected act within the meaning of section 27 of Equality Act 2010 by requesting a job evaluation on 3 April 2010?

2.8 If so, did the Respondent subject the Claimant to a detriment because she had done the protected act by Holger Kramer not nominating her for a Special Award Scheme award in May and June 2020?

THE HEARING

3. The hearing was held in public and conducted by video. From a technical perspective, there were very few minor connection difficulties.

4. The Claimant gave evidence. For the Respondent we heard evidence from:

- Holger Kramer, Head of Mass Spectrometry (was Claimant's line manager and had the tile Head of Biological Mass Spectrometry and Proteomics)
- Sharon Citrone, Head of Human Resources

5. The tribunal ensured that each of the witnesses had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

6. There was an agreed hearing bundle of 1429 pages (including the Respondent's third amended Grounds of Resistance). We read the evidence in the bundle to which we were referred and we refer to the page numbers of key documents upon which we relied upon when reaching our decision below.

7. There was insufficient time in the hearing to enable an oral judgment to be delivered. We therefore reserved out judgment. Employment Judge E Burns has been responsible for writing it and wishes to apologise to the parties for the length of time it has taken to send it to them.

FINDINGS OF FACT

8. Having considered all the evidence, we find the following facts on a balance of probabilities.

9. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

10. This section begins with some brief background information, including the Respondent's Pay and Grading Structure. We then set out our findings with regard to the creation of the jobs performed by the Claimant, Mr Montoya and Dr Mokochinski and how they came to be paid as they were. We then set out the chronology of the Claimant's request for job evaluation and her grievances. We conclude with a section with our findings as to the work performed by the Claimant, Mr Montoya and Dr Mokochinski.

Background

11. The Claimant commenced employment with the Respondent on 1 November 2018.

12. The Respondent was created in April 2018. It is a non-departmental public body sponsored by the Department for Business, Energy and Industrial Strategy (BEIS). It brought together seven disciplinary research councils, including the Medical Research Council (MRC).

13. The Claimant and her comparators worked at the London Institute of Medical Sciences (LMS) which was one of the institutions which was a member of the MRC. The Claimant and her comparators were employed on legacy MRC terms and conditions.

Respondent's Pay and Grading Structure

14. The relevant policies are the MRC Recruitment and Selection Policy (28 March 2018) (177 – 207), MRC Policy on Pay and Grading (28 March 2018) (208 – 225) and Medical Research Council - Job Evaluation Guidance (December 2013) (123 – 137).

15. The MRC pay structure is based on seven bands. Band 7 is the lowest with Band 1 being the highest. Within each main band are three sub-bands:

- A – Entry / Developmental
- B – Experienced / Competent
- S – zone – Fully Competent AND sustained excellence

16. Sub-band A is intended as an entry band. It is envisaged that all new starters will join at sub-band A, but will progress, or be 'promoted', to sub-band B once they can demonstrate sufficient experience in the role. The MRC Policy on Pay and Grading contains guidelines as to the minimum years that an employee is expected to remain at sub-band A before promotion. For promotion from sub-band A to B in Band 4, there is a three year minimum period. For promotion from sub-band A to B in Band 5, the duration is two years.

17. It is possible for new starters to be brought in at sub-band B, but only with the approval of the HR lead. Employees cannot be recruited directly into the S-zone of the band.

18. The bands contain pay points with pay point 1 being the lowest. Bands 4 and 5 follow the same pattern. The A sub-band runs from pay point 2 to pay point 7, the B sub-band from pay point 7 to pay point 13 and the S sub-band pay point 13 to pay point 15. The pay point values are different depending on the band. Pay point 7 in band 4 is a completely different value to pay point 7 in band 5.

19. Employees usually start on the lowest pay point applicable to their sub-band. It used to be the case that employees would, subject to their performance being satisfactory, rise through the pay points each year, but this has not been in operation for many years.

20. A cost of living increase is made to each of the pay points each year, subject to being agreed. This is backdated to 1 April each year. Staff are informed of the annual increase by email and the pay bands are published on the Respondent's intranet. Copies of the pay bands for the years 2017 (225), 2018 (420) and 2019 (421) were contained in the bundle.

21. The MRC uses the civil service job evaluation scheme known as JEGS to score jobs. The scheme uses 7 factors to score jobs in order then to identify into which band they should be placed. The allocation is the main band rather than the sub-band.

22. All newly created roles must either be evaluated or matched to existing roles before they are advertised. Matching can be to similar jobs in any of the MRC institutions. There is little guidance on the matching process in the Job Evaluation Guidance. All it says is:

"**Process**

This process will be led by the HR Lead for the relevant region.

Job matching is an informal process but in considering whether a job is similar to an established role the HR Lead must review the role in relation to the 7 job evaluation criteria:

- Knowledge and skills
- Contacts and communications
- Problem-solving
- Decision-making
- Autonomy
- Management of resources
- Impact

Record keeping

The HR Lead must keep records of the job matching that has taken place and must inform the Head of Reward and Recognition of any matches made." (131)

23. Roles are advertised at salary ranges which reflect the sub-band, usually A, pay range plus London weightings where applicable.

24. For each role within the MRC, a job description and person specification are created. When jobs are being evaluated, a more detailed document, a job evaluation form (JAF) is created.

The Claimant and her Comparators

25. At all times throughout her employment, the Claimant worked in the Mass Spectrometry Facility (the "Facility"). The Facility offers research groups from across the UK the opportunity to analyse samples using Mass Spectrometry Instruments.

26. At the time she joined the facility it had four members of staff, but for a long time previously there had only been two members of staff, namely the Head of the Facility and one other. By November 2018 however, the unit was made up as follows:

- Dr Holger Kramer, Head of the LMS Mass Spectrometry Facility, who had commenced his role on 1 September 2016.

- Mr Alex Montoya, who had originally joined the facility on 26 November 2012. He reported to Dr Kramer's predecessors and then to Dr Kramer.

- Dr Joao Mokochinski, who joined with the job title Senior Metabolomics Scientist on 18 September 2018 and also reported to Dr Kramer.

- The Claimant, who had the job title Research Assistant in Proteomics, and also reported to Dr Kramer.

27. Dr Kramer, the Claimant and Mr Montoya were specialists in proteomics. Dr Mokochinski, however, was a specialist in metabolomics. Until his arrival, the facility was only able to offer mass spectrometry for proteomics, but this expanded to include metabolomics research with his employment.

Mr Montoya's Role

28. Mr Montoya joined the Facility in 2012 from another similar facility. His manager at that facility was offered the position as head of the LMS Facility and Mr Montoya was recruited with him as his assistant. Mr Montoya's job title on recruitment was Mass Spectrometrist and Proteomics Scientist and his starting salary was a pay point in Band 4A.

29. The Respondent told us that usually Band 4 roles require a PhD, but this can be satisfied through relevant experience instead. Although Mr Montoya did not have a masters or PhD at the time of his recruitment his previous experience in the other facility was taken into account.

30. After around five years in the role Mr Montoya was promoted to Band 4B, in line with the Respondent's advancement processes. This was with effect from 1 January 2017 (349).

31. In around 2016 onwards, following the arrival of Dr Kramer, the Respondent wanted to expand its offering into the area of bioinformatics. From 2016 onwards, it sought, on three occasions, to recruit a Bioinformatician who would specialise in Mass Spectrometry. Each recruitment campaign has been unsuccessful, however.

32. In the meantime, however, Mr Montoya had been teaching himself programming skills and this was an area of interest for him. He had developed some software tools that were being used in the Facility. This led to Dr Kramer proposing and receiving approval for an alternative solution to the recruitment of a Bioinformatician in March 2018.

33. Instead of recruiting externally, it was agreed that the Respondent would fund Mr Montoya to undertake a two year part time masters' degree in bioinformatics. He would also have a change in his job title Mass Spectrometrist and Proteomics Scientist to Proteomics Scientist and Data Analyst. Once he was qualified it was envisaged that Mr Montoya would provide the bioinformatics services to the Facility's research clients.

34. Dr Kramer made some changes to Mr Montoya's job description at this time to reflect his new responsibilities. He did not update the person specification for the role, however, and the role was not evaluated or matched for job

evaluation purposes. It was assumed that the changes made no difference to the grading of the role and Mr Montoya did not receive a pay increase. He continued to be paid at Band 4B.

35. Mr Montoya's new job title change became effective in July 2018. Mr Montoya commenced his two year masters' degree in October 2018. He completed it in around August 2020.

The Claimant's Role

36. Because Mr Montoya would be undertaking his part time studies, the Respondent decided it needed to backfill his role. It decided to create a role at Band 5A rather than duplicate Mr Montoya's Band 4 role. Mr Kramer believed that the Facility did not need someone with the same level of knowledge and experience as Mr Montoya and envisaged a more junior member of staff that would perform only the most basic of tasks.

37. The official job title for the role was Research Assistant in Proteomics.

38. Mr Kramer created a job description for the new role using Mr Montana's original job description as the starting point, but simplifying some of the duties. A person specification for the role was created which asked for a degree, but not a PhD.

39. The Claimant applied for the role and was offered it. The Claimant had a PhD and two year's relevant experience when she applied. She had used Mass Spectrometers in her PhD (which she undertook in Sheffield) and had stayed there working in the same laboratory continuing to use the equipment.

40. The Claimant's qualification and experience meant that she was overqualified for it. To reflect her experience, the Respondent agreed that she should be employed at Band 5B (pay point 7). It so happened that the highest pay point in Band 5A was the same as the lowest pay point in Band 5B. The Respondent told the Tribunal that it could not offer the Claimant more than this because this was the upper end of the range of pay for which the role had been advertised.

41. The role was not job evaluated. Ms Citrone told us that she remembered matching the role to two Band 5 roles (407-409 and 413-415) that existed within LMS at that time. She kept no record of this, however.

Dr Mokochinski's Role

42. A Further area of expansion for the Facility was into the area of metabolomics research. Previously the Mass Spectrometry Facility had only offered facilities for research into proteomics.

43. The role of Senior Metabolomics Scientist was created and a recruitment process undertaken in 2018.

44. Dr Mokochinski applied and was offered the role. Prior to joining the Facility, Dr Mokochinski had a PhD which he had obtained overseas. He had run a metabolomics Mass Spectrometry Facility in Hungry for a year.

45. The job description and person specification for Dr Mokochiniski's role were created by Dr Kramer. The position was not job evaluated. Ms Citrone told us that she considered it was appropriate for the role to be at Band 4 because it required a PhD.

46. She "matched" it using the roles Dr Kramer and Mr Montoya. The role was similar to Mr Montoya's role and reported to Dr Kramer. In her mind, Dr Kramer's role was a Band 3 role so it made sense for the role to be placed in Band 4, beneath Dr Kramer's role and at the same level as Mr Montoya's role.

47. In the end, Dr Mokochinski was paid at Band 4B, pay point 9. Ms Citrone told us this was because Dr Mokochinski was offered a role elsewhere and so LMS increased its offer to be competitive. As this was above the amount for which the role had been advertised, the role was re-advertised with a higher upper limit. This was necessary because Dr Mokochinski needed a work permit.

Dr Mokochinski's Special Award

48. As the Facility had not offered metabolomics research facilities previously, Dr Mokochinski had to set them up. This meant acquiring the relevant equipment and establishing brand new research protocols. Although he was supported in this activity by Dr Kramer, Dr Kramer was heavily dependent on Dr Mokochinski's expertise because Dr Mokochiniski had the relevant expertise while Dr Kramer's expertise was in proteomics.

49. As a result of the work that Dr Mokochinski undertook, establishing the metabolomics research facilities, Dr Kramer nominated him for a Special Award on 2 June 2020.

50. The MRC Special Awards Scheme was a scheme that enabled managers within the LRS to nominate employees for a small financial reward annually (138–149). The intention of the scheme was to reward someone for exceptional performance. Up to around 25% of employees were given an award each year. Manager's nominations were to a panel who made the final decision across the institution.

51. Dr Kramer did not nominate Mr Montoya or the Claimant for a Special Award. He told the Tribunal that he considered that the work of Dr Mokochinski was outstanding and exceptional and met the criteria for the Award. Whilst he valued the work of Mr Montoya and the Claimant highly, he did not consider them eligible for an award.

52. In addition, he was mindful that he did not want to be seen as nominating all his staff for an award that was meant only for the top 25% of performers. He considered it would weaken the value of his nomination to do this.

Claimant's Request for Job Evaluation and Grievances

53. It took the Claimant around six months to settle into her role.

54. She began to feel that she was being paid adequately for the work she was doing and started to raise concerns about the grading of her job in early 2020. She touched upon the topic in her PDR with Dr Kramer in February 2020 and later raised the issue with HR. The Claimant did not say that she believed she was being discriminated against because of her sex during these conversations.

55. The Claimant sent an email to HK and HR on 3 April 2020 asking that her role be job evaluated (558).

    The email said the following:

    "I would like to ask MRC to evaluate my current position in order to move the role from pay band 5 to 4. We discussed this briefly during the PDR review where you said you will support my application if I decide to go forward with it. Could we please discuss what needs to be done now and fill in the required documentation to start the application process?" (558)

56. Dr Kramer was reluctant to agree to the role being evaluated. His understanding at that time was that evaluation was only necessary if the Claimant was undertaking tasks that were different to those set out in her job description.

57. Dr Kramer asked the Claimant to compile a list of the activities she was undertaking which she did (550). He checked the list she created against the headings in her job description and concluded that the Claimant was not doing anything extra to her job description and therefore did not qualify for job evaluation.

58. Unhappy with this outcome, the Claimant continued to request job evaluation. This led to a meeting on 15 May 2020 between the Claimant, her trade union representative, HR and Dr Kramer. The Claimant asked if her job could be matched against the roles of her colleagues in the Mass Spectrometry Unit at this meeting, i.e. Mr Montoya and Dr Mokochinski.

59. The Claimant was aware that her colleagues were both working at Band 4, but did not know how much they were paid. The Claimant did not say that she believed that she was being discriminated against because of her sex and did not suggest that her role should be matched against that of Mr Montoya or Dr Mokochiniski because they were men. She suggested them because she thought she was doing similar work to them.

60. The Claimant was told that this was not possible because the job descriptions of Mr Montoya and Dr Mokochinski were very different to her job description. The Respondent, however, agreed to contact other Mass Spectrometry Units within the MRS to ask if they had any job descriptions that were similar to the Claimant's job description.

61. This led to two job descriptions being identified at a different Mass Spectrometry Facility. As these roles were being paid at Band 4, the Respondent decided to proceed with the job evaluation of the Claimant's role.

62. Dr Kramer's superiors made it clear to him at around this time, that if the job evaluation process resulted in the Claimant's role coming out as higher than grade 5, he would need to make staffing changes. This was because the Facility could only afford two grade 4s and a grade 5 within its budget, and could not afford three grade 4 employees.

63. The process of preparing a job evaluation form (JAF) containing information about the Claimant's role was not straightforward. Essentially, the difficulty arose because the Claimant and the respondent took different approaches to the exercise. The Claimant populated the form with what she considered she was actually doing. Dr Kramer and Ms Citrone, who helped him, approached the task differently. Their aim was to ensure that the role that had been initially envisaged was job evaluated. They relied on the content of the job description.

64. Initially the Claimant prepared a JAF and shared it with Dr Kramer. He largely agreed it. Then only change he wanted to make was to amend the JAF so that it did not record that a PhD was required for the role. The Claimant had referred to this as a necessary requirement. Although the Claimant amended the JAF accordingly, ultimately the JAF was not presented for evaluation. Instead, Dr Kramer and Ms Citrone created a second JAF. Although the Claimant did not agree it, the second JAF was the one that was sent for evaluation. The evaluation result was that the role came out at Band 6.

65. The Claimant was informed of the Band 6 evaluation on 2 September 2020 in a letter from Ms Citrone which said:

"The job evaluation form we submitted for grading has been assessed at a high Band 6 level. The panel felt that the evaluation form as presented did not demonstrate enough problem solving, decision making or autonomy. [Dr Kramer] will provide more detail in these sections in order to help the panel to understand the hand-over of responsibilities between the post-holder and the line manager. We will re-submit the evaluation to a subsequent panel.

It is recognised that since January 2020, [Dr Kramer] has re-arranged the way the facility members worked with LMS groups, which impacted the way that you carried out your role. I understand that it is your perception that during this period you may have been working at an equivalent of Band 4 level responsibilities. We disagree with this assessment of the role however we do agree that some additional duties you took on and the way in which you worked may have been in line with the requirements of a Band 4 level employee. We are therefore intending to pay you a lump sum to compensate you for the difference between your salary and the additional responsibilities of a Band 4 (at the level of salary appropriate to your

qualifications, skills and experience) for 9 months, from January to September 2020.

Going forward you will be allocated work from [Dr Kramer] and the expectation is that this will be appropriate to a Band 5 role.

We regret that this situation has happened, and acknowledge that it may have given you the impression that the role should be graded at a Band 4 level when in fact the facility only has and requires a Band 5 position. You are not expected to work at the autonomy or responsibility levels of a Band 4 employee." (802-803)

66. In line with the letter, a responsibility allowance of £4,701, effective from 1 January 2020 was paid to the Claimant. The value was based on Band 4A, pay point 4. This was the mid-point of the sub-band. Ms Citrone told the Tribunal that the Respondent considered this amount to be fair and that the Claimant's level of experience in the role put her above the two lower pay points on Band 4A.

67. The reference in the letter to changes in January 2020 is misleading. All that had occurred in January 2020 was a brief meeting between the Claimant, Dr Kramer and Mr Montoya where they had agreed which of them would be the lead contact for which research groups. Dr Kramer emailed both of them after the meeting with the agreed list (461). Dr Kramer told the Tribunal that he did not think anything changed about the Claimant's work in January 2020, but that HR had wanted to try and reach an amicable solution and advised him to use the January meeting as a hook on which to offer the Claimant some extra money. He also told us that he was not consulted about the value of the responsibility allowance that was paid to the Claimant.

68. Unhappy with the job evaluation process and the length of time it had taken, the Claimant had, by this time, submitted two grievances. She resigned on 11 September 2020, three days after receiving the outcome of the first grievance. IT had not been upheld.

69. The Claimant's resignation letter said the following:

"*I am writing to inform you that I am resigning from my position as Research Assistant in Proteomics with immediate effect. Please accept this le er as a formal notice of termination of my employment contract.*

I believe the reasons for my resignation will be very clear to you:

1. *You have exploited me and underpaid me since the beginning of my employment, and continued to do so until today.*
2. *You refused to deal with the manner in a fair way, and abused your power together with the HR department and the higher management of the company.*
3. *You falsified the job evaluation form to avoid financial responsibility.*
4. *You victimized me because of the actions I've taken to fight for a fair salary.*

5. *You refused to change my responsibilities in a fair way that fits a band 5 salary.*
6. *MRC LMS did not handle my grievance properly.*
7. *I have developed mental health problems as a result of the above*.

Given the unbearable working environment I find myself in, I cannot work with you any longer and I feel a huge relief to be leaving this company." (911)

70. Although the Claimant ceased to be employed by the Respondent, it nevertheless concluded the consideration of her grievances and the appeals she submitted.

71. In addition, the Claimant's role was re-evaluated again after she left. The second JAF was further amended by Ms Citrone and Dr Kramer and it produced a Band 5 grading when evaluated again in October/November 2020.

72. The Respondent subsequently recruited a replacement for the Claimant. The Tribunal was told that the replacement is performing the Band 5 duties set out in the original job description.

Purported Protected Disclosures

73. The Claimant relies on three verbal disclosures she made during the grievance processes as protected disclosures.

74. On 28 September 2020, the Claimant says she made a verbal disclosure to Becky Smith, who was Investigation Manager for the Claimant's second grievance, to the effect that that her role had been incorrectly advertised as a pay band 5 post and that other jobs may have faced similar issues within LMS.

75. A notetaker was present at the meeting and took a note of what the Claimant said and the context in which she said it. The note was not a verbatim record. The Claimant had the opportunity to make extensive tracked changes to the note, however, to ensure that it reflected what she wished to say (1381).

76. The amended note records that the Claimant said that she believed her role was not a band 5 role and that it had not been correctly evaluated or matched at the time her role was created. She also told Ms Smith that she believed that the roles of Mr Montoya and Dr Mokochinski had also not been evaluated.

77. The Claimant said nothing about feeling that she had been exploited or that there had been any impact of what had happened on her mental health.

78. On 27 October 2020, the Claimant made a verbal disclosure to Matthew Coles who was considering her second grievance. A notetaker was present at the meeting and again a note was taken of what the Claimant said. As before, the Claimant had the opportunity to make extensive tracked changes to the note to ensure that it reflected what she wished to say (1127).

79. The amended note records the following:

"*IK expressed that she was sad to see that her post had now been advertised again with the same job description and job advert as two years ago when she applied for it. The job was also advertised as a band 5 position despite the fact that it had not been evaluated fairly. IK was worried that the new post holder will be exploited in the same way as she was.*

She said that she already told that two other posts in the Facility were created by HK, but when she asked HK for a job evaluation, he did not know if or how this is done. This means that the other positions were never evaluated either because if they were, HK would have been involved in the process.

IK suspects MRC commonly does not evaluate jobs and undervalues their pay band with the aim to exploit its employees and save money. IK said that MRC had committed fraud by falsifying her job evaluation form and claiming that she was working at band 5 when they knew she was not." (1132)

80. The final verbal disclosure on which the Claimant relies was made on 25 November 2020 to Paul Ellix (HR Business Partner). The Claimant attended a grievance outcome hearing on this date. Following the meeting, Mr Ellix sent her an email to acknowledge and record what she had said. The email records that she said:

"*LMS systematically does not evaluate jobs and puts them in a lower pay band than they deserve for the financial benefit of the institute"* (1227)

The reason for Mr Ellix recording it was because the Claimant had said that she wanted the concern to be investigated under the Respondent's whistleblowing policy.

81. The Claimant accepted, when giving her evidence to the Tribunal, that when raising the issue of exploitation, she had referred to financial exploitation and alleged that the Respondent was being fraudulent. She accepted that she had not said that a potential consequence of the exploitation of LMS colleagues was that their health and safety was at risk.

Job Content

82. We turn now to our factual findings with regard to the work that was being undertaken by the Claimant, Mr Montoya and Dr Mokochinski. Our factual findings are based on the content of the documents set out below and what we were told by Dr Kramer and the Claimant.

- Mr Montoya's original job description from 2012 (1423) and person spec (405-406)
- The Claimant's job description and person spec prepared in 2018 (335)
- Mr Montoya's new job description prepared in 2018 (332-333)
- The key activities document prepared by the Claimant (550)

83. We have also considered the JAF forms that were prepared for the purpose of evaluating the Claimant's role. We consider that the first JAF that the Claimant prepared herself (804) to be reliable for this purpose, but not the forms prepared by Dr Kramer and Ms Citrone (738, 760 and 996).

84. In addition, we have considered copies of the following PDRs which were also contained in the bundle:

- Mr Montoya - for the calendar years 2016, 2017, 2018, 2019 and 2020
- Dr Mokochinski – for the calendar years 2019 and 2020
- The Claimant – for the calendar year 2019

85. We have found them to be very reliable documents in terms of accurately recording what work the Claimant and her comparators were doing.

86. We find that the Claimant's role was not limited to the tasks that are set out in her job description. The Claimant was doing more than the basic level tasks envisaged in her job description, as acknowledged by the Respondent's decision to give her a responsibility allowance. We consider she was working at this enhanced level from between three and six months after she started her role.

87. We note that Mr Montoya was undertaking his part time master's degree from October 2018 to August 2020. This reduced the time he was able to spend on his normal role. In the second year of this degree he was required to do a dissertation and took study leave. The Facility was also affected by the Covid-19 pandemic with the result that homeworking was required form March 2020 onwards.

88. The work of all three of Mr Montoya, the Claimant and Dr Mokochinski was to assist research groups with their research by providing them with mass spectrometry facilities. In the case of Mr Montoya and the Claimant, the research area was proteomics. For Dr Mokochinski, the area was metabolomics.

89. All three of them were involved with liaising with research groups. Before any experiments could be run, the scientists at the Mass Spectrometry Facility needed to understand what the research groups were trying to achieve and assist them with experimental design. They then ran the experiments through the instruments in the laboratory and assisted the groups with understanding and analysing the results.

90. In all cases it was necessary to meet with new research groups at an early stage in the experimental design process. As Dr Kramer was also a proteomics expert, the first meetings would usually be led by him with other one of Mr Montoya or the Claimant present. Once the Claimant had settled into the role (after between three to six months), Dr Kramer did not distinguish between which of Mr Montoya or the Claimant would get involved in a particular project. He confirmed to us that allocation of work was done equally with no differentiation.

91. Dr Kramer also met with research groups interested in undertaken metabolomics research with Dr Mokochinski. He was not able to offer as much by way of input to these groups, however, and relied more heavily on Dr Mokochinski's expertise.

92. All three of Mr Montoya, the Claimant and Dr Mokochinski ran data samples using the instruments in the facility. The instruments used by Mr Montoya and the Claimant were the same. In Dr Mokochinski's case, however, he had to use additional instruments.

93. In order to be able to run the samples, the instruments needed to be correctly set up and appropriate adjustments made. Using the instruments had become much easier in the last decade as technological improvements brought changes to the user interface. Mr Montoya had experience of the earlier manual processes that had been required because he had used Mass Spectrometers for a longer period when this was needed. He was not required to undertake this work during the period he and the Claimant were employed contemporaneously. The Claimant developed a facility on her laptop that enabled her to monitor experiments remotely.

94. The Claimant, Mr Montoya and Dr Mokochinski were all involved in instrument maintenance and troubleshooting when problems arose. This included liaising with field engineers when necessary. Dr Mokochinski had to maintain different instruments, however. In the initial two years of his role, while he worked alongside the Claimant, a large part of his role involved acquiring the relevant instruments and getting them set up. Neither Mr Montoya nor the Claimant had to do this to the same extent at the same time.

95. The Claimant had learned all of the necessary basic instrument maintenance techniques within around three to six months. She had observed some of the more infrequent techniques, such as the front end clean, but had not had an opportunity to do this. Although it had initially been envisaged that the Claimant would take over doing the basic instrument maintenance techniques and Mr Montoya would stop doing this work, they both did it throughout the period that she worked at the Facility.

96. Mr Montoya had more experience of using Mass Spectrometers when compared to the Claimant's experience. This led to Dr Kramer relying on him when a problem arose in April 2020 with one of the machines. The intervals of cleaning were getting shorter, which led in the end to a need to replace a component.

97. Once samples had been run, the next stage of the experimental workflow was to process the data and analyse it so that it produced useful information for the research groups. Both Mr Montoya and the Claimant spent around 50% of their working time involved in data analysis.

98. They both used an application called Max Quant to organise the data and a software application that had been developed by Mr Montoya called the R

scripts to undertake quality control checks. Mr Montoya had developed the R scripts in 2016 and 2017. It was his interest in programming and his development of the R scripts that had led to the decision to fund him to do the Bioinformatics Master's degree.

99. The next stage of the experimental process involved the biological interpretation of the results. The output of this process was a presentation of the results that could be shared with the research groups. All three of Mr Montoya, the Claimant and Dr Mokochinski were involved in this aspect of their work. According to the Claimant's unchallenged evidence, once she had settled in, she often delivered these presentations herself without having to seek input form Dr Kramer beforehand. She told us that Mr Montoya would far more regularly check his output with Dr Kramer first.

100. Dr Mokochinski necessarily had to be largely self-sufficient when it came to this part of his work, as Dr Kramer's expertise in metabolomics was limited.

101. Both Mr Montoya and the Claimant used another application called Perseus to assist with the preparation of the presentations for the research groups. It was envisaged that Mr Montoya's new skills, learned during his master's degree would enable him to write bespoke software that would enhance the Facility's ability to analyse and present the data. Although he was on the verge of beginning to do this, he had not begun this by the time the Claimant had resigned.

102. The Claimant quickly developed an expertise in the use of Perseus. It was a relatively new application that was being increasingly used to assist with Mass Spectrometry data analysis. She became the team expert on it and was sent to a Summer School in the US to learn more about it. Although Perseus was a ready made software application, it nevertheless involved the Claimant in developing some complex bioinformatic workflows.

103. Dr Kramer told us that the degree of collaboration that Mr Montoya and Dr Mokochinski were able to offer the research groups that used the Facility was greater than that which the Claimant was able to offer. He told us that this was reflected in the number of papers that the research groups had published which named either Mr Montoya or Dr Mokochinski as a contributor. He provided the Tribunal with a list of publications for the periods from 2014 to 2021. The Claimant told the Tribunal that she expected to be named as a collaborator in future research papers. She explained that it often took many years for research papers to be published after the experiments actually took place.

104. Dr Kramer told the Tribunal that when he was absent her would name Mr Montoya in his out of office message. However, page 451 of the tribunal bundle, showed that on 24 October 2019, his message to a particular group had said the following:

"Thanks for the message. I will actually be away for a week from tomorrow, but I would suggest for you to have a discussion with Iliyana and Alex (both CCed). They are both very experienced with interaction proteomics

experiments and will be able to advice on suitable buffers and validation of the Co-IP ahead of proteomics analysis." (451)

105. Finally, we note that Mr Montoya and the Claimant both described themselves as "*Mass Spectrometry and Proteomics Scientists*" in their email signatures when writing emails to internal and external contacts. For both of them, this did not reflect the actual job titles on their job descriptions. Dr Kramer did not challenge their use of the email signatures.

THE LAW

Equal Pay

Like Work

106. In relation to the question of "like work" section 65 of the Equality Act 2010 provides as follows:

> "(2) A's work is like B's work if –
>
> (a) A's work and B's work are the same or broadly similar, and
>
> (b) such differences as there are between their work are not of practical importance in relation to the terms of their work.
>
> (3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to –
>
> (a) the frequency with which differences between their work occur in practice, and
>
> (b) the nature and extent of the differences."

107. The focus, when determining like work is on what the Claimant and her comparators actually did, rather than what they might in theory be required to do under the contract of employment: *Capper Pass Ltd v Allan* [1980] ICR 194 per Slynn J at 196F-G. The job descriptions of the Claimant and the comparators may be relevant providing they reflect the work that was actually done (*Dorothy Perkins Ltd v Dance* [1977] IRLR 266) reflect.

Comparators

108. Section 79 of the Equality Act 2010 defines relevant comparators for an equal pay claim:

> "(2) If A is employed, B is a comparator if subsection (3) or (4) applies.
>
> (3) This subsection applies –
>
> (a) B is employed by A's employer or by an associate of A's employer, and

(b) A and B work at the same establishment.

(4) This subsection applies if –

(a) B is employed by A's employer or an associate of A's employer,

(b) B works at an establishment other than the one at which A works, and (c) common terms apply at the establishments (either generally or as between A and B)."

109. A woman is able to compare herself with contemporary employees and predecessors (*Macarthys Limited v Smith* [1980] ICR 672); *Kells v Pilkington plc* [2002] IRLR 693, EAT)

Material Factor Defence

110. If the Claimant is able to establish "like work" or work of equal value to any of her comparators, a sex equality clause applies to her terms and conditions. Section 66 of the Equality Act 2010 provides:

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

(2) A sex equality clause is a provision that has the following effect –

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

111. However, even if "like work" or "work of equal value" is established, the equality clause will not operate if the Respondent can establish a material factor defence. Section 69 of the Equality Act 2010 provides:

"69(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 (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."

112. In *Glasgow City Council v Marshall* [2000] ICR 196 Lord Nicholls considered the approach to a material factor under the Equal Pay Act at 202F-203C:

"The scheme of the Act is that a rebuttable presumption of sex discrimination arises once the gender-based comparison shows that a woman, doing like work … to that of a man, is being paid or treated less favourably than the man … The 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 a 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.' … Fourth, that the factor relied upon is … a significant and relevant difference between the woman's case and the man's case.

… an employer who satisfies the third of these requirements is under no obligation to prove a 'good' reason for the pay disparity. In order to fulfil the third requirement, he must prove the absence of sex discrimination, direct or indirect … But if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity."

113. The Equality Act 2010 makes it clear that a reliance on a "material factor" must not "*involve treating A less favourably because of A's sex*"; i.e. involve direct sex discrimination. It is only in a case of disparate impact/indirect discrimination under section 69(2) that the Tribunal goes on to consider where reliance on the factor is "a proportionate means of achieving a legitimate aim".

114. In determining whether there is direct sex discrimination the Tribunal is required to have regard to shifting burden of proof found in section 136 of the Equality Act 2010. That section envisages a two-stage process. Initially it is for a claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from a respondent, that the respondent committed an act of unlawful discrimination.

115. At the second stage, discrimination is presumed to have occurred, unless a respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was not unlawful discrimination. A respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

116. Guidelines on the application of the predecessor of section 136 of the Equality Act 2010 were set out by the Court of Appeal in *Igen Ltd* v *Wong [2005] EWCA Civ 142* and *Madarassy* v *Nomura International Plc [2007] EWCA Civ 33*. The decision of the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33 confirms the guidance in these cases applies under the Equality Act 2010.

117. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572 at 576.

118. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on section 136 of the Equality Act 2010: *Amnesty International v Ahmed* [2009] ICR 1450 and *Martin v Devonshires Solicitors* [2011] ICR 352 as approved in *Hewage v Grampian Health Board* [2012] ICR 1054.)

119. In considering what inferences can be drawn, tribunals must adopt a holistic approach, by stepping back and looking at all the facts in the round, and not focussing only on the detail of the various individual acts of discrimination. We must "see both the wood and the trees": *Fraser v University of Leicester* UKEAT/0155/13 at paragraph 79.

120. The Tribunal may also have regard to the statutory codes of practice issued by the EHRC.

Protected Disclosures

121. Section 47B(1) of the Employment Rights Act 1996 says:

> "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

122. According to section 43A "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

123. Section 43B(1) says "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

Disclosure of Information

124. There must be a disclosure of information. In *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, the EAT held that to be protected a disclosure must involve information, and not simply voice a concern or raise an allegation.

125. The court of appeal has subsequently cautioned tribunals against treating the categories of "information" and "allegation" as mutually exclusive in the case of *Kilraine v London Borough of Wandsw*orth [2018] EWCA Civ 1436. At paragraphs 30 -31, Sales LJ says:

"*I agree with the fundamental point …….. that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. …….Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. ……*

On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision."

126. He goes on to say at paragraph 35:

"*In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection [43B](1).*"

Reasonable Belief

127. It is irrelevant whether or not it is true that a relevant failure has occurred, is occurring or is likely to occur (*Darnton v University of Surrey* 2003 [ICR] 615, EAT; *Babula v Waltham Forest College* [2007] ICR 1026, CA).

128. The test is whether the claimant reasonably believes the information shows this. The requirement for reasonable belief requires the tribunal to identify what the claimant believed and to consider whether it was objectively reasonable for the claimant to hold that belief, in light of the particular circumstances including the Claimant's level of knowledge. (*Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4, EAT).

Public Interest Test

129. The leading case dealing with when the public interest test is met is *Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979. The Court of Appeal confirmed that where a disclosure relates to a breach of the worker's own contract of employment, or some other matter under

section 43B(1) where the interest in question is personal in character, there may be features of the case that make it reasonable to regard the disclosure as being in the public interest as well as in the personal interest of the worker.

Victimisation

130. Section 39(4)(d) of the Equality Act 2010 provides that an employer must not victimise its employees. The definition of victimisation is contained in section 27 of the Act.

131. Section 27(1) of the Act provides that:

‘A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.’

132. The definition of a protected act is found in section 27(2) and includes:

(a) bringing proceedings under the Equality Act 2010;

(b) giving evidence or information in connection with proceedings under the Equality Act 2010;

(c) doing any other thing for the purposes of or in connection with the Equality Act 2010; and

(d) making an allegation (whether or not express) that an employer or another person has contravened the Equality Act 2010.

133. A complaint made to an employer can amount to a protected act under section 27(2)(d) without referring to the Equality Act 2010 and without using the correct legal language. It must however contain a complaint about something that is capable of amounting to a breach under the Equality Act 2010.

134. In the case of *Beneviste v Kingston University* EAT 0393/05, the following was said:

“There is no need for the allegation to refer to the legislation, or to allege a contravention, but the gravamen of the allegation must be such that, if the allegation were proved, the alleged act would be a contravention of the legislation. If a woman says to her employer, "I am aggrieved with you for holding back my research and career development" her statement is not protected. If a woman says to her employer, "I am aggrieved with you for holding back my research and career development because I am a woman" or "because you are favouring the men in the department over the women", her statement would be protected even if there was no reference to the 1975 Act or to a contravention of it.” (Paragraph 29)

Although the paragraph above refers to a pleading and to the Sex Discrimination Act 1975, we consider it is good guidance when considering whether an act amounts to a protected act under the Equality Act 2010.

135. If the tribunal is satisfied that the Claimant has done a protected act, the Claimant must show any detriments occurred *because* she had done that protected act.

136. The analysis the Tribunal must undertake is in the following stages:

(a) we must first ask ourselves what actually happened;

(b) we must then ask ourselves if the treatment found constitutes a detriment

(c) finally, we must ask ourselves, was that treatment because of the claimant's protected act.

137. A detriment can encompass a range of treatment in the workplace. The test for detriment was formulated in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 where it was said that it arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work.

138. The EHRC Employment Code, drawing on this case law, says: '*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage……. However, an unjustified sense of grievance alone would not be enough to establish detriment*." (paragraphs 9.8 and 9.9). Accordingly, the test of detriment has both subjective and objective elements.

139. The essential question in determining the reason for the claimant's treatment is what, consciously or subconsciously, motivated the respondent to subject the claimant to the detriment? This is not a simple "*but for*" causation test, but requires a more nuanced inquiry into the mental processes of the respondent to establish the underlying "core" reason for the treatment. In overt cases, there may be an obvious conscious attempt to punish the claimant or dissuade them from containing with a protected act. In other cases, the respondent may subconsciously treat the claimant badly because of the protected act. A close analysis of the facts is required.

140. It is only if the necessary link between the detriment suffered/dismissal and the protected act can be established, the claim of victimisation will succeed. The protected act need only be one of the reasons. It need not be the only reason (EHRC Employment Code paragraph 9.10).

141. The shifting burden of proof found in section 136 of the Equality Act sets applies. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the reason for any unfavourable

treatment was because of the claimant's protected act. If the claimant succeeds, discrimination is presumed to have occurred, unless the respondent can show otherwise.

ANALYSIS AND CONCLUSIONS

Equal Pay

142. The Claimant claims equal pay in relation to her salary on the basis that she undertook "like work" to Mr Montoya and/or Dr Mokochinski within the meaning of section 65(1)(a) of the Equality Act 2010 or in the alternative, that she was undertaking "work of equal value" to one or other of them within the meaning of section 65(1)(c). The Tribunal is not determining this latter point.

Like Work - The Claimant and Mr Montoya

143. Based on the Tribunal's factual findings, our conclusion is that the Claimant was doing like work to Mr Montoya from between three to six months after she started her role and this continued until her resignation.

144. The Claimant was not working and was not required to work to the basic job description that had been prepared for her role. There had been no adjustment to the tasks performed by Mr Montoya in response to her arrival.

145. Following an initial learning period for the Claimant, Dr Kramer did not differentiate between them in relation to work allocation. The two employees shared responsibility for assisting the research groups using the Facility for proteomics research and both were held out as Mass Spectrometry and Proteomics Scientists to the research groups.

146. Mr Montoya had more experience of maintaining mass spectrometry instruments than the Claimant. This meant that when a front end clean was required, he carried it out. The Claimant would have done the next one however had she not resigned. In addition, Mr Montoya was, on one occasion, called upon by Dr Kramer to assist with a significant trouble shooting issue. We do not consider that these differences were of practical importance in relation to the terms of their work, given the infrequency with which they occurred.

147. The biggest difference between Mr Montoya and the Claimant would have been in the area of data analysis. It was envisaged that Mr Montoya would write and develop bespoke software programmes that would enable more sophisticated data analysis to be undertaken. This type of data analysis was not part of her role.

148. The Tribunal's determination is that this difference was not of practical importance in relation to the terms of the work of the Claimant and Mr Montoya because it existed only in theory rather than in practice, at the time they worked alongside each other contemporaneously.

149. The Tribunal has found, as a matter of fact, that Mr Montoya had not started implementing this work to any significant extent by the time the Claimant left. He had, understandably, focussed on his master's degree, and was involved in writing very little code for any other purpose while he was undertaking his studies. In the meantime, the Claimant had developed a high level of expertise in the use of Perseus for her own data analysis work which she also shared with Mr Montoya.

150. We consider what the differences in their approaches to data analysis were not significant at the relevant times.

Like Work - The Claimant and Dr Mokochinski

151. Our conclusion is that the Claimant was not doing like work to Dr Mokochinski. Although many of the aspects of their work were similar, and mirror the similarities between the work of the Claimant and Mr Montoya outlined above, there were two significant differences which we consider were of practical importance in relation to the terms of their work.

152. The first difference was that Dr Mokochinski was working in the area of metabolomics which meant that the experiments he was conducting involved some different processes. The differences were significant in our judgment and should be taken into account in our judgment.

153. The second difference was that during the period of comparison, a large part of Dr Mokochinski's time was spent establishing metabolomics as a new field of research for the Facility. This required him to be involved in the acquisition of new instruments and establishing new research protocols. The Claimant did a small bit of work in these areas on the proteomics side, but her contribution was minor in comparison to the work undertaken by Dr Mokochinski. Again, we consider the difference was significant and should be taken into account.

Pay Differences

154. There was a pay difference between the amount paid to the Claimant and to Dr Mokochiniski.

155. The Claimant was paid from 1 November 2018 to 31 December 2019 at Band 5B on point 7 with a London weighting. This increased to Band 4A, pay point 4 from 1 January 2020 when she was paid the backdated responsibility allowance.

156. Mr Montoya was paid at Band 4B, pay point 7 with a London weighting, throughout this period.

157. In terms of the actual amounts by which their pay differed, we have found it quite difficult to work these out. We are satisfied however, that based on the 2018 pay scale figures, the difference between the Claimant's pay and Mr Montoya's pay was between £7,000 and £7,500 for the period from the start of her employment until 31 December 2020. The gap narrowed to closer to

£3,000 when the Claimant was paid the responsibility allowance, based on the 2019 pay scale figures.

158. Dr Mokochinski was paid on Band 4B at pay point 9 plus a London weighting throughout the time he worked in the same team as the Claimant.

159. This amounted to a gap between his and the Claimant's pay of more than £9,000 on the 2018 pay scale figures. The gap narrowed to around £4,700 based on the 2019 pay scale figures when the Claimant was paid the responsibility allowance.

Material Factor Defence

160. Although we have found that the Claimant was doing like work as Mr Montoya and there was a pay difference between them, we have not upheld her claim for equal pay. This is because in our judgment, the Respondent has proved, on the balance of probabilities, that the reason for the difference in their pay was not discriminatory on the grounds of sex.

161. The same is also true, in our judgment, for the pay difference between the Claimant and Dr Mokochinski. Even if, which has not been determined, she was doing work of equal value to him, she fails in her equal pay claim against him because the difference in pay between them was not because of sex.

162. Our explanation for these two conclusions is set out below.

Mr Montoya

163. In our judgment, the primary reason for the difference in the pay between the Claimant and Mr Montoya was because she was recruited to (and paid at) a Band 5 role, but was working at Band 4. In other words, the reason was because the Claimant was recruited to a role for which she was over-qualified. She did more than was required by her job description to the extent that she was doing the same job as Mr Montoya, but this was not the Respondent's intention and it was not because of her sex.

164. The role to which the Claimant applied was a genuine Band 5 role. There is no evidence that her sex or sex more generally influenced the creation of the job description at Band 5. The job description was created before the Claimant or any other applicants applied for the role.

165. The Respondent's genuine intention was to employ someone who would undertake some of Mr Montoya's basic responsibilities. The Respondent's thinking was that initially the assistance would enable Mr Montoya to focus on his master's degree and, then once he was qualified, subsequently it would enable him to focus on data analysis work.

166. The Claimant, however, with her PhD and relevant experience, was capable of working at the same level as Mr Montoya after a short period of induction and did do. Neither Dr Kramer nor Mr Montoya stopped her doing this and there was no reorganisation of work to prevent this from happening. There

was no evidence before us, however, that this was influenced by the Claimant's sex.

167. The Claimant says that she was actively required to work to this level she did and the situation was one which was created deliberately to exploit her. The evidence does not support this conclusion, but even if there was deliberate exploitation, it would still be a leap to connect this with the claimant's sex.

168. There was no evidence before us suggesting that the Respondent anticipated that the job would be more attractive to female candidates or that they deliberately selected a female candidate because the Respondent thought she would be more malleable.

169. When the job description for the Claimant's role was correctly converted into a JAF, the grading showed it was a Band 5. Had she not resigned, steps would have been taken to address the level at which she was working. Her successor has only been working at a Band 5 level because the respondent has, no doubt, been keen to ensure the allocation of tasks has been better managed.

170. We consider it was the Claimant's confidence and capability that led to her working at a higher level than was needed. In our judgment, the same situation would have arisen had a man with a PhD applied for and been offered the role and then worked at a higher level. The situation arose because of a failure to actively manage the situation and a degree of naivety as to the consequences of allowing the Claimant to work at a higher level.

171. We add that we consider the situation was not helped by the fact that that Claimant's job evaluation request was handled very poorly and that Dr Kramer refused to recognise and acknowledge the reality of the situation. It is not surprising the Claimant developed a high degree of mistrust in the Respondent. It took an extremely lax approach to the process of grading her role in the first place and then dealt with her desire to understand that process and challenge it very badly. We do not consider this was an attempt to cover up sex discrimination, however, or that any evidence has been presented to us from which we could infer this.

172. We consider that there was also a secondary reason for the difference in pay between the Claimant and Mr Montoya. This was the Respondent's adherence to its pay policies which dictated that normally, employees start on Band A and then move to Band B following a process of internal promotion.

173. Mr Montoya had followed the normal promotion process to move from Pay Band 4A to Pay Band 4B as outlined in the Respondent's policy on promotion. This provides for a minimum period of three years before an employee in Band 5 can seek promotion from Band 4A to Band 4B.

174. Once the respondent had, belatedly, recognised that the Claimant was working at a Band 5 level, it paid her the responsibility allowance based on

the mid-point of Band 4A. The Claimant did not have the requisite minimum three years' service enabling her to be considered for promotion. The Respondent's decision making with regard the value of the responsibility allowance was not, in our judgment, influenced by the fact that the claimant was a woman. Although length of service can operate as an indirectly discriminatory factor on the grounds of sex, this is only in relation to longer service requirements and not ones which are as short as three years.

Dr Mokochinski

175. We turn now to the pay difference between the Claimant and Dr Mokochinksi. We find that the primary reason for it was the same as above, namely the fact that the Claimant had been recruited to a Band 5 role.

176. The secondary reason in the case of Dr Mokochinski was not length of service, however, because his length of service was almost the same as that of the Claimant. Instead, in the case of Dr Mokochinksi, the reason he was able to negotiate a higher salary was because he was the candidate that the Respondent particularly wanted, due to his experience and skill set, but he had another job offer and would have gone elsewhere had it not been prepared to deviate from its normal pay policies. The reason was market forces and had nothing to do with the fact that he was a man.

Protected Disclosures

177. The Claimant's case is that the three disclosures of information she made constituted protected disclosures because they were of information that, she reasonably believed, tended to show that the health and safety of individuals was at risk pursuant to section 43B(1)(d) of the Employment Rights Act 1996.

178. Given that she accepts that she said nothing about health and safety when making the disclosures, we have had to consider whether it was implicit in what she said that the health and safety of her colleagues was at risk. The judgment of the Tribunal is that it was not.

179. The Claimant does refer in her second disclosure to exploitation and, in particularly, her fear that her replacement would be exploited in the same way as she had been. The surrounding context suggests that she means financial exploitation.

180. We note, however, that the Claimant had informed the Respondent that her own mental health had been damaged as a result of the way she was treated by Dr Kramer. We have therefore considered whether her disclosures (and the second one in particularly) can be understood as concerns raised about health and safety matters against this background. We do not consider they can.

181. We consider the correct interpretation of the Claimant's resignation letter is that she found the process of asking for her role to be evaluated and pursing grievances stressful and it was this that caused her mental health difficulties. She does not say in her resignation letter that her health difficulties were

caused because she had been required to undertake additional work or work at a greater level of responsibility and does not raise this as a concern for her replacement.

182. We therefore conclude that the Claimant's disclosures of information do not constitute protected disclosures with the effect that her claim under section 47B of the Employment Rights Act 1996 fails.

Victimisation

183. The Tribunal does not uphold the Claimant's claim for victimisation for two reasons.

184. First, after careful consideration, we have decided that the Claimant did not do a protected act.

185. In her email of 3 April 2020, the Claimant asked for her job to be evaluated in accordance with the internal job evaluation process that the Respondent operated. Her email did not say that the reason she was seeking this was because she believed she was being paid less than her male colleagues.

186. The Claimant invited us to find that asking for her job to be evaluated amounted to a protected act. She argued it was clear from the email that she was unhappy with her pay and, because she was the only female member in an all-male team, it was implicit that her complaint must have been one of sex discrimination. In addition, she invited is to view her request, in light of the fact that she expressly asked that her job description be matched against that of her two make colleagues at the meeting she attended with Dr Kramer and HR on 15 May 2020.

187. In our judgment, the Claimant's actions do not meet the threshold required for a protected act. As noted above, we found the guidance in *Beneviste* helpful on this point. We do not consider it was implicit from the Claimant's circumstances, her request for job evaluation or her request that her job be matched to her colleagues that she believed she was being treated less favourably than them because of her sex. She needed to go further and say that she believed her sex was or might be a factor.

188. The second reason we have not upheld this claim is because we do not consider that Dr Kramer's decision not to nominate the Claimant for a Special Award was not influenced in any way whatsoever by the fact that she had raised concerns about her pay.

189. Dr Kramer had a clear and cogent reason for nominating Dr Mokochinski for the Special Award. His work had enabled the Mass Spectrometry Facility to offer an entirely new service to researchers by exposing its remit into metabolomics. This was a hugely significant development and one which Dr Kramer valued highly.

190. Although he also valued the work of the Claimant and Mr Montoya, Dr Kramer did not want to be seen nominating more than one member of his team for an award designed to reward the top 25% performers across the

institute. He considered it would weaken the value of his nomination to do this. In our judgment, he would have acted in the same way regardless of whether or not the Claimant had complained about her pay.

Employment Judge E Burns
2 March 2022

Sent to the parties on:

.03/03/2022.....

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For the Tribunals Office