EMPLOYMENT TRIBUNALS

Claimant:	Mrs G Long	
Respondent:	British Gas Trading Limited	
Heard at:	Reading	**On: 6, 7, 8, 9 and 20 December 2021**
Before:	Employment Judge Gumbiti-Zimuto Tribunal Members Mrs C Baggs and Mr J Appleton	

Appearances
For the Claimant: Mr Daniel Brown, counsel
For the Respondent: Mrs Anisa Niaz-Dickinson, counsel

JUDGMENT

The claimant's complaints of equal pay, sex discrimination, less favourable treatment on the grounds of part-time working and unfair dismissal are well founded and succeed.

REASONS

1. In a claim form presented on the 11 December 2019 the claimant brought complaints of unfair dismissal, sex discrimination, equal pay and less favourable treatment on the grounds that she was a part-time worker. The respondent denies the complaints and states that the claimant was dismissed fairly on the grounds of redundancy.

2. The claimant gave evidence in support of her own case, the respondent relied on the evidence of Sarah Hartnell, Vicky Wells and Stephanie Hallett all the witnesses produce written statements as their evidence in chief. The parties produced a trial bundle of 500 pages of documents, plus two further documents, Centrica Selection Matrix (R1) and a screen print from Workday (R2). From these sources we made the following findings of fact.

3. The claimant is a solicitor who since qualification in 2000 has several years of experience in the field of Intellectual Property. The claimant's continuous service with the respondent commenced on 3 January 2012 until 23 July 2019. At all material times, the claimant

was employed in the role of Intellectual Property ('IP') Counsel.

4. The claimant commenced a period of maternity leave on 29 May 2016 returning to work from maternity leave on 11 September 2017. On returning to work, the claimant was contracted to work three days a week (Monday to Wednesday, 8am to 4pm). At the relevant time the claimant was a mother of two-year-old triplets and a son with significant additional needs.

5. The claimant's line manager on her return to work was Sarah Hartnell. Sarah Hartnell is a solicitor whose background is in competition law. Sarah Hartnell's line manager was Vicky Wells, an experienced solicitor with a corporate law background.

6. The claimant's salary, when she left the respondent in July 2019, was £46,800 for her three day per week working pattern. The full-time equivalent salary for a 5 day per week working pattern was £78,000.

7. The respondent carries out annual performance reviews. There was no written performance review policy in the bundle. The oral evidence was that none existed and that there was 'custom and practice' aided by guidance from HR when necessary. It was common ground and the Tribunal accepted that the respondent's policy included 'capping' the overall performance rating at 'Achieving', in respect of employees absent for the majority of a given year ('the performance capping policy'). Sarah Hartnell accepted that when she carried out the claimant's scoring in the redundancy process, by completing the Centrica Selection Matrix, she marked the claimant in a way that meant this discriminatory policy was applied against the claimant to adverse effect. Had she been properly scored the claimant would have been given a better score.

8. The performance capping policy is discriminatory in relation to the protected characteristics of pregnancy/maternity and sex. The Respondent has not sought to defend or explain the performance capping policy.

9. Sarah Hartnell's Manager Evaluation in the claimant's December 2017 performance review was glowing. In the performance review meeting, Sarah Hartnell told the claimant that she had been rated "Exceeding Expectations". The performance reviews are divided into "What" had been achieved and "How" it had been achieved. Following the calibration across Legal, Regulatory, Ethics, Compliance and Secretariat, the claimant received "Exceeding Expectations" for the "How" and "Achieving Expectations" for the "What" resulting in an overall rating of "Achieving Expectations". Sarah Hartnell put forward an explanation for the discrepancy in a letter to the claimant (p100). However, as the claimant was on

maternity leave for 254 days of 2017, her performance rating would have been capped at Achieving Expectations in accordance with Centrica policy. The effect of the respondent's discriminatory policy of capping performance ratings at "Achieving Expectations" results in the claimant's performance rated as "Exceeding expectations" before calibration is recorded as "Achieving Expectations" after calibration.

10. On her return from maternity leave, the claimant worked as one of two IP lawyers, with the workload divided between the claimant and her colleague Lucy Cawker so that the claimant focused on patents and Lucy Cawker focused on trademarks ('TMs'). Lucy Cawker worked full time. Of the overall IP workload, dealing with TMs made up the lion's share.

11. In June 2018 Lucy Cawker resigned. The claimant put forward a pitch for a promotion in which she proposed that, rather than recruiting a full-time replacement for Lucy Cawker, the respondent recruit a junior lawyer, overseen by the claimant, to undertake some of the more repetitive/mundane aspects of the workload. The claimant would take on responsibility for Lucy Cawker's former work. In return, the claimant asked for a promotion from L6 to L5, a pay rise and for her job title to be changed to 'Senior IP Counsel'.

12. In discussions with the claimant about the promotion proposal Sarah Hartnell was supportive. The claimant was asked to carry out some research to benchmark the amount of pay she was requesting. The claimant asked for '£108k FTE/£65K', a figure within the range of salaries uncovered by the claimant's research.

13. The promotion to L5 was not offered to the claimant. The claimant was initially offered a pay rise to the part-time equivalent of a full-time salary of £73,000. The claimant declined that offer and a revised offer of £78,000 was made on 8 August 2018. The claimant was told that this offer was "the best balance… between showing you how much we value you and absolutely want you to stay and take on the re-shaped role, and the constraint being put on us by HR" (p108). The claimant accepted the offer and with effect from September 2018, the claimant's salary was £46,800.

14. An L5 role was created for one of the claimant's male colleagues, Shaw Stapely from 1 November 2018 promoting him from L6. The respondent's position is that Shaw Stapely's promotion came at the end of years of exceeding expectations, whereas at the time the claimant was underperforming. Further that it was not secret that Shaw Stapely had ambitions to be promoted to level 5'.

15. However, this evidence is not supported by the record of Shaw Stapely's own annual performance reviews. In cross-examination, Sarah Hartnell accepted that she had been mistaken about Shaw

Stapely's annual performance ratings. Prior to the rating for the year ending 31 December 2018, Shaw Stapely's annual performance ratings are similar to those of the claimant. The claimant gave evidence that she was told by Shaw Stapely that he was asked not to tell people about his promotion. The claimant's evidence on this point is not supported by the respondent, however, Vickey Wells states that "there were times when it was not appropriate to publicize or celebrate promotions, such as during redundancies when it would be insensitive". The Tribunal accept that the claimant was told by Shaw Stapely that he was asked not to tell people about his promotion.

16. Following her salary increase the claimant started to feel pressure to work on her non-working days from Sarah Hartnell. The claimant referred to an email in which Sarah Hartnell stated

> *"I'm not bothered by the content/purpose of the email itself (I was not asking you to come to Staines too), but I was just a bit surprised that the first time you saw it was this morning.*
>
> *"In our recent conversations about the role and your pay, we discussed you being more flexible around mon-wed, given that work does not stop and people cannot always wait from Wednesday until the following Monday. I am not expecting you to open your laptop and work on your days off but a flexible approach to work would suggest you keep an eye on email (in the way I do on my day off and other full-time employees do over the weekend). My note on Thursday was only for info so you could decide whether to join me or not but it would have been different had it been about a meeting in Staines you needed to attend. Similarly, if an IP emergency were to arise, you would be aware and could do something to help (and, if you did end up doing some significant work on a day off then the flexibility works both ways). And, for non-urgent work, a simple acknowledgement can go a long way to manage expectations for the start of the following week…."*(p117)

17. The evidence shows that there were discussions taking place between Sarah Hartnell and Vicky Wells about the claimant about on this theme of the claimant's working time. The claimant points to an email exchange including the following, in which Vicky Wells wrote to Sarah Hartnell "*are you going to speak to Gemma this week about not dropping everything when she leaves on Weds? Let me know how it goes…" and "I've also told her that the work doesn't stop at 4pm on a Wednesday." (p110-111)*

18. On Wednesday 26 September, the claimant received an email from Vicky Wells asking that the claimant secure the rights for Vicky Wells to use some content from a TED Talk at a Centrica conference the following Tuesday 3 October 2018. The email arrived five minutes

before the claimant left the office and was not due be in work again until the next Monday.

19. The claimant appreciating that the request was urgent researched TED's licensing policy from home, emailed Vicky Wells asking for further details and requested a licence online. During her non-working days and the weekend, the claimant attempted to secure a licence from TED. This turned out to be impossible because there was a two-week turnaround to get a licence. The claimant kept Vicky Wells informed.

20. Vicky Wells criticises the claimant's efforts to secure the licence. In paragraph 19 of her statement, she writes:

    "*I asked Gemma to seek a licence for me to use a TED talk in an important presentation. Shortly before I was about to give the presentation, I checked with Gemma whether she had secured the licence. At the last moment, and for the first time, Gemma told me that she had not managed to obtain a licence… I felt that Gemma should have approached the need for the licence with more urgency and followed up with TED earlier in the week…"*

21. This characterisation of the claimant's efforts is unfair in that it suggests a tardiness in the claimant's efforts which is unsustainable and unreasonable. In her evidence to the Tribunal Vicky Wells changed the nature of her criticism to the timing of the claimant in informing her on returning to work: "*She had all of Monday to tell me- but left it to the end of the day"* and offering no alternatives. This unreasonable criticism of the claimant is congruent with the attitude evident in the correspondence between Vicky Wells and Sarah Hartnell that suggests a dissatisfaction with the claimant's working time.

22. From the point that Lucy Cawker left the respondent's employment on 14 September 2018 until 12 March 2019 the claimant was the sole IP lawyer. She continued to work Monday to Wednesday 8am to 4pm being responsible for all the IP previously undertaken by Lucy Cawker, as well as her previous workload. It was put to Sarah Hartnell that the claimant's workload doubled, she did not demur, she did however express criticism of the claimant based on her planning of the workload and restated the claimant and Lucy Cawker's view expressed to her at around the time Lucy Cawker left the respondent's employment that there was not a full role (i.e., to replace Lucy Cawker).

23. At around the time that Lucy Cawker left, Vicky Wells told the claimant that the respondent intended to recruit a junior L6 reporting to the claimant. Sarah Hartnell in her correspondence with HR about the recruitment, commenting on a job specification for a 5 year PQE solicitor, stated that she was looking to recruit someone with "*slightly*

less experience who can grow into the role". As the recruitment process progressed Sarah Hartnell's view changes and she began considering more experienced lawyers, eventually arriving at MP who was a 9 years PQE solicitor. MP was offered the role in December 2018, he started work in March 2019, and like the claimant he reported to Sarah Hartnell.

24. MP was offered a salary of £80,000 per year. In her evidence Sarah Hartnell states that *"it was a competitive market near London requiring specialist skills"* and refers to her email to Vicky Wells in which she states in reference to the salary offered "*that's what Ian tells us we have to go for to stand a chance of securing him, so we have to go for it.*" Sarah Hartnell was not involved in discussions with MP about salary and gave no evidence of having carried out any examination of the market conditions in relation to pay at the relevant time. Vicky Wells states that in relation to MP's starting salary she "*took into account guidance given by the reward team."* She recognized that MP would be paid more than the claimant.

25. Sarah Hartnell stated that in January 2019, she spoke to the claimant about underperformance in her 2018 end of year performance review in which the claimant was rated below expectations. She explained that the rating reflected that her performance during 2018 was not at the level she would expect. She considered that the claimant's focus on getting to the end, to completion, was lacking. Two areas of concern where this was most observable were: IP ownership and REstore. Sarah Hartnell states that it was company policy that employees who were rated 'Below Expectation' would generally be placed on a Performance Improvement Plan (PIP) and that that she considered that this would be appropriate for the claimant to support her in making improvements.

26. Sarah Hartnell stated that she had serious concerns about the claimant's performance during 2018, including in the summer of 2018. In answers given in cross examination Sarah Hartnell said the concerns were serious and further that she was "*concerned about key aspects of her performance in her role – I was increasingly concerned at this time"*. Sarah Hartnell was not able to gainsay the claimant's contention that the IP ownership project was still unresolved despite its importance to the respondent and MP having taken it on after the claimant left the respondent's employment. The claimant was not notified of any alleged serious performance concerns in writing, prior to the 2018 annual performance review process. The claimant was not subjected to any form of disciplinary or capability process. There are no notes of any informal conversations and Sarah Hartnell's evidence was not specific about any particular discussions that allegedly took place with the claimant about poor performance. The claimant says that if the concerns about her performance were genuine, she does not accept that the concerns were well founded.

27. The 2018 annual performance review document contains a mix of positive and negative feedback. The claimant contends that the document's content does not give the impression that, overall, the claimant was performing below expectations. Sarah Hartnell accepted that she was capable of expressing herself clearly in writing and that one would expect cogent reasons for 'Below Expectations' rating to be contained within the performance review document.

28. The claimant argues that Sarah Hartnell made no allowance for the fact that from, September 2018, the claimant was the only IP lawyer and that her workload had more than doubled. In cross examination Sarah Hartnell accepted that in respect of the IP ownership project and REstore there were factors beyond the claimant's control such as tax implications and political considerations within the respondent's organization that the claimant was not given credit for by Sarah Hartnell in arriving at the Below Expectations rating.

29. In an email of 6 March 2019, it was confirmed that the claimant was placed on a PIP due to her Below Expectations rating in the performance review for 2018. The claimant was not given the opportunity to appeal or otherwise challenge the decision that she be placed on a PIP of the Below Expectations rating. There is no record of the claimant being placed on a PIP being recorded in the relevant section on Workday. There is no evidence that any formal review of the PIP took place, there are no notes or emails detailing any informal PIP reviews. Sarah Hartnell stated in cross examination that "*I suggested we review PIP as part of the claimant's 1-2-1".* Her evidence does not detail what if any discussions about the PIP that took place in the 1-2-1 sessions.

30. The claimant was informed that she was at risk of redundancy on 6 June 2019. The claimant was in pool of 2 of which 1 was to be made redundant. At this stage the respondent did not make any assessment of the workload, the process was going to result in 60% FTE or 100% FTE being dismissed. There was no evidence that any employees or representatives were consulted about the selection criteria to be used. The respondent produced R1. There was no evidence that this was used by Sarah Hartnell in her scoring process, her evidence was that she could not recall using the document and she accepted that she makes no reference to document in any of the documents she has prepared.

31. The selection matrix form completed by Sarah Hartnell contained the following instruction prominently on the page headed "Performance Rating History (last 2 years)" (p204). The emphasis is contained in the original document.

Note: if this individual has been on **maternity or sick**

> **leave** for the greatest part of the two performance cycles and their performance rating was therefore capped at 'Achieving Expectations'**, the Performance Rating assigned in these cases must be that from the year previous to the absence**.

32. In assessing the claimant's scores Sarah Hartnell used the claimant's 2017 performance rating when she should have used the 2016 performance rating. Stephanie Hallett, who conducted the claimant's appeal, in her evidence to the Tribunal refused to accept that the wrong performance rating was used. When it was pointed out that the claimant had been on maternity leave in 2017, Stephanie Hallett stated that "I would assume the scoring matrix was filled correctly." When it was pointed out to her that she had failed to carry out a thorough appeal Stephanie Hallett said, "*on that small point I accept that"*. We understood the respondent's position to be an acceptance that the wrong score was used. The conclusion of the Tribunal was that the wrong score was used.

33. In the scoring matrix Sarah Hartnell scores the claimant 1 out of 7 for Focus. A score of 1 denotes that the person being scored "**Rarely** demonstrates this capability and/or sometimes demonstrates the opposite". In her evidence to the Tribunal, Sarah Hartnell accepted that the claimant's focus on trademarks was good, and that this made up the lion's share of her work. It was put to her that the mark for focus of 1 was therefore irrational: Sarah Hartnell denied that was the case. The Tribunal's view is that a score of 1 for focus is irrational having regard to the information which Sarah Hartnell had about the claimant's performance which was that her focus was good in respect of the lion's share of her work.

34. Vicky Wells informed the claimant that she was at risk of redundancy in a phone call while the claimant was at a train station. Vicky Wells was using a template discussion document which contains a question inviting the employee to draw attention to anything that might support the manager in completing the scoring matrix. Vicky Wells did not ask the claimant that question.

35. In cross-examination, Vicky Wells said that she knew the claimant would have wanted her former manager, Rachel Callaghan to be consulted. Despite that, Rachel Callaghan was not consulted before the scoring matrix was completed by Sarah Hartnell. Sarah Hartnell completed the selection matrix on 6 June 2019 and the claimant was informed that she was at risk of redundancy by letter dated 19 June 2019.

36. The claimant asked how the selection criteria had been chosen and suggested that the criterion of "focus" '*is stacked against me as a working mother'*. The claimant challenged the score of 1/7 for 'focus', she asserted that no allowance was made for the fact that she was

working alone for six months before MP started employment. Sarah Hartnell acknowledged that 'focus on trademark work is good'. The claimant also pointed out that Rachel Callaghan, who had been her line manager for five years, was 'the senior stakeholder for a significant proportion of her recent work'.

37. The claimant's dismissal was confirmed in a letter dated 12 July 2019. The claimant appealed against her dismissal and relied on a report dated 16 July 2019 from 'Problems at Work'. The claimant had a telephone meeting about her appeal on 14 October 2019. The appeal was dismissed by letter dated 29 November 2019.

38. The parties submitted that the relevant statutory provisions are:

39. On unfair dismissal: Section 98 of the Employment Rights Act (1996) ("ERA (1996)" provides that "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. (2) A reason falls within this subsection if it … (c) is that the employee was redundant... (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

40. On redundancy: Section 139, ERA (1996), defines redundancy: (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (a) the fact that his employer has ceased or intends to cease (i) to carry on the business for the purposes of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

41. On direct sex discrimination: Section 13 Equality Act 2010 (EQA) A person (A) discriminates against another (B) if because if a protected characteristic, A treats B Less favourably than A treats or would treat others. Section 23(1) EQA provides that on a comparison of the

cases for the purposes of section 13 the must be no material differences between the circumstances relating to each case. Section 24 EQA states that for the purpose of establishing a contravention of this Act by virtue of section 13(1), it does not matter whether A has the protected characteristic. Section 136 EQA provides that (1) This section applies to any proceedings relating to a contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold the contravention occurred. (3) But subsection (2) does not apply is A shows that A did not contravene the provision. Section 123 deals with time limits.

42. On Equal Pay section 65 EQA provides, (1) For the purposes of this Chapter, A's work is equal to that of B if it is (a) like work… Section 66 EQA provides that, (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; (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. Section 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 teats B, and (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim. (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared to persons of the opposite sex doing work equal to A's.

43. On part-time working: The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR). Regulation 5 (1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker (a)as regards the terms of his contract; or (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer. (2) The right conferred by paragraph (1) applies only if—(a)the treatment is on the ground that the worker is a part-time worker, and (b)the treatment is not justified on objective grounds. (3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.(4) A part-time worker paid at a lower rate for overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time

worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime. Regulation 8 in respect of time limits and further, Regulation 8(6), where a worker presents a complaint under this regulation it is for the employer to identify the ground for the less favourable treatment or detriment.

44. We have been referred to a number of cases drawing out principles or guidance for the application of these provisions. Williams v Compair Maxam [1982] ICR 156; Polkey v AE Dayton Services Ltd [1988] ICR; Nagarajan v London Regional Transport [1999] IRLR 572 (UKHL); Abertawe Bro Morgannwg Health Board v Morgan [2018] ICR 1194 (CA); Abertawe Bro Morgannwg Health Board v Morgan UKEAT/0305/13; R v British Coal Corporation, Ex p Price [1994] IRLR 72; Carl v University of Sheffield [2009] IRLR 616; British Aerospace plc v Green [1995] ICR 1006; Mitchells of Lancaster (Brewers) Ltd v Tattersall [2012] UKEAT/0605/11; Swinburne and Jackson v Simpson LLP [2013] UKEAT/0551/12; Nicholls v Rockwell Automation Ltd [2012] UKEAT/0540/11; Madarassy v Nomura International plc [2007] IRLR 246; Shamoon v CC of the Royal Ulster Constabulary [2003] 2 All ER 26; Glasgow City Council and Others v Marshall [2000] 1 All ER 641; Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96; Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434.

45. We have come to the following conclusions:

46. The claimant's complaint about equal pay is well founded and succeeds because the respondent has not been able to show that the difference in pay between the claimant and MP was because of a material factor which does not involve treating the claimant less favourably of her sex than MP.

47. The respondent concedes that the claimant carried out like work in comparison to MP. The respondent also concedes that MP was paid more than the claimant. The respondent maintained that the higher salary afforded to MP was not related to the claimant's sex but to market forces.

48. The respondent relied on the evidence of Sarah Hartnell and Vicky Wells whose evidence was that the indication from HR was that MP would require a salary of £80k in order to secure him as an employee. In an email exchange between Vicky Wells and Sarah Hartnell the pay differential is recognized, reference is made to the purported reason for the higher salary and it is said that there is a "clear intention to bridge that gap at the earliest opportunity": the respondent accepted that this did not occur in the 9 months that

claimant remained employed by the respondent.

49. The claimant points out that the defence of market forces is not pleaded in any detail. There is no evidence of a shortage of candidates for the role, there is no evidence that this was the reason for offering MP a salary of £80,000. The respondent's witnesses have not offered any detailed explanation or direct evidence in respect of market forces. They rely on hearsay. The extent of the hearsay evidence from Sarah Hartnell's was to the effect that she thought it was necessary to pay MP more because 'Ian' from HR said so. There is no evidence from Ian or another person from HR to support this. There is no evidence that a lower salary matching the claimant's salary would not have secured the services of MP. There is no evidence of negotiation with MP.

50. Taking these matters into account and bearing in mind that the respondent has the burden of proving its defence, the Tribunal has come to the conclusion that it has failed to do so. The evidence put forward of market forces is just an assertion by the respondent's witnesses that "Ian" from HR gave that advice. The exact nature of the advice is not clear, what it was based on is unexplained and whether it was reasonable to act as the respondent did is not ascertainable.

51. The respondent's reliance on the assertion contained in the email referencing HR in our view adds nothing to the unproven contention that it was because HR said that was what was required to secure the services of MP. There is no evidence of the state of the market at all. There were no benchmark salaries provided by the respondent, the only benchmark salaries provided were from the claimant in respect of a role at L5 which provides no assistance in the case of MP's role.

52. For the respondent's defence of market forces to succeed we consider that is necessary for the respondent to show that it was objectively justifiable to pay MP £80,000. This requires the respondent to show that the discriminatory effect is justified when balanced against the need of the respondent to recruit a solicitor to fill the role MP filled. Unless the respondent can show by evidence, not simply relying on unsubstantiated assertion, that it was necessary to pay MP more than the claimant the claimant is entitled to succeed.

53. The claimant makes a complaint that the decision to refuse the application for promotion was sex discrimination.

54. The claimant's complaint was presented on 11 December 2019. Considering the dates of early conciliation, any complaint about events which occurred prior to the 18 July 2019 is out of time. The decision to refuse the claimant's application for promotion was made

in about August 2018.

55. The claimant says that given the secrecy surrounding the promotion she did not become aware of it until July 2019 and that it was not until 24 November 2021 that the claimant became aware that Shaw Stapely had been promoted because he was considered a "high flight risk". In those circumstances she contends that it is just and equitable to extend time for the presentation of her complaint.

56. The respondent states that the claimant's claim in relation to her promotion is significantly out of time as Shaw Stapely was promoted in November 2018 and the claimant did not lodge her claim until January 2020. While the claimant states that she did not become aware of Shaw Stapely being promoted until July 2019, she was aware of the promotion decision that was made in relation to her in August 2018 and could have lodged a claim in that regard if she was concerned about discrimination.

57. Having regard to all the circumstances we consider that it is just and equitable to consider the claimant's complaint about promotion. In our view there is little prejudice to the respondent in allowing the claimant to make this complaint out of time. The respondent is not hindered in its ability to deal with the allegations made by the claimant. In contrast the claimant has after the time limit expired discovered matters which to her mind show that she was discriminated against by the respondent. In presenting her complaint as she does as part of the case arising from her dismissal, we consider that she has presented the complaint about promotion within a reasonable further period of time and if she was not permitted to make the claim she would suffer greater prejudice than the claimant.

58. The claimant submitted that she was working in a state of discriminatory affairs following her return from maternity leave that continued to her dismissal: Sarah Hartnell and/or Vicky Wells regarded the claimant as underperforming, not being committed to her work and/or not being 'focused' because she was a woman.

59. The claimant alleges that both Sarah Hartnell and Vicky Wells personally discriminated against her, and it is no answer for the Respondent to assert in submissions that the decision about whether to give the claimant a promotion was made by "senior HR bods". There is no evidence from any "HR bod" to explain the treatment.

60. The claimant states that in deciding whether discrimination is made out, we must bear in mind that it is relatively rare to find direct evidence of discrimination and if the reason for the treatment is a protected characteristic, any benign motive or intention is irrelevant.

61. The respondent contends that neither Vicky Wells nor Sarah Hartnell were involved in the decision to promote Shaw Stapely as he was not line managed by them and worked in the commercial department. Therefore, neither treated the claimant less favourably than they treated Shaw Stapely as the decision to promote Shaw Stapely was made by others. Sarah Hartnell didn't know about Shaw Stapely's promotion at the time. Neither Vicky Wells or Sarah Hartnell graded Shaw Stapely as a 'flight risk'.

62. Vicky Wells gave evidence of her awareness in relation to Shaw Stapely and explained that he had built a strong reputation and was a top performer who had exceeded expectations in his performance reviews for three consecutive years leading up to his promotion in November 2018.

63. In contrast, the claimant was graded as below expectations around the same time, and she had never had three consecutive years of exceeding her expectations at any stage of her career or in the period leading up to the end of 2018.

64. The respondent contends that Shaw Stapely is not an appropriate comparator as his circumstances were materially different to the claimant's. Any differential treatment on a balance of probabilities was due to Shaw Stapely's exemplary performance, the claimant's underperformance and not to the claimant's sex.

65. The conclusion of the Tribunal is that there are material differences between the circumstances of the claimant and that of Shaw Stapely. The claimant and Shaw Stapely worked in different departments they had different line managers. The claimant did not have three years of consecutive exceeding expectations. The claimant presented cogent arguments about her performance review gradings but it does not alter the fact that the claimant did not have three years of exceeding expectations grading. Section 23 (1) EQA states that on a comparison of cases for the purposes of section 13 there must be no material differences between the circumstances relating to each case. There are material differences in the cases of the claimant and Shaw Stapely.

66. We have come to the conclusion the claimant has not shown that there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened section 13. Neither Vicky Wells or Sarah Hartnell were involved in the promotion of Shaw Stapely. Vicky Wells and Sarah Hartnell were supportive of the claimant's pitch for promotion, the decision was not in their hands. The position is illustrated by the email from Vickey Wells to the claimant where she states, "*This figure is the best balance that I could achieve between showing you how much we value you and absolutely want you to stay and take on the re-shaped role, and the constraint being put on us by HR when it comes to any*

salary increase (they currently all have to be approved personally by Grant and Senior HR bods)." (p108) Both Sarah Hartnell and Vicky wells supported the claimant's pitch for promotion. The claimant's case was that they personally discriminated against her in this respect, this has not been established.

67. The claimant's allegation that she was discriminated on the grounds of sex in relation to her promotion request is not well founded and is dismissed.

68. The claimant also contends that the refusal of promotion was less favourable treatment because she was a part-time worker. The claimant's situation and that of Shaw Stapely are not in our view comparable for the reasons set out in paragraph 65 above, and further because they did different types of work as solicitors. Taking these matters into account in considering PTWR 2(4) we consider that the evidence does not establish that both workers are engaged in the same or broadly similar work having regard to skills and experience. Additionally, the evidence presented to us does not show that there is any basis for saying that the promotion of Shaw Stapley was not justified on objective grounds. However, the evidence does not allow us to make a comparison between the claimant and Shaw Stapely so that we can conclude that when compared the failure to promote the claimant was not justified on objective grounds.

69. The claimant contends that her dismissal was sex discrimination.

70. The respondent contends that in respect of the dismissal, the claimant relies on nothing more than a bare assertion of sex discrimination. The respondent says that we should not forget that this is an allegation that another woman dismissed the claimant because of her sex, that would be highly unusual. The respondent urges the Tribunal to focus on all of the evidence that shows that this was a genuine redundancy process, with scoring which required the line manager, Sarah Hartnell, to score two employees, and that's what she did in good faith. The reason for the claimant's dismissal was redundancy.

71. The respondent says that even if we find that the claimant was unfairly treated during that redundancy process, unfair treatment in and of itself does not amount to discrimination. There needs to be something more to establish facts from which the Tribunal could conclude that it was on the grounds of sex and that something more is lacking in this case.

72. The claimant contends that Sarah Hartnell accepted that she applied a discriminatory criterion by using the claimant's capped performance rating from 2017; she said she did not do so intentionally. But it is well established law that the intention or motive

of an individual is irrelevant to liability.

73. The claimant says that in terms of liability, it does not matter whether the claimant might have been dismissed even if the performance rating for 2016 had been used. The performance rating for 2017 was a significant influence on the dismissal. The question of whether the claimant would have been dismissed in any event is relevant only to remedy.

74. In the alternative the claimant states that there are facts from which the Tribunal could conclude that the respondent discriminated against the claimant. The claimant then goes on to list 17 matters on which the Tribunal could rely.

75. The Tribunal has come to the conclusion that the claimant's dismissal was direct sex discrimination and in addition that the claimant was less favourably than a comparable full time employee contrary to regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

76. The respondent is in breach of equal pay legislation. We consider that this is a factor which we can take into account in considering whether there are facts from which we could conclude the dismissal was on the grounds of sex. We also consider that the fact that the claimant and MP had different level of experience, with the claimant having nine years more experience than the claimant but is nevertheless paid less than MP is relevant where MP is a man.

77. The respondent operated a discriminatory performance capping policy. The respondent has put forward no defence or explanation for the policy. The policy operated in a discriminatory way against women.

78. The claimant has been identified on the respondent's computer system as a low flight risk. The explanation for why or how this came to be entered about the claimant is unexplained the claimant's line manager denies responsibility for it. The entry is contrasted with the view taken of Shaw Stapely, a man, who was considered a flight risk which the claimant stated meant that the leadership team was concerned that he would seek employment elsewhere. We consider that it is possible to infer that the claimant was considered a low flight risk because she was a part-time working mother with young children.

79. The claimant relies on various emails between Sarah Hartnell, Vickey Wells and the claimant which indicate that the claimant's part-time worker status was an issue of concern. The matters relied on are at (p110) '*are you going to speak to Gemma this week about not dropping everything when she leaves on Weds'*; (p111) *'I've also told her that the work doesn't stop at 4pm on a Wednesday'*;

(p117-118) Sarah Hartnell's email to the claimant on 8 October 2018 at 14:22; (p117) *'a really tactful note'*; (p153) *'not too mean at all'.* These matters in our view also allow us to infer that the claimant's personal circumstances as a mother of young children was unconsciously being held against her.

80. Vicky Wells' criticism of the claimant in relation to a TED talk licence was in our view unreasonable, the way that Vicky Wells has adjusted her criticism of the claimant does not in our view redeem or excuse the unreasonable nature of the criticism. We consider that implicit in the criticism is the way that the claimant worked due to her part-time worker status.

81. The fact that Sarah Hartnell used the claimant's performance rating for 2017 in the redundancy scoring matrix when it was obvious, she should not have done so is unexplained and has had an obviously discriminatory effect that Sarah Hartnell accepted.

82. Considering all the matters set out above we consider that the respondent has not been able to show that there was no discrimination in the decision to dismiss. Considering the treatment of the claimant set out above we conclude that the claimant was treated less favourably than MP, a full-time male worker, in the process that resulted in the claimant's dismissal. The Tribunal concludes that the claimant was treated less favourably than the respondent treats a comparable full-time worker. The claimant's complaints about dismissal succeed on the grounds of direct sex discrimination and less favourable treatment because of part-time working.

83. Turning to the question of unfair dismissal, the respondent points out that the wider redundancy process was genuine and that the pool for selection which included the claimant and MP was reasonable.

84. Addressing the claimant's challenge to the principles 3 and 4 as set out in the case of *Compare Maxam and Others Ltd* the respondent states as follows:

84.1 The scoring criteria were reasonable and intended to ensure a fair assessment of skill and expertise. It was reasonable for the line manager to carry out the scoring process as the criteria did not depend solely on the opinion of Sarah Hartnell and were capable of being checked against objective examples relating to the claimant's performance.

84.2 The claimant does not dispute that she was placed on a performance improvement plan or that she received a below expectations rating in her performance review in 2018.

84.3 Sarah Hartnell gave credible evidence and reasonably

accepted that she had not scored the claimant correctly in relation to past performance, in particular she accepted that the claimant should have been given the same score as MP for that criterion. However, despite that score the claimant would still have scored lower overall than MP as her scores for 'stakeholder management', and 'focus' were two and four points, respectively, lower than MP's.

84.4 That Sarah Hartnell gave a credible and reasonable explanation for the scores she gave to the claimant versus the score she gave to MP.

84.5 Sarah Hartnell explained during her evidence that following the claimant's suggestion during the consultation process she did approach two people that were specifically named by the claimant as being able to give positive feedback that might change Sarah Hartnell's scores

84.6 That the claimant was scored fairly, and that her scores were objectively justified. In a role that involved a high level of skill and expertise a tick box exercise would not have been appropriate. The personal judgment and degree of subjectivity exercised by Sarah Hartnell was necessary did not render the claimant's scoring as being unreasonable.

84.7 Sarah Hartnell justified the scores awarded to MP who evidently impressed her

84.8 There is no evidential basis for the claimant's contention that the redundancy process was predetermined from late 2018

84.9 The procedure followed gave the claimant an opportunity to challenge her scores during the consultation and appeal process.

85. The claimant submits that the respondent's concession that it used the wrong performance rating (2017 rather than 2016) is fatal to its case because it was a significant procedural error.

86. The claimant says that there was not a potentially fair reason for dismissal. The respondent consciously or unconsciously discriminated against the claimant on the grounds of sex and/or part-time status. It was assumed that the claimant was not performing as well as a full-time male colleague. It was thought that the claimant was less "focused" because she was a woman with triplets working three days a week.

87. The claimant further contends that the scoring exercise was not undertaken in good faith. To support this the claimant states that score of 1 out of 7 given for focus, on the scoring matrix, is outside

the range of reasonable responses.

88. The Tribunal have concluded that the dismissal was unfair. In coming to this conclusion, we had regard to the following matters.

89. There was no consultation with employees in relation to what selection criteria should be applied. We consider some thought should have been given to the specific criteria to be used in this case where a pool of two included one long serving employee and another who had been recently hired. The 'Selection Matrix Scoring Principles (November 2017)' was used in the 2019 redundancy process. It makes numerous specific references to the years 2015 and 2016 and it was designed for a specific exercise. Sarah Hartnell did not recall seeing the document at the time. There is no evidence that Sarah Hartnell or Vicky Wells had a conversation with HR about whether to apply the principles in relation to the claimant and MP.

90. The respondent's policy required that the scoring rating for 2016 should have been used, however, in breach of its policy the respondent used the 2017 rating. This procedural error was not remedied on appeal. To the extent that the matter was considered on appeal the use of the wrong criteria was endorsed by Stephanie Hallett. Her evidence explained her approach to the use of the 2017 rating was to "*assume that the scoring matrix was filled correctly."*

91. MP was given two 'Exceeding Expectations' ratings he had only been in the respondent's employment a short time. The respondent did not take into account length of service or otherwise consider how a long serving employee could be fairly compared to a short serving employee in a redundancy exercise which involved a pool of two.

92. The claimant was placed on a PIP because of the 2018 Below Expectations rating as directed by the respondent's policy. The consequence of placing the claimant on a PIP was, in the view of Sarah Hartnell, that the claimant was always going to score lower than MP. The evidence presented to the Tribunal did not show that there was any consideration given to the progress the claimant had made on the PIP. The evidence given by Sarah Hartnell did not illustrate that she gave any consideration to the claimant's progress once she was placed on the PIP. There are no progress reports or evidence of meetings where the PIP was specifically considered.

93. For the reasons set out above the claimant's complaints of equal pay, sex discrimination, less favourable treatment on the grounds of part-time working and unfair dismissal are well founded and succeed.

Remedy hearing

94. Within 28 days of this judgment the parties are to provide their dates

to avoid for listing of a remedy hearing, provide a time estimate for the remedy hearing and to state whether they require any further directions in preparation for the remedy hearing.

_____
Employment Judge Gumbiti-Zimuto

Date: 25 February 2022

Sent to the parties on:

4 March 2022

For the Tribunals Office